Form 49

[Rule 13.19]

COURT FILE NUMBER	1601-12571	Registrar's Stamp
COURT	Court of Queen's Bench of Alberta	
JUDICIAL CENTRE	Calgary	

Applicant	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 186330 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP
DOCUMENT	**BOOK OF AUTHORITIES OF APOLLO MANAGEMENT, L.P. AND GSO CAPITAL PARTNERS** **VOL. 1 OF 2**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOODMANS LLP** Barristers & Solicitors 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 Fax: 416.979.1234 **Brendan O'Neill** Tel: 416.849.6017 Fax: 416.979.1234 boneill@goodmans.ca **David Conklin** Tel: 416.597.5164 Fax: 416.979.1234 dconklin@goodmans.ca **Jason Wadden** Tel: 416.597.5165 Fax: 416.979.1234 jwadden@goodmans.ca Lawyers for Apollo Management L.P., and GSO Capital Partners
Date:	November 15 and 16, 2016
Time:	10:00am

INDEX

INDEX

Jurisprudence

TAB	DESCRIPTION
1	*Union Natural Gas Co. v. Chatham Gas Co.*, (1917), 40 O.L.R. 148, 38 D.L.R. 753 (Ont. Sup. Ct (Appeal Court) rev'd on other grounds (1918), 56 S.C.R. 253
2	*Minnesota v. Northern Securities Co.* (1902), 184 U.S. 199
3	*Coulson et al. v. Secure Holdings Ltd. and Jackson et al*., [1976] O.J. No. 1459, 1 C.P.C. 168
4	*Leclair v. Ontario (Attorney General)*, [2008] O.J. No. 2428
5	*Seaway Trust Co. v. Markle* [1988] O.J. No. 164 (Ont SC) aff'd [1990] OJ No 3115 (Ont HCJ))
6	*Din v. Melady*, [2009] O.J. No. 5658 (Div. Ct.)
7	*Naneff v. Con-Crete Holdings Ltd.*, (1995), 23 O.R. (3d) 481 (Ont. C.A.)
8	*BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69
9	*Webb v. Dipenta*, 1 D.L.R. 216
10	*Warmington v. Miller*, [1973] Q.B. 877
11	*Maynes v Allen-Vanguard Technologies Inc.*, 2011 ONCA 125
12	*London & Blackwall Ry. Co. v. Cross* (1886), 31 Ch. D. 354 (C.A.)
13	*Pointe East Windsor Ltd. V. Windsor (City)*, 2014 ONCA 467
14	*UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328
15	*Mascia v. Dixie X-Ray Associates Ltd.*, [2008] O. J. No. 4554
16	*MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270
17	*Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426
18	*Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103
19	*AbitibiBowater Inc., Re*, 2012 SCC 67 [2012] S.C.J. No. 67
20	*Re Confederation Treasury Services Ltd.*, 1997 CarswellOnt 31 (C.A.)
21	*Re Carling Acceptance Ltd.*, 1976 CarswellOnt 72 (S.C. (In Bank.)), aff'd 1997 CarswellOnt 72 (C.A.)
22	*Re Air Canada*, 2004 CarswellOnt 3320 (Sup. Ct. J. (Comm. List))
23	*Re Edgewater Casino*, 2008 CarswellBC 2 (S.C.).
24	*Re Air Canada*, 2006 CarswellOnt 8175 (Sup. Ct. J. [Commercial List])
25	*Re Lemare Holdings Ltd.*, [2012] B.C.J. No. 2218 (S.C.)

TAB	DESCRIPTION
26	*Re Harvey*, [2004] A.J. No. 1218 (Q.B.)
27	*Re Thow*, 2009 BCSC 1176
28	*Jema International Food Products Inc. v. Scholle Canada Limited*, 2013 ONSC 2785
29	*Ross v. Ross Mining Limited*, 2012 YKSC 102
30	*Re Lehndorff General Partner Ltd.*[1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List])
31	*Re Canadian Airlines Corp.*, 2000 CarswellAlta 662 (QB), leave to app ref'd, 2000 CarswellAlta 919 (C.A.)
32	*Barnabe v. Touhey* (1995), 26 O.R. (3d) 477
33	*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217
34	*Canada (Attorney General) v. Confederation Life Insurance* (1995), 24 O.R. (3d) 717 (Ont. Gen. Div.)
35	*Wurth v. Estate of 1135096 Alberta Ltd.*, 2014 ABQB 520
36	*Sino-Forest Corp., Re.*, 2012 ONCA 816
37	*Nelson Financial Group Ltd., Re*, 2010 ONSC 6229
38	*Central Capital Corp, Re*, [1996] O.J. No. 359
39	*Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R 558
40	*Re Indelex*, 2013 SCC 6
41	*New Solutions Financial Corp. v. 952339 Ontario Ltd.*, 2007 29 C.B.R. (5^{th}) 222 (Ont. S.C.J. [Commercial List])
42	*US Steel Inc. (Re)*, 2016 ONCA 662
43	*Re Pacific Shores Resort & Spa Ltd.*, 2013 BCSC 480
44	*Re Hollinger Inc.*, 2013 ONSC 5431
45	*Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14

Secondary Sources

TAB	DESCRIPTION
46	Markus Koehnen, *Oppression and Related Remedies*, (Toronto: Thomson Carswell, 2004)
47	C.F. Spry, *The Principles of Equitable Remedies: Specific Performance*,

TAB	DESCRIPTION
	Injunctions, Rectification and Equitable Damages, 8th ed (Agincourt: The Carswell Company Ltd., 2009)
48	Robert Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2015)

1

1917 CarswellOnt 104
Ontario Supreme Court

Union Natural Gas Co. v. Chatham Gas Co.

1917 CarswellOnt 104, 38 D.L.R. 753, 40 O.L.R. 148

Union Natural Gas Co. v. Chatham Gas Co.

Meredith, C.J.O., and Maclaren, Magee and Hodgins, JJ.A. and Rose J.

Judgment: July 25, 1917
Docket: None given.

Counsel: *J. G. Kerr*, for plaintiffs
J. F. Hellmuth, K.C., and *J. M, Pike*, K.C., for the defendants

Subject: Civil Practice and Procedure

***Hodgins, J.A.*:**

Attention was called during the hearing of the appeal to the fact that the Dominion Sugar Company was not a party to the action, although its contract with the defendants was attacked by the plaintiffs.

Paragraph (2) of the judgment in appeal is as follows: "And this Court doth order and adjudge that, subject to the provisions hereafter contained, the defendant, its officers, servants, and agents, be and they are hereby perpetually restrained from diverting gas supplied by the plaintiffs to the defendants under the said agreement dated the 3rd day of November, 1906, as amended by the said agreement dated the 11th day of March, 1907, to the Dominion Sugar Company Limited in the pleadings mentioned, or to or for the purposes of its sugar factory, under or pursuant to the agreement entered into by said Dominion Sugar Company Limited with the defendants, dated the 15th day of November, 1915, and from diverting gas so supplied by the plaintiffs to the defendants to or for the purposes of the said sugar factory, under any agreement hereafter entered into or under any conditions hereafter arising, unless and until this Court or a Judge thereof, upon an application made herein, sanctions and approves thereof."

This adjudication virtually annuls the sugar company's agreement, or at all events deprives that company of any right to specific performance, and places it under such a disability that it cannot make an agreement with the defendants except by the permission of the Court. I think the latter prohibition cannot be upheld.

As to the judgment, so far as it restrains the defendants from complying with the sugar company's agreement and supplying gas thereunder, there is a difficulty in the plaintiffs' way. That agreement is not merely an agreement for gas generally, but is limited to the gas received by the defendants from the plaintiffs under the agreements between them. It recites those agreements, and then provides that the supply of gas derived thereunder shall continue so long as natural gas can be obtained or secured by the defendants under and pursuant to the terms of those agreements.

It also stipulates that the defendants shall lay down the necessary pipes etc. from the place of delivery by the plaintiffs for the purpose of such supply, and that the sugar company shall have the benefit of the preferences or prior rights given in the said agreements, and for the purpose of enforcing the preference the sugar company may use the name of the defendants in taking action to compel a supply.

Another clause of the agreement provides for what is to happen on default in delivery or in the maintenance of the lines in a serviceable condition or by reason of want of diligence in finding gas in sufficient quantity. In such a case the

sugar company has the right to take action to compel both the defendants and the plaintiffs to act up to the terms of the agreements.

I think these provisions distinguish this case from others in which it might be said that a contract for the supply of a commercial article between two parties may be attacked in litigation between them without bringing in a sub-purchaser or a person to whom the purchaser is to hand over the article bargained for under the contract. In that case the remedy would be in damages, and the sub-purchaser would be expected to go into the market and supply himself. Here, however, while such a course might be open and might be taken by the sugar company — see *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105 — the other rights given by the contract would entitle the sugar company to a larger remedy than mere damages. Besides this, if the learned trial Judge's view of the relations of the plaintiffs and defendants, as that of partners, is sustainable, then there is all the more reason why the outsider should be heard in his own interest, and not left in the lurch in the settlement of the partnership difference. The contract is described as one-sided, perplexing, and practically unworkable, rendering it a very difficult thing for the sugar company in any subsequent litigation to overcome this handicap.

The rule laid down in *Hartlepool Gas and Water Co. v. West Hartlepool Harbour and R.W. Co.* (1885), 12 L.T.R. 366, should be followed. There the defendants had covenanted to take all their water from the plaintiff company, and had then leased to S. their shipbuilding yard and its own supply of water. Kindersley, V.-C., in refusing the plaintiffs an injunction against the defendants restraining their further supplying the water to S., said (p. 368): "Inasmuch as they have entered into this lease or contract, I cannot grant an injunction without doing such prejudice to S. as ought not to be done to an absent party. It is not because the defendants would not be liable to an action by S., or. to any inconvenience which might arise, but it is because the Court, upon principle, will not ordinarily and without special necessity, interfere by injunction where the injunction will have the effect of very materially injuring the rights of third persons not before the Court."

It may be noted in passing that in the well-known case of. *Lumley v. Wagner* (1852), 1 DeG. M. & G. 604, the impresario with whom the defendant had made a contract to sing otherwise than as permitted by the plaintiff's contract, was made a defendant to the action for an injunction.

In *Wilson v. Church* (1878), 9 Ch. D. 552, one dissenting bondholder was added as a defendant by Jessel, M.R., on the application of the defendant, expressly because his rights and interests would be affected.

In *McCheane v. Gyles No. 2*, [1902] 1 Ch. 911, Buckley, J., refers to *Dix v. Great Western R.W. Co.* (1886), 34 W.R. 712, and lays down the principle, upon which I think the Court has generally acted, namely, that, in order to add a defendant against the plaintiff's wishes, you must be able to shew either that the party added ought to have been joined or that his presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon what is involved in the cause or matter.

Dix v. Great Western R.W. Co. (*ante*) enunciated the same principle, and applied it in the case where there were two other covenantees interested in the covenant to make a road.

In *Metropolitan District R.W. Co. v. Earl's Court Limited* (1911), 55 Sol. Jour. 807, Lush, J., restricted the injunction against the improper use of the leased land so as not to include the acts of the under-lessee because he was not a party.

In *Cornell v. Smith* (1890), 14 P.R. 275, Meredith, J. (now C.J.C.P.), said as to the next of kin (p. 276): "A determination in favour of the plaintiffs ... though not binding on them, could not but be prejudicial to them in any future contests over the same matter, if it would not, as it might, deter them from litigating the matter over again, and so be practically an adjudication upon their rights behind their backs. It is in the interests of justice, as well as of the parties, that there should not be double or more frequent trials of the same questions between different parties."

Our Rule 134 [1] is substantially the same as the English Rule and enforces the same principle. I think this case is one within that Rule, and that, without the presence of the sugar company, it is impossible to say that the Court can effectively

and completely adjudicate upon the questions involved in the action, and that if the sugar company is not added the Court will be prevented from effectively doing justice. That company's interests and property are directly affected by the judgment, and if it is not present and can litigate again, or if its rights are practically altered or limited, then the Rule in question exactly fits the case.

The principle I have mentioned is not confined to England and Canada. It has been applied in the United States by the Supreme Court in the case of *Minnesota v. Northern Securities Co.* (1902), 184 U.S. 199. The matter involved there was the right of minority shareholders to object to a railway company obtaining and exercising ownership and control of two or more competing railways. Mr. Justice Shiras, in dealing with the objection to which he gave effect, said (p. 235): "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to, the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the Court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Plds. sec. 72."

I am therefore of the opinion that this action is not properly constituted, and that a new trial should be ordered. If, however, the parties agree to add the sugar company forthwith, and the sugar company is willing to have the case decided upon the argument already had, the Registrar can be so notified. If, however, further pleadings or evidence is required, the parties may attend before a Judge of this Divisional Court, who will settle the exact terms of the order to be made.

***Hodgins, J.A.*:**

The view of the Court is, that in this case the costs of the action up to the time when the parties were at issue should be reserved to be dealt with in the discretion of the new trial Judge, and that there should be no costs of the action from that time up to and including the trial and judgment.

The costs of the appeals should be to the defendants in any event.

Footnotes

1 134. — (1) The Court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined, be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action, be added; ...

1918 CarswellOnt 4
The Supreme Court of Canada

Union Natural Gas Co. v. Chatham Gas Co.

1918 CarswellOnt 4, 40 D.L.R. 485, 56 S.C.R. 253

The Union Natural Gas Company of Canada (Plaintiffs), Appellants and The Chatham Gas Company (Defendants), Respondents

Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

Judgment: November 7, 1917
Judgment: November 8, 1917
Judgment: March 25, 1918

Proceedings: On Appeal from the Appellate Division of the Supreme Court of Ontario.

Counsel: *Tilley K.C.* for the appellants,
Hellmuth K.C. and *Pike K.C.* for the respondents.

Subject: Contracts; Evidence; Civil Practice and Procedure; Public

Headnote

Contracts --- Construction and interpretation — Contra proferentem rule

Contract to supply gas for city — Areas subsequently annexed to city — Looking at whole agreement — Construction against grantor — Conduct of parties prior and subsequent to contract where words ambiguous.

Plaintiff company was a producer of natural gas. Defendant company had the right to distribute gas in the city of Chatham. In 1906, plaintiff company agreed to supply defendant company all the gas required by it for distribution in the said city. The references in the agreement were to "the City of Chatham", "the said City" and "in Chatham aforesaid". Held, looking at the whole contract and the circumstances in which it was made, the intention was to limit its operation to the area of the city as it existed at that time and not to include areas subsequently annexed to the city. Per Fitzpatrick C.J.: "If there be doubt, I presume that the rule laid down by Pothier in his Treatise on Obligations, No. 97, would apply. The contract is interpreted as against him who has stipulated and in favour of him who has contracted the obligation.".

Evidence --- Parol evidence rule — Interpretation — Ambiguity and uncertainty — Contracts for services or employment

Plaintiff company was a producer of natural gas. Defendant company had the right to distribute gas in the city of Chatham. In 1906, plaintiff company agreed to supply defendant company all the gas required by it for distribution in the said city. The references in the agreement were to "the City of Chatham", "the said City" and "in Chatham aforesaid". Held, looking at the whole contract and the circumstances in which it was made, the intention was to limit its operation to the area of the city as it existed at that time and not to include areas subsequently annexed to the city. Per Idington J.: "If a contract is ambiguous the surrounding circumstances must be considered by way of illuminating that which may have been imperfectly expressed. In other words, if we would understand what men have expressed we must realize the business they were about. That cannot be extended beyond the immediate

acts following the signing of their contract. I, therefore, exclude all that was done by way of subsequent contracts, evidenced only by the conduct of the parties, in the interpretation or construction of the contract in question.".

Practice --- Parties — Joinder

Per Idington J.: "The test of whether or not a party is necessary to the due constitution of a suit, was neatly put by Lord Cairns in . . . Kendall v. Hamilton (1879), 4 App. Cas. 504 (H.L.): . . . `I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed.' Pleas of abatement being abolished . . . did not prevent the application of the test.".

Public Utilities --- Operation of utility — Area

Whether franchise extending to areas annexed.

In the present case, which involved the construction of an agreement granting a franchise to a gas company, held, looking at the whole contract and the circumstances in which it was made, the intention was to limit its operation to the area of the city as it existed at that time, and not to include areas subsequently annexed to the city.

***The Chief Justice*:**

1 I have read with great care the elaborate and able judgment of Mr. Justice Lennox before whom this action was tried, but as the strength of a chain is its weakest link, so the value of his conclusion depends upon the weakest point upon which it is based. The learned judge has formed the opinion, as surprising to me as I think it is without foundation, that the contract between the appellant's predecessors in title and the respondent for the supply of natural gas to the latter constituted them partners in the respondent's undertaking and operation of its franchise for distributing gas in the City of Chatham; and the learned judge, though going so fully, as I have said, into the case, gives little reason for his opinion on this point beyond a paraphrase of the agreement which does not seem to carry the matter any further than the document itself. The absence of such reason renders unnecessary more than a brief statement of the considerations which have led me to a contrary conclusion.

2 The learned judge has held that the respondent

> is seized and possessed of a franchise of the same character, and with the same incidents, obligations and duties in the whole of the City of Chatham, as it now is, as this company was seized of and subject to in the area constituting the City of Chatham before and at the date of the annexation,

and he continues:

> considering the whole agreement, *i.e.*, between the parties * * * I have come to the conclusion that the proper interpretation is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well.

3 It seems in any case too much to say that "its provisions were intended to extend," since this must depend on the previous finding as a legal conclusion that the franchise did so extend; perhaps at most it could be said that it follows from the previous finding that they must be considered to so extend, but indeed the real reason for the judge's interpretation is given in his previous statement as follows:

> If the franchise of this company (the respondent) included the right and obligation to supply gas in territory subsequently acquired, the right to share in the benefit of this franchise was conferred, and the correlative obligation

to furnish the additional gas required for customers in the added territory was imposed upon the Union Company by the agreement of 1906. It might not always be so, but it seems quite impossible in the circumstances of this case to hold that "City of Chatham" means one thing as regards area in relation to the rights and obligations of the Chatham Company and the City Corporation, and another thing as regards the rights and obligations of the parties to the agreement of 1906. Why? Because the document of 1906 is in substance and effect a partnership agreement and practically nothing else.

4 Here we have the real reason for holding that the agreement, whatever its intention, extended to the territory subsequently added to the city. There is no other; for there is no reason that I can find why "the City of Chatham" should not mean one thing as regards the area covered by the respondent's franchise, and another as contemplated by the agreement of 1906 between the parties. On the contrary, I think there are good reasons why this should be so. In granting a franchise within the city, the corporation is naturally dealing with the area subject to its jurisdiction, whatever that may be, but parties making an agreement as private individuals for the supply of a commercial commodity in a particular area, are dealing with a geographical area and are not concerned with any question of what particular municipal jurisdiction it comes under. In the case of *The City of Calgary v. The Canadian Western Natural Gas Co.* [1], recently heard on appeal to this court and which was referred to in the argument, it was pointed out that between the years 1905 and 1914, the area comprised within the municipal boundaries had been extended from 1,800 to 25,000 acres, whilst the population had grown from 12,500 to 90,000. The franchise which was involved in that case was held to extend to the added territory; but it would surely be impossible, in a private contract for the sale of any commodity, to hold, without the plainest evidence of the intention of the parties, that the area within which it was to be supplied was not that covered by the proper description at the date of the contract, but such an enormously increased area as in the instance of the City of Calgary, and because the area within the jurisdiction of the City Corporation, no party to the contract, had been subsequently enlarged. It would be only reasonable to suppose that if the area were to be increased more than twelvefold the intention would be that the parties owning the franchise would have to make quite other arrangements for so changed a subject-matter of the contract. The conditions in the one case not only might, but probably would, be wholly unsuitable in the other.

5 As Lord Loreburn said in *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Co.* [2], at page 403:

A court can and ought to examine the contract, and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist.

6 If we look at the particular contract, we find that it starts with the recitals:

Whereas the Chatham Company is the owner of a system of mains and pipes laid through, under and along the streets, squares, highways, lanes and public places of the *City of Chatham* by and with the authority and sanction of the said City, also of certain rights and franchises to distribute and sell gas to the inhabitants of the said City.

And whereas the parties hereto have agreed for the supply by the producers (the appellant) to the Chatham Company of natural gas, and for the sale and distribution *in Chatham aforesaid* of the same by the said Chatham Company on the terms and conditions following.

7 In the first of these recitals there is an identification of the respondent's system of pipes in the City of Chatham as it existed at that time, and the agreement is for the supply of gas by the appellant in Chatham aforesaid. In other words, read as a whole, the contract is merely one by which the appellant agrees to sell the respondent a quantity of natural gas at a certain fixed price, which quantity is determined by the capacity of the system of mains and pipes then laid through, under and along the streets, squares, highways, lanes and public places of the City of Chatham, as it then was. If there be doubt, I presume that the rule laid down by Pothier in his Treatise on Obligations, No. 97, would apply. The contract is interpreted as against him who has stipulated and in favour of him who has contracted the obligation. *City of Toronto v. Toronto Railway Co.* [3].

8 And in estimating the probable intention, I do not think we can overlook the facts that the contract contemplates the supply by the appellants of gas outside the city therein mentioned to others than the respondent, and that at the time of its execution the appellants held a ten days old grant of a franchise from the Corporation of the Township of Raleigh which included the area in question here. This franchise, in so far as the 51 acres are concerned at any rate, is still in existence. The appellants moreover hold numerous similar franchises in other neighbouring municipalities. Sec. 33 of the Municipal Act, R.S.O. [1914] ch. 192, provides: —

> Where a district is annexed to a municipality, its by-laws shall extend to such district * * * and the by-laws in force therein shall cease to apply to it, except those relating to highways * * * and except by-laws in force conferring rights, privileges, franchises, immunities or exemptions which could not be repealed by the council which passed them.

9 If we conclude that the agreement of 3rd November, 1906, is not as the trial judge finds "articles of partnership" between the parties and there is nothing else to shew that the area as regards the contract is necessarily the same as that embraced in the respondent's franchise, but rather the contrary, then it becomes unnecessary to determine in this action what is the limit of the area covered by the respondent's franchise.

10 The appellant's claim is for a declaration that it is not bound under the contract of 6th (3rd) November, 1906, to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed; and the consequent relief sought is an injunction restraining the respondent from diverting the gas supplied to it by the appellant to or for the purpose of the respondent's contract with the Dominion Sugar Company, one of its principal customers, whose factory is situated within the territory added to the city.

11 The trial judge found against the appellant and held that:

> the proper interpretation of the agreement is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well;

and that

> It follows that the respondent will be entitled to obtain from the appellant a sufficient supply of natural gas for its customers on the annexed land.

12 And referring to the claim for an injunction the learned judge says:

> this prayer is based on the assumption that it would be declared that the agreement applies only to the city as it then was.

13 The finding being otherwise, no such injunction as prayed could of course be granted; but the judge has entered into a consideration of the contract made between the respondent and the Dominion Sugar Company and, being of opinion that it was

> not one under which the respondent has a right to divert gas to the Sugar Company against the will of the appellant,

has granted "a qualified injunction" restraining the respondent from so diverting gas under any agreement unless and until it is approved by the court.

14 Against this judgment both parties appealed, and the Appellate Division, apparently approving the judgment as to the refusal of the declaration sought by appellant, decided that, in view of the Sugar Company not having been a party to the proceedings, there would have to be a new trial with liberty to the appellant to add the Sugar Company as a party defendant.

15 The judgment on trial being now reversed, there is, of course, no ground on which a new trial could be ordered. The appellant is entitled to the declaration and consequential relief sought.

16 The appeal will therefore be allowed, and the judgment on trial set aside; and it will be declared that under the contract of the 3rd November, 1906, between Symmes and Coste, the predecessors in title of the appellant and the respondent, the appellant is not bound to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed or in special cases with respect to which agreements exist. The respondent will be restrained by injunction from diverting gas supplied to it by the appellant otherwise than in accordance with such declaration.

17 In *Hartlepool Gas and Water Co. v. West Hartlepool Harbour and Railway Co.* [4], the dock company were supplying their own water to their lessees in breach of their covenant to take all their water from the water company. The water company were held sufficiently satisfied with damages for breach of the covenant.

18 In the present case the defendant is diverting and supplying to strangers gas and water respectively belonging to the plaintiff to which the defendant has no right except under its contracts which do not provide for this.

19 It is no answer for the defendant to say: We have made a contract with strangers to give them your gas or water to which we have no right, and, therefore, we cannot be stopped appropriating and giving away your goods. Neither is it necessary to hear what the receiver of the misappropriated goods has got to say.

***Davies J.*:**

20 I am of the opinion that this appeal should be allowed and the judgment of the Appellate Division should be set aside and that it should be declared that appellant is not bound to supply gas for the territory annexed to the City of Chatham since the agreement in question was entered into, and I am also of the opinion that an injunction should be granted in aid of that declaration.

21 I concur generally in the reasons for judgment stated by Mr. Justice Idington, costs, of course, to follow the result.

***Idington J.*:**

22 The appellant as the assignee of the rights of H.D. Symmes and D.A. Coste under a contract made on 3rd November, 1906, between them and respondent, brought an action for the construction thereof, and in the event of appellant's contention relative thereto being maintained, for an injunction restraining the respondent from violating same.

23 The learned trial judge's construction of the contract failed to maintain the appellant's contention yet he fell far short of satisfying respondent.

24 Hence both served notice of appeal to the Appellate Division of the Supreme Court of Ontario which, without expressing any opinion on the merits of any of the several contentions set up, set the learned judge's judgment, which had granted an injunction against respondent, aside and directed a new trial with liberty to appellant herein to add the Dominion Sugar Company as defendants.

25 Upon appeal here from said judgment the objection is raised that it was merely in the exercise of its discretion that the Appellate Division directed a new trial, and hence no appeal would lie here, and further that nothing but questions of practice and procedure were involved in the appeal.

26 I am afraid that something more is involved, and that we cannot, by that easy way, evade the duty of deciding the questions raised.

27 In the first place, the then prevalent application of the rule relative to non-interference with the discretion of an appellate court granting a new trial got rather a bad blow from the Judicial Committee of the Privy Council in the case of

Toronto Railway Co. v. King [5]. We, following what had been the usual practice in this court up to that time, of assuming that when the court below in any case had, for one or other apparently good reason, decided to grant a new trial, it had exercised its discretion and hence, under section 45 of the "Supreme Court Act," now involved, no appeal would lie, refused to hear the appeal of *King v. Toronto Railway Company*.

28 The railway company was unwise enough as the result shewed to appeal to the Privy Council from the judgment of the Ontario Court of Appeal there in question to have the action dismissed, and that ended not only in the company's appeal being dismissed, but also the trial judgment which had been given against the company, being restored. That led to our examining in other cases thereafter the foundation for such alleged discretion as ground for declining jurisdiction instead of assuming it to exist.

29 When so examined herein, I fail to find any reason for declining jurisdiction. I also fail to find any adequate reason for the court below granting a new trial.

30 I have considered all the cases cited by Mr. Justice Hodgins and supplemental thereto on the same point by counsel for the respondent in their factums. None of them seem to me to touch what is involved in the alleged necessity for the Sugar Company being made a party to this suit.

31 The test of whether or not a party is necessary to the due constitution of a suit, was neatly put by Lord Cairns in the case of *Kendall v. Hamilton* [6], where he says, at page 516: —

> I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed.

32 Pleas of abatement being abolished, as he had observed, did not prevent the application of the test. Such an objection, if relied upon, may still be taken by objection, in the pleading, to the relief being granted unless and until the necessary party has been added or, I imagine, by a motion in chambers.

33 No such course was taken and adhered to herein. If so taken and adhered to, it should not have prevailed.

34 When the nature of the relief sought is such that parties to the original transaction giving rise to the litigation, and thus in privity with him complaining, have obviously a direct interest in having the question correctly decided they may have, though perhaps not actually necessary to the proper constitution of the suit, a clear right to be added.

35 Some of the cases cited are of this character as, for example, that of a party suing and alleging he sues on behalf of all other shareholders, when in fact he does not.

36 Other cases, such as those concerned in the construction of a will or its validity, have given rise to those concerned being added.

37 These several cases seem to have been disposed of by application in chambers.

38 In short, I think the rule was correctly laid down by Buckley J. in the case cited by Mr. Justice Hodgins of *McCheane v. Gyles* (No. 2) [7], at page 917, as follows:

> Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he "ought to have been joined," or that his "presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

39 I understood it to be admitted in argument that the rule in Ontario is in substance the same as that he quoted. And surely if, as in that case, for any reason the absence of a co-trustee of him sued, or the representative of such a co-trustee alleged to have been equally at fault with the one so sued, can furnish no bar to the validity of the proceeding,

the absence of one who never had anything to do with the contract in question or the creation of the obligation of which a breach is complained, cannot be heard to complain so long as the one bound by such obligation and answerable in damages is a party and liable also to have the substitutionary relief of an injunction granted against him.

40 It is not necessary to determine the question here of whether or not, for purposes of discovery, for example, or otherwise, some third party or stranger to the creation of the obligation in question, yet who has improperly intervened in thwarting the due observance of the obligation by those who were parties to its creation, might properly have been made a party defendant. The distinction between those who may properly be made parties and others who must, is old and often found applicable.

41 One rather curious feature of this case is that it has not been suggested that the Kent Company, an incorporated holding company possessed of all respondent's shares, except some held by its directors for qualification purposes, and which seems to have manipulated the whole business transactions now complained of and is to protect the Sugar Company in event of litigation, is a necessary party.

42 And yet the agreement between that company and the Sugar Company expressly provides for the defence of respondent in case of litigation in some features of its dealings through that company being handed over to the Sugar Company if it so desire.

43 I imagine the legal mind that constructed some of the devices in question had not the same view of the law requiring those conspiring to defeat a solemn obligation directly resting upon others than themselves being necessary parties to litigation arising thereout, that the judgment of the Appellate Division implies.

44 I conclude that such like parties are neither necessary parties to this suit nor entitled as of right to intervene and hence no new trial is necessary.

45 Moreover this is not a common law action, but essentially a judicial proceeding in the nature of suits or proceedings in equity within the meaning of the excepting part of section 45. of the "Supreme Court Act." And as we held in *Clarke v. Goodall*[8], a case may present both common law and equity features, and latter have to be observed in this connection.

46 I have therefore no doubt of our jurisdiction to hear the appeal and give the judgment which the court appealed from should have given.

47 I cannot agree with the learned trial judge's construction of the contract as being that which was within the contemplation of the parties. Nor am I free from doubt as to the form of the judgment granting an injunction.

48 I am of the opinion that the respondent has violated and threatens to continue violating its covenants with the assignors of the appellant which it is entitled to claim the observance of and, under the circumstances in question herein, to have that observance enforced by an injunction of the court.

49 The agreement of the 3rd November, 1906, between the respondent and Messrs. Symmes and Coste, provided that the latter should for a term of years, yet unexpired, furnish the former, from sources therein referred to, with natural gas.

50 I shall presently deal with the questions raised as to the extent of the supply intended by the contract, but meantime think it well to dispose of another aspect of the case presented.

51 The said agreement, by clauses 10 and 11 thereof, provided as follows: —

> 10. It is further agreed that the net prices to be charged and collected from consumers of natural gas in Chatham shall be as follows: 25 cents per thousand cubic feet for consumers using natural gas for heating, cooking and other purposes during the months of October to March inclusive; 35 cents per thousand cubic feet for consumers using said gas for heating, cooking and other purposes during the months of April to September inclusive; 35 cents per thousand cubic feet all the year round for consumers using natural gas for cooking, but not for heating, and 15

cents per thousand cubic feet for consumers using 250,000 cubic feet per month or more, excepting what gas shall be used by the Chatham Company at their own works, for which the net price to be paid the producers shall be 7 $^{1}/_{2}$ cents per thousand cubic feet.

11. It is further agreed that for all gas furnished hereunder the Chatham Company shall pay the producers as follows: As long as the gross recepts from the sales of gas are less than $60,000 a year, 60 per cent. of the gross receipts shall be paid by the Chatham Company to the producers, and as soon as the gross receipts from sales of gas amount to over $60,000 per year, then the Chatham Company shall pay 66 $^{2}/_{3}$ per cent. of the gross receipts to the producers and settlement to be made at the end of the year from the time said natural gas is supplied by the producers or at the end of each following year at the same date whenever said receipts have proven to be more than $60,000.

52 It then further provided for the keeping of the necessary meters, books and records, and rendering of accounts whereby the observance of said agreement should be carried out. The binding nature of the limitations upon the prices to be charged was of the essence of the contract.

53 That was fully recognized by respondent for many years in many ways, and especially by several agreements made between itself and others who had become the assignees of the said Messrs. Symmes & Coste, varying the prices and classification thereof either in general or in reference to the supply to particular individuals or companies.

54 For some reason or other they were unable to agree in like manner with regard to the Sugar Company's request for a supply, and in consequence thereof the respondent most unjustifiably proceeded by indirect means to supply the Sugar Company at a lower rate than it was entitled to serve any one in its class under above quoted clauses or any modification thereof.

55 That was attempted moreover to be put in execution by a deceptive and circuitous method which if maintained would be destructive of the efficacy of the contract.

56 The Kent Company, above referred to, as holding all the shares in respondent company, save such as needed to qualify the directors of the respondent, seemed to have such a curious conception of the obligations of a contract that it undertook to circumvent the provisions of that in question herein, and imagined that it could do so by a juggling of words to accomplish its end.

57 It was content to have the directors of the respondent as its puppets pretend in words it was observing the terms of the contract, whilst it, the real master, behind, was emasculating the vital efficiency thereof by handing back to the Sugar Company the rebate that reduced these words to a nullity.

58 In my opinion such a scheme was conceived in fraud, and is destitute of any legal defence to maintain it in face of the powers of a court of equity which has long exercised the jurisdiction of suppressing fraud.

59 I think the appellant is entitled to an injunction so framed as to prohibit the violation by the respondent, directly or indirectly, of the terms of its contract in question.

60 What I am inclined to doubt, but express no opinion upon, especially in the absence of argument directed to the point, is whether or not the injunction granted by the learned trial judge does not go so far as to exercise a supervision over the execution of the respondent's business in a way that courts of equity have uniformly declined to accept the burden of in granting injunctions.

61 In the view I have reached and am about to express I need not, if agreed to by a majority of the court, form such a definite opinion as might otherwise be necessary on this point.

62 Coming to the question which, beyond all others, the parties concerned seemed most anxious to have decided, of whether or not the contract bound the appellant's assignors, and hence it, to furnish natural gas to serve those needing

such service beyond the bounds of the city as they existed at the date of the contract, I desire at the outset to remove any impression that may be derived from the mutual course of conduct which was observable throughout in serving consumers beyond the said limits.

63 If a contract is ambiguous the surrounding circumstances must be considered by way of illuminating that which may have been imperfectly expressed.

64 In other words, if we would understand what men have expressed we must realize the business they were about.

65 That cannot be extended beyond the immediate acts following the signing of their contract.

66 I, therefore, exclude all that was done by way of subsequent contracts, evidenced only by the conduct of the parties, in the interpretation or construction of the contract in question.

67 Such subsequent transactions must stand or fall on their merits.

68 The construction of the contract in question depends upon the meaning to be attached to the words "City of Chatham" used therein, at the time it was executed.

69 Stress has been laid upon the word "customers" and it has been connected in argument with the existence of a customer or customers outside the bounds of the city at the time of the making of the contract, as indicative of some intention to operate beyond the then city limits and hence to extend to any obtainable customers.

70 It is also pointed out that in the first clause the producers were bound to furnish a high pressure line of sufficient capacity for all the requirements of the Chatham Company and its consumers. The subsequent clauses make clear what is meant. The requirements of the company were specially referred to and a lower price therefor charged than to others, being its customers. Again the producers are restrained in clause 4 from furnishing gas to any one outside Chatham excepting the supply shall be greater than that required by the company for itself and its consumers for all purposes.

71 And again in clause 6 the company is bound to take and supply the gas to its consumers in Chatham.

72 Inasmuch as the contract is clearly intended to be reciprocal this provision and the entire absence of any provision for outside customers, seems to put beyond peradventure what was meant by the word "customers." Clearly it was only those within the city that were actually provided for.

73 The supply to any others outside must depend upon collateral contracts and whether these were *intra vires* or not does not concern us here.

74 The scope and purpose of the written contract was the sale of gas in the City of Chatham to customers to be found therein and served there.

75 All other more or less irrelevant issues being eliminated, we have to determine whether it was only the then City of Chatham or also a future greater Chatham, that was within the contemplation of the parties in thus framing their contract.

76 The plain literal meaning of the words surely limits the contract to that which was then existent just as much as if the supply contracted for had been for a given factory or block of buildings. What right would any one so bound have to extend it beyond the then present limits? What right have we to extend it beyond?

77 Suppose the city had so decayed, or grown in another direction than anticipated, as to render it expedient for purposes of its municipal government to have the limits changed and a part of it cut off, and in that cut off part there was a single factory to which a service pipe of the respondent had extended, could it be said that the appellant might then refuse to furnish gas for that factory, simply because the boundaries of the city had been changed for municipal purposes?

78 I put the converse case in order to bring out clearly what is involved in the contention of respondent. I venture to think no court would heed very much such a contention as assumed on the part of appellant in the case I put.

79 Moreover there may occur at any moment in a rapidly growing city the annexation of a suburban village already equipped with a plant of its own, or a service supplied by a gas or water company; could the contracting parties serving, just as here, the rapidly growing city, pretend they had as of course in such a contingency thereby the right to serve the village annexed and discard what existed there for the like service? That seems inconceivable, yet it is what had happened and been contended for unsuccessfully in the analogous case of street railways in Detroit.

80 I cannot help thinking that the process of reasoning which rests upon the application of by-laws enacted for the general good government of a municipality to any new annexation thereto, and pressed on us as being relevant to and of necessity governing the determination of the contractual rights either of the municipality or those ancillary companies contracting for the service to be given the inhabitants thereof, is essentially unsound.

81 I submit there is a confusion of thought in such a mode of reasoning. The promiscuous mingling of the governmental jurisdiction of a council with the contractual relation of the corporate body does not help to anything but to confuse and mislead. And none the less so when we know that the mode of entering into a contract must be by by-law and the legislative function must also be discharged by a by-law.

82 To apply that mode of reasoning as sought herein must inevitably lead to unjust and possibly in some cases disastrous consequences.

83 Whatever may be said and there is much in favour of the reasonable expectation of a local company incorporated under and by virtue of the statute whereby respondent was first and secondly constituted, being liable to be defeated by the narrower construction of the said statutes than respondent contends for, is to my mind far outweighed by the consequences liable to flow from the maintenance of such contention.

84 It is to be observed that this sort of corporate companies are by the statutes enabling their creation so limited as to capital and time of existence as to shew they were only intended as a temporary expedient.

85 And, as if anticipating the very argument set up herein derivable from their creation by by-law and the enactment that in case of annexations the by-laws of the annexing municipality are to prevail, the statute has been amended to read as follows: —

> Section 33. Where a district or a municipality is annexed to a municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them.

86 I call attention to the excepting part of this new clause which I may be permitted to suggest is of very doubtful import.

87 Clearly it was intended to prohibit the very conflict I have suggested as possible by virtue of annexations of villages to towns or cities.

88 Evidently the draftsman did not suppose that such a conflict was in law possible by a claim on the part of those supplying a service to the larger and annexing municipality, as here in question.

89 The "Municipal Franchises Act," 2 George V., ch. 42, seems on the facts presented to be an impassable barrier in the respondent's way herein, unless its contention that by virtue of the annexation it obtained by force of its charter a right to serve the annexed part is maintainable.

90 I have suggested all I need say in that regard.

91 My opinion is that the instrument before us is but a contract which related to a limited period and only contemplated a service for the purposes of the City of Chatham as it existed at the date thereof.

92 The like reasoning which supported that part of the judgment of this court in the case of *Toronto Railway Co. v. Toronto* [9], and the court above in the same case [10], relative to the boundaries of the city at the date of the contract being the governing line and limit of the operation of the contract, seems to me to support the opinion I express.

93 I recognize, however; that as has been so often said, decisions upon one contract may be of little service in determining the meaning of another. As illustrations, however, they are no doubt useful.

94 And in closing I may be permitted to say that I have a great reluctance to extending by implications, unless so clear as to be necessary to execute the purpose of the parties as expressed, that which is not expressed in a contract, and especially so when that contract is one in common use likely to bring undesirable consequences as the result of such treatment. I have more faith in parties being able to express what they want than in any guess a court is likely to make.

95 The respondent argues that its charter by its very nature shews it was intended to operate in the whole of the municipality whatever might be its bounds and the company to serve all the inhabitants thereof.

96 I have already illustrated how such a contention if upheld might produce undesirable results and attempted to shew thereby how doubtful the proposition may be in law.

97 The tendency of these several statutory changes I have just cited as illustrative of the minds of legislators relative to such a contention, rather suggests that the view put forward as to the scope of such like charters has not been generally accepted and hence cannot fairly be said to have been one of the things which inevitably must have been present to the minds of Messrs. Symmes & Coste in framing the contract, and hence necessarily within the contemplation of the parties.

98 It may well be that the powers of a corporate company must form in arriving at an agreement the subject of due and full consideration in some cases. But it does not in this sort of case necessarily go beyond attention being paid to the actual fact of its having power to do that which the parties contracting with it have presented to their minds.

99 And if the respondent had clearly the widest sort of corporate power entitling it to go far beyond the bounds of the city in carrying on its business, that fact could not expand the plain literal meaning of the words used.

100 There is far more force in the counter argument of appellant that this unexpected demand upon its material appliances and resources would render it necessary to double its capacity.

101 That, however, is a contingency that possibly might have arisen had chance brought the Sugar Company to locate within the bounds of the city as they existed at the date of the contract.

102 Neither argument seems to me entitled to much weight relative to the construction of the contract.

103 The lastly mentioned one, however, does bring added force to the appellant's case by emphasizing the unjustifiable conduct of the respondent in seeking to destroy the efficacy of the contract relative to the rates to be charged.

104 I conclude that the parties having, in framing this contract, had in contemplation only a service for the inhabitants of the city as then delimitated, it should be so declared and an injunction be granted as prayed, and alternatively that in any event the appellant is entitled to have the respondent enjoined against departing from the terms of the contract as modified.

105 The appeal should be allowed and the injunction granted as prayed for with costs to the appellant throughout.

***Duff J.*:**

106 I am of opinion that the appeal in this case should be allowed in part.

***Anglin J.* (dissenting):**

107 The foundation for, as well as the occasion of, this action is alleged contravention by the defendant of its contractual obligations to the plaintiff involved in a contract for a supply of natural gas made by the defendant with the Dominion Sugar Company. No other breach of the contract between the plaintiff (assignee of Symmes & Coste) and the defendant is suggested in the statement of claim. In addition to a judgment declaratory of the rights of the plaintiff and defendant *inter se* as to the area within which the latter is entitled to distribute natural gas supplied to it by the former, the plaintiff expressly prays for an injunction restraining the defendant from supplying to the Sugar Company natural gas furnished by it.

108 The learned trial judge held that upon the proper construction of the contract between the plaintiff and the defendant the situation of the Sugar Company's refinery did not preclude the defendant from supplying it with gas furnished by the plaintiff. In his opinion, however, the contract between the defendant and the Sugar Company was unfair to the plaintiff and such that the defendant was not entitled to require the plaintiff to supply gas to enable it to be carried out, in that, although to provide means of furnishing the quantity of gas which the Sugar Company might need would entail a duplication of the plaintiff's plant at great expense, there was no obligation on the part of the Sugar Company actually to take more than a trifling quantity of gas, and that a collateral agreement for a rebate gave that company an undue preference over other Chatham consumers, and was also contrary to the bargain as to prices to be charged by the defendant to its customers fixed by its contract with the plaintiff. He granted an injunction restraining the defendant from diverting gas supplied by the plaintiff to the Sugar Company under the existing agreement between that company and the defendant and under any other agreement that might be made or other conditions that might arise until sanctioned by the court.

109 The Appellate Division, expressing no opinion upon the construction of the contract between the plaintiff and defendant as to the area within which gas furnished under it might be supplied by the defendant to its customers, but disapproving of the order disabling it from making any agreement with the Sugar Company except with the sanction of the court, was unanimously of the opinion that in the absence of the Sugar Company the action was not properly constituted. The course suggested by the court, that that company might be added with its own consent and that of the present parties and the case determined on the record so amended, having for some reason been found unacceptable, the judgment of the trial judge was set aside, and a new trial ordered, with liberty to the plaintiff to add the Sugar Company as a party defendant. From that judgment the plaintiff now appeals.

110 It is obvious that the first matter for consideration is whether the appellant is entitled *ex debito justitioe* to obtain the relief which it seeks without the Sugar Com pany being brought before the court, or whether, either because that company is a necessary party, or because judicial discretion would be properly exercised in directing that it should be added as a defendant, in order that it may have an opportunity of upholding any rights which its contract with the defendant purports to confer before it should be determined that those rights are non-existent, the order pronounced by the Appellate Division should be sustained.

111 Under its contract with the defendant it is natural gas furnished by the plaintiff that the Sugar Company is to receive. The obligation of the defendant to supply and that of the Sugar Company to take is to

> continue so long as natural gas can be obtained or secured by the Gas Company (the defendant) under and pursuant to the terms of the agreement between the Gas Company and the producers (the plaintiff).

It may at least be arguable that if the plaintiff is unwilling and cannot be compelled to furnish gas to the defendant for delivery to the Sugar Company there is a failure of the subject matter of the contract between the defendant and the Sugar

Company, and that consequently an action by the latter against the former for damages for breach of contract would not lie. As Mr. Justice Hodgins points out, we are not dealing with the ordinary case of "a contract for the supply of a commercial article," in respect of which, upon his vendor's failure to deliver, a sub-purchaser would have the ordinary recourse in damages.

112 Under these circumstances, if the construction should be placed upon its contract with the defendant for which the plaintiff contends, the effect might be to determine that the Sugar Company has no rights whatever against the present defendant. Such a determination of the Sugar Company's rights and position behind its back, though not binding upon it as *res judicata*, could not but prove prejudicial to it in any future contest over the same question. Moreover, unless the Sugar Company should be deterred by the practical effect of an adverse judgment rendered in this action from seeking to enforce its contractual claims, a second litigation of the same question (its right as a customer of the defendant within the present limits of the City of Chatham to be supplied with natural gas furnished by the plaintiff) must ensue — a result which it is now the policy of the courts to obviate, when that may be done without seriously prejudicing or embarrassing the plaintiff, by adding parties not otherwise necessary, but proper to be added within the limits prescribed by the rules. *Clifton v. Crawford* [11] ; *Cornell v. Smith* [12] .

113 While an injunction forbidding the present defendant from delivering to the Sugar Company gas received from the plaintiff would not bind the Sugar Company so as to render it technically liable for a breach thereof because it would not be enjoined from receiving the gas, yet it would be just as effectively prevented from taking gas furnished by the plaintiff as if it had been so enjoined because such taking, with knowledge of the injunction, would be "assisting in setting the court at defiance" — would "obstruct the course of justice" — would "contumaciously set at naught the order of the court" — and would therefore properly render the Sugar Company punishable for contempt. *Seaward v. Paterson* [13] , at pages 554 *et seq.; Scott v. Scott* [14] , at page 457.

114 The case of *Hartlepool Gas & Water Co. v. West Hartlepool Harbour & Rly. Co.* [15] , cited by Mr. Justice Hodgins, is indistinguishable in principle from that at bar. In alleged violation of an agreement with the plaintiff, the defendant in the *Hartlepool Case* [16] supplied its lessees (P.S. & Co.) with water not obtained from the plaintiff. Kindersley V.C., although he thought, as then advised, that the defendant could be restrained from doing this, was

> quite satisfied that the court cannot express any such opinion in the absence of P.S. & Co. so as to deal with them in such a manner as most materially to affect the important interests of those absent parties. * * * If the defendants had not entered into any lease or contract with P.S. & Co., I should grant the injunction, but inasmuch as they have entered into this lease or contract, I cannot grant an injunction without doing such prejudice to P.S. & Co. as ought not to be done to an absent party. It is not because the defendants would not (*sic*) be liable to an action by P.S. & Co. or to any inconvenience which might arise but it is because the court, on principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the court.

The interests of their lessees (P.S. & Co.) in that case would have been affected by an injunction against the defendants precisely in the same manner as those of the Sugar Company would be affected by an injunction against the present defendant.

115 It is, no doubt, quite within the power of the court to determine the construction of the contract between the parties to it in this action as now constituted. In that sense the Sugar Company is not a necessary party. If it rests on the contrary view, the judgment of the Appellate Division, even were this not an equitable action, would not be non-appealable under section 45 of the "Supreme Court Act." Yet, having regard to all the circumstances, and particularly to the obvious prejudice to the Sugar Company's contractual claims which must result from a judgment adverse to the defendant, to the occasion for and object of the present action, the form which it has been given, the allegations of the statement of claim and the relief sought, and to the desirability of having an adjudication in it which will preclude a second action upon the same issue, in my opinion, the order directing a new trial and giving the plaintiff liberty to add

the Sugar Company as a defendant may well be supported as one that might have been made in the exercise of a judicial discretion which could not be held to have been erroneous.

116 For these reasons it would seem to me to be improper to grant relief by injunction in the absence of the Sugar Company; relief by way of damages for breach of contract is not asked and would scarcely be appropriate; and the circumstances are not such that the discretionary power of the court (*In re Berens*[17]), to pronounce a declaratory judgment unaccompanied by consequential relief, which, wide as it is (*Guaranty Trust Co. v. Hannay & Co.*[18], at pages 562, 564), is always acted upon "with extreme care and caution" (*North Eastern Marine Engineering Co. v. Leeds Forge Co.*[19]); *Faber v. Gosworth Urban District Council*[20], and usually only if it does not involve "interfering with the rights of other persons" (*Austen v. Collins*[21]), should be exercised.

117 In England, where the provision for pronouncing declaratory judgments, formerly contained in the statute 15 & 16 Vict. ch. 86, sec. 50, is now found in an extended form in a Rule of Court (O. XXV., r. 5), its validity in this latter form has been upheld by the Court of Appeal on the ground that it does not confer jurisdiction in the sense that without it the court would lack "power to deal with and decide the dispute as to the subject-matter before it," but merely enables it to do so "in a different manner, under different circumstances and when brought before it by a different person," and that it is therefore "only dealing with practice and procedure." *Guaranty Trust Co. v. Hannay & Co.*[22], at pages 563-4, 570. In Ontario the former Chancery Order, No. 538, which corresponded with the former Imperial statute (15 & 16 Vict. ch. 86, sec. 50) is now replaced, likewise in an extended form, by sec. 16 (*b*) of the "Judicature Act," which is identical with the present English O. XXV., r. 5. Under the Ontario statute, as under the English Rule of Court, whatever may be the proper view as to the scope and character of the provision itself, the propriety under any given set of circumstances of exercising the power which it enunciates cannot be other than a matter of practice and procedure — just such a matter as it has been time and again decided should be finally determined by the Appellate Court of the province in which it arises, and, without questioning our jurisdiction, has been held not to be a proper subject of appeal to this court. *Emperor of Russia v. Proskouriakoff*[23]; *Green v. George*[24]; Cameron's S.C. Practice 85; *Arpin v. Merchants Bank*[25].

118 I would therefore be disposed to dismiss this appeal without any expression of opinion upon the construction of the contract between the plaintiff and the defendant.

119 In deference however to the contrary opinion on this aspect of the case held by the majority of the court, I proceed to state briefly my view upon the proper construction of the contract between the plaintiff and defendant as to the area within which the defendant is entitled to distribute natural gas supplied by the plaintiff.

120 The contract requires that the producers (the plaintiff) shall furnish to the defendant natural gas

> through a high pressure line or lines of sufficient capacity for all the requirements of the Chatham Company and its consumers:

that they shall so

> furnish to the Chatham Company natural gas in sufficient quantities at all times for the purposes of the Chatham Company's present and future consumers, and the Chatham Company's own use * * * and shall use due diligence at all times in prospecting and drilling wells for gas so that the supply may be continuous for all the purposes of the Chatham Company, and * * * shall make any reasonable expenditure that may be necessary to make the supply continuous:

and that they

> shall not furnish natural gas in Chatham during the continuance of this contract to any person or corporation other than the Chatham Company so long as the Chatham Company continues to take its supply from the producers.

It requires the Chatham Company to take its supply from the producers (the plaintiff), unless they are unable to deliver it, and forbids the producers supplying any person or corporation outside the city, except

> customers along their high pressure line, between the field and Chatham, unless the supply from time to time shall be greater that that required by the Chatham Company for itself and its consumers for all purposes.

It requires the Chatham Company to maintain and operate

> a system of mains, pipes, fixtures and apparatus suitable and sufficient to distribute the gas to be supplied under this contract to any person, firm or corporation in the said City of Chatham desiring to use the same.

121 Two features stand out as essential and predominant in this contract — the defendant is obliged to take all its gas from the plaintiff (so long as it can furnish sufficient for the defendant's business) and to provide for its distribution to every person in Chatham desiring to use it; the plaintiff is obliged to supply (as far as it can or as due diligence and reasonable expenditure will enable it to do so) all the gas required by the defendant for itself and all its customers. The franchise of the defendant to distribute, and the obligation of the plaintiff to furnish gas (within the limitation stated) would therefore appear to be co-extensive and coterminous and to have been intended to remain so during the term of the contract between the plaintiff and the defendant. The limit of the plaintiff's obligation is the requirements of the Chatham Gas Company within its franchise.

122 The Chatham Gas Company was constituted in 1872, under a power then enjoyed by municipal corporations (C.S.C., ch. 65) enabling them to incorporate companies "for supplying cities, towns and villages with gas and water," by a by-law of the Town of Chatham which recited the desirability of "lighting with gas the streets and buildings of the said town" and gave it authority for that purpose to "lay down pipes or conduits under any of the streets or public squares of the town." It was "re-created and re-constructed" under the same statutory authority (R.S.O., [1877] ch. 157) by a by-law passed in 1884, and its corporate existence was formally recognized and declared by the Ontario statute 48 Vict. ch. 81. The right to substitute natural gas for artificial gas, if it did not already possess it, was conferred upon it by a by-law in 1906, when its agreement with the plaintiff was made.

123 It was the obvious purpose in creating this corporation that its franchise and its functions should be territorially co-extensive with the area of the municipality. The creation of such a company was the means provided by the legislature for the carrying on of a public utility under municipal authority and control for the benefit of an entire city, town or village. It was intended that the Chatham Gas Company should supply the needs of all citizens. Its franchise was perpetual. It would seem to follow that, as the municipal limits should extend, the franchise of the Gas Company with its co-related powers and obligations should also extend. If not, it would lose its municipal identity and the purpose of its creation would be defeated.

124 When the territory within which the refinery of the Dominion Sugar Company is situated was brought into the City of Chatham, the franchise, powers and obligations of the Chatham Gas Company, in my opinion, automatically extended to the area so annexed, subject, it may be, to any existing right or franchise of the plaintiff or any other company within the annexed territory. R.S.O. [1914] ch. 192, sec. 33; *Wentworth v. Hamilton Radial Electric Railway Co.* [26] . There was no exclusive gas franchise in this annexed territory.

125 Moreover, assuming that the contract should be construed as the plaintiff contends, I am by no means satisfied that it is entitled in this action as now framed to a declaration that its contractual obligation with the defendant is restricted to supplying gas to be distributed within the limits of the City of Chatham as it existed at the date of the contract, the 6th November, 1906. The plaintiff well knew that at that time the defendant was supplying gas to a considerable number of consumers outside the limits of the city and it has since continued, with the knowledge and acquiescence of the plaintiff, to supply these and other outside consumers with natural gas furnished by the plaintiff. The plaintiff has for upwards of ten years under the terms of the contract knowingly taken its 60%, or 66 $^{2}/_{3}$%, of the defendant's receipts

from such customers. If granted the declaration it seeks, the plaintiff would be entitled now to require the defendant to cut off all these customers. A general injunction restraining it from supplying consumers outside the limits of the city as they were in 1906 would have that effect and would seem to be open to the objections that it would be unfair to many persons not represented and also *ultra petita*, the only injunction asked being to restrain the supplying of gas to the Sugar Company. It may be worthy of the plaintiff's consideration whether there should not also be representation of other outside consumers.

126 In the absence of the Dominion Sugar Company the only observation I desire to make upon other features of its contractual relations with the defendant referred to in the judgment of the learned trial judge is that, at all events without some explanation not in the record, at least one of them — that providing for a rebate through the medium of a holding company — savours of methods which a court of justice cannot countenance.

127 If required now to dispose finally of the present action I should dismiss it.

Appeal allowed with costs.

Solicitors of record:
Solicitors for the appellants: *Kerr & McNevin*.
Solicitors for the respondents: *Wilson, Pike & Stewart*.

Footnotes

1 56 Can. S.C.R. 117.

2 [1916] 2 A.C. 397.

3 [1907] A.C. 315.

4 12 L.T. 366

5 [1908] A.C. 260.

6 4 App. Cas. 504.

7 [1902] 1 Ch. 911.

8 44 Can. S.C.R. 284.

9 37 Can. S.C.R. 430.

10 [1907] A.C. 315.

11 18 Ont. Pr. R. 316, 318.

12 14 Ont. Pr. R. 275, 276.

13 [1897] 1 Ch. 545.

14 [1913] A.C. 417.

15 12 L.T. 366.

16 12 L.T. 366.

17 [1888] W.N. 95.

18 [1915] 2 K.B. 536.

19 [1906] 1 Ch. 324, 329.

20 88 L.T. 549, 550.

21 54 L.T. 903, 905.

22 [1915] 2 K.B. 536.

23 42 Can. S.C.R. 226.

24 42 Can. S.C.R. 219.

25 24 Can. S.C.R. 142.

26 54 Can. S.C.R. 178

2

MINNESOTA *v.* NORTHERN SECURITIES COMPANY

No. 10. Original

SUPREME COURT OF THE UNITED STATES

184 U.S. 199; 22 S. Ct. 308; 46 L. Ed. 499; 1902 U.S. LEXIS 2300

Argued January 27, 1902
February 24, 1902

PRIOR HISTORY: ORIGINAL

SYLLABUS Whether a bill in equity, filed in the name of a State, seeking to prevent by injunction a corporation organized under the laws of another State, with power to acquire and hold shares of the capital stock of any other corporation, from obtaining and exercising ownership and control of two or more competing railroad companies of the State, so as to evade and defeat its laws and policy forbidding the consolidation of such railroads when parallel and competing, is a controversy of which this court has jurisdiction.

The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it; and the established practice of courts of equity to dismiss the plaintiffs' bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings, or suggested by counsel.

The bill discloses that the parties to be affected by the decision of this controversy are -- directly the State of Minnesota, the Great Northern Railway Company, and the Northern Pacific Railway Company, corporations of that State, and the Northern Securities Company, a corporation of the State of New Jersey -- and, indirectly, the stockholders and bondholders of those corporations, and of the numerous railway companies whose lines are alleged to be owned, managed or controlled by the Great Northern and Northern Pacific Railway Companies; and it is obvious that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties; and it further appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, as in this case, when made parties, the jurisdiction of the court will thereby be defeated, it would be useless for the court to grant leave to amend.

ON the 7th day of January, 1902, came the State of Minnesota, by Wallace B. Douglas, its Attorney General, and moved the court for leave to file a bill of complaint against the Northern Securities Company, a corporation of the State of New Jersey. Thereupon the court directed that notice of such application should be given to the defendant, and set the motion for argument on January 27, 1902, when it was duly heard.

The bill proposed to be filed was in the following terms:

To the Judges of the Supreme Court of the United States of America:

Your oratrix, the State of Minnesota, complainant, by Wallace B. Douglas, Attorney General thereof, brings this its bill of complaint against the Northern Securities Company, a corporation organized under and by virtue of the laws of the State of New Jersey, and alleges:

I.

That by an act of Congress, entitled "An act for the admission of Minnesota into the Union," approved May 11, A.D. 1858, the said State of Minnesota was admitted into the Union upon an equal footing with the original States.

II.

That said Northern Securities Company is a corporation organized as hereinafter alleged, under and by virtue of the laws of the State of New Jersey, and is a citizen of the State of New Jersey.

III.

A.

That by an act of the Congress of the United States, of March 12, 1860, extending to the State of Minnesota the swamp lands grant theretofore made to the State of Arkansas, and by various subsequent acts, the Congress of the United States donated to the State of Minnesota from the public domain large quantities of lands situated within the State of Minnesota, and of the value of several millions of dollars. That the State of Minnesota now has left and undisposed of more than three million acres of said lands, of the value of more than fifteen million dollars, much of which said land is located in the territory traversed by the railroads of the Great Northern and Northern Pacific Railway Companies, as hereinafter alleged. That the value of said land, and the salability thereof, depends in very large measure upon having free, uninterrupted and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway Companies.

That many of said lands are vacant and unsettled and located in regions not at present reached by railway lines, and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of said Great Northern and Northern Pacific Railway Companies, respectively, to extend spur lines into territory adjacent to each of said roads, as well as into new territory, for the purpose of developing such territory, as well as to obtain traffic therefrom; that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies, for existing, as well as new business; that under the consolidation and unity of control hereinafter set forth, such rivalry cease, and many of the lands now owned by the State of Minnesota will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the products raised thereon; that if said lands are sold and become occupied, they will add very largely to the taxable value of the property of the State, and that said lands cannot be sold or the income of the State increased thereby without the construction of railroad lines to, or adjacent to, the same.

B.

That the State of Minnesota is now and for many years past has been the owner of, and continuously maintained, an educational institution for the benefit of its citizens, known as the University of Minnesota; also a large number of hospitals for the insane, within its territorial limits; also five normal schools for the education of teachers within the State; also a state training school for boys and girls; also several state schools for the education, care and maintenance of the deaf, dumb, blind and feeble-minded; also a state school for indigent and homeless children; also a state penitentiary and reformatory.

That for many years past the State of Minnesota has continuously maintained and supported each of said institutions, and in the care, maintenance and management thereof has been compelled to and in the future, of necessity, will annually purchase large quantities of supplies for said institutions, including provisions, clothing and fuel, a great portion of which the State of Minnesota is compelled to ship over the different lines of railway owned and operated by the Northern Pacific Railway Company and the Great Northern Railway Company.

That the State of Minnesota is compelled to expend annually more than seven hundred thousand dollars in the operation and maintenance of said public institutions, most of which sum is raised by general taxation upon the lands and other property of the citizens of the State of Minnesota, and situated therein. That the amount of taxes which said State of Minnesota can collect, and the successful maintenance of its said public institutions, as well as the performance of its governmental functions and affairs, depends largely upon the value of the real and personal property situated within its territorial limits, and the general prosperity and business success of its citizens. That the value of said real and personal property of the citizens of the State of Minnesota, as well as their business success and general prosperity, depend very largely upon maintaining in said State free, open and unrestricted competition between the railway lines of said Great Northern and Northern Pacific Railway Companies respectively within said State.

C.

That it has been the settled policy and practice of the State of Minnesota since its organization as a Teritory to develop the resources of the State by encouraging railroad building therein, and in furtherance of this policy the Territory of Minnesota, by an act thereof, under the date of May 22, 1857, granted to the Minnesota and Pacific Railroad Company a charter, and in consideration of the construction and maintenance of a line of railway in Minnesota, by said company, said Territory donated to it out of its public domain about seven hundred thousand acres of land. That said Minnesota and Pacific Railroad Company thereafter became insolvent, and all its property was placed in the hands of a receiver; that such proceeding were thereafter had that all the property of the last named company, including said land, was duly sold and conveyed to the St. Paul, Minneapolis and Manitoba Railway Company, hereinafter mentioned.

That the State of Minnesota, by an act of its legislature, and in consideration of the construction and maintenance of a line of railway by the Great Northern Railway Compay, hereinafter referred to, between St. Cloud and Hinckley, a distance of eighty-four miles, donated and conveyed to said last named company upwards of four hundred thousand acres of land then owned by and situated in the State of Minnesota, which said land was then worth more than one million dollars. That in carrying out said policy, and in aid of the building of railways within the State of Minnesota, there has been granted out of the public domain within the limits of the State of Minnesota upwards of 10,500,000 acres of land, nearly all of which has been granted to said Great Northern and Northern Pacific Railway Companies, and the subsidiary companies owned and controlled by them.

D.

That by an act of the legislature of the State of Minnesota, approved March 3, 1881, entitled "An act granting swamp lands to aid in the construction of the main line of the road of the Little Falls and Dakota Railway Company." and which now is a part of the Northern Pacific Railway Company system. hereinafter referred to, the State of Minnesota donated to said Little Falls and Dakota Railway Company two hundred and forty-three thousand five hundred and ninety-one (243,591) acres of land situated in and then belonging to said State, in consideration of the construction and maintenance by said last named railway company of a line of railway extending from Little Falls to Morris, in the State of Minnesota.

IV.

Your oratrix further alleges that immense quantities of wheat and other products are shipped annually from East Grand Forks, Crookston, Moorhead, Fergus Falls and other competitive points within the State of Minnesota, and all on the lines of railway of the said Great Northern and Northern Pacific Railway Companies, hereinafter referred to, to the cities of Duluth, St. Paul and Minneapolis, within the State of Minnesota. That nearly all of the shipment of such products made from the above named initial points are consigned to various citizens at either the city of Duluth, St. Paul or Minneapolis over one or the other of said lines of railroad last above named. That enormous quantities of merchandise have been and will continue to be shipped annually over said lines of railway, between the cities of St. Paul and Minneapolis and various other cities and villages along said lines of railway situated within the State of Minnesota, and which are purchased and used entirely by the people of said State. That the competition in both freight and passenger traffic to and from said places has always been sharp and active between said railway companies, and has

secured to the residents of said cities, as well as the State of Minnesota, and to the State of Minnesota itself, much lower rates for both freight and passengers than would otherwise have been obtained, or than will or can be obtained in case the consolidation or unity of control and management of said Great Northern and Northern Pacific Railway Companies, hereinafter alleged, is not enjoined as herein prayed.

V.

That the Great Northern Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, to wit, under an act duly passed by the Territory of Minnesota, entitled "An act to incorporate the Minneapolis and St. Cloud Railroad Company," approved March first, A.D. 1856, and various subsequent acts of the State of Minnesota amendatory thereof and supplemental thereto, respectively entitled as follows:

"An act to amend an act entitled 'An act to incorporate the Minneapolis and St. Cloud Railroad Company,' passed March 1, 1856." Approved February 23, 1864.

"An act of the legislature of the State of Minnesota entitled 'An act granting swamp lands to aid the Minneapolis and St. Cloud Railroad Company in building branches to connect with the Lake Superior and Mississippi Railroad and the Winona and St. Peter, or any other railroad in southern Minnesota.'" Approved February 11, 1865.

"An act to amend an act entitled 'An act to incorporate the Minneapolis and St. Cloud Railroad Company,' approved March 1, 1856, and to repeal certain portions of an act amending the charter of said company, passed February 23, 1864." Approved February 28, 1865.

"An act to amend an act entitled 'An act granting swamp lands to aid the Minneapolis and St. Cloud Railroad Company in building branches to connect with the Lake Superior and Mississippi Railroad and Winona and St. Peter Railroad, or any other railroad in Southern Minnesota.'" Approved March 5, 1869.

"An act to amend the charter of the Minneapolis and St. Cloud Railroad Company." Approved March 6, 1869.

"An act to amend the charter of the Minneapolis and St. Cloud Railroad Company." Approved March 2, 1870.

"An act to extend the time for the construction and completion of the branch of the Minneapolis and St. Cloud Railroad Company." Approved March 11, 1879.

"An act to amend an act entitled 'An act granting swamp lands to aid the Minneapolis and St. Cloud Railroad Company in building branches to connect with the Lake Superior and Mississippi Railroad and the Winona and St. Peter Railroad, or any other railroad in southern Minnesota,' approved February 11, in the year of our Lord one thousand eight hundred and sixty-five, as amended." Approved March 10, 1885.

That on the 16th day of September, 1889, the corporate name of said company was duly changed to the Great Northern Railway Company. That during the year 1889 said railway company caused to be constructed a line of railway extending from St. Cloud, Minnesota, to Hinckley, Minnesota, which line was immediately conveyed to the St. Paul, Minneapolis and Manitoba Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, hereinafter referred to as the Manitoba Company. That said Manitoba Company, prior to the first day of February, 1890, had built, purchased and put in operation various lines of railway within the State of Minnesota, as well as in the States of North Dakota, Montana, Idaho and Washington, connecting by rail the cities of St. Paul and Minneapolis, within the State of Minnesota, and various other cities and villages within said State, with each other, and with Puget Sound, on the Pacific Ocean; which said railways are hereinafter more particularly described.

That on the first day of February, 1890, said Manitoba Railway Company leased to the said Great Northern Railway Company, for a period of nine hundred and ninety-nine years, all of the lines of railway, including the rolling stock then owned and controlled by said Manitoba Company; that ever since said last named date said Great Northern Railway Company has continued to and now does control, operate and maintain each and all of said lines as one complete railroad system. That said lines of railway so constructed by said

Manitoba Company and now so controlled, operated and maintained by said Great Northern Railway Company under said lease, are described as follows:

A line of railway extending from St. Paul, Minnesota, via Minneapolis, Elk River, St. Cloud, Sauk Center, Fergus Falls, Glyndon, Crookston to the northern boundary line of the State of Minnesota at St. Vincent.

Another line of railway extending from Minneapolis, Minnesota, along the western bank of the Mississippi River to St. Cloud, Minnesota.

Another line of railway extending from St. Cloud easterly to Hinckley, Minnesota.

Another line of railway extending from Elk River, Minnesota, northward to Malaco, Minnesota, on the line of the St. Cloud and Hinckley Branch, last above referred to.

Another line of railway extending from Minneapolis, Minnesota, to Breckenridge, Minnesota.

Another line extending from Sauk Center, Minnesota, to Park Rapids, Minnesota.

Another line of railway extending from Hutchinson Junction to Hutchinson, Minnesota.

Another line of railway extending from Benson, Minnesota, thence in a westerly direction to the western boundary line of the State; thence to Watertown, South Dakota.

Another line of railway extending from Evansville, Minnesota, westerly to the state boundary line, thence to Ellendale, North Dakota.

Another line of railway extending from Moorhead, Minnesota, westerly to the state boundary line; thence to Wahpeton, North Dakota.

Another line of railway extending from Moorhead, Minnesota, to Crookston, Minnesota.

Another line of railway extending from Barnesville, Minnesota, to Moorhead, Minnesota.

Another line of railway extending from Carman, Minnesota, to Foster, Minnesota.

Another line of railway extending from Crookston, Minnesota, to Red Lake Falls and Thief River Falls, Minnesota.

All of the foregoing lines being situated in the State of Minnesota, except as hereinafter otherwise expressly stated.

That said Great Northern Railway Company now either owns or controls, and operates and maintains, by virtue of said lease, a line or system of railways connecting with said lines above referred to, and extending from the western boundary line of the State of Minnesota through the States of North Dakota, Montana, Idaho and Washington, to Puget Sound on the Pacific Coast. The said railway lines covered by said lease, or owned by said Great Northern Railway Company, aggregate a total of about four thousand five hundred miles.

That many of said railroads above described being located within the State of Minnesota, were built by subsidiary companies or corporations, and said Great Northern Railway Company now owns all of the capital stock of such corporations in addition and as supplemental to said lease; and in addition thereto said Great Northern Railway Company owns all of the capital stock of the Eastern Railway Company of Minnesota, a corporation organized under the laws of the State of Minnesota, and which owns and operates a railway line extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota; and from Duluth, Minnesota, to Bemidji, Minnesota; and by virtue of such ownership of stock said Great Northern Railway Company dictates the policy of said railway company and controls the lines of railway and properties of said Eastern Railway Company, and operates the same as a part of the Great Northern system of railway.

That said Great Northern Railway Company also owns all of the capital stock of the Willmar and Sioux Falls Railroad Company, a corporation owning a railroad extending from Willmar, Minnesota, to Yankton, South Dakota, and by virtue of such ownership of stock dictates the policy of and owns and controls the railway line and property of said Willmar and Sioux Falls Railroad Company.

That all of the railways and railway lines hereinbefore described are operated and controlled by and form a complete system under the name of said Great Northern Railway Company.

That the charter of said Great Northern Railway Company provides as follows: "That all of the affairs and business of said company shall be conducted by or under the direction of a board of directors, and they are authorized, for the purposes specified in this act, to make and establish regulations and bylaws, and to do all things necessary to be done and not inconsistent with the Constitution and laws of the United States, or the laws of this Territory, or this act."

Your oratrix further alleges that the board of directors of said Great Northern Railway Company, at the time of the organization of the Northern Securities Company, hereinafter referred to, to wit, on or about the 13th day of November, 1901, was and now is composed of the following named persons, to wit: James J. Hill, James N. Hill. Samuel Hill, William P. Clough, Edward Sawyer, M.D. Grover, Jacob H. Schiff and Henry W. Cannon; and at said date the managing or executive officers of said corporation were and now are as follows: President, James J. Hill; Vice President, Willaim P. Clough; Secretary and Assistant Treasurer, E.T. Nichols. That on said last named date said Great Northern Railway Company had issued, and there was then outstanding, a total of one hundred and twenty-five million dollars, par value, of the capital stock of said corporation, and your oratrix is informed and believes, and upon information and belief alleges, that said James J. Hill was on said last named date the owner of or in possession and control of, or had subject to this direction and disposition, more than a majority of said capital stock so outstanding.

VI.

That the Northern Pacific Railway Company was formerly a corporation organized and existing under and by virtue of an act of the Congress of the United States, entitled, "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the northern route," approved July 2, 1864; and a joint resolution of Congress extending the time for the completion of said railroad until July 1, 1868; and a joint resolution granting the consent of Congress provided for in section ten of said act, incorporating the Northern Pacific Railroad Company, approved March 1, 1869; the joint resolution of Congress granting the right of way for the construction of a railroad from Portland, Oregon, to a point west of the Cascade Mountains in Washington Territory, approved April 1, 1869; the joint resolution of Congress authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes, approved May 31, 1870. And complainant asks leave to refer to and have each of said acts and resolutions considered as though fully herein set forth.

That under and in pursuance of the said several acts and joint resolutions of Congress, the Northern Pacific Railroad Company constructed and put into operation, prior to January 1, 1890, all of its main line of road, extending from Ashland, in the State of Wisconsin, westward across the States of Minnesota, North Dakota, Montana and Idaho, and in the State of Washington to Walla Walla Junction; also all that other part of its main line of railroad extending from Portland, Oregon, to Tacoma, Washington; Also the whole of its cascade Branch, extending from Pasco Junction, in the State of Washington, to Tacoma, in the State of Washington.

That said Northern Pacific Railroad Company had also, prior to said first day of January, 1880, acquired and then owned all of the capital stock of the following named railroad companies and corporations, to wit, the St. Paul and Northern Pacific Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a railroad extending from St. Paul, Minnesota, to Brainerd, Minnesota; and from Little Falls, Minnesota, to Staples, Minnesota; also of the Duluth and Manitoba Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a line of railroad extending from Winnipeg Junction, Minnesota, via Red Lake Falls, Minnesota, to the western boundary line of said State, and thence to Grand Forks, North Dakota; and thence to the international boundary line

between the state of North Dakota and Canada; also of the Duluth, Crookston and Northern Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a railroad extending from Fertile Junction, Minnesota, though Crookston to Carthage Junction, Minnesota; also of the Little Falls and Dakota Railroad Company, a corporation organized under the laws of the State of Minnesota, and which then owned a railroad extending from Little Falls, Minnesota, to Morris, Minnesota; also of the Northern Pacific, Fergus Falls and Black Hills Railroad Company, a corporation organized under the laws of the State of Minnesota, and which owned a line of railroad extending from Wadena, Minnesota, thence westerly to the western boundary line of the State; and thence of North Dakota points; also all of the capital stock of various railroad corporations or companies organized in the States of North Dakota, South Dakota, Montana and Washington, which owned and operated various railway lines in said States respectively. The said railway lines built by said companies within the State of Minnesota, as well as those built outside of the State of Minnesota, and the capital stock of the corporations so building said lines, and owned by said Northern Pacific Railroad Company, as hereinbefore alleged, were operated, managed and controlled by said Northern Pacific Railroad Company as a system of railway or railways extending from and between various points in the State of Minnesota, more specifically hereinafter referred to, through said State and thence to the Pacific Coast; and aggregate about four thousand five hundred miles of railway.

VII.

That the Northern Pacific Railway Company is now and for upwards of five years last past has been a corporation organized under and by virtue of the laws of the State of Wisconsin; said corporation being organized during the year 1895. That thereafter and prior to the time said Northern Pacific Railway Company became possessed of and the owner of the railway lines and property formerly owned and operated by said Northern Pacific Railroad Company, said Northern Pacific Railway Company filed with the Secretary of State of the State of Minnesota, in accordance with the terms and provisions of the laws of said State of Minnesota, a duly authenticated and certified copy of its articles of incorporation, and thereupon said Northern Pacific Railway Company became a corporation of and within the State of Minnesota, and subject to all of the laws, regulations and provisions of said State of Minnesota relating to railway or railroad corporations, including those acts or parts of acts hereinafter specifically pleaded or referred to.

That under the charter or articles of incorporation of said Northern Pacific Railway Company the powers of said company are delegated to and exercised by a board of fifteen directors; that during the month of April, 1901, the following named persons constituted and now are the members of the board of directors of said last named company: James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, H. McK. Twombly, Brayton Ives, D. Willis James, John S. Kennedy, Daniel S. Lamont, Charles S. Mellen, Samuel Rea, Willam Rockfeller, Charles Stelle, James Stillman and Eben B. Thomas. That on the 13th day of November, 1901, J. Pierpont Morgan, with certain other persons to your oratrix unknown, but who were acting with said Morgan, owned and had in their possession, or held under and subject to their control and disposition, upwards of eighty-five per cent of the total capital stock of said Northern Pacific Railway Company then outstanding. That the total amount of capital stock of said Northern Pacific Railway Company then issued and outstanding amounts to one hundred and fifty-five millions of dollars, par value, seventy-five millions of dollars of which was preferred stock, subject to retirement as provided by the articles of incorporation and agreement under which the same was issued.

That during the year 1893 the said Northern Pacific Railroad Company became insolvent, and all of the property of said last named company, of whatever kind or character, was duly placed in the hands of receivers appointed for that purpose by the Circuit Court of the United States for the Eastern District of Wisconsin; and thereafter, in proceedings ancillary thereto, by the various Circuit Courts of the United States in whose jurisdictions said property was located. That after said Northern Pacific Railway Company had filed its said articles of incorporation in the State of Minnesota and had become subject to its laws, and during the year 1896, said Northern Pacific Railway Company duly purchased and became the owner of the entire railroad properties and railway lines, including the right of way, rolling stock and capital stock, formerly owned by said Northern Pacific Railroad Company; and immediately thereafter entered into the possession thereof; and at all times since has continuously owned and operated each and all of the said lines of railway so situated within the State of Minnesota, and which connect the cities of St. Paul and Minneapolis and Duluth, and various other villages and cities within the State of Minnesota, and connect with the lines of railway

outside of said State of Minnesota.

That during the year 1899 said Northern Pacific Railway Company purchased, and ever since has owned and operated, a line of railway extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota; that said last named line parallels and is a competing line of railway for both freight and passenger traffic with the line of railway between said Minneapolis and St. Paul and Duluth, hereinbefore described, and which is owned by said Eastern Railway Company of Minnesota, but operated, controlled and managed by said Great Northern Railway Company as a part of the system of said last named company, as hereinbefore alleged.

That the lines of railway now owned and operated by said Great Northern Railway Company within the State of Minnesota are parallel and competing lines for freight and passenger traffic with the lines of railway now owned, operated and controlled by said Northern Pacific Railway Company within the State of Minnesota, between the following points in said State, to wit: The cities of St. Paul and Minneapolis and the city of Duluth, Minnesota, and the various cities and villages between said points; also between the cities of St. Paul and Minneapolis and Crookston, Minnesota, by way of Fergus Falls and the various cities and villages between said points; also between the cities of St. Paul and Minneapolis and Crookston by way of Breckenridge, and the towns and cities between said points; and also between the cities of Duluth and Crookston, and the cities and villages between said points, as well as the country adjacent to the lines of railway between each and all of said cities; and the said lines of railway owned, operated and controlled by said Great Northern Railway Company, and also the lines of railway owned, operated and controlled by said Northern Pacific Railway Company which connect with the said lines of railway owned, operated and controlled by each of said companies respectively within the State of Minnesota, are parallel and competing lines through the States of North Dakota, Montana, Idaho and Washington to Puget Sound on the Pacific Coast for passenger and freight traffic. That during all of the time aforesaid each and all of said lines of railway were maintained and operated by said respective companies as common carriers of freight and passengers within the State of Minnesota; and that said companies are now, and for upwards of eleven years last past have been, the only railway companies owning or operating lines of railway crossing the State of Minnesota and connecting the Pacific Ocean by rail with points in Minnesota; also the only lines of railway traversing east and west the northern tier of States of the United States lying west of the Mississippi River, and connecting such territory and territory tributary thereto by rail with the Pacific Ocean; and, with one exception, the only lines of railway crossing the north half of the State of Minnesota in any direction.

VIII.

That the Chicago, Burlington and Quincy Railway Company is and, for many years last past has been, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; and, as such, until the disposition of its capital stock as hereinafter alleged, owned, operated and controlled an extensive system of railway lines extending from the city of Chicago, in the State of Illinois, in a westerly direction to the city of Denver, in the State of Colorado; and also in a westerly and northwesterly direction from said city of Chicago, to the city of Billings, in the State of Montana; which last named point is a junction and competitive point for freight and passenger traffic with the said Northern Pacific Railway Company; and also from said city of Chicago to the cities of St. Paul and Minneapolis, in the State of Minnesota; and in addition to said main lines, owned, operated and controlled a large number of connecting and tributary lines, extending to various cities and towns in the States of Illinois, Iowa, Missouri, Wisconsin, Minnesota, Nebraska, Kansas, Wyoming and Montana. That the total mileage of said railway company is approximately seven thousand four hundred miles. That during the year 1901 the said Great Northern Railway Company and said Northern Pacific Railway Company jointly purchased ninety-eight per cent of the total capital stock of said Chicago, Burlington and Quincy Railway Company, aggregating approximately one hundred and seven millions of dollars, par value, and now own the same; and issued in payment therefor the joint bonds of said Great Northern and Northern Pacific Railway Companies, payable in twenty years from the date thereof, and bearing interest at the rate of four per cent per annum, payable semi-annually. That said Great Northern and Northern Pacific Railway Companies issued and delivered in exchange for each one hundred dollars in amount of said Chicago, Burlington and Quincy Railway Company stock two hundred dollars in amount of the said bonds.

That under and by virtue of the purchase of said stock the joint ownership and control of the said Chicago,

Burlington and Quincy Railway Company is vested in and ever since has been exercised by the said Great Northern and Northern Pacific Railway Companies.

IX.

That the defendant Northern Securities Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. That said corporation was organized on the 13th day of November, A.D. 1901, with its principal office for the transaction of its business located at the city of Hoboken, county of Hubson and State of New Jersey, and is a citizen of the State of New Jersey.

That the articles of incorporation of said Northern Securities Company are as follows:

CERTIFICATE OF INCORPORATION OF NORTHERN SECURITIES COMPANY.

STATE OF NEW JERSEY, *ss*:

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the State of New Jersey, entitled "An act concerning corporations (Revision of 1896), and the acts amendatory thereof and supplementary thereto," do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the State of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territoty or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owners of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds, or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other States and in foreign countries, and to

have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four hundred million dollars ($ 400,000,000), divided into four million (4,000,000) shares of the par value of one hundred dollars ($ 100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and post-office addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business) are as follows:

		Number
Name and post office address.		*of shares*.
George F. Baker, Jr., 258 Madison avenue,		100
	New York, New York.	
Abram M. Hyatt, 214 Allen avenue,		100
	Allenhurst, New Jersey.	
Richard Trimble, 53 East Twenty-fifth street,		100
	New York, New York.	

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for term of three years; and at each annual election the successors to the class of directors whose terms shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of directors the additional directors shall be elected as may be provided in the bylaws, by the directors or by the stockholders at an annual or special meeting, and one third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one third of their number for the unexpired portion of the term of the directors of the second class, and one third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the State of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number amy be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the State of New Jersey passed March 22, 1901, amending the seventeenth section of the act concerning corporations (Revision of 1896), any action which theretofore required the consent of the holders of two thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employe of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws, or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice presidents, one or more assistant treasurers, and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the corporation; to determine whether any, and if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and the payment of dividends; and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors from time to time shall determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute of the State of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

The board of directors may make by-laws, and, from time to time, may alter, amend or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting, or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof, we have hereunto set our hands and seals, the twelfth day of November, 1901.

GEORGE F. BAKER, JR.

(L.S.)

ABRAM M. HYATT.

(L.S.)

RICHARD TRIMBLE.

(L.S.)

Signed, sealed and delivered in presence of -- GEORGE HOLMES.

STATE OF NEW YORK, *ss*:

COUNTY OF NEW YORK,

MANHATTAN,

Be it remembered, that on this twelfth day of November, 1901, before the undersigned, personally appeared George F. Baker, Junior, Abram M. Hyatt, Richard Trimble, who, I am satisfied, are the persons named in and who executed the foregoing certificate, and I, having first made known to them, and to each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

GEORGE HOLMES,

Master in Chancery of New Jersey.

Endorsed: "Received in the Hudson Co., N.J. Clerk's office, Nov. 13, A.D. 1901, and recorded in Clerk's Record, No. , on page . Maurice J. Stack, Clerk. Filed Nov. 13, 1901, George Wurts, Secretary of State."

That said Northern Securities Company was incorporated at the instigation and request, and under the direction of James J. Hill and William P. Clough, and certain other stockholders of said Great Northern Railway Company to your oratrix unknown, who were cooperating with said James J. Hill and William P. Clough, and who, with said Hill and Clough, owned and controlled, or have the disposition and management, as hereinafter alleged, of a very large majority of the capital stock of said Great Northern Railway Company; and J. Pierpont Morgan and certain other stockholders of said Northern Pacific Railway Company, to your oratrix unknown, who were cooperating with said Morgan, and who, with said Morgan, owned and controlled, or have the disposition and management of, a very large majority of the capital stock of said Northern Pacific Racific Railway Company. That said Northern Securities Company was formed by George F. Baker, Jr., and Richard Trimble, of the City of New York and State of New York, and Abram Hyatt, of Allenhurst, in the State of New Jersey, who adopted the said articles of incorporation. That said three last named parties had no interest in said corporation other than the formation of the same for and at the request of said James J. Hill, William P. Clough, J. Pierpont Morgan, and their several associate stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, as above alleged, acting in concert with said parties.

That said James J. Hill, William P. Clough and J. Pierpont Morgan, who, with their associates, did on said 13th day of November, 1901, and prior thereto, own and control a large majority of the capital stock of both said Great Northern Railway Company and said Northern Pacific Railway Company, were prior to, and at the time of, the organization of said Northern Securities Company, almost continually in conference with each other and with a large number of other stockholders of said Great Northern Railway Company and said Northern Pacific Railway Company, but whose names are to your oratrix unknown, considering such organization and the scheme and agreement herein referred to, and the means and manner by which the laws of Minnesota, hereinafter referred to, could be most successfully evaded or avoided, all of which facts were well known to the organizers of said Northern Securities Company, including the parties executing the said articles of incorporation. That said Northern Securities Company was organized solely for the purpose of carrying out and accomplishing the designs, agreement and plans of said James J. Hill and J. Pierpoint Morgan and their said associate stockholders, as herein set forth, and to effect a consolidation of the property, railway lines, corporate powers and franchises of said Great Northern and Northern Pacific Railway Companies, respectively, through said defendant the Northern Securities Company.

That prior to the organization of said Northern Securities Company the said owners and holders of a large majority of the capital stock of said Great Northern Railway Company, as well as the owners and holders of a large majority of the capital stock of said Northern Pacific Railway Company, as a part of the scheme or plan herein alleged, as well as a part of the plan and purpose of the organization of said Northern Securities Company, entered into a mutual agreement or arrangement, the exact terms of which are unknown to your oratrix, but which is in substance as follows:

The said owners of a large majority of the capital stock of said Great Northerm Railway Company and said Northern Pacific Railway Company mutually agreed with each other and certain persons who thereafter

became the officers and directors of said Northern Securities Company, to transfer or cause to be transferred to said Northern Securities Company in exchange for the capital stock of said last named company substantially all of the capital stock of said Great Northern Railway Company and said Northern Pacific Railway Company, respectively; the said capital stock of the Great Northern Railway Company to be transferred to and exchanged for the capital stock of the said Northern Securities Company on the basis of one share of the capital stock of the Great Northern Railway Company for one and 80-100 shares of the capital stock of said Northern Securities Company, and one share of the common stock of said Northern Pacific Racific Railway Company for one and 15-100 shares of the capital stock of said Northern Securities Company. The $ 75,000,000 of the preferred stock of said Northern Pacific Railway Company to be retired in accordance with the provisions of the articles of incorporation of said Northern Pacific Railway Company, and the conditions and agreements under which the same was issued; said retirement to take place on the 1st day of January, 1902. The funds for retiring said preferred stock to be raised by the issuance by said Northern Pacific Railway Company of its negotiable bonds, bearing date November 15, 1901, of the aggregate amount of seventy-five million dollars, payable January 1, 1907, in gold coin of the United States, with interest thereon at the rate of four per cent per annum, payable semi-annually in like gold coin, from and after January 1, 1902. The said bonds, however, to be convertible at the option of either the holders thereof, or said railway company, into shares of the common stock of said Northern Pacific Railway Company at the rate of one share of stock for each one hundred dollars of the principal sum of such bonds, and the said common stock, when so taken in exchange for such bonds, to be converted into stock of said Northern Securities Company upon the basis of one share for each one and 15-100 shares of stock of said Northern Securities Company.

That said preferred stock could only be retired by resolution of the board of directors of said Northern Pacific Raiway Company; that a very large majority of said preferred stock was owned by certain individuals who were opposed to the agreement and plan herein referred to relative to turning over the management and control of said Northern Pacific Railway Company to said Northern Securities Company, and the holding of its stock by said Northern Securities Company; that the owners of said preferred stock so opposed to said agreement and plan were also owners of sufficient of the common stock of said Northern Pacific Railway Company to give them a small majority of the total capital stock of said Northern Pacific Railway Company; thus making it necessary, in order to carry out the plan and agreement herein set forth and to vest the management and control of said Northern Pacific Railway Company in said Northern Securities Company in the manner and for the purposes herein alleged, to retire said preferred stock; all of which was well known to the board of directors of said Northern Pacific Railway Company and to said J. Pierpont Morgan and his associate stockholders of said Northern Pacific Railway Company, as well as said Northern Securities Company.

That on or about the 13th day of November, 1901, the board of directors of said Northern Pacific Railway Company took such official action as was necessary to retire said preferred stock upon the basis and in accordance with the plan and agreement herein set forth; and thereafter said preferred stock was retired by the issuance of convertible bonds to the amount and in the manner herein alleged. That immediately after the retirement of said preferred stock, said Northern Pacific Railway Company, acting through its board of directors and executive officers, exercised its right and option of declaring said bonds to be convertible into the shares of the common stock of said Northern Pacific Railway Company, and thereupon the same were so converted and the common stock of said Northern Pacific Railway Company issued in exchange therefor, upon the basis and for the purposes herein alleged. That in order to prevent the persons who owned said preferred stock, and who were opposed to the carrying out of the plan and agreement herein referred to, from acquiring a like control of the common stock, it was provided that the $ 75,000,000 of common stock into which the said bonds were convertible could only be subscribed for and taken by holders of the then outstanding $ 80,000,000 of the common capital stock of said Northern Pacific Railway Company; each share of said common stock then outstanding entitling the owner and holder thereof to take an additional seventy-five eightieths of a share of said $ 75,000,000 additional common stock. That the retirement of said preferred stock and the conversion of the said bonds into common stock of said Northern Pacific Railway Company, and the exchange of said common stock for stock of said Northern Securities Company, as herein alleged, were each and all a part of the agreement, plan and scheme of said J. Pierpont Morgan and his said associate stockholders of said Northern Pacific Railway Company who then and there owned and controlled a large majority of the then outstanding common stock of said Northern Pacific Railway Company,

under and by which the complete management and control of said Northern Pacific Railway Company was to be, and was thereafter, turned over to and vested in said Northern Securities Company in order that said Nothern Pacific Railway Company, its property and franchises, might be in effect consolidated with the property and franchises of said Great Nothern Railway Company, as herein alleged. That said James J. Hill and his associate stockholders of said Great Northern Railway Company had full knowledge of and assisted in retiring said preferred stock for the purposes and objects herein alleged. That as a part of said agreement and plan entered into between said James J. Hill and his associate stockholders and said J. Pierpont Morgan and his associate stockholders, each and all of whom were then, and are now, acting is concert for the purpose of evading and violating the laws of the State of Minnesota, in the manner, for the purposes, and with the object and design herein set forth, and in furtherance of said purposes and design, and to avoid the effect of any litigation which might be instituted to defeat the consummation of the agreement, plan and scheme herein referred to of vesting the complete management and control of the railway lines, properties and franchises of said Great Northern and Northern Pacific Railway Companies in said defendant Northern Securities Company, said partes further undertook and agreed with each other and the persons who thereafter became the officers and directors of the defendant Northern Securities Company that pending the delivery and transfer of a majority of the capital stock of said Great Northern Railway Company to said Northern Seurities Company, the same should be held by or under the control of some person or corporation to your oratrix unknown; and that pending such delivery it was mutually agreed between said Hill and his associate stockholders and said Morgan and his associate stockholders and the persons who thereafter became the directors and officers of the defendant, as well as the person or corporation so temporarily holding said stock that the same should be held during said period for the purposes above set forth in trust for the use and benefit of the defendant, the Northern Securities Company; and that during such time the parties holding said stock should attend and vote the same at all meetings of the stockholders of said Great Northern Railway Company, in the interests of the defendant, and as directed by the board of directors of said Northern Securities Company or the executive committee thereof, or in unison with the stock of said railway companies, actually assigned to and held by the defendant. That said Northern Securities Company has not purchased and does not intend to purchase the stock of either of said railway companies, except by issuing its stock in exchange for and in lieu of the stock of said rail way companies on the basis and in the manner and for the purposes herein alleged.

That for the unlawful purposes aforesaid the said Northern Securities Company, by circular letter heretofore issued to the public, has offered and is still offering to issue and exchange for the capital stock of the said Great Northern and Northern Pacific Railway Companies, capital stock of said Northern Securities Company to the amount of one hundred and eighty dollars par value thereof for each share of capital stock of said Great Northern Railway Company, and to the amount of one hundred and fifteen dollars par value thereof for each share of stock of said Northern Pacific Railway Company. And that the said Northern Securities Company is about to receive, on the basis aforesaid, and will unless enjoined therefrom, receive, hold and hereafter control all the capital stock of said Great Northern and Northern Pacific Railway Companies.

X.

That the organization of said Northern Securities Company in the manner hereinbefore alleged, and the making of said agreement of arrangement hereinbefore referred to, are each and all a part of a scheme or plan on the part of said James J. Hill and his said associate stockholder of the Great Northern Railway Company, and J. Pierpont Morgan and his said associate holders of the stock of said Northern Pacific Railway Company, under and by which the said two last named railway companies are to be in effect consolidated, and the complete management and control of the business affairs of said corporations respectively placed in one body and under the direction and control of one man or one board of directors, through and by means of said defendant. That pursuant to said plan, agreement and arrangement, and in consummation thereof, and for the purpose of placing the complete management and control of said Great Northern Railway Company and said Northern Pacific Railway Company under one management, and for the purpose of establishing, in effect, a consolidation of said railway companies, together with said railway lines and properties, in and through said defendant, the said J. Pierpont Morgan and his associate stockholders have actually assigned and delivered to said Northern Securities Company upwards of eighty-five per cent of the total capital stock of said Northern Pacific Railway Company; and your oratrix alleges, on information and belief, that said James J. Hill, and his associate stockholders of said Great

Northern Railway Company have also actually assigned and delivered to said Northern Securities Company upwards of eighty-five per cent of the said capital stock of said Great Northern Railway Company. That the sole purpose, object and effect of the transfer of said stock by said James J. Hill and his said associates and the said J. Pierpont Morgan and his said associates to said Northern Securities Company was and is to transfer to and vest in said defendant Northern Securities Company the complete management and control of the respective lines of railway and railway properties of each of said railway companies within and without the State of Minnesota, and to place the complete management and control of the same, and the power to dictate the policy of each of said corporations, as well as the power and authority to fix rates and charges for the transportation of both freight and passengers within the State of Minnesota, as well as without said State, in the hands of and under the control of the party or board of directors, and thereby create, foster and perpetuate a monopoly in railway traffic in the State of Minnesota.

That the purpose, object and effect of the incorporation of the defendant and the receipt by it of a controlling amount of the capital stock of the said Northern Pacific and Great Northern Railway Companies, as well as each act of the officers and board of directors thereof, in entering into, adopting or executing the agreement or plan herein set forth, including the issuance and exchange of the capital stock of the Northern Securities Company for the stock of the said Northern Pacific and Great Northern Railway Companies on the basis hereinbefore set forth, was and is to place the said railway companies and the property and franchises thereof under a single management, and enable a single party or body of men acting as the board of directors of the said Northern Securities Company, or such executive committee as they may designate, to fix all rates and charges for the transportation of passengers and freight over any and all the lines of railway of each of said companies within the State of Minnesota; to determine what trains shall be operated over each or any of the lines of railway of each of said railway companies, and to remove all competition in freight or passenger traffic over said parallel and competing lines, and prevent the building of lines into new territory as well as into the territory now reached by only one of said lines of railway; that the purpose of said agreement and of the parties thereto was the creation of a trust or the formation of a combination by which a monopoly of railway traffic in northern Minnesota and elsewhere will be perfected; that the defendant company was organized for, and is to be used as a medium through and by which this unlawful agreement, purpose and object can, if not enjoined, will be accomplished; that this agreement and the consummation thereof is in restraint of trade, tends to create a monopoly in railway traffic and is against public policy, and void.

That holders of a large majority of the capital stock of both said Great Northern and Northern Pacific Railway Companies had knowledge of, consented to, and assisted in carrying out the agreement, arrangement and scheme herein set forth by which a large majority of the capital stock of each of said railway companies was to be exchanged for the capital stock of said Northern Securities Company upon the basis and for the purposes herein set forth; and the said stockholders of said Great Northern and Northern Pacific Railway Companies so consenting to, taking part and assisting in the formation of said Northern Securities Company, and the perfecting of the agreement and scheme herein set forth, constitute all of the stockholders of said Northern Securities Company; and the board of directors and executive officers of said Northern Securities Company hereinafter named have been selected from and elected by such stockholders of said Great Northern and Northern Pacific Railway Companies.

That under the articles of association of said Northern Securities Company, its corporate powers and entire business management is vested in a board of directors consisting of such number as shall be fixed from time to time, by the bylaws of said corporation, and the board of directors itself is authorized to make such by-laws as it deems best, and from time to time to alter, amend or repeal any by-laws. This the board of directors of said company thereby has power to determine its own number, and to adopt rules and regulations for its own conduct and the conduct of the affairs of said corporation. The articles of association further provide that said board of directors may appoint an executive committee in the manner provided by the by-laws of the company, which committee shall exercise all the powers and duties of said board of directors.

That on or about the 14th day of November, A.D. 1901, the following named persons were elected as and now constitute the board of directors of said Northern Securities Company, to wit: For the term of one year, James J. Hill, George F. Baker, Daniel S. Lamont, James Stillman and N. Terhune; for the term of two

years, Samuel Thorne, Charles E. Perkins, Jacob H. Schiff and William P. Clough; for the term of three years, John S. Kennedy, D. Willis James, E. T. Nichols, Robert Bacon and E. H. Harriman. That on the 15th day of November, A.D. 1901, said board of directors met and elected the following executive officers of said company, to wit: President, James J. Hill; First Vice President, John S. Kennedy; Second Vice President, George F. Baker; Third Vice President, D. Willis James; Fourth Vice President, William P. Clough; Secretary and Treasurer, E. T. Nichols.

Complainant further alleges that said James J. Hill and said William P. Clough were, on said last named date, the President and Vice President respectively of said Great Northern Railway Company; and both were members of the board of directors of said last named company. That said E. T. Nichols was, on said date and now is, the Secretary and Assistant Treasurer of said Great Northern Railway Company. That said James J. Hill and his associates either own or have in their possession or under their control, a large majority of the capital stock of said Great Northern Railway Company. That said James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, D. Willis James, John S. Kennedy, D. S. Lamont and James Stillman were, on said 14th day of November, 1901, and now are members of the board of directors of said Northern Pacific Railway Company, and constitute a majority of the board of directors of said named company.

That said James J. Hill and his associate directors and officers of said Northern Securities Company own and control a majority of the capital stock of said last named company; that during the month of December, 1901, said Northern Securities Company, through its directors and executive officers, began dictating the policy and management of said Northern Pacific as well as said Great Northern Railway Company, and ever since has been and now is directing and managing the business and property of both said Great Northern and Northern Pacific Railway Companies, and determining and enforcing freight and passenger rates on many of the lines of railway of said companies in the State of Minnesota, together with the manner and means of handling the freight and passenger business of said companies on such lines of railway, and will continue so to do unless enjoined as herein prayed.

That said Northern Securities Company has no authorized agent or representative within the State of Minnesota on whom a summons or other process in any legal proceeding may be served.

That the massing and concentration of said railway properties and the control and management thereof in the defendant company in the manner hereinbefore outlined, tends to and does create a monopoly in railway traffic in the State of Minnesota, and tends to and does deprive the State of Minnesota and the citizens thereof of the privilege of competition in fixing charges and rates of transportation for a large amount of freight transported annually over the lines of railway of each of said railway companies, between stations upon the lines of railway of both said companies within the State of Minnesota.

The it has ever been a part of the settled and public policy of the State of Minnesota to prohibit therein, in any way, the consolidation in any manner of competing and parallel lines of railway; and to this end the legislature of the State of Minnesota did, in the year 1874, pass the following enactment, which ever since has remained and now is a part of the statute law of the State of Minnesota, known as chapter 29 of the General Laws of 1874, to wit:

"SEC. 1. No railroad corporation, or the lessees, purchaser or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues.

"SEC. 2. This act shall take effect and be in force from and after its passage. Approved March 9, 1874."

That in the year 1881 the legislature of the State of Minnesota passed the following enactment, which ever since has remained and now is a part of the statute law of the said State and known as chapter 94 of the General Laws of 1881, to wit:

"SEC. 3. No railroad corporation shall consolidate with, lease or purchase, or in any way become the owner of or control any other railroad corporation or stock, franchises, rights or property thereof, which owns or controls a parallel or competing line.

"SEC. 4. This act shall take effect and be in force from and after its passage. Approved March 3, 1881."

That said Northern Securities Company is a railroad corporation within the meaning of the laws of the State of Minnesota; and the purpose, object and design of the said organizers and promoters of said Northern Securities Company, both in the organization thereof and in the making and carrying out of the said plans, agreement and designs hereinbefore referred to, was and is to violate the said legislative enactments of the State of Minnesota, and to evade and escape the provisions thereof; and it is the purpose, intent and design of said corporation, its stockholders, directors, executive committee, officers, agents and representatives, to violate the said legislative enactments, and to evade and escape the terms and provisions thereof, and to effect a consolidation of said railway corporations and properties as herein alleged. That each and all the said acts are violations and evasions of the said laws and the settled public policy of the State of Minnesota, and unless said parties are enjoined will cause the State of Minnesota irreparable injury.

That for many years last past it has been a part of the settled policy of the State of New Jersey to permit the consolidation of only such lines of railroad as are or can be connected so as to form continuous lines of railroad, and not to permit the consolidation of parallel or competing lines; and to that end, in they year 1885, the legislature of the State of New Jersey enacted a law which permits the consolidation of such lines as shall or may form connecting or continuous lines of railroads.

Your oratrix is informed and believes, and upon information and belief alleges, that defendant is not the owner of any property or stock or securities of any corporation, except as above set forth, and is not engaged in any business whatever except such as is incidental to the ownership of such stock and the general management and control of said Great Northern and Northern Pacific Railway Companies and the railway lines and properties thereof.

Your oratrix further alleges that if the defendant is permitted to control and manage the affairs of said Great Northern and Northern Pacific Railway Companies, in a manner hereinbefore alleged or otherwise, all competition between them will forever cease, and a monopoly in railway traffic in Minnesota be created, to the great and permanent and irreparable damage and injury to the State of Minnesota and to the people thereof, and in violation of its laws.

That your oratrix has and can have no other adequate remedy or relief by action at law except as herein prayed for in equity.

To the end, therefore, that the defendant, the Northern Securities Company may, if it can, show cause why your oratrix should not have the relief herein prayed for, and that it may be compelled to answer all and singular the premises, and all matters and things herein stated, as fully and particularly as if they were here again repeated, and said company thereunto interrogated, and that the defendant may be required to answer without oath, its answer under oath being hereby expressly waived; and that the defendants may, by the decree of this court, be perpetually enjoined and restrained:

First. From voting at any meeting of the stockholders of either said Great Northern or Northern Pacific Railway Company any of the capital stock of either of said companies by any means or in any manner whatsoever, and from attending, by reason of such ownership, possession of control of stock, either through its officers or by proxy, or in any other manner, any meeting of the stockholders of either of said companies.

Second. That the defendant, its stockholders, officers, directors, or the executive committee thereof, its attorneys, representatives, agents or servants, and each of them, be enjoined and restrained from, in any way, aiding, advising, directing, interfering with or in any way taking part, directly or indirectly, in any manner whatsoever, in the management, control or operation of any of the lines of railway of either of said companies, or in the management or control of the affairs of either of said companies.

Third. That the said defendant, its officers, attorneys, representatives, agents or servants, including its board

of directors, or any of its members as such, be enjoined and restrained from exercising any of the powers or performing any of the duties, or in any manner acting as a representative, officer, member of the board of directors or employe, of either said Great Northern or Northern Pacific Railway Company, or in any way exercising any management, direction or control over the same.

Fourth. That said defendant, its stockholders, directors and other officers, representatives and agents, be enjoined and restrained from doing any and all acts and making any arrangements or combinations by contract or otherwise having for their object, effect or result the consolidation or establishment of a joint management or control in any manner whatsoever of the said Great Northern and Northern Pacific Railway Companies, their lines of railway or properties.

Fifth. That the said defendant be enjoined from either directly or indirectly holding, owning or controlling any of the stock of either of said companies at one and the same time for any of the purposes or objects alleged in said bill, or otherwise.

Sixth. That in case it shall appear upon the hearing that the defendant owns or controls, or is acting in concert with the owners of, a majority of the capital stock of either of said railway companies, and owns or controls a minority of the stock of the other of said companies, then that the defendant, its officers, directors, agents, or representatives, be enjoined and restrained from receiving, acquiring or controlling any additional capital stock of such other railway company.

Seventh. And your oratrix further prays the leave of this court to amend this, its bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

And that complainant be granted such other and further or different relief as the nature of this case may require, and as shall be agreeable to equity and good conscience.

COUNSEL: *Mr. W. B. Douglas* and *Mr. M. D. Munn* for complainant. *Mr. George P. Wilson* was on their brief.

Mr. William D. Guthrie and *Mr. John W. Griggs* for defendant. *Mr. John G. Johnson* was on their brief.

JUDGES: Fuller, Harlan, Gray, Brewer, Brown, Shiras, Jr., White, Peckham, McKenna

OPINION BY: SHIRAS

OPINION [*234] [321] [***515]** MR. JUSTICE SHIRAS, after making the above statement, delivered the opinion of the court.

Whether a bill in equity in this court, in the name of a State, which seeks to prevent by injunction a corporation **[**322]** organized under the laws of another State, with power to acquire and hold shares of the capital stock of any other corporation, from obtaining and exercising ownership and control of two or more competing railroad companies of the complainant State, so as to evade and defeat its laws and policy forbidding the consolidation of such railroads when parallel and competing, presents the case of a controversy of a civil nature whereof this court had jurisdiction under the Constitution and laws of the **[*235]** United States, and whether the bill in the present case is of that description, or whether it is the case of a suit brought by a State to enforce its penal statutes, and hence within the principle of the decision in *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, are questions which have been ably discussed by counsel.

But it is not necessary for us to consider and answer those questions, for, in view of the nature of the facts presented and the remedies prayed for in the bill proposed to be filed, we think that the suit is defective for want of essential parties whose rights would be vitally affected by the relief sought therein.

The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it so that there **[***516]** may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Plds. sec. 72.

The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel. *Shields* v. *Barrow*, 17 How. 130; *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black, 545.

In the case of *Shields* v. *Barrow*, 17 How. 130, the question was fully discussed, and it was shown, upon a review of the previous cases, that there are three classes of parties to a bill in equity. **[*236]** They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. The court in respect to the act of Congress of February 28, 1839, 5 Stat. 321, and to the forty-seventh rule in equity practice, said (p. 140):

"The first section of that statute enacts: That when in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties, who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit.

"This act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it reaches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron* v. *McRoberts*, 3 Wheat. 591; *Osborn* v. *The Bank of the United States*, **[*237]** 9 Wheat. 738, and *Harding* v. *Handy*, 11 Wheat. 132. For this court had already there decided that the non-joinder of a party who could not be served with process would not defeat the jurisdiction. The act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court, in *Mallow* v. *Hinde*, 12 Wheat. 193, 198, when speaking of a case where an indepensable party was not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.' So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served **[**323]** with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the forty-seventh rule is only a declaration, for the government of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of this court, on the subject of that rule. *Hogan* v. *Walker*, 14 How. 36.

"It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can

make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights."

California v. *Southern Pacific Co.*, 157 U.S. 229, was a case in several particulars like the present one. There a bill was filed in this court by the State of California against the Southern Pacific Company, a corporation of the State of Kentucky, claiming title and jurisdiction by the State over certain large tracts of land lying upon the shores of the bay of San Francisco and over the harbor waters of said bay, including San Antonio Creek, and averring that the Southern Pacific Company claimed adversely to the State, and was engaged in placing structures **[***517]** in and upon said tracts of land, thereby obstructing navigation in the bay and adjoining waters. The bill prayed **[*238]** for a decree quieting the title of the State and enjoining the defendant company from maintaining the structures that it had placed upon said tracts and the adjacent waters. The defendant company answered the bill, denying the ownership of the complainant in the premises in dispute, and setting forth its own title derived from the town of Oakland, as to the whole of the water front of that town, through one Carpentier, as grantee of said town by ordinance and deed of conveyance, and claiming that by subsequent mesne conveyances the said title and property had become vested, as to a part thereof, in the Central Pacific Railroad Company, and, as to another part, in the South Pacific Coast Railway Company, and in the defendant company as lessee. It further was claimed that certain ordinances and deeds of the town of Oakland operated as a grant by the city of Oakland and the State of California of the land to the Oakland Water Front Company, as grantee or alienee of Carpentier. The case was duly put at issue, and a commissioner was appointed to take testimony therein and to return the same to the court.

When the case came on for hearing it was held by this court that the city of Oakland and the Oakland Water Front Company were so situated in respect to the litigation that the court ought not to proceed in their absence. In reaching this conclusion the court reviewed the cases, including the cases above cited and others.

Upon the contention that the city of Oakland and the Oakland Water Front Company might be made parties defendant, and the court thus enabled to proceed with the case, the court held that this could not be done, because this court could not exercise original jurisdiction in a suit between a State on the one hand and a citizen of another State and citizens of the complainant State on the other. Accordingly, the bill was dismissed for want of parties who should be joined, but could not be without ousting our jurisdiction.

We shall, therefore, proceed to examine the substance of the bill proposed to filed, in order to see whether it discloses a case in which a decree could be granted which would do final and complete justice between the nominal parties without **[*239]** vitally affecting other persons not before the court. As already stated, a conclusion reached that the suit cannot be entertained for want of necessary and essential parties, will not imply any expression of opinion beyond that question.

As the bill is set forth in full in the preceding statement, it will not be necessary to here repeat its allegations. They may be summarized as follows:

The complainant is the State of Minnesota; the defendant is the Northern Securities Company, a corporation of the State of New Jersey.

It is part of the policy of the State of Minnesota, as declared in its public statutes, to prohibit therein the consolidation in any manner or competing and parallel lines of railway. The statutes specially recited in the bill are the act of March 9, 1874, the first section whereof is in the following terms: "No railroad corporation, or the lessees, purchaser or managers of any railroad company, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer or any other railroad corporation owning or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and the act of March 3, 1881, of which the third section is as follows: "No railroad company shall consolidate with, lease, or

purchase, or in any way become the owner of or control any other railroad corporation or stock, franchises, rights or property thereof, which owns or controls a parallel or competing line."

The Great Northern Railway Company is a corporation organized and existing under an act duly passed by the Territory of Minnesota and under various subsequent acts of the State of Minnesota, and owns and controls, as lessee, several important lines of railroad, some only within and others extending beyond the State of Minnesota, and which are maintained by the Great Northern Railway Company as one complete system. The **[*240]** board of directors of the Great **[**324]** Northern Railway Company, at the time of the organization of the Northern Securities Company, to wit, on or about November 13, 1901, was and now is composed of the following-named persons, to wit: James J. Hill, James N. Hill Samuel Hill, William P. Clough, Edward Sawyer, Jacob H. Schiff and Henry W. Cannon. That on said last mentioned date the Great Northern Railway Company had issued and there was then outstanding a total of one hundred and twenty-five million dollars, par value, of the capital stock of said corporation, of which, it is alleged, that said James J. Hill was on said last mentioned date the owner of or had subject to his direction and disposition, more than a majority of said capital stock so outstanding.

The Northern Pacific Railway Company was organized under the laws of the State of Wisconsin of the year 1895, and afterwards, by filing a certified copy of its articles of incorporation, became a corporation of the State of Minnesota and subject to the laws of that State relating to railroad corporations. In the year 1896 the Northern Pacific Railway Company duly purchased and became the owner of the entire railroad properties and lines formerly owned by the Northern Pacific Railroad Company, and at all times since has continuously owned and operated each and all of said lines of railway situated within the State of Minnesota, **[***518]** and which connect the cities of St. Paul and Minneapolis and Duluth, and connect with the lines of railways outside the State of Minnesota. During the year 1899 the said Northern Pacific Railway Company purchased, and ever since has owned and operated a line of railway extending from the cities of St. Paul and Minneapolis to Duluth, Minnesota. Said last mentioned line parallels and is a competing line of railway for both freight and passenger traffic with the line of railway between said Minneapolis and St. Paul and Duluth, owned by the Eastern Railway Company of Minnesota, but which is operated, controlled and managed by said Great Northern Railway Company, as a part of the system of that company. The lines of railway now owned and operated by said Great Northern Railway Company within the State of Minnesota are parallel and competing lines for freight and passenger traffic **[*241]** with the lines of railway now owned, operated and controlled by said Northern Pacific Railway Company within the State of Minnesota; and also said lines of railway owned, operated and controlled by said Great Northern Railway Company, and also the lines of railway owned, operated and controlled by said Northern Pacific Railway Company, which connect with the lines of railway owned, operated and controlled by each of said companies respectively within the State of Minnesota, are parallel and competing lines through the States of North Dakota, Montana, Idaho and Washington to Puget Sound on the Pacific Coast, for passenger and freight traffic. That said companies are the only railway companies owning or operating lines of railway crossing the State of Minnesota and connecting the Pacific Ocean by rail with points in Minnesota.

That the Chicago, Burlington and Quincy Railway Company, a corporation of the State of Illinois, has, for many years last past, owned, operated and controlled an extensive system of railway lines, connecting the city of Chicago with the city of Denver, in the State of Colorado, and with the city of Billings, in the State of Montana, which last named point is a junction and competitive point for freight and passenger traffic with said Northern Pacific Railway Company, etc. That during the year 1901 the said Great Northern Railway Company and said Northern Pacific Railway Company jointly purchased ninety-eight per cent of the total capital stock of said Chicago, Burlington and Quincy Railway Company, aggregating approximately one hundred and seven million of dollars, par value, and now own the same, and issued in payment therefor the joint bonds of said Great Northern and Northern Pacific Railway Companies, payable in twenty years from the date thereof, and bearing interest at the rate of four per cent per annum, payable semi-annually. That the said Great Northern and Northern Pacific Railway Companies issued and delivered in exchange for each one hundred dollars in amount of said Chicago, Burlington and Quincy Railway Company stock two hundred dollars in amount of the said bonds; and that under and by virtue of the purchase of the said stock the joint ownership and control of the said Chicago, Burlington and Quincy Railway Company are vested in, **[*242]** and ever since have been exercised by, the said Great Northern and Northern Pacific Railway Companies. During April, 1901, and ever since, the following named persons constituted and now are the members of the

board of directors of the Northern Pacific Railway Company: James J. Hill, Robert Bacon, George F. Baker, E. H. Harriman, H. McK. Twombly, Brayton Ives, D. Willis James, John S. Kennedy, Daniel S. Lamont, Charles S. Mellen, Samuel Rea, William Rockefeller, Charles Steele, James Stillman and Eben B. Thomas. On November 13, 1901, J. Pierpont Morgan, with certain other unknown persons, but who were acting with said Morgan, owned and had in their possession, or held and had subject to their control and disposition, upwards of eighty-five per cent of the total capital stock of said Northern Pacific Railway Company. The Northern Securities Company was organized on November 13, 1901, with its principal office at Hoboken, in the State of New Jersey, and the objects for which the corporation was formed, as stated in the articles of incorporation, are to acquire and hold, as investments, the bonds, securities and capital stock of any other corporation or corporations of the State of New Jersey, or of any other State, Territory or country, and while owner of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon; and it is declared that the corporation shall have power to conduct its business in other States and in foreign countries, to have one or more offices **[**325]** out of the State, and to purchase, hold and convey real and personal property out of the State.

It is alleged that the Northern Securities Company was incorporated at the instigation and request of James J. Hill, William P. Clough, and certain unknown stockholders of said Great Northern Railway Company, who, with said Hill and Clough, owned or controlled, or have the disposition and management of, a large majority of the capital stock of said Great Northern Railway Company, and with the cooperation of J. Pierpont Morgan and certain other unknown stockholders of said Northern Pacific Railway Company, who, with said Morgan, owned and controlled, or have the disposition and management, **[*243]** of, a large majority of the capital stock of said Northern Pacific Railway Company.

On November 14, 1901, James J. Hill, George F. Baker, Daniel S. Lamont, James Stillman, N. Terhune, Samuel Thorne, Charles L. Perkins, Jacob H. Schiff, William P. Clough, John S. Kennedy, Willis James, E. T. Nichols, Robert Bacon and E. H. Harriman were elected directors of the Northern Securities Company, and said directors on November 15, 1901, elected James J. Hill to be president, and John S. Kennedy, George F. Baker, Willis James and William P. Clough to be vice presidents, and E. T. Nichols, **[***519]** to be secretary and treasurer, of said company. It is alleged that the holders of a large majority of the capital stock of both said Great Northern and Northern Pacific Railway Companies had knowledge of and assisted in the formation of the said Northern Securities Company, and that such stockholders, so consenting and assisting, constitute all of the stockholders of said Northern Securities Company.

The bill charges that the purpose of the formation of the Northern Securities Company was to place the management and control of the Great Northern Railway Company and of the Northern Pacific Railway Company under one management, and to thus, in effect, establish a consolidation of said railway companies, and defeat and evade the statutes and policy of the State of Minnesota forbidding consolidation of parallel and competing lines of railway

The relief prayed by the bill is that the defendant company be perpetually enjoined and restrained from voting, at any meeting of either said Great Northern and Northern Pacific Railway Company, any of the capital stock of either of said companies by any means or in any manner whatsoever, and from attending, by reason of such ownership, possession or control of stock, either through its officers or by proxy, or in any other manner, any meeting of the stockholders of either of said companies, and from, in any way, aiding, advising, directing, interfering with or in any way taking part, directly or indirectly, in any manner whatsoever, in the management, control, or operation of any of the lines of railway of either of said companies; and that said defendant, its officers, attorneys, representatives, **[*244]** agents, or servants, including its board of directors, or any of its members as such, be enjoined and restrained from exercising any of the powers or performing any of the duties, or in any manner acting as a representative, officer, member of the board of directors or employe, of either said Great Northern or Northern Pacific Railway Company, or in any way exercising any management, direction or control over the same; and that said defendant, its stockholders directors and other officers, representatives and agents, be enjoined and restrained from doing any and all acts and making any arrangements or combinations, by contract or otherwise, having for their object, effect or result the consolidation or establishment of a joint management or control in any manner whatsoever of the said Great Northern and Northern Pacific Railway Companies, their lines of railway or properties; and that said defendant be enjoined from either directly or indirectly holding, owning or controlling any of the

stock of either of said companies at one and the same time for any of the purposes or objects alleged in the bill, or otherwise, and that in case it shall appear upon the hearing that the defendant owns or controls, or is acting in concert with the owners of, a majority of the capital stock of either of said railway companies, and owns or controls a minority of the stock of the other of said companies, then that the defendant, its officers, directors, agents or representatives, be enjoined and restrained from receiving, acquiring or controlling any additional capital stock of such other railway company; and further for leave to amend the bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

More briefly stated, the case presented by the charges and prayers of the bill is that the State of Minnesota is apprehensive that a majority of the stockholders respectively of the Great Northern Railway Company and of the Northern Pacific Railway Company have combined and made an arrangement, through the organization of a corporation of the State of New Jersey, whereby such a consolidation, or what is alleged to amount to the same thing, a joint control and management **[*245]** of the Great Northern and Northern Pacific Railway Companies, shall be effected as will operate to defeat and overrule the policy of the State in prohibiting the consolidation of parallel and competing lines of railway, and therefore appeals to a court of equity to prevent by injunction the operation and effect of such a combination and arrangement.

But at once, as we have seen, the court is put upon inquiry whether the parties and persons to be affected by such an injunction are before it.

The narrative of the bill unquestionably discloses that the parties to be affected by a decision of the controversy are, directly, the State of Minnesota, the Great Northern **[**326]** Railway Company, the Northern Pacific Railway Company, corporations of that State, and the Northern Securities Company, a corporation of the State of New Jersey, and, indirectly, the stockholders and bondholders of those corporations, and of the numerous railway companies whose lines are alleged to be owned, managed or controlled by the Great Northern and Northern Pacific Railway Companies.

Can such a controversy be determined with due regard to the interests of all concerned, by a suit solely between the State of Minnesota and the Northern Securities Company? It is, indeed, alleged that all of the stockholders of the Northern Securities Company are stockholders in the two railroad companies, and, therefore, it may be said that the latter stockholders are sufficiently represented in the litigation by the Northern Securities Company; but it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company. It is obvious, therefore, that the rights of the minority stockholders of the **[***520]** two railroad companies are not represented by the Northern Securities Company. They have a right to be represented, in the controversy, by the companies whose stock they hold, and their rights ought not to be affected without a hearing, even if **[*246]** it were conceded that a majority of the stock in such companies, held by a few persons, had assisted in forming some sort of an illegal arrangement. Moreover, it must not be overlooked that it is not the private interests of stockholders that are to be alone considered. The directors of the Great Northern and Northern Pacific Railway Companies are appointed to represent and protect not merely the private and pecuniary interests of the stockholders, but the rights of the public at large, which is deeply concerned in the proper and advantageous management of these public highways. It is not sufficient to say that the Attorney General, or the Governor, or even the Legislature of the State, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a State, when it voluntarily becomes a complainant in a court of equity, cannot claim to represent both sides of the controversy. Not only have the stockholders, be they few or many, a right to be heard, through the officers and directors whom they have legally selected to represent them, but the general interests of the public, which might be deeply affected by the decree of the court, are entitled to be heard; and that, when the State is the complainant, and in a case like the present, can only be effected by the presence of the railroad companies as parties defendant.

Upon investigation it might turn out that the allegations of the bill are well founded, and that the State is entitled to relief; or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard of the policy of the State, but that what is proposed is consistent with

that policy and advantageous to the communities affected. But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond **[*247]** the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.

As then, the Great Northern and the Northern Pacific Railway Companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if those companies were made parties defendant, the motion for leave to file the proposed bill must be and is

Denied.

3

1976 CarswellOnt 282
Ontario Court of Appeal

Coulson v. Secure Holdings Ltd.

1976 CarswellOnt 282, [1976] O.J. No. 1459, 1 C.P.C. 168

Coulson et al. v. Secure Holdings Ltd. and Jackson et al.

Dubin, Howland and Wilson JJ.A.

Judgment: May 10, 1976

Counsel: *I. W. Fefergrad* , for appellants.
D. R. Walkinshaw, Q.C. , for respondent Secure Holdings Ltd.

Subject: Civil Practice and Procedure

Headnote
Practice --- Default proceedings — General

Rr. 74, 136(1).

In 1922 the executors of the estate of J. transferred a block of land (subsequently known as Drumsnab Road) to a trustee for the owners of 10 blocks of land fronting thereon. The trust agreement provides that Drumsnab Road was to be a private right of way to provide access to any adjoining highway for the benefit of the owners of the 10 blocks of land, which in turn were mortgaged for a period of 11 years to obtain financing for construction of the roadway. The mortgage provided was paid off but no request for reconveyance was made until 31st December 1974 by which time a corporation (S. Ltd.) had asserted a prescriptive right of way over the road by virtue of more than 20 years' use. Without the knowledge of the then current owners of the original 10 blocks of land ("the appellants"), S. Ltd. on 11th December 1974 commenced an action for a declaration as to such a prescriptive right and obtained a judgment on 11th February 1975. The judgment was obtained on a motion based on admissions in the pleadings of the defendants, the trustees of J.'s estate. The trustees had pleaded that before issuance of the writ they had offered to execute a quit claim deed of easement in favour of the plaintiffs. The appellants learned of the judgment from a report of it in the newspaper on 13th February 1975 and they moved promptly to set aside the judgment and be added as party defendants with leave to defend the action. The appellants' motion was dismissed for want of jurisdiction.

On their appeal from this order, *held* , the appellants should be added as defendants with leave to plead in defence of the action because:

(1) Rule 136(1), which provides for the joinder of all persons "who ought to have been joined" as parties to an action or "whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action" does not become inapplicable subsequent to judgment, particularly when there has been no adjudication on the merits, because: (a) generally, a Court of equity will not permit injustice to be done to an absent party with a material legal or beneficial interest in the subject-matter of the lawsuit and; (b) specifically, the overriding provisions of s. 18 §5 of The Judicature Act require the Court to "recognize and take notice of all equitable estates, titles and rights ... appearing incidentally in the course of any cause or matter".

(2) Semble, R. 74 would also have justified joinder of the appellants as defendants in the circumstances of this case.

(3) The judgment could be reopened since: (a) it was tantamount to a default judgment in view of the position taken by and the limited interest of the trustees, and; (b) an in rem judgment purporting to bind the world at large cannot be allowed to stand where interested parties were not afforded an opportunity to be heard.

Annotation

Rule 136 is to be liberally interpreted so that all persons may be joined as parties whose presence is necessary to enable the Court effectually and completely to adjudicate upon all questions involved in the action (see Holmested & Gale, R. 136, §14). When persons are needed as party defendants to achieve this objective, they will be added without the plaintiff's consent (Holmested & Gale, R. 136, §30). In such a case the Court has power of its own volition to add such persons as parties (see Holmested & Gale, R. 136, §35).

Third persons not already parties to an action may apply to be joined as parties thereto if they appear to have a substantial legal interest in the action (Holmested & Gale, R. 136, §33 and see also §16).

While ordinarily an application to add a party will be denied after final judgment in the action (Holmested & Gale, R. 136, §45), the Court of Appeal has in a number of cases added parties during the pendency of an appeal (Holmested & Gale, R. 136, §39).

As for the right of a third party to move to set aside a default judgment and be permitted to defend the action when substantially interested therein, see Holmested & Gale, R. 526, §11.

W.H.O.M.

Table of Authorities

Cases considered:

Union Natural Gas Co. v. Chatham Gas Co. (1917), 40 O.L.R. 148, 38 D.L.R. 485 , reversed 56 S.C.R. 253, 40 D.L.R. 485 — *considered*

Minnesota v. Northern Securities Co. (1902), 184 U.S. 199 — *referred to*

Appeal for order dismissing application by persons seeking to set aside judgment and be added as party defendants in the action.

The judgment of the Court was delivered by *Wilson J.A.* :

1 This appeal is brought by a group of residential property owners fronting on Drumsnab Road, in Toronto, from an order of O'Driscoll J. dismissing their application to set aside a judgment of Cory J. in which he declared that the plaintiff respondent, Secure Holdings Ltd., the owner of No. 2 Castle Frank Avenue, had acquired a prescriptive right of way over Drumsnab Road for all residential purposes. Mr. Justice Cory's order limited Secure's right of way to 15 residential units, No. 2 Castle Frank Avenue being a former single family dwelling of substantial dimension, since converted into rental accommodation for an undetermined number of tenants and occupants.

2 The basis of the appellants' application before O'Driscoll J. was that Drumsnab Road was a private roadway for the benefit of their properties and they had had neither notice of, nor opportunity to be heard in, the proceeding before Cory J. On the same application the appellants sought to be added as party defendants to Secure's action with leave to

defend. O'Driscoll J. found that he had no jurisdiction to grant the application since Mr. Justice Cory's judgment was a final judgment which had been issued and entered. There was no allegation of fraud.

3 O'Driscoll J. held also that the applicants, not having been parties to the action before Cory J., had no status to move under Rr. 526-9 to set it aside or vary it. The appellants are accordingly before this Court as "proposed defendants" in the main action, asking that Mr. Justice O'Driscoll's order be reversed, the order of Cory J. set aside and that they be permitted to plead to the main action as party defendants. The executors of Mr. Jackson's estate were not represented on the appeal.

4 The history of Drumsnab Road forms the backdrop to these proceedings. It would appear that all the properties owned by the appellants, together with the property which is now Drumsnab Road, formed part of the estate of one Maunsell Bowers Jackson. Mr. Jackson's executors subdivided the property in 1922 and by an agreement made on 15th September 1922, transferred the property which is now Drumsnab Road, but on the plan of subdivision was referred to as Block "Z", to the Toronto General Trusts Corporation in trust "for the benefit of and to be maintained by and at the expense of the owners, from time to time of lots 1 to 10 inclusive, fronting on Block 'Z'."

5 The agreement more particularly provided in the habendum as follows:

> To hold the said lands and premises marked Block 'Z' as a right of way (and which said Block 'Z' is hereby declared to be and shall continue to be a private way); for the use and benefit of the owners from time to time, of the lands and premises designated as lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, fronting on the said Block 'Z' as shown on the survey hereto annexed, to permit the said respective owners, their tenants, agents, servants, workmen, visitors and persons having business with them, to use the said Block 'Z' as a means of ingress and egress, in common, in travelling to and from the respective lands owned by them to any public highway adjoining the said Block 'Z'; and, the said right of way is hereby declared to be and shall be an appurtenance to all the lands shown on the said annexed survey as lots numbers 1 to 10 inclusive.

6 Under the agreement the executors agreed to give the trustee a mortgage on lots 1 to 10 to secure the financing of the con struction of the roadway and the installation of sewers and water and gas mains on Block "Z". The trustee was to permit the owners of lots 1 to 10 to hook up to the services once they were installed and was to be responsible for maintaining the roadway and services in good order for their benefit for a period of 11 years from the date of the agreement or until the agreement was sooner terminated. The principal and interest on the mortgage was to be chargeable proportionately against the owners of lots 1 to 10 (the exact sums payable by each being set out in a subsequent agreement dated 1st May 1923) and, once the mortgage was fully paid off, the owners of lots 1 to 10, or a majority of them, could call for a conveyance of Block "Z" from the trustee to whomsoever they directed.

7 Subsequent to the making of the agreement the subdivision was registered in the Registry Office of the Registry Division of East Toronto as Plan 626-E, Toronto, and the agreement of 15th September 1922 was also registered. Even although the mortgage had long since been paid off no steps were taken by the appellants to require a conveyance from the trustee (now known as Canada Permanent Trust Co.) until 31st December 1974. No doubt their request at that time was prompted by the contention which had arisen between the appellants and Secure over the use of Drumsnab Road by Secure's tenants. It transpired, however, that by the time the request was made, the trustee had reconveyed Drumsnab Road back to the trustees of Mr. Jackson's estate. A formal offer to purchase Drumsnab Road for the sum of One Thousand Dollars ($1,000) was made on the appellants' behalf to the trustees of Mr. Jackson's estate on 17th February 1975.

8 On 11th December 1974, unknown apparently to the appellants, Secure issued its writ against the trustees of Mr. Jackson's estate claiming a declaration that it had obtained a prescriptive right of way over Drumsnab Road by reason of more than 20 years user. A motion for judgment was made before Cory J. based on admissions in the defendant's pleadings and Mr. Justice Cory's judgment in Secure's favour issued on 11th February 1975. In his affidavit in support of the appellants' application to O'Driscoll J., one Paul Durish, the owner of No. 4 Drumsnab Road, stated that the first

he knew of Secure's lawsuit was a report of Mr. Justice Cory's judgment in the Osgoode Hall Proceedings appearing in the Globe & Mail of 13th February 1975. He immediately attended on his solicitor. The day following, a barrier which the appellants had erected on Drumsnab Road on or about 22nd April 1974 to evidence the private nature of the road was removed by Secure on the basis that it now had a right of way over it.

9 This appeal raises legal issues both substantive and procedural and they are to some considerable extent intertwined.

10 The starting point for a consideration of the procedural issue is the finding of O'Driscoll J. that he had no jurisdiction to set aside or vary the judgment of Cory J. at the behest of these appellants who were not parties to the action and whom he found he had no jurisdiction to make parties. A review of R. 136(1) of the Rules of Practice raises the question whether the appellants are persons "who ought to have been joined" or "whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action", or both.

11 It was submitted by Mr. Walkinshaw that R. 136(1) has no application to a case such as the one at bar where final judgment has already issued and no appeal has been taken by either of the parties to the action. He submits that in these circumstances the question whether the "proposed defendants" are persons described in the section is academic since there is no "stage of the proceedings" at which the Court may order them added. The proceedings, he says, are closed and the power of the Court under the Rule terminated. Support is to be found for his submission in *Attorney General v. Corporation of Birmingham* (1880), 15 Ch. D. 423 . Mr. Walkinshaw also reminded us that it is in the public interest that there be a finality to judgments and that third parties should not be allowed to reopen them in the absence of fraud. With all due respect to Mr. Walkinshaw's persuasive argument on the interpretation of the Rule, I do not believe that the Court can utilize the Rules of Practice to escape its duty under s. 18 §5 of The Judicature Act, R.S.O. 1970, c. 228 in administering law and equity to "recognize and take notice of all equitable estates, titles and rights, ... appearing incidentally in the course of any cause or matter".

12 In *Union Natural Gas Co. v. Chatham Gas Co.* (1917), 40 O.L.R. 148, 38 D.L.R. 485 , reversed 56 S.C.R. 253, 40 D.L.R. 485 this Court was faced with an analogous situation. The action between plaintiff and defendant had proceeded to judgment and the judgment provided in part that the defendant was perpetually restrained from diverting gas supplied by the plaintiff to the defendant to a third party, the Dominion Sugar Co., pursuant to a contract Dominion had with the defendant. Hodgins J.A., speaking for the Court, pointed out that the adjudication between plaintiff and defendant virtually annulled Dominion's contract and such an injustice should not be done to an absent party. He held that the case came within R. 134 (now R. 136) and ordered a new trial. He quoted with approval from the judgment of Mr. Justice Shirus in the Supreme Court of the United States in *Minnesota v. Northern Securities Co.* (1902), 184 U.S. 199 at 235:

> The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity for a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story's Eq. Plds. sec. 72.

13 While the harm done to the appellants by Mr. Justice Cory's judgment may be much less dramatic than that done to Dominion in the *Union Natural Gas Co.* case, supra, the principle appears to me to be equally applicable, and particularly where, as in this appeal, there does not appear to have been any adjudication of the plaintiff's claim on the merits.

14 Although counsel for the appellants made no submission to the Court on the application of R. 74 to these proceedings, it would appear that the appellants could be added as party defendants under that Rule also.

15 It is unquestionably true that, depending upon the precise nature and extent of the interest the appellants have in Drumsnab Road, their interest may be totally unaffected by the declaration of the prescriptive right of way of Secure. For example, if they have merely a non-exclusive right of way themselves, it may be argued that the acquisition of a right of way by another, while it may prejudice them in terms of more traffic on the private roadway, does not affect their equitable interest in the property. On the other hand, if they have an exclusive right of way and even more so if they are the equitable owners of the roadway, their interest would be very materially affected by a declaration that some third party had acquired a right of way over the roadway. This is where the procedural and substantive issues on this appeal converge and why I believe it is necessary on this appeal to consider in at least a preliminary way the effect of the agreement of 15th September 1922, since it is to that agreement that the appellants point for their equitable interest in Drumsnab Road.

16 It would appear that the appellants acquired two different types of interest under the agreement of 15th September 1922. They acquired a beneficial interest in the roadway for purposes of ingress and egress to their properties during the period it was to be held in trust by the trustee, i.e., they acquired an equitable right of way; and they acquired also a right to obtain a conveyance of the roadway from the trustee once the mortgage had been paid off and the trust could be terminated.

17 Mr. Walkinshaw made submissions with respect to both interests. As to the appellants' right to obtain a conveyance he submitted that it was invalid because it violated the rule against perpetuities. It could not be said on 15th September 1922, he argued, that the appellants' right to a conveyance must vest, if at all, within a period of 21 years from the date of the agreement. This being so, it was a nullity from the beginning. As to the appellants' beneficial interest in the roadway during the trust period, Mr. Walkinshaw argued that there was nothing in the agreement to indicate that the apppellants were given an exclusive right of way over Drumsnab Road. Mr. Jackson's executors were not precluded by the agreement from giving rights of way to other people and there was likewise no reason why other people might not acquire rights of way over it by prescription.

18 It would be inappropriate for the Court to determine the rights of the appellants and the Jackson estate inter se in Drumsnab Road on this appeal. That determination must form part of the appellants' defence to Secure's claim in the main action if they are added as party defendants. Suffice it to say that, even if Mr. Walkinshaw's submission on the invalidity of the appellants' right to obtain a conveyance is correct, the appellants were given an immediate equitable interest in Drumsnab Road by the agreement of 15th September 1922. While the agreement contemplates that that interest would merge into legal ownership when they obtained the conveyance, the invalidity of their right to obtain the conveyance (if it was invalid) or their failure to exercise their right (assuming its validity) would appear to mean only that their equitable interest continued and was unaffected by the trustee's reconveyance of the property to the Jackson estate. This interest is sufficient in the circumstances to warrant the setting aside of Mr. Justice Cory's judgment and the addition of the appellants as party defendants in the main action. If, however, the appellants have more than an equitable right of way over Drumsnab Road, then it is all the more necessary that they be parties to Secure's action since the acquisition of any interest by Secure in the manner alleged may be foreclosed by the agreement of 15th September 1922. These are matters which must be thoroughly canvassed and on which all interests, legal and equitable, should be represented before the Court. The appellants are entitled to have Secure's claim to a prescriptive right of way adjudicated on the merits.

19 O'Driscoll J. was concerned not only about the right of the appellants to be added as party defendants in the main action but also about reopening the issue concluded in a final way by Mr. Justice Cory's judgment. I do not share his concern on this aspect since Mr. Justice Cory's judgment, if not a consent or default judgment in the strict sense, very closely approximated such a judgment. It was obviously a matter of complete indifference to the trustees of Mr. Jackson's estate whether Secure had acquired a prescriptive right of way over Drumsnab Road or not, the estate having retained no property in the area other than its interest, if any, in Drumsnab Road itself. Indeed, in its statement of defence to Secure's claim the trustees pleaded that before the writ was issued against them they had offered to execute a quit claim grant of easement over Drumsnab Road to Secure for residential purposes provided it paid its fair share of its upkeep along with other users. Mr. Justice Cory's judgment, in effect, merely gave judicial sanction to what was already a matter

of agreement between two technical litigants. It is, moreover, an in rem judgment purporting to bind the world at large and cannot be allowed to stand where interested parties were not afforded an opportunity to be heard.

20 I would allow the appeal from the order of O'Driscoll J. and set aside the judgment of Cory J. The appellants should be added as party defendants and the style of cause amended accordingly. The respondent should be at liberty to deliver a fresh statement of claim within 15 days hereof and the added defendants shall have 10 days thereafter to deliver their statement of defence. The appellants are entitled to their costs from Secure Holdings Ltd. both of this appeal and of the motion before O'Driscoll J.

Appeal allowed.

End of Document

4

2008 CarswellOnt 3669
Ontario Master

Leclair v. Ontario (Attorney General)

2008 CarswellOnt 3669, [2008] O.J. No. 2428, 170 A.C.W.S. (3d) 39

GILLES LECLAIR and JULIE MENARD (Plaintiffs) and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO represented by the Attorney General for Ontario, and represented by the Solicitor General for Ontario (now the Minister of Community Safety and Correctional Services) DONNA EASTWOOD, OTTAWA POLICE SERVICES BOARD, JOHN MONETTE, YASMINE AYROUD and SUSAN AITKEN (Defendants)

Master R. Beaudoin

Heard: May 6, 2008
Judgment: June 17, 2008
Docket: 06-CV-36597

Counsel: Charles M. Gibson for Plaintiffs
Jeremy J. Wright for Defendants, John Monette, Ottawa Police Services Board
Francois Baril for Defendants, Drs. Yasmine Ayroud, Susan Aitken
Connie Vernon for Defendants, Her Majesty the Queen in Right of Ontario, Donna Eastwood
Nicole N. Vaz for Proposed Added Defendant, David Alexander Chiasson

Subject: Public; Civil Practice and Procedure; Torts

Headnote

Public law --- Crown — Practice and procedure involving Crown in right of province — Parties — Miscellaneous

Public law --- Crown — Practice and procedure involving Crown in right of province — Pleadings

Table of Authorities

Cases considered by *Master R. Beaudoin*:

Gagro v. Morrison (1995), 1995 CarswellOnt 999, 40 C.P.C. (3d) 331 (Ont. Gen. Div.) — followed

Seaway Trust Co. v. Markle (1988), 1988 CarswellOnt 343, 25 C.P.C. (2d) 64 (Ont. Master) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — referred to

Coroners Act, R.S.O. 1990, c. C.37
Generally — referred to

s. 28(2) — referred to

Evidence Act, R.S.O. 1990, c. E.23
Generally — referred to

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 5.04 — referred to

R. 5.04(2) — referred to

R. 26.01 — referred to

R. 30.1 — referred to

R. 39.03(1) — referred to

***Master R. Beaudoin*:**

The Motion

1 The Plaintiffs seek to amend their Statement of Claim to increase the quantum of damages; to add claims against the Crown pursuant to the *Proceedings Against the Crown Act*; to add Dr. David Chiasson as a party and to plead a new cause of action against the new party. No one opposes the request to increase the damages claimed. This decision deals solely with the motion to add Dr. Chiasson as a party. The Crown also opposes the amendments sought against it and that motion will be argued at a later date.

Background

2 The Plaintiffs' claims arise out of the August 13, 2003 death of Beverley Leclair, the wife of the Plaintiff, Gilles Leclair and the mother of Plaintiff, Julie Menard. Mrs. Leclair's body was found submerged in the backyard pool of the Leclair residence. Gilles Leclair was arrested and charged with her murder two days later. In December, 2005, Gilles Leclair was discharged at the preliminary inquiry at the request of the Crown. The Plaintiffs now seek damages for malicious prosecution, abuse of public office, negligence and negligent investigation.

3 The Defendant Donna Eastwood is the assistant Crown prosecutor who had carriage of the prosecution. The Defendant John Monette is the detective who was the lead investigator. The Defendant Susan Aitken, was the coroner for the Ottawa-Carleton region at the relevant time. She examined the body of Beverley Leclair and ordered an autopsy pursuant to the provisions of the *Coroners Act.* The Defendant Yasmine Ayroud is the pathologist who conducted the autopsy. She concluded that the cause of death was asphyxiation by compression of the neck and advised the police of her conclusions. That conclusion played a significant role in the laying of charges against Gilles Leclair.

4 The Statement of Claim was issued on November 24, 2006 and was amended on consent, on April 20, 2007 and further amended on May 28, 2007. Statements of Defence, as subsequently amended, were all delivered by August, 2007. In the interim, on June 1, 2007, the Defendants, Ottawa Police Services Board and Detective John Monette, the Defendants, Drs. Aitken and Ayroud and the Defendants, Her Majesty the Queen in Right of Ontario and Donna Eastwood each

brought separate motions for summary judgment. At a case conference, I scheduled the first of these to be heard during the week of February 4th, 2008. These motions have now been rescheduled to September, 2008.

5 In preparation for the February date, the parties agreed to conduct examinations for discovery and cross-examinations on affidavits simultaneously. Before the completion of examinations, Mr. Gibson, counsel for the Plaintiffs, summonsed forensic pathologists Dr. Michael Pollanen and Dr. David Chiasson and the Regional Coroner, Dr. Andrew McCallum, pursuant to Rule 39.03(1). The Plaintiffs now seek to add Dr. Chiasson as Defendant.

6 The proposed amendments relating to Dr. Chiasson are found at paragraphs 33.1, 33.2 and 33.3 of the proposed Fresh as amended Statement of Claim. The Plaintiffs claim that Dr. Chiasson breached the provisions of section 28(2) of the *Coroners Act* by failing to disclose the results of a quality assurance review of Dr. Ayroud's opinion as to the cause of death. The relevant section is set out below:

> The person who performs the *post mortem* examination shall forthwith report his or her findings in writing only to the coroner who issued the warrant, the Crown Attorney, the regional coroner and the Chief Coroner and the person who performs any other examination or analysis shall forthwith report his or her findings in writing only to the coroner who issued the warrant, the person who performed the *post mortem* examination, the Crown Attorney, the regional coroner and the Chief Coroner.

7 The Plaintiffs claim that the quality assurance review performed by Dr. Chiasson falls into the category of "*any other examination or analysis*" and further claim that his failure to comply with that provision constitutes an infringement of their rights pursuant to section 7 of the *Canadian Charter of Rights and Freedoms.* In argument, counsel submitted that Dr. Chiasson also breached a common law duty to disclose the results of his review but that particular claim is not readily apparent from the pleadings as currently drafted.

8 Dr. Chiasson is a Forensic Pathologist. In July 2001, he was retained by the Coroner's Office, as an independent consultant, to assist in a quality assurance review based on a documentary review of reports of post-mortem examinations and to provide comments, if any were required, to the supervising regional coroner and/or to the chief coroner.

9 In late February 2004 and at the request of the regional supervising coroner, Dr. Chiasson did review the Preliminary Report of Post-Mortem prepared by the Dr. Yasmine Ayroud. Following his review, Dr. Chiasson expressed concerns about Dr. Ayroud's conclusions given the stated post-mortem findings. He set out his comments in an email dated February 27, 2004 to the regional supervising coroner, Dr. Andrew McCallum, with a copy to Dr. Barry McLellan, the acting coroner, and to Katherine Stephen, Dr. McLellan's executive assistant.

10 Dr. Chiasson received a reply email from Dr. McCallum advising that he had spoken to Dr. Ayroud and that Dr. Ayroud was convinced of her conclusions and had provided further information to support her reasoning. Dr. Chiasson was also advised that a second post-mortem examination was conducted by an expert from Winnipeg who had been retained by the Plaintiff. Dr. Chiasson had no further involvement.

11 On November 5th, 2007, Sarah Blake, on behalf of the Crown, disclosed Dr. Chiasson's involvement in the quality assurance review for the first time. The e-mails between Drs. Chiasson and McCallum were provided along with her acknowledgement that this information had not been previously disclosed to any of the parties. The timing and the extent of this disclosure are important to the determination of the issues on this motion.

12 Counsel for the Plaintiffs first argued that the Plaintiffs did not know that Dr. Chiasson had breached his disclosure obligations until he was provided with a final e-mail from Dr. Chiasson stating: "The follow-up is much appreciated". According to him, that last e-mail revealed that Dr. Chiasson was not taking any further steps as result of his peer review.

13 At first, counsel submitted that this final e-mail was not disclosed until he cross-examined Dr. McCallum on January 28th, 2008. I cannot accept that argument since Plaintiff's counsel served their notice to the Crown on January

15th, 2008 of its intention to make a claim as a result of Dr. Chiasson's alleged failure to disclose. In addition, the affidavit of Trina Morrisette, filed in support of this motion, attaches as Exhibit "D" the complete set of e-mails; including the one containing Dr. Chiasson's final comment. Ms. Morrisette swears that this is the version of the e-mails received by Plaintiffs' counsel prior to Dr. Chiasson's cross-examination. When confronted with his own evidence, Mr. Gibson simply claimed that Ms. Morrisette's affidavit was in error. Given these contradictions, I have to rely on the evidence that the Plaintiffs have themselves put before the court; namely that they had the full text of the e-mail exchanges on or about November 5th, 2007.

14 In any event, I do not believe that anything turns on the final e-mail from Dr. Chiasson. It is apparent from the very first e-mail that Dr. Chiasson's concerns with regard to Dr.Ayroud's conclusions were only shared with the regional supervising coroner and the acting coroner and were not provided to the crown or to anyone else. In disclosing the e-mails in November, 2007, Ms. Blake admitted that these had never been provided to anyone before.

15 After their receipt of this information, the Plaintiffs decided to cross-examine Dr. Chiasson as a non-party and served a Notice of Examination under Rule 39.03 in December 2007. Service of the Notice was accepted by the law firm of Stockwoods LLP, then Coroner's counsel, during the course of an inquiry in which Dr. Chiasson was testifying as former Chief of Forensic Pathology for the Coroner's Office.

16 Dr. Chiasson was not advised to seek independent legal advice. Dr. Chiasson says that he understood that he was being served with the Notice of Examination as a non-party to the Plaintiffs' action and, as such, was required to attend at an examination solely for that purpose.

Dr. Chiasson's Cross-Examination

17 Dr. Chiasson attended his cross-examination on January 4, 2008. All parties attended and participated in varying degrees. Sara Blake, counsel for the Defendants, the Coroner's Office and Donna Eastwood, acted as Dr. Chiasson's counsel at that time. Dr. Chiasson says that he understood that Ms. Blake was acting as his counsel and would protect his interests during his cross-examination.

18 Also in attendance at the cross-examination were Charles Gibson, Plaintiffs' counsel, Marc Somerville, former counsel for the Defendants, Dr. Aitken and Dr. Ayroud; and Jeremy Wright, counsel for the Defendants, Ottawa Police Services Board and John Monette. According to Dr. Chiasson, all parties in attendance behaved in such a manner as to reassure him that he was not a party to the action and he proceeded with the cross-examination on that basis.

19 On several occasions during the cross-examination, Ms. Blake stated on the record that Dr. Chiasson was not giving evidence as a representative of the Coroner's Office and that Dr. Chiasson was there as a non-party. At no time during the cross-examination did Mr. Gibson refute Ms. Blake's comments.

20 Dr. Chiasson adds that he testified under oath at his cross-examination that he was not the Chief Forensic Pathologist at the time of Beverley LeClair's post-mortem examination. Instead, he was an independent consultant who provided feedback to the regional coroner. He performed his contractual duties and was not asked to provide any further services. Ms. Blake refused all of Mr. Gibson's questions that related to Dr. Chiasson's previous role as Chief Forensic Pathologist. These refusals are the subject of a separate motion by the Plaintiffs.

21 On other occasions during the cross-examination, Ms. Blake stated on the record that Dr. Chiasson was not there to provide an expert opinion and that he had not been retained by any party to do so. Ms. Blake refused all of Mr. Gibson's questions that were designed to extract an expert opinion from Dr. Chiasson. These refusals are also the subject of the further motion.

22 During the cross-examination, Ms. Blake also stated on the record that the Plaintiffs were not "suing" Dr. Chiasson and that he was not a party to the action. Mr. Somerville stated on the record that Dr. Chiasson was "nobody's witness"

except for Mr. Gibson's. At no time during the cross-examination did Mr. Gibson refute those comments. At no time did anyone advert to the possibility that Dr. Chiasson would or could be subsequently added as a party to the action. During the cross-examination, Ms. Blake took no steps to avail Dr. Chiasson of the protection afforded under the *Evidence Act.*

23 Following the cross-examination, the Plaintiffs advised Ms. Blake of their intention to amend their claim as a result of Dr. Chiasson's involvement and Ms. Blake advised Dr. Chiasson to seek independent legal advice.

Status of the Action

24 The Plaintiffs' action is well-underway. To date, the parties have scheduled and participated in twenty-six (26) days of discoveries involving eight (8) different individuals. The discoveries of all parties and the cross-examinations of several non-parties are complete. There are three summary judgment motions pending.

25 The examinations for discovery of the Defendants, Susan Aitken, Donna Eastwood and John Monette, and the cross-examinations of Peter Markesteyn, Michael Pollanen, and Michael Edelson took place in November and December 2007 and early January 2008.

26 Following Dr. Chiasson's cross-examination, the Plaintiffs proceeded through January, February, March and April 2008 with the examinations and continued examinations for discovery of the Defendants, John Monette and Yasmine Ayroud, and with the cross-examination and continued cross-examinations of Peter Markesteyn, Michael Pollanen, and Andrew McCallum. Dr. Chiasson has had no opportunity to participate at any of these examinations of the parties and non-parties.

27 His counsel claims that the totality of this conduct has resulted in prejudice to Dr. Chiasson that cannot be compensated for by costs or an adjournment, which is fatal to the Plaintiffs' motion to add Dr. Chiasson as a party. In the alternative, Dr. Chiasson claims that the chronic disregard the Plaintiffs have shown for his right to counsel and to participate in the proceedings would result in gross procedural unfairness to him if he were to be added as a party. She asks that I do not exercise my discretion to add him as party at this time.

28 The Plaintiffs claim that there is no prejudice and that Dr. Chiasson was represented by counsel who should have protected his interests.

The Law

29 Rule 5.04 specifically governs the addition, deletion and substitution of parties. It provides that:

> At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

30 Counsel for Dr. Chiasson submits that there are two parts to an inquiry under Rule 5.04 as to whether a party should be added. The first part is similar to the test under Rule 26.01, which governs the amendment of pleadings generally. The court must consider whether there is any prejudice to the party sought to be added that cannot be compensated for by costs or an adjournment.

31 Unlike Rule 26.01, Rule 5.04(2) is not mandatory. Even if any prejudice to a party sought to be added can be compensated for by costs or an adjournment, the court retains a residual discretion to consider whether there will be such procedural unfairness to that party that he should not be added. [1]

32 The law is well stated by Master Sandler in the following passage of the *Seaway Trust Co. v. Markle* decision:

> The argument contra is, that the reason a discretion remains (as reflected by the use of the word "may") when adding new parties to an existing action, is to ensure procedural fairness in such things as the state of the action, with the

> Court considering such factors as whether the trial is imminent or not, or whether the examinations for discovery of all parties have already been held (for example, see *Fusco v. Yofi Creations* (1987), 60 O.R. (2d) 287 (Ont. Master)), and also whether it would be a proper joinder of the new cause of action, and also whether there is an improper purpose for adding any defendant such as to only obtain discovery of the added party, and whether the proposed added party is a necessary or proper party, and other special problems in relation to class actions, representation orders, trade unions, assignees, insurers, trustees, infants, persons under a disability, amicus curiae, accrual of the cause of action, and limitation periods. These are the procedural considerations that come quickly to mind and there may well be others.

Prejudice to Dr. Chiasson

33 Ms. Vaz argues that where a party has been led to believe that litigation would be conducted in a certain manner and proceeds without counsel to discoveries on that basis, an amendment of pleadings distinctly contrary to that understanding would result in prejudice that party in a manner that cannot be compensated for by costs or an adjournment. She relies on *Gagro v. Morrison* (1995), 40 C.P.C. (3d) 331 (Ont. Gen. Div.). The facts of that case are quite different, but I nonetheless adopt the principle that prejudice can be presumed, if a person takes part in litigation on the understanding that they are simply a witness and then steps are subsequently taken to add them as a party to the litigation. [2]

34 It is reasonable to assume that a person who gives evidence as witness without the benefit of their own counsel will act differently than if that person is a target of the litigation. Questions may be answered that might have otherwise been refused; clarifications might be put in the record, counsel could seek to re-examine their own witness. The party who seeks to add that person later has the onus of rebutting that presumption of prejudice.

35 In this case, I am satisfied that the Plaintiffs possessed all of the relevant information that could have warranted adding Dr. Chiasson as a Defendant once they first received copies of the e-mails from Ms. Blake on November 5, 2007. For reasons that remain unclear, they chose initially not to add Dr. Chiasson as a Defendant. Instead, they waited until after they obtained Dr. Chiasson's sworn testimony, to give notice of their intention to amend their claim.

36 The January 15th letter is not clear; it could be interpreted as giving notice to the Crown solely on the basis of its vicarious liability for the actions of Dr. Chiasson. That claim can be asserted without necessarily adding Dr. Chiasson as party. The letter does not state that Dr. Chiasson will be added as a party. The Plaintiffs gave no notice to Dr. Chiasson personally. It is Ms. Blake who contacted him and suggested that he retain counsel.

37 In the interim, the Plaintiffs continued with the examinations and continued examinations for discovery of the Defendants, John Monette and Yasmine Ayroud, and with the cross-examination and continued cross-examinations of Peter Markesteyn, Michael Pollanen, and Andrew McCallum in January, February, March and April 2008.

38 Had the Plaintiffs added Dr. Chiasson in November 2007, or at least notified Dr. Chiasson that consideration was being given to adding him as a Defendant, Dr. Chiasson would have had an opportunity to retain independent counsel and would have had an opportunity to refuse any improper questions that related to his individual interests. His counsel could have sought the protections of the *Evidence Act.* That counsel could have participated in the subsequent examinations that took place.

39 Plaintiffs' counsel submits that Dr. Chiasson had counsel, namely Ms Blake. I am satisfied that she did attend as Dr. Chiasson's counsel but for the limited purposes of his examination as non-party. She appeared in the same capacity for Dr. McCallum and Dr. Michael Pollanen. It should have been apparent that she was there to protect the interests of the Coroner's Office, not the individual interests of the witnesses.

40 The Plaintiffs claim that they were misled by Dr. Chiasson's inaction following their notice to the Crown. They somehow suggest that he bears the responsibility for his failure to retain counsel and for not participating in the

subsequent examinations. As I indicated above, the Plaintiffs' letter was vague; it's not clear that it indicates an intention to add Dr. Chiasson as a party. Plaintiffs' counsel chose to proceed with the further examinations without any personal notice to Dr. Chiasson.

41 Mr. Gibson notes that the existing examinations have been very thorough and have been conducted by competent counsel and Dr. Chiasson's counsel will have few, if any, discoveries to conduct. He also notes the many objections made by Ms. Blake at Dr. Chiasson's cross-examination as evidence that his interests were protected. Those observations miss an important point, at no time during any of these examinations was this separate cause of action put in issue to any of the parties. It is debatable whether or not Dr. Chiasson's peer review constitutes an "examination or analysis" for the purposes of section 28(2) of the *Coroners Act*.[3] Had this claim been disclosed, the examinations may have very well taken a completely different turn.

42 The Plaintiffs have failed to explain in any detail why they are only now seeking to add Dr. Chiasson as a Defendant and, more importantly, why did not do so in November 2007. Counsels' further attempt to blame Ms. Blake for not giving Dr. Chiasson any warning that he might be added as a party has no merit. The Crown also opposes this motion, although for different reasons. If the Crown sees no merit in the Plaintiffs' claim against Dr. Chiasson, how could they have anticipated it earlier? Moreover, If Ms. Blake could have ascertained the possibility of such a claim, surely Mr. Gibson, who had all the information he needed, should have anticipated this possibility and given Dr. Chiasson fair warning.

43 I am satisfied that these lost opportunities to participate in these further examinations constitute a prejudice that cannot be compensated for by costs. The Plaintiffs have failed to rebut the presumption of prejudice that arises when a person has been misled as to his involvement as a witness. Even if there were no such prejudice, I conclude it would be unfair to add Dr. Chiasson as party at this time

Procedural Fairness

44 Adding a party for the purpose of obtaining discovery from them is not a proper motive. A significant portion of plaintiffs' counsel's Rule 39.03 cross-examination of Dr. Chiasson was directed towards eliciting information regarding Dr. Chiasson's former role as Chief Forensic Pathologist and the standard of care associated with that position. Those questions were refused and are now the subject of a refusals motion which was brought contemporaneously with this motion to add Dr. Chiasson as a Defendant.

45 Dr. Chiasson's counsel submits that the Plaintiffs' real reason for adding Dr. Chiasson as a Defendant to this action is to obtain discovery from him by way of information that would assist the Plaintiffs in their case against the Coroner's Office. I need not decide that point but I find it curious that the Plaintiffs also rely on a common-law duty to disclose the results of the peer review as the basis for their claims against Dr. Chiasson yet have chosen not to add Dr. McCallum, the person who requested the peer review and received Dr. Chiasson's comments.

46 This is a very large and complicated action. To date, twenty-six (26) days of discoveries, involving eight (8) different individuals, have already taken place. I am satisfied that there is no realistic or practical substitute for Dr. Chiasson's lack of participation in all of those discoveries. There are three motions for summary judgment that are pending.

47 The merits of the claims are very much in issue. It is likely that Dr. Chiasson would be forced to join all of the other Defendants in bringing a motion for summary judgment. Those motions have already been delayed. It would be unfair to Dr. Chiasson if he were forced to participate in future motions or at trial having been excluded from the action to date.

48 For these reasons, the motion to amend the Statement of Claim and to add Dr. Chiasson as a party is dismissed. The parties may make brief written submissions as to costs within 20 days of the release of this decision.

Footnotes

1 *Seaway Trust Co. v. Markle* (1988), 25 C.P.C. (2d) 64 (Ont. Master)

2 A similar principle can be found in the *Deemed Undertaking* Rule 30,1

3 In response to their motion, the Crown takes the position that s. 28(2) has no applicability to the actions of Dr. Chiasson

End of Document

5

1988 CarswellOnt 343
Ontario Supreme Court

Seaway Trust Co. v. Markle

1988 CarswellOnt 343, [1988] O.J. No. 164, 25 C.P.C. (2d) 64, 8 A.C.W.S. (3d) 257

SEAWAY TRUST CO. et al. v. MARKLE et al; Fogler, Rubinoff (third party)

Master Sandler

Heard: November 27, December 2 and 7, 1987
Judgment: February 19, 1988
Docket: Doc. No. 8635/83

Counsel: *W.V. Sasso*, and *D.V. MacDonald*, for the plaintiffs and proposed plaintiffs.
W.R. Murray, Q.C., for the proposed defendant Phillip Meretsky.
D. Bristow, Q.C., for defendants Broadhurst & Ball, and David Allport.
L.T. Forbes, Q.C., for existing third party and proposed defendant Fogler, Rubinoff.

Subject: Civil Practice and Procedure

Headnote

Practice --- Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — General

Practice --- Practice on interlocutory motions and applications — Evidence on motions and applications — Examination of witnesses — Before hearing of pending motion or application

Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — Court not to consider factual merits of proposed allegations on motion to add parties and amend allegations — Ontario Rules of Civil Procedure, rr. 5.04(2), 26.01.

Practice on interlocutory motions and applications — Evidence on motions and applications — Examination of witness — Before hearing of pending motion or application — Cross-examination of witness swearing affidavit in support of motion — Motion to compel answers to disputed questions on affidavit filed in support of a motion should be heard by same Judge who hears main motion.

The plaintiffs claimed various remedies as a result of an alleged conspiracy to wrongfully convert the assets of one of the plaintiffs for the benefit of the defendants. The conspiracy was alleged to have been acted upon in a series of transactions involving a property known as 6 Adelaide Street East, Toronto. The defendants consisted of various parties to these transactions and their solicitors.

The plaintiffs moved to amend the statement of claim to add certain plaintiffs and defendants to the existing causes of action.

Specifically the plaintiff moved to add Greymac Trust Co. and Greymac Mortgage Corp. as party plaintiffs, and to move Greymac Properties Inc. from its position as a defendant to that of a plaintiff. The plaintiff also proposed to add as parties defendant the third party solicitors and a non-party solicitor of that firm.

In support of their motion the plaintiffs filed an affidavit of a solicitor with the firm of solicitors acting for the plaintiffs. The affidavit consisted of 18 paragraphs in which no evidence was provided or discussed with respect to the facts relevant to the amendments sought in the proposed statement of claim or with respect to the addition of new parties. The affidavit essentially detailed the state of the existing action.

On cross-examination of D, objection was taken to questions on a number of matters not discussed or referred to in the affidavit. They included:

(1) the assets of the plaintiffs and proposed plaintiffs;

(2) whether the solicitors for the plaintiff had a conflict of interest;

(3) whether the plaintiffs' solicitor had committed a delay before the bringing the motion;

(4) the identity of the party instructing the plaintiffs solicitors;

(5) the quantum of the proposed plaintiffs' losses;

(6) the involvement of certain non-parties in conducting the plaintiffs action.

The defendants and the proposed defendants moved for an order compelling D to re-attend to answer these questions. The plaintiff cross-moved to terminate the cross-examination of D on her affidavit.

Held:

The motion and cross-motion were dismissed.

There was no dispute with respect to the principles to be applied on a motion to compel answers to questions posed on cross-examination of an affidavit filed in support of, or in opposition to, a motion. The relevant considerations were as follows:

(a) Is the question relevant to any matter in issue on the motion on which the affidavit is to be used?

(b) Is the question fair?

(c) Is the question in a bona fide way being directed to an issue on the motion, or to the credibility of the witness?

In order to apply these tests on the motion, it was necessary to make a ruling with respect to the matters which were relevant on the main motion for leave to deliver an amended statement of claim. The main motion to amend the statement of claim should be heard by the same Master hearing the motion with respect to disputed questions. This procedure would avoid inconsistent results, and increase the efficient use of Court time. Much of the material both factual and legal, necessary to the determination of the main motion was also required to be canvassed on the motion with respect to the cross-examinations on the affidavit filed in support of the main motion.

The motion to amend the statement of claim was governed by both r. 5.04(2) and r. 26.01. There were parties to be added, bringing the motion to amend within r. 5.04(2). There were also allegations as against existing parties which were sought to be amended, to which r. 26.01 applied.

The same threshold test applied to a motion to amend under either rule. The moving party must demonstrate that no prejudice would result from the amendment that could not be compensated for by costs or an adjournment.

Where the moving part passed this threshold test, different considerations applied depending upon whether the amendment was governed by r. 5.04(2) or r. 26.01.

In the case of amendments governed by r. 26.01 — amendments to allegations against existing parties — the Court was required to grant leave to amend when the threshold test was passed. Rule 26.01 was mandatory.

In the case of a motion governed by r. 5.04(2) — to add, delete or substitute a party or correct the name of a party incorrectly named — the Court had a discretion whether to allow the amendment upon the moving party satisfying the threshold test. The discretion was to ensure procedural fairness. This meant that consideration was given to such matters as the state of the action, whether the trial was imminent, whether examinations for discovery of all parties have already been held, whether it would be a proper joinder of the new cause of action, whether the purpose to add a party defendant was improper such as simply to obtain a discovery of the party added, whether the proposed added party was a necessary or proper party, and whether a variety of special rules were observed such as those respecting class actions, representation orders, trade unions, assignees, insurers, trustees, infants, persons under a disability, amicus curiae, accrual of the cause of action and limitation periods.

On either type of amendment of pleadings motion, the Court was not permitted to consider the factual or evidentiary merits of the proposed new claim. A Court was not to concern itself with the credibility of the case set forth by the party seeking the amendment.

The questions put by the responding parties were therefore not relevant on the main motion. The motion to compel reattendance of D to answer questions on her affidavit was dismissed. The plaintiffs' cross-motion to terminate the cross-examination of D was dismissed as redundant and unnecessary. The pending motion by the plaintiffs to add parties and amend pleadings was adjourned sine die to be heard by the Master hearing the motion.

Annotation

Motions to amend pleadings are frequently controversial and cause great expense to the parties. Extensive examination into the factual merits of the proposed amendments is particularly costly. The effect can be to telescope into the pleadings amendment motion a vast array of procedural and substantive issues arising in the action.

It is submitted that this decision correctly defines the applicable tests on pleadings amendment motions to be as follows:

(1) The amendment should not be allowed if it would cause injustice to a responding party that cannot be compensated for by costs or an adjournment.

(2) No amendment should be allowed which if originally pleaded would fail to conform to the rules of the pleading, specifically, rules 25.06-25.11.

(3) No amendment should be allowed which clearly discloses no reasonable cause of action or defence.

The factual basis for a proposed amendment is not a material consideration. In the vast majority of cases it is impossible as a practical matter to judicially determine factual merits where the evidentiary record consists of affidavits and transcripts of cross-examinations. This has been expressly recognized in the case of interlocutory injunction motions. In these cases the law has recognized the difficulty of assessing the factual strength of a case

on a motion: see *American Cynamid co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); followed *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 has recognized the difficulty of assessing the factual strength of a case on a motion: see *American Cynamid co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); followed *Yule Inc. v. Alantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505 at 513, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Ont. Div. Ct.).

Under the former Rules of Practice a great deal of judicial time and litigants' resources were wasted in attempting to determine whether there was any factual basis to permit the amendments to be made. The problem was that all proposed amendments could be evaluated in the usually futile search to weed out the rare amendment having no basis in fact. The ordinary result of permitting the inquiry as to factual merits was that the responding party got the benefit of double discovery.

It is respectfully submitted that this decision is a sensible new solution to an old problem. The more appropriate time to evaluate factual merits of claims or defences is at the trial of the action after production of documents and completion of examination for discovery.

Paul Bates

Table of Authorities

Cases considered:

A.H.A. Automotive Technologies Corp. v. 589348 Ontario Ltd. (1985), 3 C.P.C. (2d) 9 (Ont. Master) — *considered*

A.I. MacFarlane & Associates Ltd. v. Delong (1986), 10 C.P.C. (2d) 25, 55 O.R. (2d) 89 (Ont. H.C.) — *distinguished*

Barker v. Furlotte (1985), 12 O.A.C. 76 (Ont. Div. Ct.) — *followed*

Cdn. Imperial Bank of Commerce v. Molony (1983), 32 C.P.C. 213 (Ont. H.C.) — *followed*

Carmacks Construction Ltd. v. Beaumont (1981), 15 Alta. L.R. (2d) 367, 30 A.R. 328 (Alta. Master) — *referred to*

Consolidated Foods Corp. v. Stacey (1986), 13 C.P.C. (2d) 137, 76 N.S.R. (2d) 182, (sub nom. *Stacey v. Electrolux Can.)* 189 A.P.R. 182 (N.S. C.A.) — *applied*

Ellis v. Pelton, [1933] O.W.N. 191 (Ont. C.A.) — *followed*

Fusco v. Yofi Creations (1987), 60 O.R. (2d) 287 (Ont. Master) — *referred to*

Kinnear v. Kinnear (1924), 25 O.W.N. 699 (Ont. Master) — *referred to*

Lubotta and Lubotta, Re, [1959] O.W.N. 322 (Ont. Master) — *followed*

Neogleous v. Toffolon (1977), 17 O.R. (2d) 453, 4 C.P.C. 192 (Ont. H.C.) — *followed*

O'Keefe v. Ontario Hydro (Lerner J., August 25, 1980) — *referred to*

Overholt v. Williams, [1958] O.W.N. 422 (Ont. H.C.) — *considered*

Phelan v. Famous Players Cdn. Corp., [1937] O.W.N. 93 (Ont. H.C.) — *referred to*

Reynolds v. Ausable, Ont. Master, Toronto, Doc. No. 690/77, Master Sandler, March 24, 1981 — *considered*

Reynolds v. Miller, Ont. Master, Toronto, Doc. No. 1236/75, Master Sandler, March 24, 1981 — *considered*

Reynolds v. Schultz, Ont. H.C., Toronto, Doc. No. 7070/81, Catzman J., March 31, 1982 — *considered*

Rodrigues v. Madill (1985), 3 C.P.C. (2d) 1 (Ont. Master) — *not followed*

Royal Bank v. Fogler, Rubinoff (1985), 3 C.P.C. (2d) 248 — *distinguished*

Simrod v. Cooper, [1952] O.W.N. 720 (Ont. Master)*distinguished*

(Ont. Master) — *distinguished*

Vaiman v. Yates (1987), 60 O.R. (2d) 696, 20 C.P.C. (2d) 33, 41 D.L.R. (4th) 186 (Ont. H.C.) — *considered*

Young v. Young, [1952] O.W.N. 297 (Ont. H.C.) — *considered*

Statutes considered:

Family Law Act, S.O. 1986, c. 4.

Limitations Act, R.S.O. 1980, c. 240.

Loan and Trust Corporations Act, R.S.O. 1980, c. 249.

Loan Companies Act, R.S.C. 1970, c. L-12.

Unconscionable Transactions Relief Act, R.S.O. 1980, c. 514.

Rules considered:

Nova Scotia Civil Procedure Rules —

r. 15.02(1)

Ontario Rules of Civil Procedure —

r. 1.04(1)

r. 5.03

r. 5.03(1)

r. 5.03(2)

r. 5.03(3)

r. 5.04(2)

r. 6.01

R. 20

R. 21

r. 21.01

r. 25.10

r. 25.11

r. 25.11(c)

R. 26

r. 26.01

r. 34.14(1)(a)

r. 34.14(1)(b)

r. 39.02(2)

r. 56

Ontario Rules of Practice —

R. 126

R. 132

R. 136

R. 136(1)

Authorities considered:

G.S. Holmested, ed., The Judicature Act of Ontario and Consolidated Rules of Practice and Procedure of the Supreme Court of Ontario (4th ed., 1915), p. 553.

Holmested and Langton, eds., The Judicature Act of Ontario and Consolidated Rules of Practice and Procedure of the Supreme Court of Ontario (5th ed., 1940), p. 635.

Holmested and Gale, eds., The Judicature Act of Ontario and Consolidated Rules of Practice and Procedure of the Supreme Court of Ontario (1983), vol. 2, p. 1106.

Leon, Round and Birnberg, eds., Rules Review, Summaries of Cases Decided under the Rules of Civil Procedure (1987), pp. 121-133.

Words and phrases considered:

may

shall

APPEAL by defendants and proposed defendants to compel reattendance of affiant for cross-examination on refused questions; CROSS-MOTION by plaintiff for order terminating cross-examination.

***Master Sandler*:**

1 Five motions have been presented to me by various parties and proposed parties in this action which were argued at great length over the course of three Court days. The main issue raised by these motions is an important procedural one, namely, is it open to a Court hearing a motion under r. 5.04(2), to add new parties to assert new claims in an existing action, to consider, at all, the *actual facts and evidence* relating to the *merits* of the claims by the proposed added plaintiffs or against the proposed added defendants, or ought the scope of the inquiry on such a motion be more narrowly confined so as to exclude any examination and consideration of the actual *facts and evidence* relating to the *merits* of the claim sought to be added or joined.

2 In summary, it is the position of the existing and proposed defendants who appeared on these motions, that a Court on such a motion can "take a peek" at the factual and evidentiary merits of the proposed claims (as Mr. Bristow so colourfully put it) to see if the proposed added claim "presents an issue worthy of trial and [is] *prima facie* meritorious": *Simrod v. Cooper*, [1952] O.W.N. 720 at 721 (Ont. Master).

3 It is the position of the plaintiff that a Court on such a motion cannot explore the merits and truth of the facts and evidence that actually underly and relate to and support the amendments that are being proposed. The Court can and should consider whether there will be any procedural unfairness or injustice to the proposed added parties if the amendments are allowed, and whether the new claim as pleaded discloses a known cause of action or is tenable in law, and whether the new claim has been properly pleaded in accordance with the rules relating to pleadings and particulars, but that is the limit of the Court's inquiry under r. 5.04(2).

Background

4 The present action was started in 1983 and arises out of a series of transactions involving a property known as 6 Adelaide St. East, Toronto, which transactions are alleged to have been carried out in furtherance of a conspiracy to wrongfully convert the assets of the plaintiffs for the benefit of the defendants Markle, Rosenberg and Player and corporations controlled by them being 435713 Ontario Inc., S.T.M. Investments Ltd., and Kilderkin Investments Ltd. The defendants Broadhurst & Ball and David Allport are solicitors who acted for these said defendants in the subject transactions. The defendant Kingsberg Property Investments Ltd. was the owner of the said property. The defendant Braun was connected with Kingsberg. Some of the other aforesaid individual defendants were connected with the defendant Camreco Inc. Greymac Properties Inc. was also named as a defendant at the time of the commencement of this action.

5 The defendant Kingsberg Property Investments Ltd., the owner of the property, has issued a third party claim against its own solicitors, Fogler, Rubinoff, alleging negligence in connection with the handling of the sale of the property resulting in the claim by the plaintiffs against Kingsberg and it seeks indemnity from its former solicitors. Fogler, Rubinoff has defended both the third party claim and the main action.

6 There have been many previous interlocutory proceedings in this action, including motions by some of the existing defendants to attack the statement of claim; and a successful motion by the plaintiffs to strike out certain paragraphs of the statement of defence and counterclaim of the defendants Broadhurst & Ball, and Allport; and an unsuccessful motion by the defendant Rosenberg to remove McMillan, Binch as solicitors for the existing plaintiffs; and an unsuccessful motion by the defendant Markle to stay this action. Material relating to these earlier motions has been placed before me by plaintiffs' counsel.

7 The present difficulties started when the plaintiffs and their solicitors, McMillan Binch, decided to launch a motion seeking to add Greymac Trust Co. and Greymac Mortgage Corp. as party plaintiffs, and to move Greymac Properties Inc. from its position as a defendant to that of a plaintiff, and to add the third party, and a non-party who was and is an individual solicitor with that firm, one Phillip Meretsky, as additional defendants to this action, and to amend the statement of claim accordingly, and for an extension of time to serve the defendant Braun, and to fix dates for the discovery of Rosenberg and Broadhurst/Allport and compelling them to deliver their affidavits of documents. This motion was served in early August of 1987, and was supported by an affidavit of Theresa Dufort, a solicitor with the firm of McMillan, Binch. The motion was initially returnable on September 8, 1987, and was adjourned to allow counsel the existing defendants, Broadhurst & Ball and Allport, and for the proposed added defendants, Fogler, Rubinoff and Meretsky, to cross-examine on the Dufort affidavit.

8 That cross-examination began on October 29, lasting a full day, and resumed on November 19. On October 29, counsel for the defendants Broadhurst & Ball and Allport, and counsel for the proposed defendant Meretsky, asked a total of 715 questions on 121 pages of transcript. On November 19, there was a 2-page heated discussion on the record between senior counsel for the plaintiffs and counsel for the proposed defendant Meretsky, as they were in conflict about whether the cross-examination would continue. Two questions were then asked by Mr. Murray, Meretsky's counsel, of the witness Dufort, and Mr. Sasso, the plaintiffs' counsel, objected and cross-examination ended abruptly. Counsel for the proposed defendant Fogler, Rubinoff, attended on the October 29 cross-examination, but I am not sure if he actually asked any questions. Then, on November 19, he again appeared and stated on the record that he was now refusing to ask any questions of Dufort because he had decided that he now wanted to deliver affidavit material in opposition to the motion and was concerned about his rights to deliver any such affidavit if he cross-examined Dufort, because of the provisions of r. 39.02(2).

9 I was presented with the following five motions:

(1) A motion by the proposed defendant, Fogler, Rubinoff, (presently, only a third party) seeking an order requiring Theresa Dufort to re-attend for further cross-examination by counsel for this proposed defendant, and granting leave to Fogler, Rubinoff, to cross-examine pursuant to r. 39.02(2). In fact, after hearing argument on this motion on November 27, 1987, I dismissed this motion and will not deal with it further in these reasons.

(2) A motion by the proposed defendant, Phillip Meretsky, requiring Theresa Dufort to re-attend to answer 18 questions on her two cross-examinations, together with all other proper questions arising from the answers thereto, and to otherwise complete her cross-examination;

(3) A motion by the defendants Broadhurst & Ball and Allport, requiring Theresa Dufort to re-attend to answer about 80 questions on her cross-examination, together with all other proper questions arising from the answers thereto, and to otherwise complete her cross-examination;

(4) A motion by the plaintiffs terminating the cross-examination of Theresa Dufort on the basis that the right of cross-examination has been abused by an excess of improper and irrelevant questions by opposing counsel, and that the cross-examination of her was conducted in bad faith and in an unreasonable manner so as to annoy, embarrass and oppress the witness, and on the basis that the cross-examinations were an abuse of the process of the Court. The plaintiffs rely on rules 34.14(1)(a), (b), and (d) which use almost the exact language aforesaid;

(5) The plaintiffs also seek to proceed with their original motion to add the various corporate and individual persons as additional plaintiffs and defendants, and for leave to amend their statement of claim, all as described earlier.

10 If the position of counsel for the various existing and proposed added defendants is correct, then I should order Dufort to re-attend to answer most if not all of the questions asked and should dismiss the plaintiffs' motion to terminate the cross-examination, and should adjourn the plaintiffs' main motion to add additional parties and amend the statement of claim until the cross-examination is completed.

11 If the plaintiffs' position is correct, then I should dismiss the motions brought by the existing and proposed defendants to compel reattendance, and possibly make the order terminating the cross-examination of Dufort as asked for by the plaintiffs. (However, I note that if I dismiss the defendants' motions, then the cross-examination of Dufort would be at an end, in any event, and the plaintiffs' cross-motion would really be unnecessary. Also, the plaintiffs' motion to terminate cross-examination is based upon the alleged improper conduct of the cross-examination by counsel for the existing and proposed defendants, but it is my view, after hearing the argument, that the conflict between counsel really centres around a bona fide dispute as to the proper scope of the inquiry on a motion to add new parties to an existing action.) And I should then fix a date for the hearing by me of the main motion to add the new plaintiffs and defendants and amend the statement of claim.

The Dufort Affidavit

12 The deponent of this 18 paragraph affidavit is a solicitor with McMillan, Binch. In paras. 2, 3 and 4, she identifies as exhibits, the existing statement of claim, and the various statements of defence, and the statement of claim and statements of defence in the third party proceedings. Paragraphs 5, 6, 7, 8, 9 and 10 deal with the various unsuccessful attempts to serve the defendant Braun and why the plaintiffs need an extension of time to effect service of the statement of claim on him. Paragraphs 11, 12, 13 and 14 deal with the unsuccessful efforts of the plaintiffs to conduct an examination for discovery of the defendant Rosenberg and to obtain his affidavit of documents. Paragraphs 15, 16, 17 and 18 deal with the unsuccessful efforts of the plaintiffs to conduct an examination for discovery of the defendants Allport and Broadhurst & Ball, and obtain their affidavit of documents. The proposed new draft statement of claim is attached as Sched. "A" to the plaintiffs' notice of motion originally returnable September 8. The affidavit does not discuss or provide *any* evidence or facts with respect to the amendments sought in the proposed statement of claim or with respect to the addition of the new parties. The affidavit was described by counsel as "pro forma". It really only details the state of the existing action.

The Proposed Amendments

13 The amendments as shown by the proposed new pleading (the original draft was attached to the notice of motion as a schedule but certain typographical errors were discovered and a corrected version was tendered to me during the course of the motion) seek to add Fogler, Rubinoff and Phillip Meretsky as party defendants and to allege against them a breach of duty to the plaintiffs to disclose the true nature of the transactions between their client, Kingsberg Property Investments Ltd., and the defendant Player, which were designed to improperly divert funds from the plaintiffs to Player et al. Further, Greymac Trust Co. and Greymac Mortgage Corp. are sought to be added as plaintiffs as it is now alleged that some of their money was also improperly diverted by the defendants, or some of them. And Greymac Properties Inc. is sought to be moved from its position as a defendant (no one has yet acted for it in this action) to that of a plaintiff so as to allege that some of its money was also improperly diverted by some or all of the defendants. This corporation was not named as a party plaintiff at the time of the commencement of this action, because, so Mr. Sasso informs me, McMillan, Binch did not have instructions from any person authorized to speak on behalf of Greymac Properties Inc., to include this company as a party plaintiff, and so McMillan, Binch named Greymac Properties Inc., as a party defendant in order to have it bound by the result of this action as it was thought to be a necessary party to this action.

14 It should also be noted that the solicitors for Broadhurst & Ball and Allport, have filed a statement of defence and counterclaim in this action, but parts of it alleging champerty and maintenance in paras. 11, 14, 15 and 16, were struck out by Reid J. in his order of December 3, 1984. The fact that these allegations were struck out is important argues plaintiffs' counsel, because a number of Mr. Bristow's questions on cross-examination are said by plaintiffs' counsel to be again directed to this issue, and are quite improper.

Summary of the Questions in Dispute

15 In Mr. Bristow's argument before me, he summarized the areas to which his questions on the cross-examination of Dufort were directed, to be as follows:

(a) Are the plaintiffs or proposed plaintiffs insolvent or without funds? (This is said to be relevant to the question of security for costs of the proposed added defendants if an order is granted.)

(b) What is the role of the Royal Bank and McMillan, Binch? (and, by implication), whether McMillan, Binch has a conflict of interest? (This is said to be relevant to the question as to whether the plaintiffs and proposed plaintiffs are the "real plaintiffs" or whether the action is being conducted for the benefits of others, such as the Canadian Deposit Insurance Corporation.)

(c) How long has the information, upon which the amendments are based, been in the possession of the existing plaintiffs and proposed plaintiffs, and McMillan Binch, and what is that information? (This is said to be relevant to the issue of delay, laches, etc.)

(d) Who is directing this litigation and giving instructions in this action, and who are the actual plaintiffs? (This is said to be relevant to whether the causes of action have been assigned, or whether the fruits of any victory will be payable to others, other than the plaintiffs, and whether the plaintiffs are, in essence, suing themselves.)

(e) How much are the new plaintiffs' losses, and are the plaintiffs suing themselves, and how is the figure of $20,000,000 for damages, set out in the prayer for relief, arrived at, and were Broadhurst & Ball acting for the proposed new plaintiffs, and how much of the converted money has gone to benefit Broadhurst & Ball and Allport?

(f) What is the involvement of the Attorney General of Ontario and the Ontario Provincial Police in this action, and in the issues raised by this action?

16 In Mr. Murray's argument before me, he summarized the areas to which his questions on the cross-examination of Dufort were directed, to be as follows:

(a) Who are the real plaintiffs as opposed to the named plaintiffs? Who is trying to sue Phillip Meretsky? And which of the now six named plaintiffs is suing him, and which one(s) are saying that Meretsky failed them in some way? (Mr. Murray argues that he cannot tell this from the proposed amendments because the use of the word "plaintiffs" in the proposed new statement of claim is filled with ambiguity). To which of the "plaintiffs" did Phillip Meretsky owe a duty of care as a solicitor, and what was the nature of that duty? What did Meretsky do and what did he fail to do?

(b) What has been the involvement of McMillan, Binch, with the Greymac companies now sought to be named in the amended statement of claim, since the summer of 1983, when certain other actions were started by McMillan, Binch, especially, action 2004/83 and 8635/83? And produce the actual McMillan, Binch retainer by Greymac Properties Inc.

(c) What is the explanation as to why McMillan, Binch originally sued Greymac Properties Inc., as a defendant, and now wishes to "flip" this party into the position of a plaintiff? (Mr. Murray argues that the existing statement of claim as it now stands, in effect alleges that Greymac Properties Inc., was a "conspirator" and yet this entity now seeks to be moved into the category of "injured person". Mr. Sasso disputes this interpretation of the existing statement of claim, and argues that Greymac Properties Inc. was only added as an original defendant because it was thought that it was a necessary party, and the present plaintiffs never alleged that Greymac Properties Inc. was part of the conspiracy alleged against Markle, Rosenberg and Player.)

(d) What is the length of time that McMillan, Binch has had knowledge of the facts sought to be pleaded in the amended statement of claim, and why has the decision been made at this point in time to add Phillip Meretsky as a party defendant, and why was he not sued in 1983 when this action was originally started? (It is argued that these questions will relate to issues of bona fides, delay, laches, unfairness and estoppel.)

(e) What is the amount of money that Fogler, Rubinoff and Phillip Meretsky are alleged to have stolen, and how are the plaintiffs' damages calculated?

The Principles Governing this Motion

17 All counsel agree that the test to decide whether any question on a cross-examination of an affidavit filed in support of, or in opposition to, a motion, is proper, is as follows:

(a) Is the question relevant to any matter in issue on the motion on which the affidavit is to be used?

(b) Is the question fair?

(c) Is the question in a bona fide way being directed to an issue on the motion, or to the credibility of the witness?

18 These principles emerge from *Cdn. Imperial Bank of Commerce v. Molony* (1983), 32 C.P.C. 213 (Ont. H.C.); *Re Lubotta and Lubbota*, [1959] O.W.N. 322 (Ont. Master) and *Thomson v. Thomson*, [1948] O.W.N. 137 (Ont. H.C.). I observe that Anderson J. in *C.I.B.C. v. Molony*, said at pp. 218 and 219, supra, that "[t]he ambit of relevancy upon [an interlocutory injunction motion] is broad ..." and "... the issues to be considered on the motion for injunction may ... include all the issues in the action." In my view, this quotation highlights what is really the central issue in dispute between the plaintiffs and the existing and proposed defendants here, and that is, *what are the issues that are to be considered on a motion to add new parties to an existing action?*

The Position of Defendants' Counsel

19 Mr. Murray, in his second statement of fact and law, puts the issue this way:

13. The sole issue in this application is the proper extent, width and breadth of cross-examination of the deponent who has filed an affidavit in support of an application to amend the pleadings by adding three new plaintiffs, one of which plaintiffs was formally a defendant, the discontinuance of the action against that defendant, and the addition of defendants not previously sued by the plaintiffs, to answer to the claims of all six proposed plaintiffs.

And further:

15. The argument of counsel will simply be that while the admonitions of King, J. (in *Overholt v. Williams*, [1958] O.W.N. 422) and Grange, J. (in *Neogleous v. Toffolon* (1977), 17 O.R. (2d) 453) with respect to not deciding the merits particularly on questions of credibility, must of course be kept in mind, the Master has never been and is now not reduced to the role of an editor on a piece of fiction. The Master enjoys a duty and function to supervise and oversee certain amendments to pleadings so that actions do *not* arrive for trial unworthy of that process and *prima facie unmeritorious*. Involved and difficult questions of fact (with perhaps conflicting evidence involved) and difficult constructions of law (perhaps only possibly made upon the meticulous examination of the facts involved) will be left for the trial judge.

20 And in Mr. Murray's first statement of fact and law, he argued as follows:

4. On a motion to amend a pleading which involves the addition of a party, the court has discretion to grant the relief requested and is entitled to consider among other things, the *merits of the claim sought to be asserted.*

(my emphasis)

21 Mr. Bristow in his statement of fact and law, puts the issue this way:

10. It is submitted the Court can look at the merits of the proposed pleadings in deciding whether to allow amendments.

11. It is submitted that the Court should look at the merits of the pleading and the surrounding circumstances of the case, in order to impose 'such terms as are just', even if the motion is allowed.

12. The power of the Court to add Greymac Properties Inc. as a plaintiff and delete it as a defendant, and to add the other plaintiffs, is discretionary, and the merits of the proposed claim against Broadhurst & Ball and Allport by the new plaintiffs are the proper subject matter of cross-examination.

13. The powers under this Rule [5.04(2)] being discretionary, it is submitted that all matters of the plaintiffs and proposed plaintiff's knowledge and motives from 1982 onward are relevant in order to decide:

(a) whether or not to grant the motion;

(b) if the motion is granted, then on what terms.

14. If there is prejudice to Broadhurst & Ball and Allport that could not be compensated for by costs or an adjournment, the motion must fail under both rules 26.01 and 5.04(2).

15. The onus of proving that the defendants, Broadhurst & Ball and Allport, would not be prejudiced and there would be no injustice, lies with the plaintiffs and proposed plaintiffs in the circumstances of this case, and the onus has not been met. The affidavit of Ms. Dufort does not claim that the defendants will not be prejudiced, and there is no explanation of why, at this late date, the amendments and adding of parties is requested, despite the fact that McMillan, Binch, act for the existing plaintiffs and the present defendant, Greymac Properties Inc.

16. It is submitted that McMillan, Binch should not have been acting for the existing plaintiffs and for the defendant Greymac Properties Inc. while there were other co-defendants being sued for common relief, and prejudice to Broadhurst & Ball and Allport and the other defendants, must be the result.

17. At the very least, McMillan, Binch should have warned the other defendants of the fact that they were acting for the defendant Greymac Properties Inc. by notice, or an appearance, or Notice of Intent to Defend, on behalf of this company.

18. From the inception of this lawsuit in 1983, Broadhurst & Ball and Allport have been defending on the basis that Greymac Properties Inc. is one of their co-defendants, without any knowledge that at some stage, it was planned by McMillan, Binch and Greymac Properties Inc., to switch this company from defendant to plaintiff, increasing the exposure of those defendants by over $4,000,000, and prejudice must result.

19. If the motion is allowed, then all costs of the motion and costs thrown away should be paid forthwith as a condition precedent to the amendment.

20. It is submitted that in order to properly determine the matter of costs, the knowledge and conduct of the existing and proposed plaintiffs should be fully reviewed from the inception of the litigation.

21. It is submitted that the proper and just approach is for the Court to have all the facts before it on the motion to amend pleadings and to add plaintiffs and delete a defendant, and then to decide if these facts are relevant at the time of the motion. The Court may at this time accept what is relevant and reject anything irrelevant.

The Position of Plaintiffs' Counsel

22 Messrs. Sasso and MacDonald in their statement of fact and law puts the issue this way:

11. It is respectfully submitted that the only issue which ought to be considered by the Court in determining whether or not to grant the amendments being sought by the plaintiffs is whether or not the amendments will cause any party

> prejudice which cannot be compensated for by costs or an adjournment. The burden of establishing such prejudice rests with the party opposing the amendments.
>
> 12. As a result, and in view of the circumstances [of this case] the defendants ought not to be entitled to ask questions with respect to the merits of the proposed amendments or the truth of the allegations in the proposed statement of claim. Further, in the absence of any evidence with respect to prejudice or any issue with respect to a limitation period, questions relating to the timing of the motion seeking the amendments are not relevant.

The Law

23 It becomes necessary to review the law in this province on this issue as to what is the proper scope of inquiry on a motion to add a new party to an existing action. From the material presented to me by counsel for the existing and proposed defendants, it seems that until relatively recently, the Court did have the power to consider the merits of the proposed amendment, and to refuse to allow it if it did not appear to be true, or capable of being substantiated or if it set up an unmeritorious defence. This conclusion emerges from the *Judicature Act* of Ontario and Consolidated Rules of Practice and Procedure of the Supreme Court of Ontario, edited by G. S. Holmested (4th ed., 1915) at p. 553; and the 5th edition of *Holmested and Langton* (1940) at p. 635; and see *Ellis v. Pelton*, [1933] O.W.N. 191 (Ont. C.A.); *Phelan v. Famous Players Cdn. Corp.*, [1937] O.W.N. 93; Kinnear v. Kinnear (1924), 25 O.W.N. 699 (Ont. Master); and *Carmacks Construction Ltd. v. Beaumont* (1981), 15 Alta. L.R. (2d) 367, 30 A.R. 328 (Alta. Master), cited in *Holmested and Gale*, 1983, vol. 2, at p. 1106.

24 In *Ellis v. Pelton*, supra, Masten J.A. said that:

> ... the material filed in support of a motion for amendment of a statement of claim must indicate that the proposed amendments present an issue worthy of trial and *prima facie meritorious*, and that there was in the present case no evidence before the Court indicating that on either of the two subject-matters of amendment (fraud and assault) there was any *prima facie* case or even a suspicion of a question that ought to be tried out, the appeal should be allowed and the order vacated.

25 In *Young v. Young*, [1952] O.W.N. 297 (Ont. H.C.), the Court was considering a proposed amendment by the defendant mother in a divorce and custody case to plead adultery of the plaintiff father. Schroeder J. said:

> From the formal order it would appear that the material before the learned local judge consisted only of the pleadings. There was nothing in the way of an affidavit indicating that there was any*factual basis* for the making of the allegation contained in the amendment which was permitted. Certainly there is no reference in the pleadings to the alleged act of adultery, and this appeal must be allowed on the ground that there was no material filed in support of the motion for amendment of the statement of defence indicating that the amendment proposed presented an issue which was worthy of trial and which was prima facie meritorious. There is in the present case 'no evidence before the Court indicating that on the [subject-matter of the proposed amendment] there was any prima facie case or even a suspicion of a question that ought to be tried out', to use the words of Masten, J.A. in the case of *Ellis v. Pelton*, [1933] O.W.N. 191 at 192.

(my emphasis).

26 I next turn to what was, until 1977, considered to be the leading case on amendments to pleadings, namely, *Simrod v. Cooper*, [1952] O.W.N. 720 (Ont. Master).

27 The proposed amendment was a plea by the defendants of res judicata based on a judgment in another action. Master Marriott set forth the general rules to be applied in dealing with applications for leave to amend pleadings as follows at p. 721:

1. An amendment should be allowed unless it will cause injustice to the other side which cannot be compensated for by costs ....

2. The material filed in support of the application must indicate that the proposed amendment presents an issue worthy of trial and prima facie meritorious ....

3. No amendment should be allowed which if originally pleaded would have been struck out as embarrassing under Rule 137 ....

4. The proposed amendment must contain sufficient particulars to enable the other side to answer it ....

28 The Master went on to consider the amendment from the point of view of whether it raised a prima facie meritorious issue. He reviewed the law and stated that the law on res judicata indicated that there were many factors to be taken into consideration in determining the issue of res judicata and said that the "... *law* [was] *not sufficiently established* to warrant the Master in finding that the proposed amendment does not present an issue worthy of trial" (my emphasis). He said that even if there was considerable doubt as to whether the amendment raises a valid defence, that would not warrant a Court in refusing to allow the amendments. So the proposed new defence was a *legal* one rather than *factual* one, and the Court in that case did *not* examine the factual basis for the making of the allegation of res judicata. The judgment was affirmed on appeal by Smily J. However, the test laid down in this case, especially rule 2, above quoted, did not restrict its effect to *legal issues* but referred generally to *issues* worthy of trial and prima facie meritorious.

29 The last case to consider is *Overholt v. Williams*, [1958] O.W.N. 422 (Ont. H.C.). It is difficult to ascertain exactly what is the ratio of this case. The plaintiffs moved before a Master seeking leave to amend the statement of claim and relied upon an affidavit of one Craig, a solicitor in the employ of the plaintiffs' solicitors. The affidavit indicated that the evidence upon which reliance was placed to make the amendment had come to him in confidence during preparation for trial, and was important, but he refused to state in cross-examination exactly *what* the evidence was, or *who* gave it to him. The plaintiff argued before the Master that such disclosure was sufficient. The Master permitted some amendments and refused others. Both sides appealed.

30 King J. was of the opinion that the Master should have allowed *all* the proposed amendments as soon as it was shown that the plaintiffs were acting in good faith and were not attempting to overreach the defendants. The plaintiffs further argued on appeal before the Judge that, based upon the affidavit and cross-examination of the deponent Craig, and certain questions and answers on the examination for discovery, that there was at least a suspicion of a case to be tried concerning the proposed amendments and they were prima facie meritorious. The note of this judgment says the Judge was satisfied as to this, but then concluded that the Court should not refuse leave to amend where to do so it first became necessary to determine difficult matters of fact or of law and that all such matters should be left to be determined by the trial Judge. It is not clear whether King J. would have allowed the appeal even if he had *not* been satisfied that there was at least a suspicion of a case to be tried. but it must be remembered that the deponent Craig, on his cross-examination, refused to reveal *what* the new information was or *where* it came from, but only revealed that it was important and that it supported the proposed text of the amendment to the pleading. So I find it difficult to know whether *Overholt v. Williams*, stands for the proposition that the Court *is* to look at the merits of the factual basis for the amendments, or *not*, but it seems that the Court there, was prepared to consider whether there "was at least a suspicion of a case to be tried concerning the proposed amendments."

31 What is important to derive from all these cases is that if the merits of the factual basis for the amendments can be considered by a Court on the motion to amend, then the party opposing the amendment can cross-examine as to the factual basis, and it *is* a matter in issue relevant to the pending motion. And I think based upon *Ellis v. Pelton* and *Young v. Young*, that Mr. Murray and Mr. Bristow are correct in their position that they can cross-examine on the factual merits of the proposed amendments. But there are significant legal developments following 1958.

32 I think that it is important at this point to set out the provisions of the former Rules of Practice dealing with amendments to pleadings and the adding of parties. Rule 136 provides as follows:

> 136(1) The court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action, be added or, where an action has through a bona fide mistake, been commenced in the name of the wrong person as plaintiff or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court may order any person to be substituted or added as plaintiff.

Rule 132 provides as follows:

> An amendment may be made by leave of the court, or of the judge at the trial, and such amendment shall be at once made on the face of the record.

33 I now turn to consider *Neogleous v. Toffolon* (1977), 17 O.R. (2d) 453, 4 C.P.C. 192 (Ont. H.C.). (While the report of this case indicates that it was an appeal from an order of "Master Saunders", this is incorrect and it was, in fact, an appeal from an order of mine.)

34 I wrote an 18-page judgment dismissing the motion by the plaintiffs to amend their statement of claim. In the original statement of claim, the plaintiffs pleaded an agreement, partly written and partly oral. And on the plaintiffs' discovery, and in certain other affidavits filed in the action, and in a statement of fact and law of plaintiffs' counsel, there were references to this partly oral and partly written agreement. The plaintiffs then moved to amend their statement of claim to plead an oral agreement entered into by the parties *before* the partly written/partly oral one originally pleaded, which it was alleged, provided for an option to purchase the restaurant in question. The plaintiffs wanted to now plead that, by mistake, this orally agreed-to option to purchase was omitted from the later written agreement, and they sought recitification of the written agreement, and relief in respect of the agreement as rectified. In the course of my judgment, I said the following:

> I have gone into this close analysis of the plaintiffs' original allegations and the allegations which they now wish to make in their amended Statement of Claim; and the evidence describing the two agreements and their history; and the evidence of the plaintiff Rigos contained in his affidavit in support of this application and his discovery; as well as a somewhat detailed analysis of the law of rectification; by reason of what I consider to be a need to do so on this type of application to amend pleadings.
>
> There are many different types of applications to amend pleadings. Some applications are made where the amendment is sought to make the pleading conform to the facts, usually undisputed, that emerged during or after examinations for discovery, or to correct obvious typographical or clerical errors in the pleadings. Very little is required to be shown to secure such an amendment.
>
> Some amendments are sought to plead facts which are or may be material to the original claim, but were omitted when the pleading was first drafted. They are being sought to avoid any argument at the trial by the opposite party, about surprise, and to ensure that evidence concerning the facts can be adduced at trial. Again, little is required to be shown to secure such an amendment.
>
> Another type of amendment is one to plead additional legal consequences or legal theories or legal relief which flow from the facts already pleaded. These amendments are usually sought so that there is no question of the party seeking them being able to argue, at trial, after the evidence is complete, the various legal theories and consequences which flow from the facts proven. Again, little is required to be shown to secure such an amendment.

Another type of amendment, which is the type that is presently before me, is one to plead an entirely new and separate cause of action in addition to what already exists, with new facts and the resulting new legal theory and new legal relief that flows therefrom. On this type of application, the authorities indicate that the applicant must meet a more rigorous test. The leading case setting out the principles governing applications of this kind is *Simrod v. Cooper*, [1952] O.W.N. 720.

In that case the following rules were set forth:

1. An amendment should be allowed unless it will cause injustice to the other side which cannot be compensated for by costs.

2. The material filed in support of the application must indicate that the proposed amendment presents an issue worthy of trial and *prima facie* meritorious.

3. No amendment should be allowed which if originally pleaded would have been struck out as embarrassing under Rule 139.

4. The proposed amendment must contain sufficient particulars to enable the other side to answer it.

On the other side of the coin, regard must be had to the case of *Overholt v. Williams*, [1958] O.W.N. 422, which holds that neither the master nor the Judge in Chambers, upon appeal from the master, should refuse leave to amend where to do so it first becomes necessary to determine difficult matters of fact or of law. All such matters should be left to be determined by the Trial Judge.

These principles are well-known. This case demonstrates the difficulty in applying these principles to any specific case. On the other hand, the plaintiff should be entitled to amend a statement of claim to ensure that he can make due presentation of his case and to ensure that justice can be done between the parties. If this amendment is not allowed, the plaintiffs will not be allowed to adduce evidence concerning rectification nor claim this relief, at the trial.

On the other hand, it seems to me that the plaintiff should not be allowed to amend his statement of claim where the proposed amendment and the facts now relied upon are totally inconsistent with everything that the plaintiff has said and pleaded about his case up to the time of the application. To allow the plaintiff 'to speak out of both sides of his mouth' so as to raise the issue of an oral agreement and the subsequent mistake in the recording of that agreement in the two written documents, at this time, keeping in mind what has earlier been said by the plaintiffs (in evidence) and their legal advisors (in Court documents) would, in my view, create an injustice to the defendant in having to now face and deal with and defend such allegations. It is clear to me that the parties discussed the arrangement in a general way, but that no agreement was made nor was intended to be made until it was written down (or up) by the solicitor and executed. The plaintiffs didn't read the written documents and didn't insist on having legal representation. Paragraph 5 of the plaintiff Rigos' affidavit suggests a possible misrepresentation, either innocent or fraudulent by the defendant, inducing the plaintiffs to sign the two agreements; and also suggests a claim of non est factum; but it must be remembered that the amendment sought on this motion is one of rectification.

In Snell, Principles of Equity, above referred to, at p. 686, there is a statement that 'He who seeks rectification must establish his case by strong irrefragable evidence, which means something more than the highest degree of probability. There must be evidence of the clearest and most high degree of conviction and leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties.'

In this particular application, I can find nothing indicating that there is any factual basis for the making of the allegation contained in the proposed amendment. I do not think the issue is one worthy of trial nor prima facie meritorious. I cannot see any difficult matter of fact. I can see no evidence and no facts which would raise even an arguable case about a mistake between the language of an alleged oral agreement between the plaintiffs

> and the defendant, and the language recording it in the 'Operating Agreement'. There might well have been a misunderstanding of the language of the operating agreement by the plaintiffs, but that is an entirely different matter.
>
> With regard to the first of the four rules laid down in *Simrod v. Cooper*, supra, dealing with injustice, in this case, at a time when the pleadings contained no claim for rectification, the plaintiff Rigos gave answers on his discovery (referred to earlier) which would completely undermine any claim for rectification. It would seem to me to be an injustice to the defendant, which cannot be compensated for by costs, to now permit the plaintiffs to change their pleadings and to try to escape the legal impact of their pleadings and testimony to date.
>
> I therefore dismiss this application to amend the Statement of Claim.

On appeal, Grange J. (as he then was) stated:

> The application of the plaintiffs now is to amend the statement of claim by deleting the previous allegation with respect to the existence of an oral and written agreement and to substitute for that a plea that the agreement which was executed does not represent and did not carry into effect the oral agreement that had previously been entered into between the parties. The plea goes on to allege that the document was prepared by the solicitor for the defendant and presented to the plaintiffs for execution; the plaintiffs did not read the document and it did not accurately embody the agreement previously arrived at. In an affidavit filed with the application, the said Peter Rigos states that although the answers that he gave on his examination for discovery were contrary to the facts now sought to be pleaded, at the time of his examination there was no interpreter present and he misunderstood the questions asked of him on the examination.
>
> Upon these facts the learned Master has refused the amendment. He does so essentially on the basis of the four rules set forth in *Simrod v. Cooper et al.*, [1952] O.W.N. 720. These rules are as follows [at p. 721]:
>
> 1. An amendment should be allowed unless it will cause injustice to the other side which cannot be compensated for by costs ....
>
> 2. The material filed in support of the application must indicate that the proposed amendment presents an issue worthy of trial and prima facie meritorious ....
>
> 3. No amendment should be allowed which if originally pleaded would have been struck out as embarrassing under [Rule 139] ....
>
> 4. The proposed amendment must contain sufficient particulars to enable the other side to answer it ....
>
> It is my view that the application for this amendment does indeed comply with the rules set forth in *Simrod v. Cooper*. There is no evidence of injustice to the defendant. The defendant may lose the action on the basis of the new claim, but that is not injustice; it is only injustice if there is prejudice to his defence. Certainly the defendant can be compensated in costs. In my view the amended pleading does set forth, perhaps not with the precision that one might have liked, but does set forth the basis of relief on the grounds of common mistake or of unilateral mistake involving fraud or something in the nature of fraud by the defendant and possibly a defence of non est factum. *The fact that the plaintiff in his examination for discovery has given answers that may not support this claim is, in my view, of no moment. Neither the Master nor a Judge in dealing with the amendment should go into the merits of the matter. They should merely determine whether or not there is a prima facie meritorious case set forth in the pleading*. In my view that case, as I have indicated, has been set forth. *The previous pleading, the answers on the examination for discovery and the other documents looked at by the Master go to the credibility of the case set forth by the plaintiffs which is the concern of the trial Judge*.

(my emphasis)

35 In my view, this case has modified the second rule in *Simrod v. Cooper* and restricts a Court, on an amendment motion, to looking only at whether there is a *prima facie* meritorious case set forth *in the pleading*, and precludes a Court from considering the merits of the factual basis for the proposed amendment. A Court is not to concern itself with the credibility of the case set forth by the moving party seeking the amendment.

36 The next case to consider is *385925 Ontario Ltd. v. American Life Insurance Co.* (1984), 48 O.R. (2d) 142. Master Peppiatt deals with the scope of the inquiry before him at pp. 145-146 of his judgment. He cites *Simrod v. Cooper*, *Ellis v. Pelton* and *Young v. Young*. Then he says that the plaintiff's counsel, who was resisting the motion, argued that on a motion for leave to amend, to allege fraud or murder, the Court must carefully scrutinize the material in support of the new allegations. And he stated that counsel for the moving party defendant did not quarrel with this proposition. He further stated that the defendant's counsel argued however that the Court was not to try the case in the sense of deciding whether the new defence would succeed at trial, and plaintiff's counsel did not disagree with this proposition. Thus, both counsel seem to be in agreement as to what the proper scope of inquiry was on a motion to amend pleadings as of October 1984, and thus, it is not surprising that Master Peppiatt, in dealing with the second rule in *Simrod v. Cooper*, held that he was "to consider whether the material discloses facts upon which an argument can reasonably be based." He said he was "... not to decide any question of credibility ... nor ... weigh competing pieces of evidence in an effort to determine which is the more likely to succeed." He said that nevertheless, the Court must "examine the evidence."

37 He then went on to consider the evidence and found that there were absolutely no factual merits to the proposed amendment. The only difficulty I have with considering this case as important authority on the point is that, apparently, neither counsel cited the judgment of Grange J. in *Neogleous v. Toffolon*, which held the law to be exactly opposite to the law stated by Master Peppiatt, relying, admittedly, on the law as given to him, quite erroneously, by both counsel. Master Peppiatt was *not* faced with deciding *what the proper test was*, since both counsel were in agreement as to what they thought it was, albeit wrongly, and all he was asked to do was to apply it to the particular facts of the case before him. Thus, the ratio of this case does not stand as authority for the proposition that the factual merits of the proposed amendments can be considered by a Court on a motion to amend. And Grange J. held exactly the opposite in *Neogleous v. Toffolon*.

38 The next case that I must consider is *Smith v. Simmons* (1985), 49 C.P.C. 28, a decision of Master Donkin on February 27, 1985. While the judgment was pronounced February 27, it is not clear when it was argued. The action was a 1983 action and it may well be that it was argued on the basis that the *Rules of Practice*, rather than the new *Rules of Civil Procedure*, governed. The motion was one by a defendant to amend his statement of defence to plead the *Limitations Act*, R.S.O. 1980, c. 240, and the *Unconscionable Transactions Relief Act*, R.S.O. 1980, c. 514, as defences to a claim by a plaintiff on a promissory note, where the original defence was only duress. The Master applied the test in *Neogleous v. Toffolon*, considered whether a prima facie meritorious case had been set forth in the proposed amended pleading, found that there had not been, and dismissed the motion. He did *not* consider the factual basis for the amendments but only looked at the amendments set forth in the proposed new statement of defence. This case is consistent with *Neogleous v. Toffolon* and does *not* deal with the issue raised before me on the present motion.

39 At this juncture in this judgment, it is appropriate to note that the law on amendments to pleadings and adding parties underwent a significant change when the new *Rules of Civil Procedure* came into force on January 1, 1985. Rule 26.01 provides as follows:

> On motion at any stage of an action the court *shall* grant leave to amend a pleading on such terms as are just, *unless prejudice would result that could not be compensated for by costs or an adjournment*.

(my emphasis) Rule 5.04(2) reads as follows:

> At any stage of a proceeding the court *may* by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, *unless prejudice would result that could not be compensated for by costs or an adjournment*.

(my emphasis)

40 It is important to note that the word "shall" is used in r. 26.01 whereas the word "may" is used in r. 5.04(2). In the motion before me, the plaintiffs are seeking not only to amend the statement of claim, but also to add Fogler, Rubinoff and Phillip Meretsky as party defendants, and add Greymac Trust Co. and Greymac Mortgage Corp. as party plaintiffs, and delete Greymac Properties Inc. as a party defendant, and add that company as party plaintiff, so that all these plaintiffs may assert their claims against all the existing defendants and the proposed two new defendants.

41 There is no doubt that new r. 26.01 has had a profound effect on the practice governing motions to amend pleadings. It has been held in numerous cases that r. 26.01 makes it mandatory for the Court to grant leave to amend, unless prejudice would result, and the burden of showing prejudice lies with the party opposing the amendment; *Barker v. Furlotte* (1985), 12 O.A.C. 76 (Ont. Div. Ct.), October 23, 1985, Osler, Gray and Smith JJ.; and see the other cases collected under R. 26, in *Rules Review*, *Summaries of Cases Decided under the Rules of Civil Procedure* (1987), edited by Leon, Round and Birnberg, at pp. 121-133.

42 But counsel for the existing and proposed defendants point out that the plaintiffs' main motion is not only to amend their pleading, but also seeks to add, delete and substitute parties under r. 5.04(2) where the word "may" is used, as distinct from r. 26.01 where the word "shall" is used. The argument continues that where the proposed amendment requires the use of r. 5.04(2) to add a party, as either a plaintiff or a defendant, then the Court can inquire into the merits of the factual basis for the new claims and the actual motives of the plaintiff, in seeking to add new defendants, and the reason why a decision has now been made to sue Fogler, Rubinoff and Meretsky, and who made that decision.

43 The argument contra is, that the reason a discretion remains (as reflected by the use of the word "may") when adding new parties to an existing action, is to ensure procedural fairness in such things as the state of the action, with the Court considering such factors as whether the trial is imminent or not, or whether the examinations for discovery of all parties have already been held (for example, see *Fusco v. Yofi Creations* (1987), 60 O.R. (2d) 287 (Ont. Master)), and also whether it would be a proper joinder of the new cause of action, and also whether there is an improper purpose for adding any defendant such as to only obtain discovery of the added party, and whether the proposed added party is a necessary or proper party, and other special problems in relation to class actions, representation orders, trade unions, assignees, insurers, trustees, infants, persons under a disability, amicus curiae, accrual of the cause of action, and limitation periods. These are the procedural considerations that come quickly to mind and there may well be others.

44 There is one case under the new rules that seems, at first blush, to support the position of the existing and proposed defendants, namely, *Rodrigues v. Madill* (1985), 3 C.P.C. (2d) 1 (Ont. Master). That case arose in exactly the same procedural context as the present one. There, the defendant wanted to amend his statement of defence to add a counterclaim against the plaintiff and one Mann. Since a new party was being added, r. 5.04(2) was applicable. The moving party, the defendant and proposed plaintiff by counterclaim, filed an affidavit in support of his motion to amend. The proposed added defendant by counterclaim cross-examined on the affidavit and certain questions were refused. The proposed defendant by counterclaim moved to compel re-attendance to answer.

45 Some of the disputed questions centered on the factual merits of the claim sought to be asserted and Master Peppiatt said the issue before him was whether a Court on a motion to add a party was entitled to consider, at all, the factual merits of the claim sought to be asserted. Master Peppiatt was invited to rule on that issue, as am I on the present motion, but he refused to do so because he was concerned that that would bind the Master who would be hearing the main motion to add and amend. Rather, he repeated the principle in *Re Lubotta and Lubotta* and *C.I.B.C. v. Molony* that if a question *might* be relevant to an issue on the pending motion, then it was a proper question and should be ordered to

be answered. He then referred to r. 5.04(2) and the word "may" contained therein, and held at p. 4, that it was "a possible interpretation of that rule that a Court ... must exercise a discretion, and in exercising that discretion, the merits *may* well be relevant" (my emphasis). And at p. 5 he says that:

> It may well be that one of the factors to be taken into account in exercising the discretion under rule 5.04(2) is the merits of the claim against the proposed added party. I therefore cannot say that the questions directed to that issue have no semblance of relevancy.

46 What is clear from this case is that Master Peppiatt did *not* decide what the proper test was, but only that it was *possible* that the test *might* be one that would involve a review of the factual merits. He raised the issue but chose not to decide it. Since he held that the factual merits *might* be considered, it followed that questions on the cross-examination on the affidavit as to the factual merits had to be answered.

47 By contrast, I am asked on the present motion to make a ruling as to the issues that are open to a Court for consideration on a motion to add parties, and I am willing to do so, and feel that such a ruling is necessary to decide the present case. The concern Master Peppiatt had of binding or fettering the decision-making power and discretion of the Master hearing the main motion can be overcome by requiring the main motion to also be heard by me. This procedure will avoid inconsistent results, and will also increase the efficient use of Court time, since much of the material, both factual and legal, that I have had to review to decide this motion, will also be required to be reviewed on the main motion. (In fact, I think the Court and counsel should, in most, if not all cases, of this type, unless impractical, arrange that the Master or Judge who hears a motion on the disputed questions, also hears the motion to add the parties or amend the pleadings.)

48 I also note that Master Clark in *A.H.A. Automotive v. 589348 Ontario Ltd.* (1985), 3 C.P.C. (2d) 9, decided an almost identical issue against the position put forward by the defendants and proposed defendants on the present motion, but, in fairness, there, the defendant was only moving to amend its statement of defence and counterclaim, and was not seeking to add new parties. It was argued on the motion, by plaintiff's counsel, who was opposing the defendant's amendment and who was seeking an order to compel a representative of the defendant to submit to examination, that it would be an abuse of the process of the Court to allow a defendant to make allegations in its pleadings if those allegations were false. He further argued that r. 25.11 is a limitation on r. 26.01, and an amendment which is itself false ought not to be permitted because of the sanction against abuse found in r. 25.11(*c*). Master Clark ruled against this submission and his remarks in the last two paragraphs on p. 12 of his judgment are equally applicable to a motion to add parties. He said the following:

> The course upon which the plaintiff seeks to embark is not in keeping with the intention of the rule or the recently decided cases. If every party had to prove the truth of the allegations in his pleadings, *at the pleading stage*, there would be no need for trials; and yet that is the confessed objective of plaintiff's counsel.
>
> In the event that I were to grant the plaintiff the order it seeks, the result would only be that the Master hearing the defendant's motion to amend its pleadings would be faced with presiding over a mini trial, the purpose of which would be to decide whether or not allegations sought to made in the pleading were true or false to the knowledge of the defendant. That is not the purpose of rule 25.11, and at least to that extent, the rule does not conflict with rule 26.01. The motion is dismissed.

49 I also think the case of *Consolidated Foods Corp. v. Stacey* (1986), 13 C.P.C. (2d) 137, 76 N.S.R. (2d) 182, *(*sub nom. *Stacey v. Electrolux Can.)* 189 A.P.R. 182 (N.S. C.A.) is very helpful. There, the Judge of first instance refused the motion to amend the statement of defence on two grounds, the first being that the affidavit evidence in support of the motion was "very weak", and he did not "place a great deal of faith" in it; and the second being a legal, as opposed to a factual objection, that the defendant employer could only rely on cause for dismissal of which it was aware at the time of termination of the plaintiff's employment. The Court of Appeal, in reversing the refusal to permit the amendment, stated that it was wrong for the Judge to enter upon an examination of the merits of the proposed amendment, whether on factual or legal issues, and that this examination ought to be left to the trial Judge. But again, this case was one

where the only amendment sought was to the body of the statement of defence and no amendment adding parties was being considered. But, the governing Nova Scotia Rule, r. 15.02(1), uses the word "may" in empowering the Court to grant amendments. And yet, even with this *discretionary* language, the Court held that it was improper for a Court to enter upon a consideration of the merits, including either the factual basis for the amendment or the legal basis for the amendment.

50 The law in Ontario has not gone quite this far, as is reflected in the recent case of *Vaiman v. Yates* (1987), 60 O.R. (2d) 696, 20 C.P.C. (2d) 33, 41 D.L.R. (4th) 186 (Ont. H.C.). This was a case of a motion by a plaintiff to amend the statement of claim to add a claim under the *Family Law Act*, S.O. 1986, c. 4, for damages for loss of income. Rosenberg J. held that it was open on such a motion for the Master to consider whether the amendment sought is an untenable plea in law, and whether the proposed amendment discloses, in law, a cause of action. To do this, the Court is to look at the language of the proposed amendment in the new draft pleading but is not to examine the underlying factual basis to see if there is credible and worthy evidence to support the alleged proposed amendment. This result is exactly consistent with *Neogleous v. Toffolon* and, to this extent, the law in this province differs from that laid down in Nova Scotia as described above. Leave to appeal the judgment of Rosenberg J. was refused by Sutherland J. for written reasons delivered but not yet reported.

51 Notwithstanding that the language is different in r. 26.01 and 5.04(2), namely, "shall" versus "may", it is my view that it was not the intention of the Rules Committee to give the Court the power to consider (and the parties the right to explore) the *factual merits* of a proposed amendment when such amendment involves the adding of new parties, but otherwise when the proposed amendment only involves changes to the body of the pleading. Rather, it is my view, that the preferable interpretation of r. 5.04(2) is that *in neither case* is the Court, on a motion to add and amend, to consider the factual and evidentiary merits of the proposed new claim by or against an added party.

52 There are valid areas of inquiry that a Court should and must examine on a motion to add a new party, and I have listed earlier in these reasons those that have occurred to me at the present time. There may well be others. But none of the questions sought by the defendants and proposed defendant to be compelled to be answered by the deponent, Dufort, relate to any of these legitimate areas of inquiry, but rather relate only to the factual and evidentiary merits of the new claims sought to be advanced by the existing and proposed new plaintiffs against the existing defendants and the new defendants sought to be added or to totally irrelevant areas of concern.

53 During the course of argument, I asked the question whether a plaintiff, faced with opposition to adding new defendants, or contemplating such opposition, instead of moving to add them or continuing with such a motion, or even having lost such a motion, could properly attend at Central Office and issue a fresh statement of claim in a new action, and then move for either consolidation or trial together. In choosing this route, a plaintiff does not have to endure Court scrutiny of the merits of his new claim before he can get it started. But all factors of appropriate timing and proper joinder, would be the subject of scrutiny by the Court on any motion under r. 6.01 (consolidated or trial together), and the propriety of the pleading could be considered on a motion under rr. 25.11 and 25.10, and the other factors, such as accrual of the cause of action, passage of any limitation period, the legal tenability of the claim, and the proper constitution of the action, could be scrutinized by a Court under r. 21.01 or Rule 20. Thus, there would be no procedural advantage to a plaintiff or procedural disadvantage to a defendant, whichever way the plaintiff's solicitor chose to proceed.

54 In response, Mr. Murray argued that if a plaintiff lost a motion to add new parties and amend the pleadings, because of an adverse ruling on the merits of the case, or because of delay, that it would be an abuse of process for such plaintiff to attend at Central Office to issue a fresh statement of claim against the proposed defendant. Unfortunately for Mr. Murray, Mr. Justice Catzman has ruled otherwise. The case to which I refer is *Reynolds v. Schultz*, Ont. H.C., Toronto, Doc. No. 7070/81, Catzman J., March 31, 1982, and the related cases of *Reynolds v. Miller*, Ont. Master, Toronto, Doc. No. 1236/75, Master Sandler, March 24, 1981, and *Reynolds v. Ausable*, Ont. Master, Toronto, Doc. No. 690/77, Master Sandler, March 24, 1981.

55 The facts in connection with these cases were that a mentally retarded infant by the name of Reynolds was residing in a group or foster home and suffered the loss of both arms when he came in contact with certain high voltage electrical wiring. This occurred on June 29, 1975. In 1975 and in 1977, he started two actions, 1236/75 and 690/77, against various individuals who actually worked and resided in the home, and cared for him and the other children there; against the local Children's Aid Society; against two companies that rented out and owned the home; against Ontario Hydro as the owner of the electrical installation; against an electrical contracting company and its president who did some repairs in connection with the electrical installation. A man by the name of Schultz was some kind of manager of the home, but he was not, originally, sued. These two actions proceeded over a period of six years and, by 1981, most of the parties had been examined for discovery.

56 On March 24, 1981, I heard a motion brought by the plaintiff Reynolds to add Schultz as a party defendant to each of these existing actions, and I dismissed the motion for several reasons.

57 Firstly, I held that the factual basis put forward by the plaintiff upon which he relied to add Schultz was very sketchy. The entire factual information relied upon came from the examination for discovery of one of the other defendants, and what the deponent of the affidavit in support of the motion said, relying on this discovery evidence, was speculation and invention and not in accordance with the evidence actually given by this defendant on his discovery. This was the first ground of dismissal. (Obviously, I was, on this motion, applying the law as it existed prior to *Neogleous v. Toffolon*, presumably because that is how counsel presented it.)

58 The second ground for dismissal was that the plea in the proposed amendment against Schultz was going to be that he was acting beyond the scope of his employment, and yet his employer, one of the corporate defendants, had never pleaded nor testified to anything about Schultz acting beyond the scope of his employment, in its own statement of defence or discovery. I thus held the amendment did not raise an issue that was prima facie meritorious and worthy of trial.

59 Thirdly, I relied on a judgment in *O'Keefe v. Ontario Hydro* (Lerner J., August 25, 1980), where he discussed generally the inappropriateness of suing management-level and ordinary employees where a corporation is alleged to have been negligent and is already a party. In *O'Keefe v. Ontario Hydro*, there was motion to strike out the negligence claim against the individual employees of Ontario Hydro under R. 126 and it was successful. Lerner J. held that there was no cause of action against the employees and that they were being named solely for the purposes of examination for discovery. I said in my reasons in *Reynolds v. Miller* that I believed the same considerations should apply on a motion under R. 136 (now r. 5.04(2)) to add a new party to an existing action as to a motion under R. 126 (now R. 21) to strike out a claim as showing no cause of action, and that the amendment must disclose a legally tenable claim. In this ruling I anticipated the ruling in *Vaiman v. Yates*, supra.

60 Fourthly, I held that the delay was extreme and this new defendant would suffer prejudice if he were brought in to these existing actions at this rather late stage. The *only* reason put forward by the plaintiff for the need to add Schultz was the *possibility* of his employers, who were already defendants, seeking in the future to amend their pleadings to plead that Schultz was acting outside the scope of his authority, but no such motion was pending or threatened.

61 I found that the real reason that was motivating the plaintiff in trying to add this defendant was the desire to examine him for discovery, and I held that he was not a necessary party under R. 136, and I dismissed the motion. There was no appeal taken from that judgment.

62 Rather, on June 23, 1981, a fresh writ was issued by the plaintiff against Mr. Schultz (*Reynolds v. Schultz*, Ont. H.C., Toronto, Doc. No. 7070/81, Catzman J.), claiming damages for negligence arising from the June 29, 1975 electrocution event. It is to be noted that this writ of summons was issued *several days prior to* the expiry of the 6-year limitation period.

63 In due course, a motion was brought in Motion Court under R. 126 to strike out this new action as an abuse of the process, the gist of the argument being that the plaintiffs could not now do indirectly what they were not allowed to

do directly, namely, add Schultz as a party defendant in the existing action, and that the issuance of the new writ was simply a way of subverting an unfavourable decision against them which they did not appeal.

64 The motion was heard by Mr. Justice Catzman, and on March 31, 1982, in brief manuscript reasons, he said the following:

> Having considered the proceedings in the original action and the allegations in the statement of claim again in this action [the new one against Schultz], I am not satisfied that this is not one of those plain and obvious cases where the court is satisfied beyond doubt that there is no reasonable cause of action, nor that this action is such a clear case of abuse of process to warrant its dismissal at this stage.
>
> That portion of the motion before me that seeks such relief is dismissed with costs in the cause.

65 Apparently what Catzman J. did was this. He looked at the first reason that I gave in my reasons for not allowing Schultz to be added in the earlier action, namely, the inadequacy of the material, and said that that was of no real concern where there was a *fresh action* instituted.

66 As to the fourth reason that I gave for refusing to add Schultz to the existing action, namely, the factor of delay and prejudice, he said that this reason did not apply to the fresh action, and the only valid time consideration was whether it had been instituted within the 6-year limitation period and it had been, albeit at the very last moment. Presumably, the issue of delay would be relevant on any motion for consolidation or trial together of the new action with the existing action.

67 As to the fifth reason that I gave for refusing to add Schultz to the original action, being that I felt that he was being added merely for the purposes of discovery, Catzman J. said that again, this factor was of no significance where a fresh action was instituted.

68 Lastly, Catzman J. had some trouble accepting the judgment of Lerner J. in *O'Keefe v. Ontario Hydro*, as to whether a cause of action lies against the employee of a negligent employer. In these kind of circumstances (presumably to be distinguished from the situation where the employee is the very person who committed the negligent act), he was not convinced that no cause of action would lie against Schultz. He thus dismissed the application to strike out the claim showing no reasonable cause of action, or as an abuse of process, and he saw nothing wrong with the plaintiff starting a fresh action against a person who was unsuccessfully sought to be added as a party defendant in an earlier action.

69 It follows from this judgment that it is futile in most cases to refuse to add a new defendant to an existing action since it appears (somewhat to my surprise) that it is procedurally appropriate for a plaintiff who loses such a motion to issue a fresh process against such person. (If a limitation period has clearly passed when the motion to add is being considered, the order to add should probably not be made. But there is no need to direct my mind to this problem which is inapplicable to the present motion, and which has been discussed in a myriad of other cases.) But the *terms* to be imposed when adding a new defendant are open for consideration by the Court, but I cannot imagine what cross-examination questions could be asked that would be relevant to any term that might reasonably be imposed, and, in any event, none of the *unanswered* disputed questions on the present cross-examination goes to the issue of appropriate terms.

70 Mr. Murray further argues that on the main motion to add Meretsky as a party defendant, he may want to argue the involvement of the Registrar under the *Loan and Trust Corporations Act*, R.S.O. 1980, c. 249, and the Superintendent of Insurance under the federal *Loan Companies Act*, R.S.C. 1970, c. L-12, and whether it is really these officials, rather than the plaintiffs, who should be asserting this cause of action, or whether they should be asserting this cause of action, or whether they should at least be added, either as plaintiffs or as defendants, as necessary parties. He may also want to explore the role of the Canadian Deposit Insurance Corporation (C.D.I.C.) and whether this institution should be joined as a party to this proceeding. He stated to me that he does not know at this time, for sure, whether the said officials and C.D.I.C. should be added as necessary parties under r. 5.03(1) or 5.03(2) or 5.03(3), but he argues that he should be entitled to explore these issues by the questions in issue on the cross-examination of Dufort, and that he should be entitled

to find out "what is going on in the plaintiffs' camp." He is also concerned about his client being sued twice, once by the existing plaintiffs and again by C.D.I.C., and he is concerned about whether the existing plaintiffs can provide his client with a proper release in the event of any settlement, so that no other claimant could assert similar claims against his client.

71 In my view, the proper place to address all these areas of concern is either in Meretsky's statement of defence or possibly on a motion by the defendant Meretsky to add these officials and C.D.I.C. as necessary parties under r. 5.03 where they can have input into these issues.

72 Mr. Murray further argues that he can, on the main motion, explore the motives for the plaintiffs deciding at this stage to add Meretsky as a party defendant, even though the plaintiffs have known the full involvement of Meretsky since 1983, when he was fully cross-examined on an affidavit that he had filed. And if this is so, he argues that he can also cross-examine Dufort as to these motives. Mr. Murray relies upon *Royal Bank v. Fogler, Rubinoff* (1985), 3 C.P.C. (2d) 248-49. But this case simply approved of a defendant *pleading* what the defendant thinks is the purpose or motive of the plaintiff in bringing the action, for the purpose of laying a foundation for a claim for solicitor-client costs at the end of the trial. The evidence as to the alleged motive will be reviewed and considered at trial, and possibly on discovery, but *not* at the pleadings stage itself. I thus disagree with this submission. (I am aware of *A.I. MacFarlane & Associates Ltd. v. Delong* (1986), 10 C.P.C. (2d) 25, 55 O.R. (2d) 89 (Ont. H.C.), going the other way on this issue, but I express no view on the conflict that is raised in these cases since it is unnecessary to do so to arrive at my decision on this motion.)

73 Mr. Murray next argues that delay is a factor that can be considered on the main motion to add. The word "delay", used in this context, is quite ambiguous. It can refer to the passage of time between the date of commencement of the original action to the date of the motion. It can also refer to the stage at which the action is at, when the motion to add is brought. Or it can refer to a change of position of the proposed defendant during the period of time between the original commencement date of the action and the time of the motion to add, such that prejudice to the proposed defendant will result if that defendant were now added.

74 Certainly, the stage at which the action is at and how the proposed defendant would be prejudiced if brought into the action at such stage, is a relevant factor to be considered (see *Fusco v. Yofi Creations*). But none of the questions asked relates to this factor of timing.

75 But to explore why the plaintiffs waited so long before deciding to sue Meretsky is not open for review so long as the claim is made within the limitation period. (If the claim is being attempted to be made beyond the limitation period, but the plaintiff relies on "special circumstances", then such an inquiry would be relevant, but that is not this case.)

76 If the proposed defendant filed some affidavit material setting out specific grounds of prejudice that he would suffer by being added now, rather than at an earlier stage, so that it is clear what the areas of prejudice are that are being alleged (and the burden is on the defendant to show it), then questions on the issue of this prejudice would be proper, but again, that is not what had occurred here.

77 And Mr. Bristow argues that a Court can impose security for costs as a term of adding these new plaintiffs, and thus his questions as to the financial position of the plaintiffs and proposed plaintiffs, and who is financing this law suit, are relevant. I disagree. If the defendants want security for costs, then they can apply on a motion under r. 56 at the appropriate time. It is unfair to the plaintiffs and proposed plaintiffs to raise security for costs as a *response* to the plaintiffs' motion to amend, and have the defendants file no material, and then attempt to cross-examine the plaintiffs' representative on these issues, on the basis that the defendants might raise this issue on the main motion. A much fairer way to proceed is for the defendants to move under r. 56 for security for costs, on proper material, and then the plaintiffs can determine what exactly is the case against them on this issue and deal with that motion and its factual basis and respond accordingly. So I rule that the question of security for costs as a term of adding plaintiffs and defendants is not open on the pending motion.

78 And I would add that, if after pleadings are completed, or examinations for discovery are concluded, Mr. Murray or Mr. Bristow think that the case of the plaintiffs against their respective clients is so clearly without legal or factual merit, they can always move under R. 21 or under R. 20 to dismiss the action against their respective clients under those rules, which are designed for the express purpose of providing a mechanism for a defendant to avoid having to endure the expense and inconvenience of a trial in a claim that does not, on its merits, raise a genuine issue of fact or law. It follows that I disagree with Mr. Murray's view that it would be "inefficient and senseless to grant leave to amend and then require the [added defendants] to ... move for summary judgment because there is no genuine issue for trial, a determination which could have been made at the time of the motion to amend."

79 I would also add that the time and expense that has been expended by the plaintiffs and proposed plaintiffs to date, and that will have to be further expended if the position of Mr. Murray and Mr. Bristow is correct, just for the plaintiffs to achieve the right to *commence* an action against the defendants, by itself, demonstrates the inappropriateness of interpreting r. 5.04(2) in the way contended for by these counsel. Rule 1.04(1) requires me to construe the rules so as "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits," and I would hardly be doing that if I accepted the interpretation of r. 5.04(2) contended for by Messrs. Murray and Bristow.

Conclusion

80 I thus conclude that none of the questions in dispute are relevant to any issue that will be open for consideration by a Court on the plaintiffs' pending motion to add parties and amend their pleadings, so I thus dismiss the motions by the defendants and proposed defendants to compel Dufort to re-attend for further cross-examination on the disputed questions. I also dismiss the cross-motion by the plaintiffs seeking to terminate the cross-examination on the basis of r. 34.14(1)(*a*) or (*b*), because while I have found that the counsel for the defendants and proposed defendants are in error, I do not agree that they were acting in bad faith or in an unreasonable manner, or to oppress the plaintiffs or as an abuse of process. Rather, they were just mistaken as to the scope of enquiry open to them on the proposed motion to add the various parties to this action.

81 The costs of the two motions by the existing defendants Broadhurst and Allport, and the proposed defendant Meretsky, to compel re-attendance, shall be, in the cause, as between the plaintiffs and each of the said defendants, because of the uncertain state of the law. But since I have heard no submissions on costs, I can be spoken to by any dissatisfied counsel before the formal order is issued. There will be no costs of the motion brought by Fogler, Rubinoff, or the cross-motion of the plaintiffs, which I have dismissed.

82 So far as the pending motion by the plaintiffs to add parties and amend pleadings, the motion is adjourned sine die, to be heard by me on a date to be agreed upon between counsel for the plaintiffs and proposed plaintiffs, and for the existing and proposed added defendants, Broadhurst & Ball and Allport, and Fogler, Rubinoff, and Phillip Meretsky.

Motion dismissed; cross-motion dismissed.

End of Document

1990 CarswellOnt 343
Ontario Supreme Court, High Court of Justice

Seaway Trust Co. v. Markle

1990 CarswellOnt 343, [1990] O.J. No. 3115, 40 C.P.C. (2d) 4

SEAWAY TRUST CO. et al. v. MARKLE et al.; FOGLER, RUBINOFF (third party)

Lane J.

Judgment: May 4, 1990

Subject: Civil Practice and Procedure

Headnote

Parties — Adding or substituting parties — The application — Procedural requirements and discretion of Court — Once threshold test of no prejudice met, Court having discretion to refuse amendment if no procedural fairness — Court not to consider factual or evidentiary merits of proposed claim — Appeal dismissed.

Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — Court not to consider factual merits of proposed allegations on motion to add parties and amend allegations — Once threshold test satisfied, Court not having discretion to refuse amendment — Appeal dismissed.

Practice on interlocutory motions and applications — Evidence on motions and applications — Examination of witness — Before hearing of pending motion or application — Cross-examination — Motion to compel answers to disputed questions to be returnable before same Judge who hears main motion — Appeal dismissed.

The plaintiffs alleged that the defendants had conspired to wrongfully convert the assets of one of the plaintiffs for the benefit of the defendants. The alleged conspiracy related to a series of transactions involving realty. The alleged conspirators were the parties to the transactions and their solicitors.

The plaintiffs moved for leave to amend the statement of claim to add plaintiffs, to change the status of a party from a defendant to that of a plaintiff, and to add as defendants the third-party solicitors and a non-party solicitor in that firm.

The affidavit filed in support of the motion was deposed to by a solicitor in the firm of solicitors representing the plaintiffs. The affidavit outlined the state of the action but failed to provide evidence relevant to the relief sought. On cross-examination, the deponent refused to answer questions on matters not discussed or referred to in the affidavit. The defendants, existing and proposed, moved to compel the deponent to re-attend to answer questions. The plaintiff cross-moved to terminate the cross-examination.

The learned Master dismissed the motion and the cross-motion. He reiterated the principles to be applied on a motion to compel answers to questions refused on a cross-examination on an affidavit filed in support of a motion. In applying the principles, it would be necessary to make a ruling regarding matters which were relevant on the main motion for leave to amend. The motion regarding the disputed questions should be heard by the same Master hearing the main motion.

The Master noted that the motion to amend the statement of claim was governed by rr. 5.04(2) and 26.01. The same threshold test applied to a motion to amend under either rule: the moving party was to show that no prejudice would result from the amendment that could not be compensated for by costs or an adjournment. Once this threshold was met, different considerations applied to the motions, depending on whether the amendment was governed by rr. 5.04(2) or 26.01. Rule 26.01 was mandatory and required that leave to amend be granted once the threshold test was met.

Rule 5.04(2) provided discretion to be exercised notwithstanding that the moving party satisfied the threshold test. The discretion was to ensure procedural fairness. Consideration was to be given to the state of the action: whether trial was imminent; whether examinations for discovery were completed; whether there would be joinder of a new cause of action; whether the purpose for adding a party was proper; whether the proposed party was a necessary or proper party and whether special rules applied.

On motions under rr. 5.04(2) and 26.01, the Court was not to review the factual or evidentiary merits of the proposed claim. The Court was not to determine the credibility of the case set forth by the moving party.

The motion to compel re-attendance was dismissed because the questions were not relevant to the main motion. The cross-motion was redundant. The pending motion to add parties and amend pleadings was adjourned sine die. The decision was appealed.

Held:

The appeals were dismissed.

The reasons of the Master were adopted.

Table of Authorities

Rules considered:

Ontario Rules of Civil Procedure —

R. 20

APPEAL from decision of Master Sandler (1988), 25 C.P.C. (2d) 64 dismissing appeal by defendants and proposed defendants to compel re-attendance of deponent to answer questions refused on cross-examination on affidavit, and dismissing cross-motion to terminate cross-examination.

***Lane J.*:**

1 This appeal, and the companion appeals, are dismissed. I agree with the result reached by the Master and with his reasons. A refusal to add a party based upon an analysis of the factual underpinnings of a properly pleaded claim is a wholly inappropriate exercise at this stage of the proceedings, particularly bearing in mind that under our revised rules there exists in R. 20 a carefully framed procedure to do such an analysis at an early stage. Costs of all appeals as of one motion to the responding party.

Appeal dismissed.

End of Document

6

2009 CarswellOnt 8322
Ontario Superior Court of Justice (Divisional Court)

Din v. Melady

2009 CarswellOnt 8322, [2009] O.J. No. 5658, 184 A.C.W.S. (3d) 61

Din et al, (Plaintiffs) v. Melady, William Osler Health Centre et al, (Defendants)

Karakatsanis J.

Heard: November 18, 2009
Judgment: December 14, 2009
Docket: Toronto 379/09

Proceedings: affirming *Din v. Melady* (2009), 2009 CarswellOnt 4384 (Ont. Master)

Counsel: Andreas Seibert, for Plaintiffs / Appellants
Tanya Goldberg, for Defendant / Respondent, William Osler Health Centre

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Parties — Adding or substituting parties — Adding defendant

In 2002, plaintiffs brought action for medical malpractice in treatment of infant of plaintiff against hospital and three doctors — Plaintiffs amended their statement of claim after discovery to allege that nursing staff were also negligent — Due to plaintiffs' change in counsel, first trial date was adjourned to April 2009 — In January 2009, plaintiffs' motion to add nurses and respiratory therapists, who were employees of defendant hospital, as party defendants caused adjournment of second long trial date to February 2010 — Motion was dismissed, and trial date was further adjourned to permit plaintiffs to consider options — Plaintiffs appealed — Appeal dismissed — Master properly considered factors, including unexplained delay of some eight years, adjournment of second trial date to bring motion, and hospital's admitted vicarious liability for any negligence of proposed defendants — Factors were appropriate considerations in exercise of master's discretion, and she did not fail to consider any other relevant considerations — Master did not err in finding that proposed defendants were not necessary parties — It was clear that Master did not consider that explanation of delay and of necessity of adding proposed defendants were mandatory in every case — Master properly concluded that it did not advance interests of justice to grant motion on meager explanation provided at this late date in proceedings — There was evidence to support Master's finding that adding proposed defendants would cause delay in having action go to trial — Explanations of delay and of necessity for adding proposed defendants might have tempered concerns about motion's timing and propriety.

Table of Authorities

Cases considered by *Karakatsanis J.*:

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 2001 CarswellOnt 4133, 207 D.L.R. (4th) 492, 152 O.A.C. 201, 56 O.R. (3d) 768, 15 C.P.C. (5th) 235 (Ont. C.A.) — followed

Zeitoun v. Economical Insurance Group (2008), 236 O.A.C. 76, 64 C.C.L.I. (4th) 52, 2008 CarswellOnt 2576, 53 C.P.C. (6th) 308, 292 D.L.R. (4th) 313, 91 O.R. (3d) 131 (Ont. Div. Ct.) — referred to

Zeitoun v. Economical Insurance Group (2009), 73 C.C.L.I. (4th) 255, 2009 ONCA 415, 73 C.P.C. (6th) 8, 307 D.L.R. (4th) 218, 2009 CarswellOnt 2665, 96 O.R. (3d) 639 (Ont. C.A.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 1.04 — referred to

R. 1.04(1) — referred to

R. 5.03 — referred to

R. 5.04(2) — considered

APPEAL by plaintiffs from judgment, reported at *Din v. Melady* (2009), 2009 CarswellOnt 4384 (Ont. Master), dismissing motion to add defendants to action.

***Karakatsanis J.*:**

1 The plaintiffs appeal the decisions of Master Birnbaum dated May 13, 2009 and July 16, 2009, which denied the plaintiffs' request to add thirteen nurses and two respiratory therapists as party defendants in a medical malpractice action arising out of the diagnosis and treatment of the infant plaintiff in hospital in 2001. In addition to the hospital, three physicians are named as defendants.

Standard of Review

2 A Master's decision will be interfered with on appeal only if the Master made an error of law, exercised her discretion on wrong principles, disregarded relevant evidence, misapprehended the facts or relevant evidence, or drew unreasonable inferences from the evidence such that there is a palpable and overriding error. *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Ont. Div. Ct.), at 144-145, paragraphs 40-41 and 43, appeal dismissed [2009] O.J. No. 2003 (Ont. C.A.).

3 Errors of law are reviewable on a correctness standard. The standard of appellate review for factual findings is that of "palpable and overriding error". The standard of review on matters of mixed fact and law lies along a spectrum and are subject to the "palpable and overriding error" standard unless it is clear that the motions judge (in this case the Master) made some extricable error in law or principle which can be reviewed on a standard of correctness: *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.) at paras. 8. 10, 36-37, [2002] S.C.J. No. 31 (S.C.C.).

Background

4 This action was commenced in March 2002. Discoveries were completed by the end of 2004. The amended statement of claim (para 10) alleged that nursing staff was negligent, as well as the hospital and doctors. The first long trial date in this matter was set for January 2008. The plaintiff changed lawyers in October 2007 and as a result the trial date was adjourned to April 2009. The plaintiffs brought this motion to add hospital employees as party defendants late January 2009 and, as a result, the second long trial date of April 2009 was adjourned before the actual hearing of the motion.

The third trial date of February 2010 has also been adjourned in order to permit the plaintiffs to consider their course of action after the appeal of the Master's refusal to add the parties.

5 The motion was brought under Rule 5.04(2):

> At any stage of a proceeding the court may by order add...a party...on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

6 The motion was supported by an affidavit of the plaintiffs' counsel:

> Our review of the circumstances surrounding the care provided to the minor plaintiff... revealed that the proposed defendants were closely involved in the care provided to the said minor plaintiff. Having reviewed the matter carefully, I am of the opinion that the addition of [the nurses]...as party defendants is necessary to enable the court to adjudicate effectively and completely with respect to all the issues....

7 The reasons of the Master commenced: "There comes a time in the life of every legal action when discovery ends and trial preparation begins. So it is with this action". She concluded at para 14:

> With no explanation for the long delay in bringing the motion to add defendants, with no pleading specific to any person the plaintiffs wish to add, with the hospital being vicarious liable for any negligence of the nurses and their not being necessary parties, and with prejudice to everyone including the plaintiffs for the lengthy delay in having this action go to trial, the motion is dismissed.

The Issues

8 The appellants submit the Master erred in failing to add the parties pursuant to a broad and generous approach as required in *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (Ont. C.A.) and Rule 1.04(1); erred in principle by imposing a two-part test of requiring an explanation for the delay and requiring that the proposed defendants be necessary parties; in finding that there would be delay of the action; in finding that the proposed parties were not necessary parties; and in failing to consider that the plaintiff was a severely disabled minor plaintiff and that the claims against the proposed defendants are not statute barred. They submit that there was no finding of irremediable prejudice or that the additional parties would unduly complicate the trial or unduly delay the new trial date.

9 The respondents submit that the Master's decision to dismiss the plaintiffs' motion was an appropriate exercise of her discretion based on the applicable legal principles and a reasonable appreciation of the evidence before her.

10 The issues are:

1. Did the Master err in principle?

2. Did the Master misapprehend the evidence in finding delay?

3. Did the Master misapprehend the evidence in finding the proposed parties were not necessary parties?

4. Did the Master err in failing to consider the disability and youth of the plaintiff?

1. Did the Master err in principle?

11 The general approach to a motion under rule 5.04(2) was discussed in *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (Ont. C.A.) Cronk J.A. at p. 776:

> The rule of interpretation established by subrule 1.04(1) provides the basis for a proper construction of all the other rules. In my view, the combined effect of rules 26.01, 5.04(2) and 1.04(1), generally, is to focus the analysis on the

issue of non-compensable prejudice, in the wider context of the requirement that a liberal construction be placed on the rules to advance the interests of timely and cost effective justice in civil disputes....

In contrast to rule 26.01, however, the language of subrule 5.04(2) imports a discretionary power rather than a mandatory direction. The inter-relationship of the two rules is described in *Holmested and Watson: Ontario Civil Procedure* ...

> *...where it is sought to add parties under rule 5.04(2) the court has a discretion whether to allow the amendment, notwithstanding that the threshold test has been satisfied [i.e., no prejudice would result that could not be compensated for by costs or an adjournment]; the discretion is to ensure procedural fairness* and consideration has to be given to such matters as the state of the action, whether the trial is imminent, whether examinations for discovery of all parties have already been held, whether it would be a proper joinder of a new cause of action, whether the purpose in adding a party defendant was improper (such as simply to obtain discovery of the party added), whether the proposed added party was a necessary or proper party, and whether a variety of special rules were observed such as those respecting ... infants, persons under disability ... and limitations.
>
> [Emphasis added in the original]

12 Laskin J.A. held at page 793:

Absent non-compensable prejudice, these motions should ordinarily be granted. The court retains a discretion to refuse the motion, but that discretion should not be invoked often. Courts should work out when it is appropriate to do so case by case.

13 The Master did not find non-compensable prejudice to the parties; nor did she rely on such prejudice in exercising her discretion.

14 In submitting that the Master erred in principle, the appellant relies upon para 6 of her reasons:

Numerous cases provided made clear that to be successful, the moving party must show why the proposed defendants are necessary parties and meet the onus to explain the delay in making the motion to add the parties. Master MacLeod in *Plante v Industrial Alliance Life Assurance Co* [[2003] O.J. No. 3034] clearly stated:

> The addition of a party should not unduly delay or complicate a hearing or cause undue prejudice to the other party. In a case managed proceeding, it may also be appropriate to withhold consent if it will cause a significant disruption to the court ordered schedule.

15 It would be an error in principle if the Master considered it to be a mandatory legal requirement "that to be successful, the moving party must show why the proposed defendants are necessary parties and meet the onus to explain the delay in making the motion to add the parties". These are not required by rule 5.04(2). However, in the context of the Master's reasons as a whole, it is clear that she did not consider these factors to be mandatory in every case but rather considered the delay and the failure to explain the delay or why the proposed defendants were necessary parties, to be significant factors in the exercise of her discretion in the circumstances of this particular case - where the motion was brought late in the proceedings, without more than counsel's bald assurance that the proposed parties were "closely involved" in the underlying events and were "necessary" parties.

16 This motion was brought seven years after the action had been commenced, three years after discovery had been completed, one year after the first adjourned trial date and less than three months before the second trial date. I am satisfied that in the circumstances of this case, the delay in bringing the motion, the failure to adequately explain the delay and why the proposed defendants were necessary parties, were appropriate factors to consider in the exercise of discretion pursuant to the principles in *Mazzuca*.

17 Although there is no expired limitation period involved, the Master was entitled to consider the delay involved as a factor. Further, the Master was entitled to weigh whether the proposed parties were necessary parties and any explanation against that delay.

18 While she made no finding of improper purpose, it was open to the Master to question the timing of the motion, especially since the plaintiffs gave no explanation for the substantial delay.

2. Did the Master err in finding "delay in having this action go to trial"?

19 When the second trial date was adjourned because of this motion, the parties had agreed to a discovery schedule that would have permitted the Feb 2010 date to proceed - subject to the issue of expert reports which could have been resolved by agreement or by Order. Thus, the plaintiffs argue, there was no evidence that the new trial date would be delayed by adding the proposed parties.

20 The Master was entitled, however, to consider the evidence that the parties had not yet fully agreed to a timetable for the new trial date. Given the outstanding matters, it would be difficult for the Master to conclude that there would be no further delay. Even if it was possible for the February 2010 trial date to be met, the Master did not err in considering the delay already occasioned by the motion, including the adjournment of the second long trial date. But for this motion, the trial could have proceeded in April 2009.

21 The state of the action, whether the trial is imminent, whether examinations for discovery of all parties have already been held are all relevant considerations referred to in *Mazzuca*. Clearly the delay in bringing the motion and any ensuing delay are relevant factors that the Master was entitled to consider in exercising her discretion. There was evidence and circumstances to support her findings with respect to delay.

3. Did the Master err in finding the proposed parties were not necessary parties?

22 The plaintiffs submit that that the Master also erred in relying upon the fact that the Hospital was vicariously liable to find that proposed defendants were not necessary parties and that she failed to consider the fact that the proposed defendants' participation is "otherwise necessary to allow the court to adjudicate effectively" in light of the existing allegations of staff negligence, the hospital's defence that it was acting pursuant to instructions of independent medical practitioners and that the minor plaintiff was under the care of independent practitioners (the doctors) for whom the hospital is not responsible.

23 While an employer's liability does not displace the employee's liability, the Master did not suggest that the employees were not *proper* parties. In finding they were not *necessary* parties, she relied upon the hospital's admission of vicarious liability for its employees, the likelihood that many would be witnesses at trial and the plaintiffs' failure to make allegations specific to any of the proposed new defendants or to explain why they were necessary as party defendants. Further, she noted that there was no possibility of greater recovery by joining the individual defendants, there was no suggestion the hospital could not have satisfied any judgment and there was no possibility of divided liability as between the hospital and its employees (as opposed to the independent doctors).

24 I am not satisfied that the Master erred in principle or misapprehended the evidence.

4. Did the Master err in failing to consider the disability and youth of the plaintiff?

25 The appellants contend that the Master ignored the fact that this motion was being brought on behalf of a severely disabled child, who was free to start another action and move under rule 5.03 for joinder. They submit that as a result, the Master ignored the general Rule 1.04 to facilitate the most expeditious and least expensive proceeding as the plaintiff would be required to commence a separate action and apply to join the actions. This, they submit, would not be the most expeditious or cost effective way of proceeding.

26 It is clear from the Master's reasons that she was concerned about the expeditious resolution of this proceeding. While she did not specifically deal with the issue of joinder, this issue does not appear to have been specifically addressed in the supporting affidavit and in any event, would not have appeared as a significant factor, given the absence of an explanation of why the proposed defendants were necessary. The Master is not obliged to provide reasons with respect to every potential factor. I am not satisfied that she erred in failing to directly address the issue of joinder or that her decision is clearly wrong as a result.

Conclusion

27 It is clear from the reasons that the Master considered the following factors in reaching her decision:

- the delay of bringing this matter to trial after 8 years;
- the adjournment of the second trial date to bring a motion to add the parties;
- the supporting affidavit did not provide whether the care provided by the individual nurses was negligent;
- there was no explanation for the 'huge' delay in bringing this motion;
- the nurses had not been personally involved in this litigation for seven years and the hospital has admitted it is vicariously liable for any negligence of the proposed parties; and
- there was no suggestion the hospital does not have the ability to pay any judgment.

28 These factors are appropriate considerations in the exercise of a master's discretion under the Rules. Furthermore, I am not satisfied that she failed to consider other relevant considerations in exercising her discretion. She did not draw any inference not supported by evidence.

29 New counsel may well form a different view of a case and seek to add parties even late in the proceedings; however, the court is entitled to more than new counsel's bald assertion that the proposed defendants were 'clearly involved' and were 'necessary' parties. In these circumstances, the Master was entitled to conclude, on any fair view of the balance of competing interests, that it did not advance the interests of justice to grant the motion with the attendant potential delay, on the meager explanation provided, at this late date in the proceedings.

30 As a practical reality, if new counsel seeks to add new parties so late in the proceedings, an explanation of both the delay and why the parties are necessary, may temper concerns about the lateness of the motion or dispel any concerns about whether the motion is brought for an improper purpose or simply for discovery. It would permit the court to better weigh the competing factors in the wider context of the requirement to advance the interests of timely and cost effective justice in civil disputes (rule 1.04(1)).

31 The appeal is dismissed.

32 The parties agreed that $10,000 is an appropriate quantum for this appeal. The respondent shall have costs fixed in the amount of $10,000 all inclusive.

Appeal dismissed.

7

1995 CarswellOnt 1207
Ontario Court of Appeal

Naneff v. Con-Crete Holdings Ltd.

1995 CarswellOnt 1207, [1995] O.J. No. 1377, 23 B.L.R. (2d) 286, 23 O.R. (3d) 481, 55 A.C.W.S. (3d) 86, 85 O.A.C. 29

ALEXANDER NANEFF v. CON-CRETE HOLDINGS LIMITED, SKEAD TRANSPORT LIMITED, SKEAD TRANSPORT INCORPORATED, RAINBOW CONCRETE INDUSTRIES LIMITED, GRANITE PRESTRESSED CONCRETE LIMITED, ALBONA INVESTMENTS INC., NATSCHO NANEFF a.k.a. NICK NANEFF, BORIS NANEFF and INGEBORG GINA NANEFF

Carthy, Galligan and Austin, JJ.A.

Heard: March 27-28, 1995
Judgment: May 16, 1995
Docket: Doc. CA C20548

Counsel: *J. Edgar Sexton, Q.C.* and *Larry P. Lowenstein*, for appellants.
Brian P. Bellmore and *Roger W. Proctor*, for respondent.

Subject: Corporate and Commercial

Headnote

Corporations --- Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief

Practice and procedure in actions involving corporations — On appeal — Powers and duties of appellate court — Powers being limited in reviewing remedy ordered after finding of oppression — Interference by appellate court only appropriate where trial judge making error in principle or if remedy being unjust.

Shareholders — Shareholders' remedies — Relief from oppression — Broad discretion can only be exercised to rectify oppressive conduct in relation to status of applicant as shareholder and not to advance applicant's interest as family member — Remedy must reflect reasonable expectations of parties and should rectify oppression but not punish it.

Shareholders — Shareholders' remedies — Relief from oppression — Relationships in family business being very different from those between principals in normal commercial business — Following estate freeze, two sons of founder receiving 50 per cent ownership interest in family business — One son estranged from family, removed from office and management and his income cut off — Son's share to be purchased by father and other son.

The appellant, N, founded his own business producing concrete blocks in Sudbury over forty years ago. Through N's keen business sense and hard work over the years, he developed a diversified business which grew and expanded. Most of this growth and expansion took place well before his two sons, the appellant B and the respondent A, became active in the business.

In 1977, by means of an estate freeze, N made B and A equal owners of all of the equity in the business. However, N retained complete control of the business through redeemable voting special or preference shares.

In 1989 and 1990, problems arose between N, B and their family, on the one hand, and A on the other hand. N and his family had serious concerns about A's relationship with a particular woman. A year of threats and promises, of estrangements and reconciliations, culminated in a family rupture on Christmas Day 1990. The family threw A out of the family home and removed him as an officer of the companies which comprised the family business and excluded him from management of the business. As well, A was virtually cut off from the income from the business.

This and other conduct by N, B and the family toward A was found by the trial judge to be oppressive to A within the meaning of s. 248 of the *Business Corporations Act* (Ont.) The trial judge had ordered that the business be sold publicly as a going concern with each of or any combination of N, B and A being entitled to purchase it. The Divisional Court upheld that judgment, with one variation. N and his family appealed the Divisional Court's decision with respect to the remedy ordered.

Held:

The appeal was allowed.

An appellate court's power of review of an oppression remedy ordered under s. 248(3) of the Act is quite limited. The appellate court can only interfere with the remedy if it concludes that there was an error in principle on the part of the trial judge or if the remedy in all of the circumstances was an unjust one. The fact that this was a family business could not oust the provisions of s. 248. However, the family context of the dispute had to be kept in mind when fashioning a remedy under s. 248(3), as it bore directly upon the reasonable expectations of the principals. Any remedy granted here under s. 248(3) had to be fashioned such that it was just, having regard to the considerations of a personal character which existed among the family members.

Section 248(3) gives the court a very broad discretion in the manner in which it can fashion a remedy but it can only be exercised for a very specific purpose — to rectify the oppression. The court has the power, if it finds oppression or certain other unfair conduct, to "make an order to rectify the matters complained of". As such, if a given remedy has some result other than rectifying the matter complained of, then such a remedy is not authorized by law. Another limit imposed by s. 248(2) upon the discretionary power contained in s. 248(3) is that relief can be granted only if made with respect to the person's interest as a shareholder, creditor, director or officer of the corporation. The provisions of s. 248 cannot be used to protect or to advance directly or indirectly any personal interest which the shareholder, officer or director may have.

In deciding whether there has been an oppression of a minority shareholder, the court must determine what were the reasonable expectations of that person according to the arrangements which existed between the principals. This will also have an important bearing upon the decision as to what was a just remedy in a particular case. The trial judge's finding that A ultimately expected to be an equal co-owner of the business with his brother had to be interpreted in light of two other important and intertwined considerations. First, A fully understood that until the death or voluntary retirement of N, N retained ultimate control over the business even to the extent of deciding what dividends would be paid and what would be done with any of those dividends. Second, this was a family business which had been built by N. As such, A could not reasonably have expected to control the family business while N was alive and active, nor could A have reasonably expected N's paternal bounty to continue, if N no longer considered A to be a dutiful son. It would have been quite unrealistic of A to expect that N would continue to be bountiful to him if his family ties were severed. For these reasons, A's reasonable expectations must be looked at in the light of the family relationship.

The remedy granted by the trial judge gave A something which he could never aspire to while N was alive and active — the opportunity to obtain full control of the family business. A remedy that rectifies cannot be a remedy

which gives a shareholder something that even he never could have reasonably expected. Moreover, the remedy was punitive in nature as against N insofar as it put at risk the very condition upon which N exercised his bounty in favour of his sons — his total control of the business during his active life. The Act authorizes the court to rectify oppression; it does not authorize the court to punish for it. The second error in this remedy was that it attempted to protect A's interest in the family business as a son and family member, in addition to protecting his interest as a shareholder. The remedy of public sale, which gave A the opportunity to buy the company, enabled him to obtain that control while out of N's favour. This appeared to protect much more than A's interest as a shareholder as such; it protected and advanced, A's interest as a son. Therefore, the trial judge's remedy constituted an error in principle in that it did more than rectify oppression, and it did more than protect A's interest as a shareholder in the companies.

Beyond this, the remedy was also unjust to N. While no one could disparage the productive and devoted work which A put into the business, A's contribution paled when compared with that of N's contribution over forty years. The effect of the relief granted to A was to put N in the position where he was just another person, equal to A, who was entitled to buy the business which he had himself founded and built from nothing. The remedy jeopardized something which A knew was always to be his father's, the right to ultimate control of the business. The remedy gave to A the possibility of taking control of the business, something he knew he could never have during N's lifetime. As such, the remedy was unjust.

The just remedy in this case was that N and B would acquire A's shares of the companies at fair market value, without minority discount. This remedy, together with certain of the other remedies ordered by the trial judge, would have the effect of fully compensating A for the value of the equity given to him by N and for his own contributions to the business. The value of his shares would reflect the success of the business and A's contribution toward that success, as well as the value of the gift of equity which he had received from N. This remedy would put A, insofar as money can, in the position which he would have been in had he not been ejected. It would not give A an opportunity to which he had no reasonable expectation, nor would it put at risk N's right to ultimate control which A knew was a condition of N's gift of equity. The remedy would protect A's interest as a shareholder.

The trial judge awarded A his costs of the trial on a solicitor and client basis. A very large part of the trial involved an attempt by the appellants to defeat A's claim of oppression and to prove that A's job performance and personal life justified his expulsion from the family business. That position greatly prolonged the trial and must have been calculated to humiliate A. Notwithstanding the disagreement with the trial judge upon the appropriate remedy in this case, the trial judge's order of costs at trial should not be interfered with because of that stance by the appellants on the issue of oppression at trial. However, the appellants were entitled to their costs of the appeal because they succeeded on the remedy issue and they did not maintain their untenable defence to the claim of oppression.

Annotation

One usually reads of unfortunate family break-ups in family law cases. This appeal demonstrates that they can also occur in commercial cases.

Thus does Justice Galligan of the Ontario Court of Appeal began his reasons for judgment. The *Naneff* case on appeal is noteworthy for at least four reasons:

(i) it is illustrative of the growing number of family enterprise disputes that are the subject of reported litigation;

(ii) it demonstrates one of the outer boundaries of the oppression remedy: with due allowance to reflect the reasonable expectations of parties in the context of a family business, the remedy is to be granted only in accordance with the same principles as apply in a non-family enterprise setting;

(iii) it confirms the convergence of the "just and equitable" winding up jurisprudence with the statutory oppression remedy cases; and

(iv) it contains a restatement of the applicable standard of appellate review and shows the deference which the Ontario Court of Appeal accords to the decisions of one of its commercial judges.

1. *Family Enterprise Disputes: Is There an Alternative?*

Increasingly, family enterprise disputes have achieved notoriety, perhaps none greater in the Canadian setting than the McCain family dispute. However, family acrimony that results in litigation is not restricted to dynasties of the highly rich and famous. The recent case of *Kowal v. Bubna* [1] involved an action for the repayment of a $5,000 family loan which was to be conditional on the borrower's becoming financially able to make the repayment. The case of *Borsook v. Broder* [2] involved an inability of a brother and sister to agree on expansion of the family business. The *Safarik v. Ocean Fisheries Ltd.* [3] case, like *Naneff* itself, involved a complainant who was shut out from the enterprise, after a falling out amongst family members.

Apart from the interesting questions of substantive law that these disputes bring forward, they raise in a way that almost no other class of disputes can the question why these families are in court at all. Why did their advisors not put in place from the outset of the business arrangements a comprehensive ADR clause that would permit facilitation, mediation and, only if necessary, binding arbitration? With the possible exception of technology disputes involving valuable confidential information, there can be no other class of business arrangement that cries out so strongly for the settlement of disputes outside the glare of publicity of the courtroom. The good news is that it is never too late to make ADR a part of the family enterprise.

2. *Oppression Remedy in the Family Setting: Business as Usual*

The family business in corporate form is clearly subject to the oppression provisions of the corporation statutes. Oppression is still oppression, even within the confines of the family enterprise. However, *Naneff* is also a useful reminder that these statutory remedial provisions are directed to rectifying oppression, not to punishing it, and that the relief granted must relate to a complainant's status as shareholder, for example, as opposed to his or her interest as a family member. Families being what they are, circumstances change. Today's favourite may be tomorrow's black sheep. It ought not to be the function of corporate law to disturb this dynamic; rather, its function is to reflect what was the reasonable expectation of the parties, in their particular circumstances, when they put the arrangements into effect.

3. *The Convergence of "Just and Equitable" and the Oppression Remedy*

In fashioning what it considers to be the precisely appropriate result, the Ontario Court of Appeal bases its key finding on what were the reasonable expectations of the principals, taken in the context of a family enterprise. As justification for this approach, the Court cites the seminal "just and equitable" case from England, *Ebrahimi v. Westbourne Galleries Ltd.* [4] In this way, the Court is then free to narrow its remedy, in effect, to put the complainant in the position he would have been in, if the oppressive conduct had not taken place, but still leaving open the possibility that the father later might decide to change his plans for dividing his estate.

4. *Standard of Appellate Review and Deference to Trial Judgment*

It is not surprising that an appellate court would restate the standard of review that it considers to be applicable, namely a limited scope of review invoked only when it detects an error in principle or if the remedy ordered below is unjust. However, it is interesting that in invoking this right of review an appellate court would be as highly solicitous as it was of the findings of the trial judge. The "excellent" reasons for judgment of the trial judge were

noted by the Court of Appeal, as well as the fact that they "show great sensitivity for the feelings of all of the [Naneff] family members". Further, the Court of Appeal noted its "great deference" to Justice Blair, "who is a distinguished jurist with extensive commercial experience". Presumably these accolades reflect well on the Commercial List as an institution, of which Justice Blair was a sitting member at trial.

Richard B. Potter, Q.C.

Table of Authorities

Cases considered:

Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.) — *applied*

H.R. Harmer Ltd., Re, [1959] 1 W.L.R. 62, [1958] 3 All E.R. 689 (C.A.) — *applied*

Mason v. Intercity Properties Ltd. (1987), 37 B.L.R. 6, 59 O.R. (2d) 631, 38 D.L.R. (4th) 681, 22 O.A.C. 161 (C.A.) [leave to appeal to S.C.C. refused (1987), 62 O.R. (2d) ix (note), 28 O.A.C. 320 (note), 87 N.R. 73 (note) (S.C.C.)]*applied*

Mathers v. Mathers (1992), 113 N.S.R. (2d) 284, 309 A.P.R. 284 (T.D.), additional reasons at (1992), 113 N.S.R. (2d) 284 at 310, 309 A.P.R. 284 at 310 (T.D.), reversed (1993), 16 C.P.C. (3d) 16, 123 N.S.R. (2d) 14, 340 A.P.R. 14 (C.A.) — *referred to*

Stone v. Stonehurst Enterprises Ltd. (1987), 80 N.B.R. (2d) 290, 202 A.P.R. 290 (Q.B.) — *applied*

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.), additional reasons at (May 7, 1991), Doc. RE 1305/90 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) — *applied*

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16 —

s. 248 [am. S.O. 1994, c. 27, s. 71(33)]

s. 248(2)

s. 248(3)

s. 248(3)(*j*)

Business Corporations Act, S.N.B. 1981, c. B-9.1 —

s. 166(2)

Companies Act, 1948 (U.K.), 11 & 12 Geo. 6, c. 38 —

s. 222

Courts of Justice Act, R.S.O. 1990, c. C.43.

Appeal from judgment reported at (1994), 16 B.L.R. (2d) 169, 19 O.R. (3d) 691, 73 O.A.C. 334 (Ont. Div. Ct.) allowing in part appeal from judgment reported at (1993), 11 B.L.R. (2d) 218 (Ont. Gen. Div. [Commercial List]), additional reasons at (1993), 11 B.L.R. (2d) 218 at 260 (Ont. Gen. Div. [Commercial List]), further additional reasons at (1993), 11 B.L.R. (2d) 218n (Ont. Gen. Div. [Commercial List]), allowing action under oppression remedy provisions of *Business Corporations Act* (Ont.).

The judgment of the court was delivered by *Galligan J.A.*:

1 One usually reads of unfortunate family break-ups in family law cases. This appeal demonstrates that they can also occur in commercial cases.

2 The appellants appeal, with leave, from a judgment of the Divisional Court ((1994), 19 O.R. (3d) 691) upholding, with one variation, a judgment in the respondent's favour given at trial by Blair J. ((1993), 11 B.L.R. (2d) 218). The respondent's application was for relief under the oppression provisions contained in s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"). The text of s. 248 is set out as a Schedule to these reasons. Blair J. found oppression by the appellants and granted remedies to the respondent. The appellants did not contest the findings of oppression before the Divisional Court and they do not do so before this court.

A. The Circumstances

3 The facts and the evidence upon which they were found are set out in great detail in the very full reasons for judgment delivered by Blair J. The reasons for judgment show great sensitivity for the feelings of all of the family members. It will do a disservice to those excellent reasons when I briefly summarize the facts. But it is necessary to do so in order to put the issues in the appeal in their factual context.

4 This case involves a family business operated through a number of different companies. For the purposes of my decision, it is not necessary to outline the details of how the companies are owned and controlled nor the way in which they are inter-related. Except where it becomes necessary to refer to specific details of the companies and their holdings, I will refer to them comprehensively as the business, or the family business.

5 Natscho Naneff is the father of the family. In these reasons, I will refer to him as Mr. Naneff. Ingeborg Gina Naneff is the other and I will refer to her as Mrs. Naneff. Alexander Naneff, the respondent in the appeal, is the elder of Mr. and Mrs. Naneff's two children. He is 36 years of age. In the factums filed, he has been referred to as Alex. I will also refer to him by that shortened name. Boris Naneff is now 33 years of age and is the second Naneff son.

6 Mr. Naneff came to Canada from Bulgaria in 1951. He was a graduate civil engineer but because his European degree was not recognized here and because of his limited English, he could not work in his chosen profession. He found work at Inco and settled in Sudbury. He saved his money and after a short time started his own business producing concrete blocks in Sudbury. Through his keen business sense and hard work, Mr. Naneff's enterprise thrived. His business expanded both geographically and in terms of product. It now includes a number of concrete block plants and ready-mix plants in Dowling, Espanola, Elliott Lake, Blind River, Sturgeon Falls and South River. The original plant in Sudbury has been modernized and expanded to include a precast concrete plant. The business either owns or has rights to extract aggregates from gravel pits and quarries in Sudbury, Elliott Lake and North Bay. In North Bay, the business has two concrete block plants, a precast plant and a ready-mix plant. In addition to the original plant in Sudbury, it has a concrete pipe plant and manufactures prestressed hollow core building slabs. It also has a second ready-mix plant and a Kwik-Mix manufacturing plant. Most of this growth and expansion took place well before Alex and Boris became active in the business. In the last year in which Alex was involved in the business, the gross revenues of only some of its companies were well in excess of $23 million.

7 Mr. Naneff has demonstrated a business acumen that is rare in the business world of the 1980s and 1990s. Throughout the history of the business, he has refused to borrow from outside sources and has financed all of the expansion by retaining profits in the business. At the time of the trial, the family business was debt free. Blair J. said (at p. 227):

> Mr. Naneff can be justifiably proud of the thriving business which he has created and fashioned into such a successful enterprise.

8 It was Mr. Naneff's passionate desire that his sons come into the business with him and succeed him in it when he died or chose to retire. To that end, he had both of his sons work in the business, particularly after school, on weekends and during school vacations. He showered his bounty upon them in the form of educational opportunities, flying lessons, vacations, powerful cars, snowmobiles and boats.

9 In 1977, when Alex and Boris were still in high school, Mr. Naneff took the step which is at the root of these unhappy proceedings under the OBCA. By means of an estate freeze with respect to one of his companies, he made his two sons equal owners of all of the common shares of the company through which the business was then being operated. Reorganization took place in 1987 but did not change the effect of the estate freeze.

10 While he gave the equity in his business to his sons, he did not give them control. In fact he retained complete control of the business through redeemable voting special or preference shares. Those shares gave him the right, which he has never ceased to exercise, of complete and final operating control and the right to declare what dividends will be paid, when they will be paid, and to whom they will be paid. He has always directed what the recipients of the dividends would do with them. The arrangement ensured that he would have that control for as long as he lived. It is not necessary to set out the details of the estate freeze; what is important, however, is that the effect of it was that Mr. Naneff gave the equity of his business to his sons but retained full, final and ultimate control over it until he died.

11 Alex entered the business fulltime in 1981 and Boris followed him into the business in 1985. They both undertook and executed important responsibilities. There is no doubt that both sons worked hard and effectively. Blair J. found that the business became "a team effort" between father and sons and that it prospered during the years that the three of them worked together. Blair J. also found that Mr. Naneff "remained — and still remains — the ultimate decision maker in these operations" (at p. 229).

12 In 1989 and 1990, dark clouds appeared over this happy family and its prosperous business. Alex's parents began to have legitimate parental concerns about his lifestyle when he was not at work. Coupled with that concern was what the parents considered a far more serious development. Alex began to keep company with a woman of whom Mr. and Mrs. Naneff ardently disapproved. It is unnecessary to recount the details of the parents' attempts to have Alex change his ways nor of Alex's reaction to them. A year of threats and promises, of estrangements and reconciliations, culminated in a family rupture on Christmas Day 1990 which Blair J. described as immediate, traumatic, and unfortunately, lasting (at p. 238):

> Alex was thrown out of the family home. Boris physically threw some of Alex's belongs after him. He was told that he was out of Rainbow [the family business], and that the family was going to teach him a lesson.

The other family members followed through on the threat. As soon as the necessary directors' meetings could be held and the paperwork completed, Alex was removed as an officer of all of the companies comprising the family business and ordered to stay off the business premises. He was excluded from all participation in and management of the business. He was virtually cut off from income from it. Until this litigation was started and an interim order was made in November 1992, all Alex received from the business was $35,000.00.

13 This conduct, and other conduct by Mr. and Mrs. Naneff and Boris toward Alex after December 25, 1990, was found by Blair J. to be oppressive to Alex within the meaning of s. 248 of the OBCA. No appeal is taken, nor could it successfully be taken, from that finding.

14 Before turning to a consideration of the remedies granted to Alex I think this review of the background should be completed by the following extract from the reasons for judgment given by Blair J. (at p. 251):

> The desire — understandable and genuine as it may be — to chastise and correct the actual and perceived failing of a son or brother in his personal life, is not a basis for ignoring the duties and obligations which the parent and sibling owe in their corporate capacities to the son and brother in his corporate capacity. In circumstances such as these, the strictures of the OBCA and of corporate law override the family desires. In their corporate capacity as directors they are required to act in good faith and in the best interests of the company, and not for some extraneous purpose ... [references omitted].
>
> Here, the Naneffs may have felt that their interests as a family in dealing with Alex's perceived failings and the interests of the Rainbow Group in this respect were one and the same. They are not. Alex's personal life had no adverse effect on his business/company life ...

15 I agree that family differences can never justify oppression under s. 248 of the OBCA.

B. The Remedies Ordered by Blair J.

16 The judgment at trial contained a number of specific remedies. The fundamental and most important remedy, contained in paragraph 9, was that the business, i.e. those corporations which comprise it, be sold publicly as a going concern with each of or any combination of Mr. Naneff, Alex and Boris being entitled to purchase it. There were remedies contained in paragraphs 4 to 7 inclusive of the judgment which set aside certain changes in corporate structure and other corporate arrangements which were made after Alex was ejected. Those remedies were ordered in an effort to restore the corporate arrangements to the state which they were in at the time of Alex's ejection. One remedy ordered the payment to Alex of his outstanding shareholder's loans to two of the corporations together with interest. There were two other ancillary remedies which I will mention later. I propose to discuss those remedies and give my opinion with respect to their validity.

1. Public Sale of the Companies Forming the Business as a Going Concern

17 Before discussing the merits of the challenge to this remedy, I wish to make brief reference to the principles which guide an appellate court in its review of a remedy ordered under s. 248(3) of the OBCA. Section 248(3) empowers a court upon a finding of oppression to make any order "it thinks fit". When that broad discretion is given to a court of first instance, the law is clear that an appellate court's power of review is quite limited. In *Mason v. Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 (C.A.), Blair J.A. set out the governing principle at p. 636:

> The governing principle is that such a discretion must be exercised judicially and that an appellate court is only entitled to interfere where it has been established that the lower court has erred in principle or its decision is otherwise unjust.

18 I approach this issue, therefore, keeping in mind that this court can only interfere with the remedy if it concludes that there was an error in principle on the part of Blair J. or if the remedy in all of the circumstances is an unjust one. It cannot be interfered with, as Carruthers J. said (at p. 701) when giving the judgment of the Divisional Court, "simply because someone else might prefer a different way of going about things". With great deference to Blair J., who is a distinguished jurist with extensive commercial law experience, I regret to say that I have concluded, in the circumstances of this case, that the remedy of public sale of this business amounts to an error in principle and is unjust to Mr. Naneff.

19 At the outset I think it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the courts below have correctly held,

the fact that this is a family business cannot oust the provisions of s. 248 of the OBCA. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under s. 248(3) as it bears directly upon the reasonable expectations of the principals.

20 I have come to that conclusion after considering certain observations made by Lord Wilburforce during the course of his speech in *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.). The statute under consideration, the *Companies Act*, 1948 s. 222, authorized the court to wind-up a company if it was "just and equitable" to do so. In my opinion, the words "just and equitable" convey the same meaning as the word "fit" in s. 248(3) of the OBCA. Lord Wilburforce explained that when this jurisdiction is being exercised, the relationship between the principals should not be looked at from a technical legal point of view; rather the court should examine and act upon the real rights, expectations and obligations which actually exist between the principals. He said at p. 379:

> The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that *there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure*. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. *It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another*, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. [Emphasis added.]

21 Thus, I think any remedy granted under s. 248(3) in this case had to be fashioned so that it was just, having regard to the considerations of a personal character which existed among Mr. Naneff, Alex and Boris.

22 The provisions of s. 248(3) give the court a very broad discretion in the manner in which it can fashion a remedy. Broad as that discretion is, however, it can only be exercised for a very specific purpose; that is, to *rectify* the oppression. This qualification is found in the wording of s. 248(2) which gives the court the power, if it finds oppression or certain other unfair conduct, to "make an order to rectify the matters complained of". Therefore, the result of the exercise of the discretion contained in s. 248(3) must be the rectification of the oppressive conduct. If it has some other result the remedy would be one which is not authorized by law. I agree with the opinion expressed by Professor J.G. MacIntosh in his paper "The Retrospectivity of the Oppression Remedy" (1987-88), 13 Can. Bus. L.J. 219 at 225:

> The private law character of the enactment strengthens the argument, for in seeking to redress equity between private parties the provision *does not seek to punish but to apply a measure of corrective justice*. [Emphasis added.]

23 That opinion was referred to with approval by Glube C.J. in *Mathers v. Mathers* (1992), 113 N.S.R. (2d) 284 (T.D.) at 304, rev'd on other grounds (1993), 123 N.S.R. (2d) 14 (N.S.C.A.).

24 My analysis of s. 248(2) indicates that there is another limit imposed by law upon the apparently unlimited discretionary powers contained in s. 248(3). Section 248(2) provides that when the court is satisfied that in respect of a corporation there is certain specified conduct "that is oppressive, or unfairly prejudicial to or that unfairly disregards the interest of *any security holder*, creditor, *director*, or *officer* of the corporation, the court may make an order to rectify the matters complained of." [Emphasis added.] The expression "security holder" includes a shareholder. Thus, the provision only deals with the interest of a shareholder, creditor, director or officer. It follows from a plain reading of the provision that any rectification of a matter complained of can only be made with respect to the person's interest as a shareholder, creditor, director or officer.

25 In *Stone v. Stonehurst Enterprises Ltd.* (1987), 80 N.B.R. (2d) 290 (Q.B.) Landry J. was called upon to interpret s. 166(2) of the New Brunswick *Business Corporations Act*, whose provisions are the same as s. 248(2) of the OBCA.

The company in question was a family company run as a family business. The company decided to sell its assets. A minority shareholder in his personal capacity wanted to buy the assets and bid for them. When the majority shareholder exercised her controlling interest and sold the assets to someone else, the minority shareholder attacked the transaction as being oppressive to him as a shareholder. Landry J. held that the Act protected a person's interest as a shareholder "as such". Basing his opinion on the judgment of Jenkins L.J. in *H.R. Harmer Ltd., Re*, [1958] 3 All E.R. 689 at 698 (C.A.), Landry J. said at p. 305:

> [34] It must be remembered, and it is very important in this case, that it is only the interest of a shareholder *as such*, or of a director or officer *as such* that is protected by this section.
>
> [35] The applicant must establish that his interest *as a shareholder* has been affected. He may of course have other interests, such as being a prospective purchaser of the assets of the company. But it is only the applicant's interest as a shareholder which we must be concerned with in applying s. 166. [Emphasis in original.]

26 I agree with, and adopt Landry J.'s analysis as a correct statement of the law. Persons who are shareholders, officers and directors of companies may have other personal interests which are intimately connected to a transaction. However, it is only their interests as shareholder, officer or director *as such* which are protected by s. 248 of the OBCA. The provisions of that section cannot be used to protect or to advance directly or indirectly their other personal interests.

27 I conclude, therefore, that the discretionary powers in s. 248(3) OBCA must be exercised within two important limitations:

> i) they must only *rectify* oppressive conduct
>
> ii) they may protect only the person's interest as a shareholder, director or officer *as such*.

28 The law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between the principals. The cases on this issue are collected and analyzed by Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.) aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.). I agree with his comment at pp. 185-86:

> Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

29 The determination of reasonable expectations will also, in my view, have an important bearing upon the decision as to what is a just remedy in a particular case.

30 The finding made by Blair J. that Alex expected ultimately to be an equal co-owner of the business with his brother cannot be challenged. However, it must be interpreted in the light of two other important and intertwined considerations. The first consideration is that Alex fully understood that until death or voluntary retirement his father retained ultimate control over the business even to the extent of deciding what dividends would be paid and what would be done with any of those dividends. The second consideration is that this was a family business which had been built by his father.

31 The importance of the first of those considerations is that Alex knew that until his father died or retired he could under no circumstances have any right to have or even to share absolute control of the business. Therefore, under no circumstances could Alex's reasonable expectations include the right to control the family business while his father was alive and active. The second consideration is important because, while Alex expected that his father would give him an equal share in the control of the business upon his death or retirement, that expectation was based upon his belief that his father would continue to be bountiful to him in the future. It should have been apparent to Alex that he could not

expect that paternal bounty to continue if his father for good reason or bad no longer considered him to be a dutiful son. It would have been quite unrealistic of Alex to expect that his father would continue to be bountiful to him if his family ties were severed. Alex knew that the reason for his father giving him one-half of the equity in the family business was his father's desire for his sons to work with him in his business. He must also have known that it would be impossible for him, Mr. Naneff and Boris to work together in the business as a family if the family bonds ceased to exist. It is for those reasons that Alex's reasonable expectation must be looked at in the light of the family relationship.

32 It is my view that the first error in principle in this remedy is that it did more than simply rectify oppression. As I noted above, the OBCA authorizes a court to rectify oppressive conduct. I think the words of Farley J. in *Ballard*, supra, at p. 197 are very appropriate in this respect:

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. *The job for the court is to even up the balance, not tip it in favour of the hurt party*. I note that in *Explo [Explo Syndicate v. Explo Inc.*, a decision of the Ontario High Court, released June 29, 1989], Gravely L.J.S.C. stated at p. 20:
>
> > In approaching a remedy the court, in my view, should interfere as little as possible and *only to the extent necessary to redress the unfairness*.
>
> [Emphasis added.]

33 The order of Blair J. gave Alex something which he knew he could never have while his father was alive and active — the opportunity to obtain full control of the family business. A remedy that rectifies cannot be a remedy which gives a shareholder something that even he never could have reasonably expected.

34 Moreover, I am unable to view the remedy as anything other than a punitive one towards Mr. Naneff. There was never any doubt among the three men that Mr. Naneff would exercise ultimate control of the family business until he died or retired. Mr. Naneff solidified his right of complete control by the corporate arrangements he put in place at the time of the estate freeze and which he kept in place to the knowledge of his sons throughout the time that the three of them worked together. It is not the task of any court of law to judge the family dispute or to rule upon the justice of the explusion of Alex from the family. However, I am unable to accept as anything other than punitive, a remedy which puts at risk the very condition upon which Mr. Naneff exercised his bounty in favour of his sons — his total control of the business during his active life. The OBCA authorizes a court to rectify oppression; it does not authorize the court to punish for it.

35 The second error in this remedy is that it attempts to protect Alex's interest in the family business as a son and family member, in addition to protecting his interest as shareholder *as such*. As I mentioned above, it is my view that Alex's expectation of ultimately obtaining an equal share of the control of the business with Boris was based upon his expectation of being the continuing object of his father's bounty. That in turn depended upon him remaining in his father's favour and remaining in his father's eyes a member of the family. The remedy of public sale, which gives Alex the opportunity to buy the company, enables him to obtain that control while out of his father's favour. This appears to protect much more than his interest as a shareholder as such; it protects, indeed it advances, his interest as a son.

36 It is my view, therefore, that the remedy imposed in this case constituted an error in principle in that it did more than rectify oppression, and it did more than protect Alex's interest as a shareholder as such in the companies.

37 As well as concluding that the remedy granted to Alex was wrong in principle, it is my view that the remedy was unjust to Mr. Naneff. By the time of Alex's ouster from the business, Mr. Naneff had devoted almost 40 years of his life to creating, nurturing and building the business into a very significant enterprise. Instead of using profits from the business to acquire other personal assets, he used them to finance the growth and expansion of the business. There was never any doubt in the minds of his sons that their father gave them their equity positions upon the understanding that

he would retain ultimate control as long as he wanted to exercise it. No one can disparage the productive and devoted work which Alex put into the business. But his nine years of contribution pales to almost insignificance when compared with that of his father's contribution.

38 The effect of the relief granted to Alex is to put Mr. Naneff in the position where he is just another person, equal to Alex, who is entitled to buy the business which he had himself founded and built from nothing. The remedy jeopardizes something which Alex knew was always to be his father's, the right to ultimate control of the business. The remedy gives to Alex the possibility of taking control of the business, something he knew he could never have during his father's lifetime. Having regard to the circumstances of this case this remedy, which jeopardizes the right which everyone knew belonged to Mr. Naneff and which gives Alex the opportunity to take away that right, strikes me as unjust.

39 At trial there were three possible fundamental remedies suggested to the trial judge. One of them was properly rejected out of hand. No more need be said about it. The alternative remedy to public sale of the business as a going concern was that Mr. Naneff and Boris acquire Alex's shares of the companies at fair market value, without minority discount. In my view that was the just remedy in this case. While I find that Mr. Naneff's oppressive conduct should not endanger his right to control the business, neither should he be able to take away what he had given to Alex, or to take away what Alex had contributed to the business. This remedy, together with certain of the other remedies ordered by Blair J., would have had the effect of fully compensating Alex for the value of the equity given to him by his father and for his own contributions to the business. The value of his shares would reflect the success of the business and Alex's contribution toward that success, as well as the value of the gift of equity which he had received from his father. When I discuss the remedy respecting the shareholders' loans, it will be seen that when the business was ordered to repay Alex the amounts of his loans, in fact he was receiving his share of the operating profits of the business over previous years.

40 This remedy would be just because it will put Alex, in so far as money can, in the position which he would have been in had he not been ejected. It would not give him an opportunity to which he had no reasonable expectation. It would not put at risk Mr. Naneff's right to ultimate control which Alex knew was a condition of his father's gift of equity. The remedy would protect Alex's interest as a shareholder as such.

41 It is my opinion that paragraph 9 of the trial judgment, which provides for the sale of the appellant companies on the open market as a going concern, cannot be sustained. In its place, I would order that the appellants acquire Alex's shares of the companies at fair market value fixed as of the date of his ouster, December 25, 1990. It is conceded on behalf of the appellants that it would not be fair to apply a minority discount to the market value of Alex's shares. I agree and would order that there be no minority discount when fixing the fair market value of his shares. Alex is also entitled to pre-judgment interest on the value of his shares as provided in the *Courts of Justice Act* from December 25, 1990.

42 In the event that the parties cannot agree upon the value of the shares or to having the value of them fixed in some other way, I would direct a new trial restricted to fixing the value of Alex's shares in the appellant companies as of December 25, 1990. In my view the costs of such a new trial ought to be in the discretion of the judge presiding at it.

2. The Remedies Contained in Paragraphs 4 to 7 Inclusive of the Trial Judgment

43 These remedies all relate to steps taken after December 25, 1990. They are directed to returning the companies to their status as of that date. Because I would set aside the remedy of public sale and direct that the appellants acquire Alex's shares as of December 25, 1990, those remedies are no longer relevant. I would, therefore, set them aside.

3. Lansing Avenue

44 Blair J. directed that Mr. Naneff convey to Alex a certain property on Lansing Avenue in Sudbury. That remedy was varied by the Divisional Court. No appeal was taken from that remedy as varied. It is, therefore, unnecessary to say anything more about it except that I would uphold the judgment of the Divisional Court in so far as it maintained that remedy in its varied form.

4. Repayment of Alex's Outstanding Shareholder's Loans to Rainbow Concrete Industries Limited and to Skead Transport Inc.

45 The only issue now outstanding about this remedy is the date upon which interest on the loans ought to be begin to run. Blair J. held that interest ought to be paid upon them from April 1, 1992. The argument that a later date ought to have been chosen is not persuasive. I would not interfere with the date chosen by Blair J.

46 Strictly speaking, while this is all that need be said about this issue, I think I should outline the way in those loans were created. When Mr. Naneff was of the opinion that sufficient profits had been earned from the business, he would direct that dividends be paid equally to his sons who would then pay the income tax upon them. After the taxes were paid, the amount of the dividends remaining were required to be loaned back by Alex and Boris to one of the companies making up the business. It was out of those transactions that the substantial loan balances were generated in Alex's account. Alex's loan to Rainbow Concrete Industries Limited amounted to just under $835,000 on December 25, 1990 and his loan to Skead Transport Inc. was just under $100,000. Both Alex and Boris had all of their personal expenses of every kind paid by the business and those payments were charged against their loan accounts. In addition, each drew a very modest salary from the business. Thus, it can be seen that the loan balances were Alex's share of profits earned by the business over a number of years. When the appellants were ordered to pay Alex's outstanding shareholders' loans he was being paid his share of profits accumulated in the business.

5. Compensation Akin to Damages for Wrongful Dismissal

47 Blair J. found that when dismissal is part of an overall pattern of oppression the provisions of s. 248(3)(*j*) of the OBCA authorize payment of compensation to the aggrieved person. He ordered monetary compensation in the amount of $200,000.00. While no challenge is taken to the making of an award, the amount of it is in dispute.

48 It is my view that the evidence justified an award of compensation in the amount of $200,000.00 in this case. I would not interfere with that assessment.

C. Costs

1. Costs of the Trial

49 Blair J. awarded the respondent his costs of the trial on a solicitor and client basis. It is apparent that a very large part of this trial involved an attempt by the appellants to defeat the claim of oppression and to prove that Alex's job performance and personal life justified his expulsion from the family business. Without a doubt, that stance must have greatly prolonged the trial and must have been calculated to humiliate Alex. While I respectfully disagree with Blair J. upon the appropriate remedy in this case, the stance of the appellants on the issue of oppression convinces me that his order of costs at trial should not be interfered with.

2. Costs of the Appeals

50 Because I think the appellants should succeed on the remedy issue and because they have not maintained their untenable defence to the claim of oppression, they are entitled to their costs of the appeals. I would therefore allow them their costs of the appeal to the Divisional Court and to this court, including the costs of the motion for leave to appeal.

3. Costs of the New Trial

51 As indicated above I think that the costs of a new trial, if one is held, should be in the discretion of the judge presiding at it.

D. Disposition

52 For the reasons set out above I would dispose of this appeal on the following basis:

1. I would allow the appeal from the Divisional Court and set aside its judgment except in so far as it upholds with a variation the order of Blair J. relating to the Lansing Avenue property.

2. I would strike out paragraphs 4 to 7 inclusive and paragraph 9 of the judgment of Blair J. and in their place I would order that the respondents acquire all of the shares which the respondent owns in any of the companies making up the family business at fair market value as of December 25, 1990 without minority discount together with pre-judgment interest as provided in the *Courts of Justice Act* from that date.

3. That a new trial be ordered to fix the value of the respondent's shares as provided for in paragraph 2. above. The costs of the new trial to be in the discretion of the judge presiding at it.

4. That in all other respects the judgment of Blair J. be affirmed.

5. That the appellants should have their costs of the appeal to the Divisional Court and to this court including the motion for leave to appeal.

. . . . .

Appeal allowed.

APPENDIX

Excerpt from the Ontario Business Corporations Act, R.S.O. 1990, c. B.16

248. — (1) A complainant, the Director and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(*a*) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

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

(*c*) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

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

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(*a*) an order restraining the conduct complained of;

(*b*) an order appointing a receiver or receiver-manager;

(*c*) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(*d*) an order directing an issue or exchange of securities;

(*e*) an order appointing directors in place of or in addition to all or any of the directors then in office;

(*f*) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(*g*) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(*h*) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(*i*) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(*j*) an order compensating an aggrieved person;

(*k*) an order directing rectification of the registers or other records of a corporation under section 250;

(*l*) an order winding up the corporation under section 207;

(*m*) an order directing an investigation under Part XIII be made; and

(*n*) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(*a*) the directors shall forthwith comply with subsection 186(4); and

(*b*) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3)(f) or (g) if there are reasonable grounds for believing that,

(*a*) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(*b*) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Footnotes

1 (1994), 16 B.L.R. (2d) 255, 29 C.P.C. (3d) 92 (Ont. Gen. Div.).

2 (1994), 16 B.L.R. (2d) 265 (Ont. Gen. Div. [Commercial List]).

3 (1995), 22 B.L.R. (2d) 1, 12 B.C.L.R. (3d) 342, 64 B.C.A.C. 14, 105 W.A.C. 14 (C.A.) additional reasons at (1996), 00 B.C.L.R. (3d) 000 (C.A.).

4 [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.).

End of Document

8

2008 SCC 69
Supreme Court of Canada

BCE Inc., Re

2008 CarswellQue 12595, 2008 CarswellQue 12596, 2008 SCC 69, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 172 A.C.W.S. (3d) 915, 301 D.L.R. (4th) 80, 383 N.R. 119, 52 B.L.R. (4th) 1, 71 C.P.R. (4th) 303, J.E. 2009-43

BCE Inc. and Bell Canada (Appellants / Respondents on cross-appeals) and A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc. A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited (Respondents / Appellants on cross-appeals) and Computershare Trust Company of Canada and CIBC Mellon Trust Company (Respondents) and Director Appointed Pursuant to the CBCA, Catalyst Asset Management Inc. and Matthew Stewart (Interveners)

6796508 Canada Inc. (Appellant / Respondent on cross-appeals) and A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc. A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited (Respondents / Appellants on cross-appeals) and Computershare Trust Company of Canada and CIBC Mellon Trust Company (Respondents) and Director Appointed Pursuant to the CBCA, Catalyst Asset Management Inc. and Matthew Stewart (Interveners)

McLachlin C.J.C., Bastarache [*], Binnie, LeBel, Deschamps, Abella, Charron JJ.

Heard: June 17-20, 2008
Judgment: December 19, 2008

Docket: 32647

Proceedings: additional reasons to *BCE Inc., Re* (2008), 2008 CarswellQue 5401, 2008 CarswellQue 5402 (S.C.C.); reversing *BCE Inc., Re* (2008), 43 B.L.R. (4th) 157, 2008 CarswellQue 4179, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935 (C.A. Que.); varying *CIBC Mellon Trust Co. v. Bell Canada* (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898, 2008 CarswellQue 1805, [2008] R.J.Q. 1029 (C.S. Que.); and varying *Computershare Trust Co. of Canada v. Bell Canada* (2008), 2008 CarswellQue 2226, 43 B.L.R. (4th) 69, 2008 QCCS 899 (C.S. Que.); and reversing *BCE Inc., Re* (2008), 2008 CarswellQue 2227, 43 B.L.R. (4th) 1, 2008 QCCS 905, [2008] R.J.Q. 1097 (C.S. Que.); affirmed *BCE Inc., Re* (2008), 2008 CarswellQue 2883 (C.A. Que.); and affirming *Addenda Capital inc v. Bell Canada* (2008), 2008 CarswellQue 2228, 43 B.L.R. (4th) 135, 2008 QCCS 906 (C.S. Que.); and affirming *Aegon Capital Management Inc. v. BCE inc.* (2008), 2008 CarswellQue 2229, 43 B.L.R. (4th) 79, 2008 QCCS 907, [2008] R.J.Q. 1119 (C.S. Que.)

Counsel: Guy Du Pont, Kent E. Thomson, William Brock, James Doris, Louis-Martin O'Neill, Pierre Bienvenu, Steve Tenai, for Appellants / Respondents on Cross-Appeals, BCE Inc. and Bell Canada
Benjamin Zarnett, Jessica Kimmel, James A. Woods, Christopher L. Richter, for Appellant / Respondent on Cross-Appeals, 6796508 Canada Inc.
John Finnigan, John Porter, Avram Fishman, Mark Meland, for Respondents / Appellants on Cross-Appeals, Group of 1976 Debentureholders and Group of 1996 Debentureholders
Markus Koehnen, Max Mendelsohn, Paul Macdonald, Julien Brazeau, Erin Cowling, for Respondent / Appellant on Cross-Appeals, Group of 1997 Debentureholders
Robert Tessier, Ronald Auclair (written), for Respondent, Computershare Trust Company of Canada
Christian S. Tacit, for Intervener, Catalyst Asset Management Inc.
Raynold Langlois, Q.C., Gerald Apostolatos, for Intervener, Matthew Stewart

Subject: Corporate and Commercial; Civil Practice and Procedure; Contracts; Estates and Trusts; Property

Headnote

Business associations --- Specific corporate organization matters — Directors and officers — Fiduciary duties — General principles

Large telecommunications corporation, BCE, received offer from group led by Ontario Teachers Pension Plan Board and financed in part by assumption by Bell Canada, subsidiary of BCE, of $30 billion debt, to purchase all of BCE's shares — On June 30, 2007, group and BCE entered into definitive agreement and on September 21, 2007, BCE's shareholders approved arrangement in proportion of nearly 98 percent — Leveraged buyout was opposed by debentureholders of Bell Canada on ground that increased debt contemplated by purchase agreement would reduce value of their bonds — Superior Court found arrangement fair, approved it and dismissed debentureholders' claims for oppression — Quebec Court of Appeal allowed debentureholders' appeal, found that arrangement had not been shown to be fair and held that it should not have been approved — BCE and Bell Canada appealed to Supreme Court of Canada and debentureholders cross-appealed — Appeals allowed; cross-appeals dismissed — Fact that shareholders stood to benefit from transaction and that debentureholders were prejudiced did not in itself give rise to conclusion that directors had breached their fiduciary duty to corporation — Directors had fiduciary duty to act in best interests of corporation and content of this duty was affected by various interests at stake in context of auction process that BCE was undergoing — Directors, faced with conflicting interests, might have no choice but to approve transactions that, while in corporation's best interests, would benefit some groups at expense of others.

Business associations --- Powers, rights and liabilities — Corporate borrowing — Bonds and debentures — Miscellaneous issues

Large telecommunications corporation, BCE, received offer from group led by Ontario Teachers Pension Plan Board and financed in part by assumption by Bell Canada, subsidiary of BCE, of $30 billion debt, to purchase all of BCE's shares — On June 30, 2007, group and BCE entered into definitive agreement and on September 21, 2007,

BCE's shareholders approved arrangement in proportion of nearly 98 percent — Leveraged buyout was opposed by debentureholders of Bell Canada on ground that increased debt contemplated by purchase agreement would reduce value of their bonds — Superior Court found arrangement fair, approved it and dismissed debentureholders' claims for oppression — Quebec Court of Appeal allowed debentureholders' appeal, found that arrangement had not been shown to be fair and held that it should not have been approved — BCE and Bell Canada appealed to Supreme Court of Canada and debentureholders cross-appealed — Appeals allowed; cross-appeals dismissed — It may be impossible to satisfy all stakeholders in given situation — Here, all bids involved substantial increase in Bell Canada's debt — There was no evidence that BCE could have done anything to avoid that risk — This reality would have been appreciated by reasonable debentureholders — Therefore, court concluded that debentureholders failed to establish reasonable expectation that could give rise to claim for oppression.

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation

Large telecommunications corporation, BCE, received offer from group led by Ontario Teachers Pension Plan Board and financed in part by assumption by Bell Canada, subsidiary of BCE, of $30 billion debt, to purchase all of BCE's shares — On June 30, 2007, group and BCE entered into definitive agreement and on September 21, 2007, BCE's shareholders approved arrangement in proportion of nearly 98 percent — Leveraged buyout was opposed by debentureholders of Bell Canada on ground that increased debt contemplated by purchase agreement would reduce value of their bonds — Superior Court found arrangement fair, approved it and dismissed debentureholders' claims for oppression — Quebec Court of Appeal allowed debentureholders' appeal, found that arrangement had not been shown to be fair and held that it should not have been approved — BCE and Bell Canada appealed to Supreme Court of Canada and debentureholders cross-appealed — Appeals allowed; cross-appeals dismissed — In reviewing directors' decision on proposed arrangement to determine if it was fair and reasonable, courts must be satisfied that arrangement had a valid business purpose, which was not disputed — It also must be satisfied that objections of those whose legal rights were being arranged were being resolved in fair and balanced way — Trial judge was correct in concluding that debentureholders should not be permitted to veto almost 98 percent of shareholders simply because trading value of their securities would be affected — Trial judge did not err in concluding that arrangement addressed debentureholders' interests in fair and balanced way — Judge emphasized that arrangement preserved contractual rights of debentureholders as negotiated — In addition, terms of trust indentures did not contain change of control provisions — Trial judge was right in concluding that arrangement had been shown to be fair and reasonable.

Associations d'affaires --- Questions spécifiquement liées à l'organisation corporative — Administrateurs et dirigeants — Devoirs fiduciaires — Principes généraux

Grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE — Groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent — Détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations — Cour supérieure a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus des détenteurs de débentures — Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé — BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident — Pourvois accueillis et pourvois incidents rejetés — Fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société — Administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus

d'enchères dont BCE faisait l'objet — Face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Emprunts de la société — Obligations et débentures — Questions diverses

Grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE — Groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent — Détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations — Cour supérieure a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus des détenteurs de débentures — Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé — BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident — Pourvois accueillis et pourvois incidents rejetés — Il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée — En l'espèce, toutes les offres que BCE a reçues accroîtraient substantiellement l'endettement de Bell Canada — Rien dans la preuve n'indiquait que BCE aurait pu faire quoi que ce soit pour écarter ce risque — Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité — Par conséquent, la cour a conclu que les détenteurs de débentures n'avaient pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus.

Associations d'affaires --- Changements corporatifs — Arrangements et transactions — En vertu des lois sur les sociétés d'application générale

Grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE — Groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent — Détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations — Cour supérieure a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus des détenteurs de débentures — Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé — BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident — Pourvois accueillis et pourvois incidents rejetés — Pour conclure que la décision des administrateurs au sujet de l'arrangement proposé était équitable et raisonnable, le tribunal devait être convaincu que l'arrangement poursuivait un objectif commercial légitime, ce qui n'était pas contesté — Il doit aussi être convaincu qu'il répondait de façon équitable et équilibrée aux objections de ceux dont les droits étaient visés — Juge de première instance avait raison de conclure que les détenteurs de débentures ne pouvaient être autorisés à opposer un veto à près de 98 pour cent des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres — Juge de première instance n'a commis aucune erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures — Juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés — De plus, les actes de fiducie ne renfermaient aucune stipulation concernant un changement de contrôle — Juge de première instance a eu raison de conclure que le caractère équitable et raisonnable de l'arrangement avait été démontré.

A large telecommunications corporation, BCE, received an offer from a group led by the Ontario Teachers Pension Plan Board and financed in part by the assumption by Bell Canada, a subsidiary of BCE, of a $30 billion debt, to purchase all of BCE's shares. On June 30, 2007, the group and BCE entered into a definitive agreement and on September 21, 2007, BCE's shareholders approved the arrangement in a proportion of nearly 98 percent. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds.

The Superior Court found the arrangement fair and approved it. It also dismissed the debentureholders' claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders.

The Quebec Court of Appeal allowed the debentureholders' appeal and found that the arrangement had not been shown to be fair and held that it should not have been approved. According to the court, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. BCE and Bell Canada appealed to the Supreme Court of Canada and the debentureholders cross-appealed.

Held: The appeals were allowed and the cross-appeals were dismissed.

The trial judge did not err in concluding that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others.

It may be impossible to satisfy all stakeholders in a given situation. Here, all of the bids were leveraged, involving a substantial increase in Bell Canada's debt. There was no evidence that BCE could have done anything to avoid that risk. This reality would have been appreciated by reasonable debentureholders. Therefore, the court concluded that the debentureholders failed to establish a reasonable expectation that could give rise to a claim for oppression.

In reviewing the directors' decision on the proposed arrangement to determine if it was fair and reasonable, courts must be satisfied that the arrangement had a valid business purpose, which was not disputed, and that the objections of those whose legal rights were being arranged were being resolved in a fair and balanced way. The trial judge was correct in concluding that the debentureholders should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. The trial judge did not err in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. In addition, the terms of the trust indentures did not contain change of control provisions. Recognizing that there is no such thing as a perfect arrangement, the trial judge was right in concluding that the arrangement had been shown to be fair and reasonable.

Une grande société de télécommunications, BCE, a reçu une offre d'acquisition visant la totalité des actions de la société d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, une filiale de BCE. Le

groupe et BCE ont conclu une entente définitive le 30 juin 2007 et le 21 septembre suivant, les actionnaires de BCE l'ont approuvée dans une proportion de près de 98 pour cent. Les détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations.

La Cour supérieure a conclu au caractère équitable de l'arrangement et l'a approuvé. De plus, elle a rejeté les demandes de redressement pour abus des détenteurs de débentures au motif que la garantie d'emprunt fournie par Bell Canada poursuivait un objectif commercial légitime, la transaction ne frustrait pas les attentes raisonnables des détenteurs de débentures, la prétention que la transaction constituait un abus parce qu'elle rendait les détenteurs de débentures vulnérables n'était pas fondée et celle selon laquelle BCE et ses administrateurs s'étaient montrés injustes en ne tenant pas compte des intérêts des détenteurs de débentures ne pouvait être retenue.

La Cour d'appel du Québec a accueilli l'appel interjeté par les détenteurs de débentures et a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé. Selon elle, les administrateurs n'avaient pas simplement l'obligation d'accepter la meilleure offre, mais aussi celle de déterminer si l'arrangement pouvait être restructuré de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures. BCE et Bell Canada ont formé un pourvoi devant la Cour suprême du Canada et les détenteurs de débentures ont formé un pourvoi incident.

Arrêt: Les pourvois ont été accueillis et les pourvois incidents ont été rejetés.

En concluant que le fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société, le juge de première instance n'a pas commis d'erreur. Il a reconnu que les administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et que le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet. Il a souligné que, face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes.

Il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée. En l'espèce, toutes les offres que BCE a reçues comportaient un emprunt qui accroîtrait substantiellement l'endettement de Bell Canada. Rien dans la preuve n'indiquait que BCE aurait pu faire quoi que ce soit pour écarter ce risque. Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité. Par conséquent, la cour a conclu que les détenteurs de débentures n'avaient pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus.

Pour conclure que la décision des administrateurs au sujet de l'arrangement proposé était équitable et raisonnable, le tribunal devait être convaincu que l'arrangement poursuivait un objectif commercial légitime, ce qui n'était pas contesté, et répondait de façon équitable et équilibrée aux objections de ceux dont les droits étaient visés. Le juge de première instance avait raison de conclure que les détenteurs de débentures ne pouvaient être autorisés à opposer un veto à près de 98 pour cent des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Le juge de première instance n'a commis aucune erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. Le juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés. De plus, les actes de fiducie ne renfermaient aucune stipulation concernant un changement de contrôle. En reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a eu raison de conclure que le caractère équitable et raisonnable de l'arrangement avait été démontré.

Table of Authorities

Cases considered:

Abitibi-Consolidated Inc., Re (2007), 2007 CarswellQue 13664, 2007 QCCS 6830 (Que. Bktcy.) — referred to

Adecco Canada Inc. v. J. Ward Broome Ltd. (2001), 21 C.B.R. (4th) 181, 12 B.L.R. (3d) 275, 2001 CarswellOnt 367 (Ont. S.C.J. [Commercial List]) — referred to

Alabama, New Orleans, Texas & Pacific Junction Railway, Re (1890), 60 L.J. Ch. 221, [1886-90] All E.R. Rep. Ext. 1143, 64 L.T. 127, 7 T.L.R. 171, 2 Megones Companies Act Cas 377, [1891] 1 Ch. 213 (Eng. C.A.) — referred to

Alberta Treasury Branches v. SevenWay Capital Corp. (1999), 50 B.L.R. (2d) 294, 262 A.R. 135, 1999 CarswellAlta 1054 (Alta. Q.B.) — referred to

Alberta Treasury Branches v. SevenWay Capital Corp. (2000), 261 A.R. 278, 225 W.A.C. 278, 83 Alta. L.R. (3d) 145, 8 B.L.R. (3d) 1, [2000] 10 W.W.R. 453, 2000 ABCA 194, 2000 CarswellAlta 705 (Alta. C.A.) — referred to

Bradbury v. English Sewing Cotton Co. (1923), [1923] A.C. 744 (U.K. H.L.) — referred to

Canadian Pacific Ltd., Re (1990), 73 O.R. (2d) 212, 48 B.L.R. 252, 70 D.L.R. (4th) 349, 1990 CarswellOnt 128 (Ont. H.C.) — considered

Cinar Corp. v. Shareholders of Cinar Corp. (2004), 2004 CarswellQue 746, 4 C.B.R. (5th) 163 (C.S. Que.) — referred to

Deutsche Bank Canada v. Oxford Properties Group Inc. (1998), 1998 CarswellOnt 4147, 40 B.L.R. (2d) 302 (Ont. Gen. Div. [Commercial List]) — referred to

Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36, 1976 CarswellBC 3 (B.C. S.C.) — referred to

Downtown Eatery (1993) Ltd. v. Ontario (2001), 2001 CarswellOnt 1680, 14 B.L.R. (3d) 41, 200 D.L.R. (4th) 289, 8 C.C.E.L. (3d) 186, 54 O.R. (3d) 161, 147 O.A.C. 275, 2002 C.L.L.C. 210-008 (Ont. C.A.) — referred to

Downtown Eatery (1993) Ltd. v. Ontario (2002), 2002 CarswellOnt 246, 2002 CarswellOnt 247, 289 N.R. 195 (note), [2002] 3 S.C.R. vi, 163 O.A.C. 397 (note) (S.C.C.) — referred to

Ebrahimi v. Westbourne Galleries Ltd. (1972), (sub nom. *Westbourne Galleries Ltd., Re*) [1973] A.C. 360, [1972] 2 All E.R. 492, [1972] 2 W.L.R. 1289 (U.K. H.L.) — considered

Ferguson v. Imax Systems Corp. (1983), 43 O.R. (2d) 128, 150 D.L.R. (3d) 718, 1983 CarswellOnt 926 (Ont. C.A.) — considered

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, 1988 CarswellAlta 103 (Alta. Q.B.) — referred to

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1989), 1989 CarswellAlta 181, 45 B.L.R. 110, 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670 (Alta. C.A.) — referred to

GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 1 O.T.C. 322, 1996 CarswellOnt 1434, 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]) — referred to

Gibbons v. Medical Carriers Ltd. (2001), 2001 CarswellMan 409, 2001 MBQB 229, 158 Man. R. (2d) 259, 17 B.L.R. (3d) 280 (Man. Q.B.) — considered

Keho Holdings Ltd. v. Noble (1987), 1987 CarswellAlta 107, 52 Alta. L.R. (2d) 195, 78 A.R. 131, 38 D.L.R. (4th) 368 (Alta. C.A.) — referred to

Kerr v. Danier Leather Inc. (2007), 2007 SCC 44, 2007 CarswellOnt 6445, 2007 CarswellOnt 6446, 87 O.R. (3d) 398 (note), 36 B.L.R. (4th) 95, 231 O.A.C. 348, 286 D.L.R. (4th) 601, [2007] 2 S.C.R. 331, 48 C.P.C. (6th) 205, 368 N.R. 204 (S.C.C.) — referred to

Lyall v. 147250 Canada Ltd. (1993), 84 B.C.L.R. (2d) 234, 33 B.C.A.C. 64, 54 W.A.C. 64, 106 D.L.R. (4th) 304, 12 B.L.R. (2d) 161, 1993 CarswellBC 281 (B.C. C.A.) — referred to

Main v. Delcan Group Inc. (1999), 1999 CarswellOnt 1605, 47 B.L.R. (2d) 200 (Ont. S.C.J. [Commercial List]) — referred to

Pacifica Papers Inc. v. Johnstone (2001), 2001 BCSC 1069, 2001 CarswellBC 1505, 15 B.L.R. (3d) 249, 92 B.C.L.R. (3d) 158 (B.C. S.C.) — referred to

Pente Investment Management Ltd. v. Schneider Corp. (1998), 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) 42 O.R. (3d) 177, 1998 CarswellOnt 4035, 44 B.L.R. (2d) 115 (Ont. C.A.) — considered

People's Department Stores Ltd. (1992) Inc., Re (2004), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Eng.), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, [2004] 3 S.C.R. 461, 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863, (sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise*) 244 D.L.R. (4th) 564, 49 B.L.R. (3d) 165 (S.C.C.) — considered

PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V. (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789, 2005 CarswellAlta 1515 (Alta. Q.B.) — referred to

Revlon Inc. v. MacAndrews & Forbes Holdings Inc. (1985), 506 A.2d 173, 54 U.S.L.W. 2483, 66 A.L.R.4th 157 (U.S. Del. Super.) — considered

Saskatchewan Wheat Pool v. Canada (1983), (sub nom. *Saskatchewan v. R.*) [1983] 1 S.C.R. 205, (sub nom. *Saskatchewan v. R.*) 45 N.R. 425, (sub nom. *Saskatchewan v. R.*) [1983] 3 W.W.R. 97, (sub nom. *Saskatchewan v. R.*) 23 C.C.L.T. 121, (sub nom. *Saskatchewan v. R.*) 143 D.L.R. (3d) 9, 1983 CarswellNat 521, 1983 CarswellNat 92 (S.C.C.) — considered

SCI Systems Inc. v. Gornitzki Thompson & Little Co. (1997), 1997 CarswellOnt 1769, 36 B.L.R. (2d) 192, 1 C.B.R. (4th) 164, 29 O.T.C. 148, 147 D.L.R. (4th) 300 (Ont. Gen. Div.) — referred to

SCI Systems Inc. v. Gornitzki Thompson & Little Co. (1998), 110 O.A.C. 160, 1998 CarswellOnt 2356 (Ont. Div. Ct.) — referred to

Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958), [1959] A.C. 324, [1958] 3 All E.R. 66, [1958] 3 W.L.R. 404, 102 Sol. Jo. 617 (U.K. H.L.) — referred to

Sparling v. Québec (Caisse de dépôt & placement) (1988), 41 B.L.R. 1, 1988 CarswellQue 29, 1988 CarswellQue 147, 55 D.L.R. (4th) 63, [1988] 2 S.C.R. 1015, (sub nom. *Sparling v. Quebec)* 89 N.R. 120, (sub nom. *Sparling v. Quebec)* 20 Q.A.C. 174 (S.C.C.) — considered

St. Lawrence & Hudson Railway, Re (1998), 76 O.T.C. 115, 1998 CarswellOnt 3867 (Ont. Gen. Div. [Commercial List]) — referred to

Stech v. Davies (1987), 1987 CarswellAlta 175, 53 Alta. L.R. (2d) 373, [1987] 5 W.W.R. 563, 80 A.R. 298 (Alta. Q.B.) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 863, 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List]) — referred to

Themadel Foundation v. Third Canadian Investment Trust Ltd. (1995), 18 B.L.R. (2d) 209, 23 O.R. (3d) 7, 1995 CarswellOnt 325 (Ont. Gen. Div. [Commercial List]) — referred to

Themadel Foundation v. Third Canadian Investment Trust Ltd. (1998), 107 O.A.C. 188, 1998 CarswellOnt 691, (sub nom. *Themadel Foundation v. Third Canadian General Investment Trust Ltd.)* 38 O.R. (3d) 749 (Ont. C.A.) — referred to

Trizec Corp., Re (1994), 21 Alta. L.R. (3d) 435, [1994] 10 W.W.R. 127, 158 A.R. 33, 1994 CarswellAlta 171, 20 B.L.R. (2d) 202 (Alta. Q.B.) — considered

Tsui v. International Capital Corp. (1993), [1993] 4 W.W.R. 613, 108 Sask. R. 62, 1993 CarswellSask 313 (Sask. Q.B.) — referred to

Tsui v. International Capital Corp. (1993), 113 Sask. R. 3, 52 W.A.C. 3, [1993] 4 W.W.R. lxvii (note), 1993 CarswellSask 561 (Sask. C.A.) — referred to

Unocal Corp. v. Mesa Petroleum Co. (1985), 493 A.2d 946 (U.S. Del. S.C.) — considered

UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc. (2002), 2002 CarswellOnt 2096, 19 C.C.E.L. (3d) 203, 27 B.L.R. (3d) 53, 214 D.L.R. (4th) 496, 32 C.C.P.B. 120 (Ont. S.C.J. [Commercial List]) — considered

Westfair Foods Ltd. v. Watt (1991), 79 Alta. L.R. (2d) 363, 115 A.R. 34, [1991] 4 W.W.R. 695, 79 D.L.R. (4th) 48, 5 B.L.R. (2d) 160, 1991 CarswellAlta 63 (Alta. C.A.) — referred to

Wright v. Donald S. Montgomery Holdings Ltd. (1998), 1998 CarswellOnt 370, 39 B.L.R. (2d) 266 (Ont. Gen. Div.) — referred to

Zwicker v. Stanbury (1953), [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257, 1953 CarswellNS 25 (S.C.C.) — referred to

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 1991 CarswellOnt 141 (Ont. Div. Ct.) — referred to

Statutes considered:

Canada Business Corporations Act, S.C. 1974-75-76, c. 33
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 102(1) — referred to

s. 122 — referred to

s. 122(1)(a) — considered

s. 122(1)(b) — considered

s. 192 — considered

s. 192(1) "arrangement" — considered

s. 192(1) "arrangement" (f) — considered

s. 192(3) — considered

s. 192(4)(c) — considered

s. 239 — considered

s. 241 — considered

s. 241(2) — considered

Companies Act, R.S.C. 1906, c. 79
s. 112A [en. 1923, c. 39, s. 4] — referred to

Companies Act, 1948 (11 & 12 Geo. 6), c. 38
s. 222 — considered

ADDITIONAL REASONS to judgment reported at *BCE Inc., Re* (2008), 2008 CarswellQue 5401, 2008 CarswellQue 5402 (S.C.C.), reversing *BCE Inc., Re* (2008), 43 B.L.R. (4th) 157, 2008 CarswellQue 4179, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935 (C.A. Que.).

MOTIFS ADDITIONNELS au jugement publié à *BCE Inc., Re* (2008), 2008 CarswellQue 5401, 2008 CarswellQue 5402 (S.C.C.), ayant infirmé *BCE Inc., Re* (2008), 43 B.L.R. (4th) 157, 2008 CarswellQue 4179, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935 (C.A. Que.).

***Per curiam*:**

I. Introduction

1 These appeals arise out of an offer to purchase all shares of BCE Inc. ("BCE"), a large telecommunications corporation, by a group headed by the Ontario Teachers Pension Plan Board ("Teachers"), financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a $30 billion debt. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. Upon request for court approval of an arrangement under s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the debentureholders argued that it should not be found to be fair. They also opposed the arrangement under s. 241 of the *CBCA* on the ground that it was oppressive to them.

2 The Quebec Superior Court, *per* Silcoff J., approved the arrangement as fair under the *CBCA* and dismissed the claims for oppression. The Quebec Court of Appeal found that the arrangement had not been shown to be fair and held that it should not have been approved. Thus, it found it unnecessary to consider the oppression claim.

3 On June 20, 2008, this Court allowed the appeals from the Court of Appeal's disapproval of the arrangement and dismissed two cross-appeals from the dismissal of the claims for oppression, with reasons to follow. These are those reasons.

II. Facts

4 At issue is a plan of arrangement valued at approximately $52 billion, for the purchase of the shares of BCE by way of a leveraged buyout. The arrangement was opposed by a group, comprised mainly of financial institutions, that hold debentures issued by Bell Canada. The crux of their complaints is that the arrangement would diminish the trading value of their debentures by an average of 20 percent, while conferring a premium of approximately 40 percent on the market price of BCE shares.

5 Bell Canada was incorporated in 1880 by a special Act of the Parliament of Canada. The corporation was subsequently continued under the *CBCA*. BCE, a management holding company, was incorporated in 1970 and continued under the *CBCA* in 1979. Bell Canada became a wholly owned subsidiary of BCE in 1983 pursuant to a plan of arrangement under which Bell Canada's shareholders surrendered their shares in exchange for shares of BCE. BCE and Bell Canada are separate legal entities with separate charters, articles and bylaws. Since January 2003, however, they have shared a common set of directors and some senior officers.

6 At the time relevant to these proceedings, Bell Canada had $7.2 billion in outstanding long-term debt comprised of debentures issued pursuant to three trust indentures: the 1976, the 1996 and the 1997 trust indentures. The trust indentures contain neither change of control nor credit rating covenants, and specifically allow Bell Canada to incur or guarantee additional debt subject to certain limitations.

7 Bell Canada's debentures were perceived by investors to be safe investments and, up to the time of the proposed leveraged buyout, had maintained an investment grade rating. The debentureholders are some of Canada's largest and most reputable financial institutions, pension funds and insurance companies. They are major participants in the debt markets and possess an intimate and historic knowledge of the financial markets.

8 A number of technological, regulatory and competitive changes have significantly altered the industry in which BCE operates. Traditionally highly regulated and focused on circuit-switch line telephone service, the telecommunication industry is now guided primarily by market forces and characterized by an ever-expanding group of market participants, substantial new competition and increasing expectations regarding customer service. In response to these changes, BCE developed a new business plan by which it would focus on its core business, telecommunications, and divest its interest in unrelated businesses. This new business plan, however, was not as successful as anticipated. As a result, the shareholder returns generated by BCE remained significantly less than the ones generated by its competitors.

9 Meanwhile, by the end of 2006, BCE had large cash flows and strong financial indicators, characteristics perceived by market analysts to make it a suitable target for a buyout. In November 2006, BCE was made aware that Kohlberg

Kravis Roberts & Co. ("KKR"), a United States private equity firm, might be interested in a transaction involving BCE. Mr. Michael Sabia, President and Chief Executive Officer of BCE, contacted KKR to inform them that BCE was not interested in pursuing such a transaction at that time.

10 In February 2007, new rumours surfaced that KKR and the Canada Pension Plan Investment Board were arranging financing to initiate a bid for BCE. Shortly thereafter, additional rumours began to circulate that an investment banking firm was assisting Teachers with a potential transaction involving BCE. Mr. Sabia, after meeting with BCE's board of directors ("Board"), contacted the representatives of both KKR and Teachers to reiterate that BCE was not interested in pursuing a "going-private" transaction at the time because it was set on creating shareholder value through the execution of its 2007 business plan.

11 On March 29, 2007, after an article appeared on the front page of the *Globe and Mail* that inaccurately described BCE as being in discussions with a consortium comprised of KKR and Teachers, BCE issued a press release confirming that there were no ongoing discussions being held with private equity investors with respect to a "going-private" transaction for BCE.

12 On April 9, 2007, Teachers filed a report (Schedule 13D) with the United States Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This filing heightened press speculation concerning a potential privatization of BCE.

13 Faced with renewed speculation and BCE having been put "in play" by the filing by Teachers of the Schedule 13D report, the Board met with its legal and financial advisors to assess strategic alternatives. It decided that it would be in the best interests of BCE and its shareholders to have competing bidding groups and to guard against the risk of a single bidding group assembling such a significant portion of available debt and equity that the group could preclude potential competing bidding groups from participating effectively in an auction process.

14 In a press release dated April 17, 2007, BCE announced that it was reviewing its strategic alternatives with a view to further enhancing shareholder value. On the same day, a Strategic Oversight Committee ("SOC") was created. None of its members had ever been part of management at BCE. Its mandate was, notably, to set up and supervise the auction process.

15 Following the April 17 press release, several debentureholders sent letters to the Board voicing their concerns about a potential leveraged buyout transaction. They sought assurance that their interests would be considered by the Board. BCE replied in writing that it intended to honour the contractual terms of the trust indentures.

16 On June 13, 2007, BCE provided the potential participants in the auction process with bidding rules and the general form of a definitive transaction agreement. The bidders were advised that, in evaluating the competitiveness of proposed bids, BCE would consider the impact that their proposed financing arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under the trust indentures.

17 Offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable. All would have likely resulted in a downgrade of the debentures below investment grade. The initial offer submitted by the appellant 6796508 Canada Inc. ("the Purchaser"), a corporation formed by Teachers and affiliates of Providence Equity Partners Inc. and Madison Dearborn Partners LLC, contemplated an amalgamation of Bell Canada that would have triggered the voting rights of the debentureholders under the trust indentures. The Board informed the Purchaser that such an amalgamation made its offer less competitive. The Purchaser submitted a revised offer with an alternative structure for the transaction that did not involve an amalgamation of Bell Canada. Also, the Purchaser's revised offer increased the initial price per share from $42.25 to $42.75.

18 The Board, after a review of the three offers and based on the recommendation of the SOC, found that the Purchaser's revised offer was in the best interests of BCE and BCE's shareholders. In evaluating the fairness of the

consideration to be paid to the shareholders under the Purchaser's offer, the Board and the SOC received opinions from several reputable financial advisors. In the meantime, the Purchaser agreed to cooperate with the Board in obtaining a solvency certificate stating that BCE would still be solvent (and hence in a position to meet its obligations after completion of the transaction). The Board did not seek a fairness opinion in respect of the debentureholders, taking the view that their rights were not being arranged.

19 On June 30, 2007, the Purchaser and BCE entered into a definitive agreement. On September 21, 2007, BCE's shareholders approved the arrangement by a majority of 97.93 percent.

20 Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser is $42.75 per common share, which represents a premium of approximately 40 percent to the closing price of the shares as of March 28, 2007. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

21 As a result of the announcement of the arrangement, the credit ratings of the debentures by the time of trial had been downgraded from investment grade to below investment grade. From the perspective of the debentureholders, this downgrade was problematic for two reasons. First, it caused the debentures to decrease in value by an average of approximately 20 percent. Second, the downgrade could oblige debentureholders with credit-rating restrictions on their holdings to sell their debentures at a loss.

22 The debentureholders at trial opposed the arrangement on a number of grounds. First, the debentureholders sought relief under the oppression provision in s. 241 of the *CBCA*. Second, they opposed court approval of the arrangement, as required by s. 192 of the *CBCA*, alleging that the arrangement was not "fair and reasonable" because of the adverse effect on their economic interests. Finally, the debentureholders brought motions for declaratory relief under the terms of the trust indentures, which are not before us ((2008), 43 B.L.R. (4th) 39, 2008 QCCS 898 (C.S. Que.); (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899 (C.S. Que.)).

III. Judicial History

23 The trial judge reviewed the s. 241 oppression claim as lying against both BCE and Bell Canada, since s. 241 refers to actions by the "corporation or any of its affiliates". He dismissed the claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders: (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907 (C.S. Que.); (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906 (C.S. Que.).

24 In arriving at these conclusions, the trial judge proceeded on the basis that the BCE directors had a fiduciary duty under s. 122 of the *CBCA* to act in the best interests of the corporation. He held that while the best interests of the corporation are not to be confused with the interests of the shareholders or other stakeholders, corporate law recognizes fundamental differences between shareholders and debt security holders. He held that these differences affect the content of the directors' fiduciary duty. As a result, the directors' duty to act in the best interests of the corporation might require them to approve transactions that, while in the interests of the corporation, might also benefit some or all shareholders at the expense of other stakeholders. He also noted that in accordance with the business judgment rule, Canadian courts tend to accord deference to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by shareholders.

25 The trial judge held that the debentureholders' reasonable expectations must be assessed on an objective basis and, absent compelling reasons, must derive from the trust indentures and the relevant prospectuses issued in connection with the debt offerings. Statements by Bell Canada indicating a commitment to retaining investment grade ratings did not

assist the debentureholders, since these statements were accompanied by warnings, repeated in the prospectuses pursuant to which the debentures were issued, that negated any expectation that this policy would be maintained indefinitely. The reasonableness of the alleged expectation was further negated by the fact that the debentureholders could have guarded against the business risks arising from a change of control by negotiating protective contract terms. The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that the bidders were prepared to treat the debentureholders any differently. The materialization of certain risks as a result of decisions taken by the directors in accordance with their fiduciary duty to the corporation did not constitute oppression against the debentureholders or unfair disregard of their interests.

26 Having dismissed the claim for oppression, the trial judge went on to consider BCE's application for approval of the transaction under s. 192 of the *CBCA* ((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905 (C.S. Que.)). He dismissed the debentureholders' claim for voting rights on the arrangement on the ground that their legal interests were not compromised by the arrangement and that it would be unfair to allow them in effect to veto the shareholder vote. However, in determining whether the arrangement was fair and reasonable — the main issue on the application for approval — he considered the fairness of the transaction with respect to both the shareholders and the debentureholders, and concluded that the arrangement was fair and reasonable. He considered the necessity of the arrangement for Bell Canada's continued operations; that the Board, comprised almost entirely of independent directors, had determined the arrangement was fair and reasonable and in the best interests of BCE and the shareholders; that the arrangement had been approved by over 97 percent of the shareholders; that the arrangement was the culmination of a robust strategic review and auction process; the assistance the Board received throughout from leading legal and financial advisors; the absence of a superior proposal; and the fact that the proposal did not alter or arrange the debentureholders' legal rights. While the proposal stood to alter the debentureholders' economic interests, in the sense that the trading value of their securities would be reduced by the added debt load, their contractual rights remained intact. The trial judge noted that the debentureholders could have protected themselves against this eventuality through contract terms, but had not. Overall, he concluded that taking all relevant matters into account, the arrangement was fair and reasonable and should be approved.

27 The Court of Appeal allowed the appeals on the ground that BCE had failed to meet its onus on the test for approval of an arrangement under s. 192, by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on this Court's decision in *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461, 2004 SCC 68 (S.C.C.), the Court of Appeal found that the directors were required to consider the non-contractual interests of the debentureholders. It held that representations made by Bell Canada over the years could have created reasonable expectations above and beyond the contractual rights of the debentureholders. In these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. In the absence of such efforts, BCE had not discharged its onus under s. 192 of showing that the arrangement was fair and reasonable. The Court of Appeal therefore overturned the trial judge's order approving the plan of arrangement: (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935 (C.A. Que.).

28 The Court of Appeal found it unnecessary to consider the s. 241 oppression claim, holding that its rejection of the s. 192 approval application effectively disposed of the oppression claim. In its view, where approval is sought under s. 192 and opposed, there is generally no need for an affected security holder to assert an oppression remedy under s. 241.

29 BCE and Bell Canada appeal to this Court arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. While formally cross-appealing on s. 241, the debentureholders argue that the Court of Appeal was correct to consider their complaints under s. 192, such that their appeals under s. 241 became moot.

IV. Issues

30 The issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders' s. 241 oppression claim and in overturning the Superior Court's s. 192 approval of the plan of arrangement. These questions raise the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control, and how a judge on an application for approval of an arrangement under s. 192 of the *CBCA* should treat claims such as those of the debentureholders in these actions. These reasons will consider both issues.

31 In order to situate these issues in the context of Canadian corporate law, it may be useful to offer a preliminary description of the remedies provided by the *CBCA* to shareholders and stakeholders in a corporation facing a change of control.

32 Accordingly, these reasons will consider:

(1) the rights, obligations and remedies under the *CBCA* in overview;

(2) the debentureholders' entitlement to relief under the s. 241 oppression remedy;

(3) the debentureholders' entitlement to relief under the requirement for court approval of an arrangement under s. 192.

33 We note that it is unnecessary for the purposes of these appeals to distinguish between the conduct of the directors of BCE, the holding company, and the conduct of the directors of Bell Canada. The same directors served on the boards of both corporations. While the oppression remedy was directed at both BCE and Bell Canada, the courts below considered the entire context in which the directors of BCE made their decisions, which included the obligations of Bell Canada in relation to its debentureholders. It was not found by the lower courts that the directors of BCE and Bell Canada should have made different decisions with respect to the two corporations. Accordingly, the distinct corporate character of the two entities does not figure in our analysis.

V. Analysis

A. Overview of Rights, Obligations and Remedies under the CBCA

34 An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares: *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744 (U.K. H.L.), at p. 767; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438 (S.C.C.). While the corporation is ongoing, shares confer no right to its underlying assets.

35 A share "is not an isolated piece of property... [but] a 'bundle of inter-related rights and liabilities": *Sparling v. Québec (Caisse de dépôt & placement)*, [1988] 2 S.C.R. 1015 (S.C.C.), at p. 1025, *per* La Forest J. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.

36 The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(a) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(b) (the duty of care). The second duty is not at issue in these proceedings as this is not a claim against the directors of the corporation for failing to meet their duty of care. However, this case does involve the fiduciary duty of the directors to the corporation, and particularly the "fair treatment" component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.

37 The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation: *Peoples Department Stores*.

38 The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

39 In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

As will be discussed, cases dealing with claims of oppression have further clarified the content of the fiduciary duty of directors with respect to the range of interests that should be considered in determining what is in the best interests of the corporation, acting fairly and responsibly.

40 In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.) [hereinafter Maple Leaf Foods]; *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331, 2007 SCC 44 (S.C.C.). It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

41 Normally only the beneficiary of a fiduciary duty can enforce the duty. In the corporate context, however, this may offer little comfort. The directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty. The shareholders cannot act in the stead of the corporation; their only power is the right to oversee the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.

42 To meet these difficulties, the common law developed a number of special remedies to protect the interests of shareholders and stakeholders of the corporation. These remedies have been affirmed, modified and supplemented by the *CBCA*.

43 The first remedy provided by the *CBCA* is the s. 239 derivative action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling to do so. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. (The requirement of leave serves to prevent frivolous and vexatious actions, and other actions which, while possibly brought in good faith, are not in the interest of the corporation to litigate.)

44 A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(b) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(a) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles

governing the law of tort and extracontractual liability: *Peoples Department Stores*. Section 122(1)(b) does not provide an independent foundation for claims. However, applying the principles of *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.), courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

45 A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

46 Additional "remedial" provisions are found in provisions of the *CBCA* providing for court approval in certain cases. An arrangement under s. 192 of the *CBCA* is one of these. While s. 192 cannot be described as a remedy *per se*, it has remedial-like aspects. It is directed at the situation of corporations seeking to effect fundamental changes to the corporation that affects stakeholder rights. The Act provides that such arrangements require the approval of the court. Unlike the civil action and oppression, which focus on the conduct of the directors, a s. 192 review requires a court approving a plan of arrangement to be satisfied that: (i) the statutory procedures have been met; (ii) the application has been put forth in good faith; and (iii) the arrangement is fair and reasonable. If the corporation fails to discharge its burden of establishing these elements, approval will be withheld and the proposed change will not take place. In assessing whether the arrangement should be approved, the court will hear arguments from opposing security holders whose rights are being arranged. This provides an opportunity for security holders to argue against the proposed change.

47 Two of these remedies are in issue in these actions: the action for oppression and approval of an arrangement under s. 192. The trial judge treated these remedies as involving distinct considerations and concluded that the debentureholders had failed to establish entitlement to either remedy. The Court of Appeal, by contrast, viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' expectations. Having found on this basis that the requirements of s. 192 were not met, the Court of Appeal concluded that the action for oppression was moot. As will become apparent, we do not endorse this approach. In our view, the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. Accordingly, we find it necessary to consider both the claims for oppression and the s. 192 application for approval.

48 The debentureholders have formally cross-appealed on the oppression remedy. However, due to the Court of Appeal's failure to consider this issue, the debentureholders did not advance separate arguments before this Court. As certain aspects of their position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here.

49 Against this background, we turn to a more detailed consideration of the claims.

B. The Section 241 Oppression Remedy

50 The debentureholders in these appeals claim that the directors acted in an oppressive manner in approving the sale of BCE, contrary to s. 241 of the *CBCA*. [51] Security holders of a corporation or its affiliates fall within the class of persons who may be permitted to bring a claim for oppression under s. 241 of the *CBCA*. The trial judge permitted the debentureholders to do so, although in the end he found the claim had not been established. The question is whether the trial judge erred in dismissing the claim.

52 We will first set out what must be shown to establish the right to a remedy under s. 241, and then review the conduct complained of in the light of those requirements.

(1) The Law

53 Section 241(2) provides that a court may make an order to rectify the matters complained of where

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

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

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer....

54 Section 241 jurisprudence reveals two possible approaches to the interpretation of the oppression provisions of the *CBCA*: M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 79-80 and 84. One approach emphasizes a strict reading of the three types of conduct enumerated in s. 241 (oppression, unfair prejudice and unfair disregard): see *Scottish Co-operative Wholesale Society Ltd. v. Meyer* (1958), [1959] A.C. 324 (U.K. H.L.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.); *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.). Cases following this approach focus on the precise content of the categories "oppression", "unfair prejudice" and "unfair disregard". While these cases may provide valuable insight into what constitutes oppression in particular circumstances, a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined. As Koehnen puts it (at p. 84), "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct.... The difficulty with adjectives is they provide no assistance in formulating principles that should underline court intervention."

55 Other cases have focused on the broader principles underlying and uniting the various aspects of oppression: see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 45 B.L.R. 110 (Alta. C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.).

56 In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

57 We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.

58 First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Gen. Div.), at p. 273; *Keho Holdings Ltd. v. Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.

59 Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

60 Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.* (1972), [1973] A.C. 360 (U.K. H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:

The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind

it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

61 Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.

62 As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

63 Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J. [Commercial List]). These expectations are what the remedy of oppression seeks to uphold.

64 Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

65 Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable expectations of the debentureholders, and it is unnecessary to go beyond this.

66 The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

67 Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s.

241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

68 In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

69 Against the background of this overview, we turn to a more detailed discussion of these inquiries.

(a) Proof of a Claimant's Reasonable Expectations

70 At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

71 It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. 1, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

72 Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

(i) Commercial Practice

73 Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy: *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J. [Commercial List]); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.), var'd (1998), 110 O.A.C. 160 (Ont. Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2002] 3 S.C.R. vi (S.C.C.).

(ii) The Nature of the Corporation

74 The size, nature and structure of the corporation are relevant factors in assessing reasonable expectations: *First Edmonton Place*; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

(iii) Relationships

75 Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Ferguson v. Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

(iv) Past Practice

76 Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229 (Man. Q.B.); *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

77 It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice: *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194 (Alta. C.A.).

(v) Preventive Steps

78 In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

(vi) Representations and Agreements

79 Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties: *Main*; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C. C.A.).

80 Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications: *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.), aff'd (1993), 113 Sask. R. 3 (Sask. C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Gen. Div. [Commercial List]); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Ont. Gen. Div. [Commercial List]), var'd (1998), 38 O.R. (3d) 749 (Ont. C.A.).

(vii) Fair Resolution of Conflicting Interests

81 As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.

82 The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best

interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

83 Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods* per Weiler J.A., at p. 192.

84 There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

85 On these appeals, it was suggested on behalf of the corporations that the "*Revlon* line" of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.

86 The "*Revlon* line" refers to a series of Delaware corporate takeover cases, the two most important of which are *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173 (U.S. Del. Super. 1985), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (U.S. Del. S.C. 1985). In both cases, the issue was how directors should react to a hostile takeover bid. *Revlon* suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. *Unocal* tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover "may have regard for various constituencies in discharging its responsibilities, ... such concern for non-stockholder interests is inappropriate when ... the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder" (p. 182).

87 What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces. In a review of trends in Delaware corporate jurisprudence, former Delaware Supreme Court Chief Justice E. Norman Veasey put it this way:

> [It] is important to keep in mind the precise content of this "best interests" concept — that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of the stockholders [i.e., as in *Revlon*]. But, in general, the directors owe fiduciary duties to the *corporation*, not to the stockholders. [Emphasis in original.]
>
> (E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399, at p. 1431)

88 Nor does this Court's decision in *Peoples Department Stores* suggest a fixed rule that the interests of creditors must prevail. In *Peoples Department Stores*, the Court had to consider whether, in the case of a corporation under threat of bankruptcy, creditors deserved special consideration (para. 46). The Court held that the fiduciary duty to the corporation did not change in the period preceding the bankruptcy, but that if the directors breach their duty of care to a stakeholder under s. 122(1)(b) of the *CBCA*, such a stakeholder may act upon it (para. 66).

(b) Conduct which is Oppressive, is Unfairly Prejudicial or Unfairly Disregards the Claimant's Relevant Interests

89 Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground

actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi v. Westbourne Galleries Ltd.*.

90 In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

91 The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

92 The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

93 The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "[U]nfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

94 "[U]nfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

(2) Application to these Appeals

95 As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

96 The debentureholders in this case assert two alternative expectations. Their highest position is that they had a reasonable expectation that the directors of BCE would protect their economic interests as debentureholders in Bell Canada by putting forward a plan of arrangement that would maintain the investment grade trading value of their debentures. Before this Court, however, they argued a softer alternative — a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures.

97 As summarized above (at para. 25), the trial judge proceeded on the debentureholders' alleged expectation that the directors would act in a way that would preserve the investment grade status of their debentures. He concluded that this expectation was not made out on the evidence, since the statements by Bell Canada suggesting a commitment to retaining

investment grade ratings were accompanied by warnings that explicitly precluded investors from reasonably forming such expectations, and the warnings were included in the prospectuses pursuant to which the debentures were issued.

98 The absence of a reasonable expectation that the investment grade of the debentures would be maintained was confirmed, in the trial judge's view, by the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, as well as by the fact that the claimants could have protected themselves against reduction in market value by negotiating appropriate contractual terms.

99 The trial judge situated his consideration of the relevant factors in the appropriate legal context. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others. He held that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt. Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

100 We see no error in the principles applied by the trial judge nor in his findings of fact, which were amply supported by the evidence. We accordingly agree that the first expectation advanced in this case — that the investment grade status of the debentures would be maintained — was not established.

101 The alternative, softer, expectation advanced is that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures. The Court of Appeal, albeit in the context of its reasons on the s. 192 application, accepted this as a reasonable expectation. It held that the representations made over the years, while not legally binding, created expectations beyond contractual rights. It went on to state that in these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on debentureholders.

102 The evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration. As discussed above, reasonable expectations for the purpose of a claim of oppression are not confined to legal interests. Given the potential impact on the debentureholders of the transactions under consideration, one would expect the directors, acting in the best interests of the corporation, to consider their short and long-term interests in the course of making their ultimate decision.

103 Indeed, the evidence shows that the directors did consider the interests of the debentureholders. A number of debentureholders sent letters to the Board, expressing concern about the proposed leveraged buyout and seeking assurances that their interests would be considered. One of the directors, Mr. Pattison, met with Phillips, Hager & North, representatives of the debentureholders. The directors' response to these overtures was that the contractual terms of the debentures would be met, but no additional assurances were given.

104 It is apparent that the directors considered the interests of the debentureholders and, having done so, concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests. It did not amount to "unfair disregard" of the interests of the debentureholders. As discussed above, it may be impossible to satisfy all stakeholders in a given situation. In this case, the Board considered the interests of the claimant stakeholders. Having done so, and having considered its options in the difficult circumstances it faced, it made its decision, acting in what it perceived to be the best interests of the corporation.

105 What the claimants contend for on this appeal, in reality, is not merely an expectation that their interests be considered, but an expectation that the Board would take further positive steps to restructure the purchase in a way that would provide a satisfactory purchase price to the shareholders and preserve the high market value of the debentures. At this point, the second, softer expectation asserted approaches the first alleged expectation of maintaining the investment grade rating of the debentures.

106 The difficulty with this proposition is that there is no evidence that it was reasonable to suppose it could have been achieved. BCE, facing certain takeover, acted reasonably to create a competitive bidding process. The process attracted three bids. All of the bids were leveraged, involving a substantial increase in Bell Canada's debt. It was this factor that posed the risk to the trading value of the debentures. There is no evidence that BCE could have done anything to avoid that risk. Indeed, the evidence is to the contrary.

107 We earlier discussed the factors to consider in determining whether an expectation is reasonable on a s. 241 oppression claim. These include commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests. In our view, all these factors weigh against finding an expectation beyond honouring the contractual obligations of the debentures in this particular case.

108 Commercial practice — indeed commercial reality — undermines the claim that a way could have been found to preserve the trading position of the debentures in the context of the leveraged buyout. This reality must have been appreciated by reasonable debentureholders. More broadly, two considerations are germane to the influence of general commercial practice on the reasonableness of the debentureholders' expectations. First, leveraged buyouts of this kind are not unusual or unforeseeable, although the transaction at issue in this case is noteworthy for its magnitude. Second, trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant where the debentureholders, it may be noted, generally represent some of Canada's largest and most reputable financial institutions, pension funds and insurance companies.

109 The nature and size of the corporation also undermine the reasonableness of any expectation that the directors would reject the offers that had been presented and seek an arrangement that preserved the investment grade rating of the debentures. As discussed above (at para. 74), courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation, rather than those relating to interests in a large, public corporation. Bell Canada had become a wholly owned subsidiary of BCE in 1983, pursuant to a plan of arrangement which saw the shareholders of Bell Canada surrender their shares in exchange for shares of BCE. Based upon the history of the relationship, it should not have been outside the contemplation of debentureholders acquiring debentures of Bell Canada under the 1996 and 1997 trust indentures, that arrangements of this type had occurred and could occur in the future.

110 The debentureholders rely on past practice, suggesting that investment grade ratings had always been maintained. However, as noted, reasonable practices may reflect changing economic and market realities. The events that precipitated the leveraged buyout transaction were such realities. Nor did the trial judge find in this case that representations had been made to debentureholders upon which they could have reasonably relied.

111 Finally, the claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.

112 The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. The evidence, accepted by the trial judge, was that Bell Canada needed to undertake significant changes to continue to be successful, and that privatization would provide

greater freedom to achieve its long-term goals by removing the pressure on short-term public financial reporting, and bringing in equity from sophisticated investors motivated to improve the corporation's performance. Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

113 Considering all the relevant factors, we conclude that the debentureholders have failed to establish a reasonable expectation that could give rise to a claim for oppression. As found by the trial judge, the alleged expectation that the investment grade of the debentures would be maintained is not supported by the evidence. A reasonable expectation that the debentureholders' interests would be considered is established, but was fulfilled. The evidence does not support a further expectation that a better arrangement could be negotiated that would meet the exigencies that the corporation was facing, while better preserving the trading value of the debentures.

114 Given that the debentureholders have failed to establish that the expectations they assert were reasonable, or that they were not fulfilled, it is unnecessary to consider in detail whether conduct complained of was oppressive, unfairly prejudicial, or unfairly disregarded the debentureholders' interests within the terms of s. 241 of the *CBCA*. Suffice it to say that "oppression" in the sense of bad faith and abuse was not alleged, much less proved. At best, the claim was for "unfair disregard" of the interests of the debentureholders. As discussed, the evidence does not support this claim.

C. The Section 192 Approval Process

115 The second remedy relied on by the debentureholders is the approval process for complex corporate arrangements set out under s. 192 of the *CBCA*. BCE brought a petition for court approval of the plan under s. 192. At trial, the debentureholders were granted standing to contest such approval. The trial judge concluded that "[i]t seemed "only logical and 'fair' to conduct this analysis having regard to the interests of BCE and those of its shareholders and other stakeholders, if any, whose interests are being arranged or affected" ((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905 (C.S. Que.), at para. 151). On the basis of Corporations Canada's *Policy concerning Arrangements under Section 192 of the CBCA*, November 2003 ("Policy Statement 15.1"), the trial judge held that the s. 192 approval did not require the Board to afford the debentureholders the right to vote. He nonetheless considered their interests in assessing the fairness of the arrangement. After a full hearing, he approved the arrangement as "fair and reasonable", despite the debentureholders' objections that the arrangement would adversely affect the trading value of their securities.

116 The Court of Appeal reversed this decision, essentially on the ground that the directors had not given adequate consideration to the debentureholders' reasonable expectations. These expectations, in its view, extended beyond the debentureholders' legal rights and required the directors to consider whether the adverse impact on the debentureholders' economic interests could be alleviated or attenuated. The court held that the corporation had failed to discharge the burden of showing that it was impossible to structure the sale in a manner that avoided the adverse economic effect on debentureholdings, and consequently had failed to establish that the proposed plan of arrangement was fair and reasonable.

117 Before considering what must be shown to obtain approval of an arrangement under s. 192, it may be helpful to briefly return to the differences between an action for oppression under s. 241 of the *CBCA* and a motion for approval of an arrangement under s. 192 of the *CBCA* alluded to earlier.

118 As we have discussed (at para. 47), the reasoning of the Court of Appeal effectively incorporated the s. 241 oppression claim into the s. 192 approval proceeding, converting it into an inquiry based on reasonable expectations.

119 As we view the matter, the s. 241 oppression remedy and the s. 192 approval process are different proceedings, with different requirements. While a conclusion that the proposed arrangement has an oppressive result may support the conclusion that the arrangement is not fair and reasonable under s. 192, it is important to keep in mind the differences between the two remedies. The oppression remedy is a broad and equitable remedy that focuses on the reasonable expectations of stakeholders, while the s. 192 approval process focuses on whether the arrangement, objectively viewed, is

fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged. Moreover, in an oppression proceeding, the onus is on the claimant to establish oppression or unfairness, while in a s. 192 proceeding, the onus is on the corporation to establish that the arrangement is "fair and reasonable".

120 These differences suggest that it is possible that a claimant might fail to show oppression under s. 241, but might succeed under s. 192 by establishing that the corporation has not discharged its onus of showing that the arrangement in question is fair and reasonable. For this reason, it is necessary to consider the debentureholders' s. 192 claim on these appeals, notwithstanding our earlier conclusion that the debentureholders have not established oppression.

121 Whether the converse is true is not at issue in these proceedings and need not detain us. It might be argued that in theory, a finding of s. 241 oppression could be coupled with approval of an arrangement as fair and reasonable under s. 192, given the different allocations of burden of proof in the two actions and the different perspectives from which the assessment is made. On the other hand, common sense suggests, as did the Court of Appeal, that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable. We leave this interesting question to a case where it arises.

(1) The Requirements for Approval under Section 192

122 We will first describe the nature and purpose of the s. 192 approval process. We will then consider the philosophy that underlies s. 192 approval; the interests at play in the process; and the criteria to be applied by the judge on a s. 192 proceeding.

(a) The Nature and Purpose of the Section 192 Procedure

123 The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: *Companies Act Amending Act, 1923*, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ("Detailed Background Paper").

124 In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.

125 This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76. One of these advantages is that it permits the purchaser to buy shares of the target company without the need to comply with provincial takeover bid rules.

126 The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company.

127 Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval

of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.

(b) The Philosophy Underlying Section 192

128 The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose lights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated:

> ... the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.
>
> (Detailed Background Paper, at p. 6)

129 Although s. 192 was initially conceived as permitting and has principally been used to permit useful restructuring while protecting minority shareholders against adverse effects, the goal of ensuring a fair balance between different constituencies applies with equal force when considering the interests of non-shareholder security holders recognized under s. 192. Section 192 recognizes that major changes may be appropriate, even where they have an adverse impact on the rights of particular individuals or groups. It seeks to ensure that the interests of these rights holders are considered and treated fairly, and that in the end the arrangement is one that should proceed.

(c) Interests Protected by Section 192

130 The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.

131 Section 192 clearly contemplates the participation of security holders in certain situations. Section 192(1)(f) specifies that an arrangement may include an exchange of securities for property. Section 192(4)(c) provides that a court can make an interim order "requiring a corporation to call, hold and conduct a meeting of holders of securities ...". The Director appointed under the *CBCA* takes the view that, at a minimum, all security holders whose legal rights stand to be affected by the transaction should be permitted to vote on the arrangement: Policy Statement 15.1, s. 3.08.

132 A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.

133 The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

134 This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

135 It is not necessary to decide on these appeals precisely what would amount to "extraordinary circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal

rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

(d) Criteria for Court Approval

136 Section 192(3) specifies that the corporation must obtain court approval of the plan. In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval.

137 In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable: see *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Alta. Q.B.), at p. 444. This may be contrasted with the s. 241 oppression action, where the onus is on the claimant to establish its case. On these appeals, it is conceded that the corporation satisfied the first two requirements. The only question is whether the arrangement is fair and reasonable.

138 In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. It is through this two-pronged framework that courts can determine whether a plan is fair and reasonable.

139 In the past, some courts have answered the question of whether an arrangement is fair and reasonable by applying what is referred to as the business judgment test, that is whether an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest would reasonably approve the arrangement: see *Trizec*, at p. 444; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069 (B.C. S.C.). However, while this consideration may be important, it does not constitute a useful or complete statement of what must be considered on a s. 192 application.

140 First, the fact that the business judgment test referred to here and the business judgment rule discussed above (at para. 40) are so similarly named leads to confusion. The business judgment *rule* expresses the need for deference to the business judgment of directors as to the best interests of the corporation. The business judgment *test* under s. 192, by contrast, is aimed at determining whether the proposed arrangement is fair and reasonable, having regard to the corporation and relevant stakeholders. The two inquiries are quite different. Yet the use of the same terminology has given rise to confusion. Thus, courts have on occasion cited the business judgment test while saying that it stands for the principle that arrangements do not have to be perfect, i.e. as a deference principle: see *Abitibi-Consolidated Inc., Re*, [2007] Q.J. No. 16158, 2007 QCCS 6830 (Que. Bktcy.). To conflate the business judgment test and the business judgment rule leads to difficulties in understanding what "fair and reasonable" means and how an arrangement may satisfy this threshold.

141 Second, in instances where affected security holders have voted on a plan of arrangement, it seems redundant to ask what an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest, would do. As will be discussed below (at para. 150), votes on arrangements are an important indicator of whether a plan is fair and reasonable. However, the business judgment test does not provide any more information than does the outcome of a vote. Section 192 makes it clear that the reviewing judge must delve beyond whether a reasonable business person would approve of a plan to determine whether an arrangement is fair and reasonable. Insofar as the business judgment test suggests that the judge need only consider the perspective of the majority group, it is incomplete.

142 In summary, we conclude that the business judgment test is not useful in the context of a s. 192 application, and indeed may lead to confusion.

143 The framework proposed in these reasons reformulates the s. 192 test for what is fair and reasonable in a way that reflects the logic of s. 192 and the authorities. Determining what is fair and reasonable involves two inquiries: first,

whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. In approving plans of arrangement, courts have frequently pointed to factors that answer these two questions as discussed more fully below: *Canadian Pacific Ltd., Re* (1990), 73 O.R. (2d) 212 (Ont. H.C.); *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (C.S. Que.); *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789 (Alta. Q.B.).

144 We now turn to a more detailed discussion of the two prongs.

145 The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

146 The valid purpose inquiry is invariably fact-specific. Thus, the nature and extent of evidence needed to satisfy this requirement will depend on the circumstances. An important factor for courts to consider when determining if the plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that

> while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, the lower the degree of necessity, the higher the degree of scrutiny that should be applied.
>
> [Emphasis added; p. 223.]

If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

147 The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.

148 An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

149 The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.

150 An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway, Re*, [1998] O.J. No. 3934 (Ont. Gen. Div. [Commercial List]).

151 Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan: *Alabama, New Orleans, Texas & Pacific Junction Railway, Re* (1890), [1891] 1 Ch. 213 (Eng. C.A.); *Trizec*.

152 Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J. [Commercial List]); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

153 This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.

154 We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.

155 As has frequently been stated, there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision: *Trizec*; *Maple Leaf Foods*. The court on a s. 192 application should refrain from substituting their views of what they consider the "best" arrangement. At the same time, the court should not surrender their duty to scrutinize the arrangement. Because s. 192 facilitates the alteration of legal rights, the Court must conduct a careful review of the proposed transactions. As Lax J. stated in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), at para. 153: "Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."

(2) Application to these Appeals

156 As discussed above (at paras. 137-38), the corporation on a s. 192 application must satisfy the court that: (1) the statutory procedures are met; (2) the application is put forward in good faith; and (3) the arrangement is fair and reasonable, in the sense that: (a) the arrangement has a valid business purpose; and (b) the objections of those whose rights are being arranged are resolved in a fair and balanced way.

157 The first and second requirements are clearly satisfied in this case. On the third element, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate before this Court focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way.

158 The debentureholders argue that the arrangement does not address their rights in a fair and balanced way. Their main contention is that the process adopted by the directors in negotiating and concluding the arrangement failed to consider their interests adequately, in particular the fact that the arrangement, while upholding their contractual rights, would reduce the trading value of their debentures and in some cases downgrade them to below investment grade rating.

159 The first question that arises is whether the debentureholders' economic interest in preserving the trading value of their bonds was an interest that the directors were required to consider on the s. 192 application. We earlier concluded that authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances. We further suggested that the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.

160 Relying on Policy Statement 15.1, the trial judge in these proceedings concluded that the debentureholders were not entitled to vote on the plan of arrangement because their legal rights were not being arranged; "[t]o do so would unjustly give [them] a veto over a transaction with an aggregate common equity value of approximately $35 billion that was approved by over 97% of the shareholders" (para. 166). Nevertheless, the trial judge went on to consider the debentureholders' perspective.

161 We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

162 The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

> ... the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them.
>
> ((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 162, quoting (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, at para. 199)

163 We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada: necessity was established. No superior arrangement had been put forward, and BCE had been assisted throughout by expert legal and financial advisors, suggesting that the proposed arrangement had a valid business purpose.

164 Based on these considerations, and recognizing that there is no such thing as a perfect arrangement, the trial judge concluded that the arrangement had been shown to be fair and reasonable. We see no error in this conclusion.

165 The Court of Appeal's contrary conclusion rested, as suggested above, on an approach that incorporated the s. 241 oppression remedy with its emphasis on reasonable expectations into the s. 192 arrangement approval process. Having found that the debentureholders' reasonable expectations (that their interests would be considered by the Board) were not met, the court went on to combine that finding with the s. 192 onus on the corporation. The result was to combine the substance of the oppression action with the onus of the s. 192 approval process. From this hybrid flowed the conclusion that the corporation had failed to discharge its burden of showing that it could not have met the alleged reasonable expectations of the debentureholders. This result could not have obtained under s. 241, which places the burden of establishing oppression on the claimant. By combining s. 241's substance with the reversed onus of s. 192, the Court of Appeal arrived at a conclusion that could not have been sustained under either provision, read on its own terms.

VI. Conclusion

166 We conclude that the debentureholders have failed to establish either oppression under s. 241 of the *CBCA* or that the trial judge erred in approving the arrangement under s. 192 of the *CBCA*.

167 For these reasons, the appeals are allowed, the decision of the Court of Appeal set aside, and the trial judge's approval of the plan of arrangement is affirmed with costs throughout. The cross-appeals are dismissed with costs throughout.

Appeals allowed; cross-appeals dismissed.

Pourvois accueillis et pourvois incidents rejetés.

Footnotes

* Bastarache J. joined in the judgment of June 20, 2008, but took no part in these reasons for judgment.

End of Document

9

1924 CarswellNS 85
The Supreme Court of Canada

Webb v. Dipenta

1924 CarswellNS 85, [1925] 1 D.L.R. 216, [1925] S.C.R. 565

Frank J. Webb and A.W. Reeves (Defendants), Appellants and Felix Dipenta and others (Plaintiffs), Respondents

Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

Judgment: November 13, 1924
Judgment: December 9, 1924

Proceedings: On Appeal from the Supreme Court of Nova Scotia

Counsel: *C.B. Smith K.C.* for the appellants.
W.F. O'Connor K.C. for the respondents.

Subject: Property; Contracts

Headnote

Sale of Land --- Agreement of purchase and sale — Formation of contract — Requirements for validity — Consideration or seal

Inadequacy of consideration alone would not render a contract invalid. However, inadequacy of consideration, coupled with fraud or misrepresentation would render a contract null and void on grounds of unconscionability.

Specific Performance --- Grounds for refusal — Discretionary nature of remedy

Discretion in this area is more elastic than is generally permitted in the administration of judicial remedies.

The judgment of the majority of the court was delivered by Rinfret J. *Rinfret J.* :

1 The appellant Webb and the respondents herein, on the 2nd November, 1922, entered into the following contract: —

This agreement made the 2nd day of November, A.D. 1922,

Between Tony D. Pistone, broker; Felix Dipenta, business man; Alex. Martinello, business man; all of the city of Sydney in the county of Cape Breton, hereinafter called the vendors on the one part, and Peter J. Webb, of the city of Sydney in the county of Cape Breton, real estate broker, hereinafter called the purchaser of the other part.

Whereas, the vendors allege that they are part owners of the estate known as the Monastery of Petit Clairveaux of Big Tracadie, in the counties of Antigonish and Guysborough, and the province of Nova Scotia, containing 709 $^{1}/_{3}$ acres more or less.

Now this agreement witnesseth that the vendors in consideration of the sum of five dollars of lawful money of the Dominion of Canada, in hand well and truly paid to them by the purchaser, the receipt whereof is hereby acknowledged, hereby covenant and agree to sell to the purchaser, his heirs or assigns, or the nominee of the said

purchaser, free from encumbrances, the said land and buildings for the sum of thirty thousand dollars ($30,000) at any time before the second day of July, A.D. 1923. This offer to be irrevocable until the said last mentioned date. This offer, if accepted before the said date, shall thereupon constitute a binding contract of purchase and sale; all adjustments to be made to the date of transfer; the purchaser to examine the title at his own expense.

This offer may be accepted by a letter posted or telegram sent to the vendors at their last known address.

If the vendors paint the exterior walls of all wooden buildings and the roof of the Monastery as well, the purchaser agrees to pay for the land and buildings herein, in that event, the sum of thirty-five thousand dollars ($35,000). Should the purchaser fail to buy the property herein on or before the 2nd day of July, 1923, then he will sell to the vendors for one thousand dollars ($1,000) whatever interest he may have in the herein mentioned property. The purchaser herein is hereby appointed by us to be the sole and only agent or party, from the date of the ensealing and delivery of this agreement until the said 2nd day of July, A.D. 1923, with authority to sell and purchase this property, and he is thereby given exclusive rights to sell, buy or bargain for the sale or purchase of the above estate within the time herein mentioned. We, the vendors herein, bind ourselves to abstain from any dealings, either directly or indirectly, with persons or corporations of whatsoever nature, for the purpose of sale, purchase, transfer, or dealing of or with the herein estate.

It is hereby declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and by binding upon the parties hereto, their heirs, executors, administrators and assigns forever.

Signed, Sealed and Delivered in the

presence of:

(Sgd.) A.A. OLLERHEAD.

(Sgd.) TONY D. PISTONE (Seal)

(Sgd.) FELIX DIPENTA (Seal)

(Sgd.) ALEX. MARTINELLO (Seal)

(Sgd.) P.J. WEBB (Seal)

2 Webb failed to buy the property on or before the 2nd July, 1923. About the 11th of July, the respondents tendered him a deed and a cheque for one thousand dollars ($1,000) for his interest in the property. He declined to accept them and then disclosed the fact that he had already deeded the property to the appellant Reeves.

3 The respondents thereupon brought this action to enforce their contract specifically, alleging that Webb had transferred his interest to Reeves for the purpose of defeating their rights under the agreement, and that such transfer was without consideration and was taken by Reeves with knowledge of the agreement of the 2nd November, 1922, and entered into between Webb and Reeves with a collusive and fraudulent intent.

4 By the prayer of their statement of claim, respondents asked for a declaration that the deed from Webb to Reeves was void, an order setting it aside, specific performance of the agreement of the 2nd November, 1922, and that the appellants should be ordered to execute a proper conveyance to the respondents of all their interest in the property; and "such other relief as to the Honourable Court may seem right and proper."

5 The appellants Webb and Reeves filed separate defences.

6 Webb pleaded that the agreement of the 2nd November, 1922, did not and was not intended to preclude his disposing of any interest he might have in the lands therein referred to. He denied the tender and added that, if made, it was made

too late. He admitted the execution of a deed of his interest to Reeves, but denied that it was without consideration or collusion and fraudulent and that it had been made in order to defeat the respondents' rights.

7 Reeves also denied that the deed was without consideration and more particularly that he had knowledge of the agreement between Webb and the respondents.

8 The trial judge found that the respondents had failed to prove a covinous agreement between Webb and Reeves. He declared that he accepted the latter's evidence in full and that this showed that Reeves was not aware of the agreement of the 2nd November, 1922, which was not registered, as he had ascertained by having the records searched. Reeves was held to have been a *bona fide* purchaser for value of Webb's interest in the property. It was therefore immaterial whether Webb had acted in bad faith or not. *Cameron v. Moseley* [1] . The fact was that Webb had placed it out of his power to perform his part of the agreement of the 2nd November, 1922, and specific performance could not therefore be decreed against him. The respondents were left with the possibility of recovering damages for breach of contract against Webb, if they elected so to proceed.

9 Upon appeal, while all the judges accepted the trial judge's findings of fact, a majority of the court differed from him in regard to the relief to which the respondents were entitled.

10 Mr. Justice Rogers, with whom the Chief Justice and Mr. Justice Chisholm concurred, was of opinion that, on the facts as they appeared, there was an insuperable difficulty to granting specific performance simpliciter as against Reeves, who had honestly entered into the bargain and had completed his title by registration without notice, actual or constructive, of the agreement of the 2nd November, 1922. He thought, however, that the option agreement was still in existence as against Webb and also bound Reeves, after he had actual notice of it, to the extent to which it was then available; and that it should be given effect to on equitable principles as to the unpaid purchase money.

11 Webb had sold his interest to Reeves for $4,000; he has been paid $1,125 on account of the purchase money and was still entitled to a balance of $2,875 which, in equity, was the money of the respondents and should be accounted for to them.

12 The court *en banc* accordingly awarded the respondents judgment against Webb for $125 representing the amount by which he had been paid in excess of the sum of $1,000 which he was to get from the respondents under the agreement of the 2nd of November. It further declared that the respondents were entitled to all unpaid purchase money in respect of the property sold by Webb to Reeves, namely, $2,875; and decreed that Reeves should pay this amount to the respondents, who, it held, were also entitled to the full right and benefit of a lien and charge of Webb, as vendor, for the unpaid purchase money against the interest in the lands conveyed by him to Reeves.

13 In the words of Mr. Justice Rogers: —

> The court thus turned over to the respondents all the benefit of their contract upon which it could lay its hands.

14 As the view of the case on which equitable relief was thus accorded had not been presented on the pleadings or at the trial, the court *en banc* allowed all proper and necessary amendments and dealt with the action as if they had been formally made.

15 Mr. Justice Mellish dissented. Although of opinion that the disposition of the case made by the majority of the court might be justified by the facts disclosed by the evidence, he thought that it should not be made without Reeves having had an opportunity to raise such defences as he might desire to offer. He was unwilling to interpret the general prayer in the statement of claim "for such relief as the court may think right and proper," as sufficient to warrant such a disposition of the rights of the parties on the pleadings and evidence as they stood. The evidence had disclosed that, in the previous November, Webb had secured an advance from the Bank of Commerce and assigned to the latter any moneys that he might receive from the sale of the property now in question. The respondents had made no intimation that they were willing to recognize such assignment. Moreover, they had thus far taken pains to have the sale from Webb

to Reeves set aside and, in his opinion, unless they were now willing to affirm that sale, their only remedy lay in damages; and it was very doubtful whether they could now affirm the sale after having elected to disaffirm it.

16 Finally, in his view, the appellants might have sought relief against the clause in the agreement requiring Webb to make a conveyance of his interest for $1,000, as in the nature of a penalty or forfeiture for his failure to carry out the other terms of the agreement. Under all these circumstances, he deemed it not desirable to make the disposition of the case favoured by the majority of the court.

17 It will thus be apparent that the judges in the Nova Scotia courts differ only in regard to the propriety of granting upon the present record a remedy appropriate to the state of facts upon the existence of which they are in accord.

18 It cannot be and is not disputed that, under "The Registry Act" of Nova Scotia then in force (R.S.N.S., 1900, c. 137, s. 15), Reeves has acquired a title clear of all legal and equitable claims. But the unregistered agreement of the 2nd November, 1922, was nevertheless a document of a nature to create an interest in land, upon its being accepted by the respondents. No repudiation by Webb resulting from the mere alienation to Reeves, in the absence of communication to respondents, could affect the latter's right to insist upon specific performance so far as possible (Williams, Vendor & Purchaser, 3rd ed., vol. 1, p. 14). The acceptance here was unconditional and made within reasonable time; and, if Webb could still set up irregularity in the tender of the 11th July, after he had rendered any tender futile by conveying the property to Reeves, any exception to it was abandoned at bar.

19 What we have really to consider in this case, is whether the granting of the remedy decreed by the court *en banc* should be upheld on the present record.

20 No doubt the administration of the relief by way of specific performance is in the discretion of the court — a discretion not arbitrary or capricious, but judicial, and to be exercised according to fixed rules (Lord Chelmsford in *Lamarre v. Dixon*)[2] , yet "more elastic than is generally permitted in the administration of judicial remedies" (*Harris v. Robinson*)[3] . Although the trial judge refused to decree specific performance, he did so only because he thought that "Webb had placed it out of his power to perform his part of the agreement." It is not pretended that the form of relief accorded by the appellate court was submitted for his consideration, nor does it appear that, if it had suggested itself to him, he would have refused to resort to it, rather than merely reserve to the respondents a right of action in damages against Webb.

21 The question now before us, however, is whether the remedy directed by the court *en banc* is not the best that could be devised under the circumstances; and, if all legitimate interests are otherwise adequately protected, whether the granting of that remedy should not be approved. It must not be forgotten that the refusal to grant specific performance, in a case like the present one, does not rest upon the nature or terms of the contract, nor

> upon any principle of justice that operates in favour of the defendant, but is based upon the necessity of the case arising out of the nature of the relief sought

(Fry, Specific Performance, 6th ed., page 463, par. 990).

22 For that reason, it is well understood that in capacity to perform a contract "literally and exactly" is not a reason for refusing to perform it in substance (Fry, p. 467, par. 1001) and the courts will be anxious to compel the execution of such a contract *cy-près* , if it is otherwise unobjectionable, and "such a plan is feasible" (Fry, page 470).

23 The following extract from Williams, Vendor and Purchaser (3rd ed., vol. 1, page 536), is in point: —

> If the vendor, pending completion of the original sale, re-sell the land and convey the legal estate therein to another without receiving payment of the whole price, the second purchaser is protected against the first purchaser's prior equity as regards so much of his purchase money as he has paid before receiving notice of the first sale, and is entitled to hold his legal estate as security for the amount so paid. But, after he has received such notice, he cannot safely

> pay the rest of his purchase money; for he will not be entitled to set up his contract of sale as specifically enforceable against the first purchaser, and, as between himself and the vendor, that contract will be rescinded and he will be discharged from all further performance of his obligation thereunder.

Reference is made in a note to *Jones v. Stanley*[4] ; *Story v. Windsor*[5] ; *Hardingham v. Nicholls*[6] ; *Tourville v. Naish*[7] . See also XXV Halsbury, Laws of England, page 377, no. 838. But for the Registry Act, that precise relief might have been awarded here. Yielding to the requirements of the Registry Law, the court will modify the relief which it would otherwise have granted, but only so far as is necessary to meet those requirements.

24 The Appellate Court has put into effect *cy-près* the principle expounded above; it has followed the property where it has found it, in another guise, converted into money (*Ferguson v. Wilson*)[8] . The course taken commends itself on equitable principles, unless it can be excepted to upon any legitimate ground open to the parties herein.

25 Now the objections taken to the course followed are enumerated in the reasons of the dissenting judge in the court *en banc* and in the grounds taken before us by counsel for appellants. Some of them are opposed to the application of the relief generally; the others are open only to one or the other of the parties individually.

26 The first objection of Mr. Justice Mellish is that the court *en banc* could not dispose, as it has done, of the rights of the parties on the pleadings as they stood. But that difficulty no longer exists after all necessary amendments have been allowed. The exercise of the power to amend, when warranted, as it is here by the Judicature Act of Nova Scotia and Rule XXVIII made thereunder, is discretionary and, consistently with its jurisprudence in matters of practice and procedure, this court will rarely, if ever, interfere with it.

27 Another objection of the dissenting judge is based upon his doubt whether the respondents would be willing to accept the relief in the form ordered by the majority of the court *en banc* , that difficulty has also disappeared since the respondents have acquiesced in the judgment and are defending it before this court. And there is no inconsistency in their action. The result of the decree which they are now upholding is to enforce, as far as may be, the very relief which the respondents sought by their original statement of claim.

28 Another objection of the dissenting judge is that Webb might perhaps have himself claimed a relief in equity against the clause in the agreement requiring him to make a conveyance of his property worth $4,000 at least for $1,000, as a penalty or forfeiture for his failure to carry out the other terms of the agreement.

29 This objection was not taken in the statement of defence, nor apparently before the trial court. It is urged before us no doubt on account of its having been suggested by the dissenting judge in appeal.

30 We are unable to construe the clause in the agreement of November, 1922, now under consideration, as stipulating anything in the nature of a penalty or a forfeiture. It was, in fact, assented to in consideration of the main agreement by which Webb was given from the 2nd November, 1922, until the 2nd July, 1923, exclusive authority to sell, purchase or bargain for the sale or purchase of the property for the sum of $30,000 (or $35,000 if the exterior walls and roof of the monastery were painted). The agreement was irrevocable, and on a sale made during that time, any profit in excess of the stipulated sum would have belonged exclusively to Webb. On the other hand, he voluntarily agreed that, in exchange for the right thus granted, he would, if he did not buy the property before the said 2nd day of July, 1923, sell to the respondents for $1,000 whatever interest he might have in it.

31 Any hardship on the defendant which might flow from the specific performance of such an agreement would be merely a consequence of the fact that his speculation proved unfortunate for him (*Haywood v. Cope*)[9] . The agreement apparently secured to him, at least when he signed it, an expectancy of profits corresponding in some measure with those which the respondents may now reap from their contract. Moreover, the mere inadequacy of the consideration, unaccompanied by any element of fraud or misrepresentation, would hardly afford him a good defence in the premises (Fry, 6th ed., nos. 399, 426, 436, 440, 444).

32 There remains a last objection suggested by the dissenting judge in appeal based upon the assignment by Webb to the Bank of Commerce of any money that he might receive from the monastery property. This really appears to be the most serious ground upon which the judgment *a quo* may be assailed.

33 What may be the rights of the Bank of Commerce under the assignment is not by any means clear, but this no doubt is due to the fact that only a passing reference was made to it in the evidence and, at the trial, it was not thought necessary further to inquire into it.

34 It does result, however, from the judgment of the court *en banc* that, while the interests of the Bank of Commerce cannot be said to have been finally disposed of, because it was not a party to the case, yet the appellant Reeves is ordered to pay the balance of the purchase money to the respondents although he had been made aware of an alleged assignment of the same purchase money by Webb to the bank.

35 Lord Langdale M.R., *in re Thomas v. Dering* [10] , lays it down as a general principle

> that the court will not execute a contract, the performance of which * * * would be prejudicial to persons interested in the property, but not parties to the contract. The court, before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how the proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor.

36 See also what Lord Romilly, M.R., says in *Attorney-General v. Sittingbourne* [11] .

37 Reeves is undoubtedly entitled to be protected against any claim of the bank before being required to make payments to the respondents. This can properly be done by remitting this action to the Supreme Court of Nova Scotia in order that the Bank of Commerce may be added as a party to it and that proper steps may then be taken to ascertain what rights, if any, it has in the money payable under the Webb-Reeves contract, and to determine the respective priorities of the bank and the respondents in regard thereto. That being done, proper directions can be given for payment by Reeves; and, on complying with them, his contractual obligations will be fully discharged.

38 The consideration given to the objections of Mr. Justice Mellish has disposed of all but one of the points in respect of which the appellants at bar alleged error in the judgment of the court *en banc* .

39 There remains only the objection resulting from the fact that the judgment appealed from decided that the appellant Webb had a vendor's lien against the estate of the appellant Reeves in the lands in question and that the respondents are entitled to the benefit of such lien.

40 The question whether the right to this lien ever existed was not raised by the pleadings. No evidence upon the subject was taken at the trial, and neither there nor in the court *en banc* was the matter ever mentioned.

41 Had the issue been raised, it would no doubt have been open to Reeves either to show that the right of lien had been expressly waived or that for other reasons such a lien did not exist or was not available to the respondents.

42 It is, however, unnecessary further to inquire into the propriety of the decree of the court *en banc* in that respect, since the declaration of the existence of a lien was not really material for the purpose of arriving at the conclusion which has been reached. Counsel for the respondents has stated before us that he did not insist upon the maintenance of the lien and the objection of the appellant Reeves on that ground can be met by striking out from the formal judgment any reference to the existence of such lien and charge in favour of Webb as unpaid vendor.

43 In the result, it follows therefore that this court finds itself in accord with the disposition which the Supreme Court of Nova Scotia *en banc* has made of this case and with the relief which it has seen fit to grant to the respondents, save

the declaration of lien, and subject to the further inquiry into the respective rights of the respondents as found by that judgment and those of the Canadian Bank of Commerce.

44 It is eminently satisfactory that the matters in controversy can be thus finally determined and further litigation avoided. This accords with the spirit of the Judicature Act.

45 While, however, pleadings may be amended at any stage in order to do justice, care should be taken that issues should not be determined without due notice and hearing, and this is a principle which we are sure is fully recognized by the Supreme Court of Nova Scotia, but unfortunately in this case, in working out a measure of equitable relief and directing the necessary amendments, the majority of the court failed to consider the possibly competing rights of the Canadian Bank of Commerce, which, as appears from the testimony of one of its local managers, had, in order to secure an advance to the appellant Webb, obtained from him an assignment of any moneys payable from a sale of the Monastery property which might include the moneys payable by Reeves. The court was not, however, lacking in inherent jurisdiction to correct this error and to give directions which would have avoided the necessity of this appeal, and it would have been good practice and in the interests of economy if the appellant Reeves had presented his grievance to the court when the judgment came to be settled, and the fact that he failed to do so would ordinarily be a reason for depriving him of the costs of this appeal in accordance with the principle enunciated in *Tucker v. N.B. Trading Co.* [12] ; and *Wilson v. Carter* [13] . The following observation of Lord Hobhouse in the latter case is applicable:

> Their Lordships do not doubt that the court has power at any time to correct an error in a decree or order arising from a slip or accidental omission, whether there is or is not a general order to that effect.

A fortiori of course the court has power to correct slip or an oversight in the judgment pronounced when settling the terms of a decree or order. His Lordship proceeded to say:

> Unfortunately the respondent did not take the proper course of applying to the Supreme Court to correct the accidental omission in the order granting leave to appeal. If he had done so no doubt the mistake would have been put right as a matter of course.

The suggestion was, however, made during the course of the argument, and it met with no denial, that this jurisdiction is not exercised in Nova Scotia, and, moreover, since the right of the bank was one of the grounds of dissent expressed by Mellish, J., the appellant Reeves may have considered that the question had not escaped consideration by the majority of the court. In these circumstances we are disposed to think that the appellant Reeves ought not to be deprived of his costs of this appeal; but, for the reasons which we have stated, this case must be regarded as an exception from the rule of practice which prevails in this court that costs will not be allowed for the correction of an error upon appeal which might conveniently have been set right by application to the court below.

46 For these reasons the appeal of the appellant Reeves should be allowed; the judgment should be varied by striking out the declaration of lien, and the action should be remitted to the Supreme Court of Nova Scotia to add the Canadian Bank of Commerce as a party and to inquire into and determine the respective priorities of the appellants and the bank with respect to the moneys payable under the agreement of sale from Webb to Reeves; further directions and subsequent costs reserved to the Supreme Court of Nova Scotia. The appellant Reeves should have his costs of this appeal.

Idington, J. **(dissenting):**

47 This appeal arises out of an action brought by respondents against appellants in which the former, suing upon an agreement giving an option, alleged by their declaration that appellant Webb had, in order to defraud respondents of their rights under said option, conveyed the land in question to his co-appellant, Reeves, who well knew such fraudulent purpose, and respondents sought to have the said conveyance to Reeves set aside, and specific performance of said option directed.

48 The learned trial judge who heard the evidence of Reeves accepted his story and found he had bought in good faith and for valuable consideration and paid a substantial part of the price.

49 The action was accordingly dismissed with costs. The respondents made no application to amend their pleadings, nor, so far as I can see, was the case fought out on any other issue than that raised by said pleadings.

50 On appeal to the Court of Appeal that court maintained said findings of fact, but seemed, by a majority, to discover some other cause of action that respondents might have in way of following the fruits of the sale from Webb to Reeves through a presumed vendor's lien that Webb might have in virtue of the sale made by him to Reeves, and allowed the appeal to that court.

51 I may say there was no evidence adduced on that point and indeed the pleadings would not, until amended, permit of such a trial.

52 It is by no means certain to my mind that, under the circumstances, a lien existed.

53 A vendor's lien is so often defeated by reason of the attendant circumstances that accompany or ensue upon the carrying out of a sale that I would be very loath to hold that one existed unless a straight issue, of that question of its existence, had been raised at the trial.

54 Moreover there does appear, accidentally as it were, evidence leading me to believe it quite probable that the agreement of Reeves with Webb had been entirely assigned by Webb to the Canadian Bank of Commerce as security. If so, the said bank would, even if the existence of a vendor's lien was put beyond peradventure, have to be made a party in order to protect appellant Reeves.

55 The last word may not have been said on the question of respondents' right to enforce the option they claim.

56 For the foregoing reasons and those assigned by Mr. Justice Mellish in his dissenting opinion, I think this appeal should be allowed with costs here and in the court below and the judgment of the learned trial judge restored; without prejudice, however, to the respondents' rights, if any, to bring another action for other causes of action, than the issue fully tried out in this action.

57 I cannot refrain from observing that by his factum respondents' counsel, though two courts below have decided against the cause of action set up, seems far from being convinced that it has no foundation.

Appeal allowed with costs.

Solicitors of record:
Solicitor for the appellants: *R. M. Langille.*
Solicitor for the respondents: *Finlay MacDonald.*

Footnotes

1 56 N.S. Rep. 300.

2 L.R. 6 H.L. 414, at p. 423.

3 21 Can. S.C.R. 390, at p. 397

4 2 Eq. Ca. Abr. 685, pl. 9.

5 2 Atk. 630.

6 3 Atk. 304

7 3 P.W. 307.

8 2 Ch. App. bottom of p. 87.

9 25 Beav. 140.

10 1 Keen, 729, at pp. 747, 748.

11 L.R. 1 Eq. 636, at the bottom of p. 639 and p. 640.

12 44 Ch. D. 249 .

13 [1893] A.C. 838 .

End of Document

10

All England Law Reports/1973/Volume 2 /Warmington and another v Miller - [1973] 2 All ER 372

[1973] 2 All ER 372

Warmington and another v Miller

COURT OF APPEAL, CIVIL DIVISION

DAVIES, CAIRNS AND STAMP LJJ

31 JANUARY, 1 FEBRUARY 1973

Specific performance - Lease - Agreement for lease - Underlease - Execution of underlease breach of covenant in lessor's head lease - Whether lessee entitled to specific performance of agreement to execute underlease.

The defendant was the lessee of premises demised to him for a term of 21 years. The lease contained an unqualified covenant 'Not to assign underlet or part with possession of part only of the demised premises'. The premises included a workshop. The defendant allowed the plaintiffs to use the workshop for their business of panel beating and spraying cars. Subsequently he made an oral agreement with the plaintiffs to grant them a lease of the workshop for a term of 12 months and thereafter until determined by 12 months' notice on either side. The defendant refused to execute the agreement and the plaintiffs claimed, inter alia, a decree of specific performance, or alternatively a declaration that they were in possession of the workshop under the terms of their agreement with the defendant.

Held - The plaintiffs were not entitled to a decree of specific performance since the court would not order the defendant to do that which he could not do under the terms of the lease under which he held the premises and which, if he did, would expose him to proceedings for forfeiture. Neither were the plaintiffs entitled to the declaration sought for the equitable doctrine that an intended lessee was to be treated as having the same rights as if a lease had in fact been granted to him only applied where the intended lessee was entitled to specific performance of the agreement; furthermore such a declaration could only be protected by an injunction and if the plaintiffs subsequently sought an injunction to protect their right to remain in possession it would be an invitation to the court to grant part specific performance of the agreement (see p 377 *b* to *d* and *g h* and p 378 a *b* and *e*, post).

Willmott v Barber (1880) 15 Ch D 96 applied.

Walsh v Lonsdale (1882) 21 Ch D 9 distinguished.

Notes

For specific performance of contracts involving a breach of a prior contract with a third party, see 36 *Halsbury's Laws* (3rd Edn) 300, 301, para 427, and for cases on the subject, see 44 *Digest* (Repl) 54-56, *405-414*.

Cases referred to in judgment

Harnett v Yielding (1805) 2 Sch & Lef 549, [1803-13] All ER Rep 704, 44 *Digest* (Repl) 24, **55*.

Walsh v Lonsdale (1882) 21 Ch D 9, 52 LJCh 2, 46 LT 858, CA, 18 *Digest* (Repl) 255, *63*.

Willmott v Barber (1880) 15 Ch D 96, 49 LJCh 792, 43 LT 95; *on appeal* (1881) 17 Ch D 772, 45 LT 229, CA, 44 *Digest* (Repl) 55, *409*.

Appeal

The defendant, Jack Edward Miller, appealed against an order of his Honour Judge Glazebrook made on 22 June 1972 at Tonbridge County Court decreeing specific performance of an oral contract made on 3 August 1971 between the defendant of the one part, and the plaintiffs, Kenneth Warmington and Bryan Sydney Read of the other part, for a lease to the plaintiffs of the ground floor workshop in premises known as The Granary, High Street, Edenbridge, Kent. The defendant appealed

on the ground, inter alia, that the judge had erred in law in holding that, where a lease contained a covenant forbidding subletting of the premises without the consent of the landlord and where, without such consent, the tenant agreed to sublet the premises, there was no sufficient ground for refusing an order for specific performance of the agreement against the tenant. The facts are set out in the judgment of Stamp LJ.

Roger Gray QC and E J Holman for the defendant.

Henry Summerfield for the plaintiffs.

1 February 1973. The following judgments were delivered.

STAMP LJ

delivered the first judgment at the request of Davies LJ. This is an appeal against an order of his Honour Judge Glazebrook, sitting at Tonbridge County Court on 22 June 1972, whereby he ordered specific performance (although the order itself does not say so) of an oral agreement made between the plaintiffs and the defendant on 3 August 1971, for a lease by the defendant to the plaintiffs of the ground floor workshop in certain premises known as The Granary, High Street, Edenbridge, in Kent, and awarded the plaintiffs nominal damages for trespass by the defendant. The agreement was pleaded thus:

> 'On or about August 23rd 1971 the Plaintiffs and the Defendant agreed orally by a conversation between the Plaintiffs and Defendant at 96 High Street aforesaid that the Defendant would grant to the Plaintiffs and the Plaintiffs would take from the Defendant a lease of the said workshop for a term of 12 months and thereafter until determined by 12 months' notice on either side at the rent of £20 per week inclusive of rates, electricity and the use of the welding plant installed therein and that the Plaintiffs should have exclusive possession of the said workshop.'

The judge found the agreement proved, and this court is asked to reverse this finding of fact. Alternatively the defendant submits that specific performance of the agreement ought not, for the reasons which I will indicate, to have been ordered. The workshop is part of larger premises demised to the defendant under a lease dated 9th February 1971 for a term of 21 years from 25th December 1970, at a basic rent of £1,100 per annum subject to seven year reviews. The lease contained a covenant by the lessee (the defendants)--

> 'Not without the consent of the Lessors to use the demised premises otherwise than as a warehouse for the storage and cleaning of motor vehicles awaiting disposal provided however that nothing herein contained shall imply or be deemed to be a warranty that the demised premises may in accordance with all town planning laws and regulations now or from time to time in force be used for the purpose above mentioned'.

It also contained an unqualified covenant 'Not to assign underlet or part with possession of part only of the demised premises'.

The defendant is a dealer in secondhand cars. The first plaintiff is a panel beater and the second plaintiff is a car sprayer. Notwithstanding the covenant as to user to which I have referred, the workshop was at the time of the alleged agreement fitted up and used as a workshop for car spraying and panel beating. The two floors were used for storage; they were reached through the workshop; and at the back was a yard where the defendant put cars. The judge, in setting out the history of the matter, said this:

> 'Panel beaters and sprayers--competent ones--are in short supply and the defendant was finding it difficult to get the work he

required done. In May 1971 he advertised in the local paper:' "Car sprayer and panel beaters required

full-time, part-time or self-employed, with premises and equipment provided". Read, the second plaintiff, came to see him. Later he brought Warmington, the first plaintiff, and it is common ground that an agreement was reached whereby Warmington and Read came to work in The Granary workshop and paid the defendant £20 a week. The workshop contained the basic equipment for car spraying and panel beating, but the plaintiffs also used equipment and tools of their own.'

The judge described the issue thus:

'The issue in the case is whether they were there as tenants (as they claim) or as licensees. They say that on 3rd August 1971 the defendant promised them a tenancy for 12 months with 12 months' notice. The defendant has refused to execute a tenancy and they ask for specific performance. The issue depends on whether I accepted the plaintiffs' or the defendant's account of what was said. That must depend principally on my estimate of their truthfulness but there are two subsidiary issues which afford some help.

'The first is whether the plaintiffs were sole occupants of the workshop. They say they were but the defendant says he had employees working there almost up to the end, i e April 1972. The evidence (even apart from the parties) is somewhat conflicting, but I am satisfied that by about early September, and possibly before, the plaintiffs were the sole occupants. They are not correct in saying they had it to themselves from 3rd August. I should suppose that the defendant's employees finished the jobs they were on and may even have continued a little after that. The plaintiffs after all had nothing in writing from the defendant and I think they felt a little uncertain of their position. But there evidence is much nearer the truth than the defendants. Their right to exclude other people was never tested.

'The second subsidiary issue concerns the work the plaintiffs were doing. They say the contract required them to give priority to the defendant's motor cars, but that otherwise they were free to take in their own work. The defendant says they were not permitted to do any work but his. It is clear that at the start there was an accumulation of the defendant's cars to be done and the plaintiffs were fully occupied with them. But by November they were in fact doing nearly as much outside work. The defendant was frequently in the workshop for various reasons, and he must have known they were working on other cars. He says he complained when he saw it going on; if he did he was singularly ineffective and I do not think he is a man who would put up with such flagrant breach of contract. Further, it is not very likely that the plaintiffs would have got headed notepaper and put in a telephone if they were only doing the defendant's work. I am satisfied that the complaints the defendant made were about the plaintiffs taking in "crashed" cars for repair. They had actually advertised for such cars. The defendant objected for two reasons: first, if his customers saw badly damaged cars going into premises, it was poor advertisement for him; secondly his lease forbade this kind of work. On both the subsidiary issues, therefore, I am satisfied the plaintiffs' version is correct or substantially correct.

'A number of other issues were raised in the evidence, but none of them gives me much assistance; for example, the £20 paid by the plaintiffs weekly, at first by deduction and later by cheque. The plaintiffs endorsed the first few cheques "Rent". The defendant, as soon as he saw it, refused to accept such cheques. The word "Rent" can, of course, be used in connection with a licence, but both parties clearly connected it with a tenancy. I think that all the incident shows is that the plaintiffs were anxious to get evidence of a tenancy--to get security--and the defendant was determined they should not have it. I get no help from the fact that everyone had keys. Although the evidence of none of the parties is very precise, I am satisfied that the plaintiffs' version of the contract, that is of how they came to be on these premises, is correct. I prefer their evidence to the

defendant's. I find that the defendant did promise them a lease for 12 months and 12 months' notice. I think the defendant was desperate to get work done on his cars. He tested the plaintiffs and found they knew their job. But they wanted to start their own business--that is common ground. They had good jobs in the town. There was no reason why they should give these up merely to work for the defendant, whether self-employed or not. It would be stupid to start their own business unless they had some security in the premises. So they asked originally for a five year lease. The defendant offered a 12 months' term and they accepted that. I do not think the defendant ever intended to keep his promise. In truth he was forbidden to part with possession of part of the premises by his lease. The plaintiffs say they kept on asking him for their lease. The defendant agrees they kept on asking; he says he kept on telling them they could not have one because he was forbidden by his lease to do it. I cannot believe they kept on asking if he told

> them that. I do not think it troubled the defendant very much to make a promise which was a breach of the head lease. After all, the work he was doing, even before the plaintiffs came on the scene, was a clear breach of the user clause.'

The judge went on to deal with the subsequent history of the matter--a history relevant for the purpose of testing the veracity of the evidence regarding the making of the oral agreement on which the plaintiffs relied and the probability or otherwise of such an agreement having been made.

It is submitted in this appeal that the judge's finding that there was an agreement for a lease was wrong. In support of that submission, it is said that the judge in making his findings gave insufficient weight to some of the facts and excessive weight to other facts. So far as that is concerned, I hope I do no disrespect to that general submission by saying that it is quite impossible to measure the weight which the judge did give to the several facts which he found and which tended to point in one direction or the other. In the end, as the judge pointed out, the issue depended on whether he accepted the plaintiffs' or the defendant's account of what was said on 3 August 1971. It is clear from the judge's judgment that he did not think much of the defendant's evidence and did not regard him as one on whose evidence he could rely. The defendant, however, relies particularly in this court on documentary evidence consisting of two letters which it is submitted are inconsistent with the prior existence of the agreement set up by the plaintiffs in that they show that as early as November 1971 the plaintiffs were not relying on the agreement and made no mention of it. The first of these letters is dated 12 November 1971, written by the plaintiffs' solicitors to the defendant, in the following terms:

> 'We have been consulted by [the plaintiffs], who at present occupy The Granary which forms part of the premises leased by you from the Stonebridge Trust, in respect of which you are charging them the sum of £20 a week. Our Clients are in a very difficult position as obviously they will wish to spend capital to keep the business going and even extend it, but unless they can have security of tenure this is impossible. We understand from them that you have approached your Landlords for consent for them to have a Tenancy of The Granary, and perhaps you would let us know whether in fact any progress has been made in respect of this, or alternatively we would be prepared to advise them to take over the assignment of the whole premises on reasonable terms. We shall be glad to hear from you.'

The second letter is a letter dated 22 November 1971 written by the plaintiffs' solicitors to their own client, the second plaintiff, in these terms:

> 'Dear Sir, Further to your call on the 10th instant [that is two days before the letter which I have just read], we have now discussed the matter with [the defendant] and he informs us that he is not contemplating assigning his Lease, but

> if and when this should take place he will communicate with you as to your position. He also informed us that although you are only on a monthly agreement at the moment if things continue to go as they are doing, he will be pleased to consider a three monthly agreement in future. In the circumstances I feel it would not be wise to go to the expense of Capital equipment and perhaps a short Partnership Agreement would suffice to protect you and your partner.'

In neither letter is there any reference to the existence of an oral agreement for the granting of a lease. But both letters were written at a time when the defendant had refused to grant a lease and when it was known (as appears from the last paragraph of the letter of 12 November 1971) that the agreement of the landlord was necessary and so were written under the shadow of the danger of a forfeiture. Read in this context, I do not find the terms of the letters inconsistent with the plaintiffs' case or that they indicate that that case was made up at a later date. So far as regards both letters, it is to be observed that the solicitor was one of the trustees for the charity who owned the property and one of the lessors under the defendant's lease. He must have found himself in a most embarrassing position; and his advice to his client not to go to the expense of capital expenditure is not surprising. For all we know he may have advised the second plaintiff orally that the defendant had no power to grant a lease, and to assert in a letter that he had done so would, in view of his dual position, have been, as I see it, most embarrassing.

There is a short passage in the evidence of a legal executive in the employ of the plaintiffs' then solicitors to the effect that the second plaintiff did not tell him about the length of the plaintiffs' tenure; but we do not know any details of the discussions that he had with the second plaintiff which may for all we know have been of very short duration.

The defendant also relied on evidence on behalf of the plaintiffs that at some time after the November letters to which I have referred the defendant agreed to a six-months' lease. The first plaintiff's evidence in this regard was as follows (this was following a dispute which had arisen):

> '[The] Defendant said there was no reason why we should argue because he needed work done as much as we needed premises. He told us we did not have to go and we all settled on a six months notice either way. He said a six months lease. These were Defendant's words. We shook hands on it. We continued as before paying rent and doing his work. We were also doing other people's work ... '

The judge dealt with this part of the case as follows:

> 'After the solicitors' letters the plaintiffs pressed the defendant for security and finally he agreed to a "six month basis". He denies that he said more than a month or six weeks. But what does a six months basis mean? If it was intended to be a mere licence, this was never made clear to the plaintiffs. Their position was that they had the original promise of 3rd August of a 12 months' lease. They had been to a solicitor to see how valid, how enforceable that was. After seeing their solicitor they believed (they may even have been told) that they could not enforce it. They believed they had to be satisfied with something less. But in fact they were already, in equity, tenants from 3 August. Nothing that happened after that date, in my view, altered their status. I do not think it can be said that, through a mistake of law or otherwise they surrendered their 12 months' agreement and accepted instead a licence. Incidentally, this is not pleaded by either side.'

I would add this: had the defendant sought to amend his pleading to plead as an alternative defence that the agreement of 3 August had been rescinded by a new agreement, it would have been open to the plaintiffs to amend their statement of

claim and to claim in the alternative specific performance of the new agreement. Reading the judgment as a whole, and having listened to the powerful submissions of counsel for the defendant, I find it impossible to accept that there was not evidence on which the judge could properly find as a fact that the plaintiffs had proved the agreement on which they relied. He saw the witnesses. I only add on this issue that a plea based on s 40 of the Law of Property Act 1925 was withdrawn.

I turn to consider the alternative submission advanced on behalf of the defendant that the judge ought not to have ordered specific performance. Counsel for the defendant submits that the judge ought not to have ordered specific performance requiring the defendant to do that which he cannot do under the terms of the lease under which he holds the premises and which, if he did, would expose him to proceedings for forfeiture. In my judgment that submission is well founded. I can see nothing in this case to take it outside the practice of the court, in determining whether to exercise its discretionary power to grant the equitable remedy of specific performance, not to do so where the result would necessitate a breach by the defendant of a contract with a third party or would compel the defendant to do that which he is not lawfully competent to do (see Fry on Specific Performance[a]; and *Willmott v Barber* ((1880) 15 Ch D 96 at 107)). Here the defendant is under an unqualified covenant in his lease not to underlet or part with possession of part only of the premises demised to him. To order him specifically to perform the contract by granting an underlease and so allowing the plaintiffs to retain possession would be to order him to do something he cannot do or, if he did it, would expose him to a forfeiture. As Lord Redesdale LC[b] remarked in a passage quoted in Fry on Specific Performance[c]:

a 6th Edn (1921) p 194

b In *Harnett v Yielding* (1805) 2 Sch & Lef 549 at 553, [1803-13] All ER Rep 704 at 705

c 6th Edn (1921) p 194

> '[The plaintiff] must also show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice.'

During the course of the debate I suggested to counsel that the position of the plaintiffs might be sufficiently and properly protected by a declaration that the plaintiffs were in possession of the workshop under the terms of the agreement of 3 August 1971. That suggestion was supported by

counsel for the plaintiffs with enthusiasm and I must deal with it. I have, for the following reasons, come to the clear conclusion that the suggestion was misconceived, and I regret having made it.

It is not and never has been the contention of the plaintiffs that they are lessees at law under the agreement; and counsel for the defendant submitted, as I think correctly, that the *Walsh v Lonsdale* situation, where the intended lessee is treated as having the same rights as if a lease had in fact been granted to him, only applies if the lessee is entitled to specific performance (see the judgment of Sir George Jessel MR in *Walsh v Lonsdale* ((1882) 21 Ch D at 14)). The equitable interests which the intended lessee has under an agreement for a lease do not exist in vacuo but arise because the lessee has an equitable right to specific performance of the agreement. In such a situation, that which is agreed to be and ought to be done is treated as having been done and carrying with it in equity the attendant rights. But the intended lessee's equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done. The suggested declaration would thus not be justified.

There is, I think, another objection to the making of such a declaration as I am discussing--or perhaps it is putting the same point in another way. The equitable right to be in possession under the agreement could only be protected by an injunction

and, if after the making of such a declaration the plaintiffs sought the equitable remedy of an injunction to protect their right to remain in possession, it would be an invitation to the court to grant part-specific performance of the agreement. Such an injunction, like the order for specific performance itself, would in its effect compel the defendant to continue to break the covenant not to part with possession of part only of the premises demised to him and be open to the same objection as an order for specific performance. The suggested declaration would be a misleading nuisance. For these reasons, the plaintiffs ought, in my judgment, to be left with their remedy at law, namely, damages for the repudiation by the defendant of his agreement to grant the plaintiffs a lease.

I must add this. At the end of his submissions counsel for the plaintiffs submitted, as an alternative to a decree of specific performance or a declaration such as that which I have considered, that he was at least entitled to a declaration, founded on the payment of a weekly rent, that the plaintiffs are weekly tenants. The purpose of such a declaration--which is, of course, a discretionary remedy--would be to give the plaintiffs an advantage in other proceedings. The question whether in truth the plaintiffs are entitled to be treated as weekly tenants was not dealt with by the judge in the court below because it was unnecessary; and it was not raised by any respondent's notice in this court. I would myself think that that question (which I am not sure has been fully ventilated in the arguments before us and on which no authority has really been cited on either side) would be better litigated in proceedings in which it is or may be relevant; and whatever the answer may be--on which I express no opinion--I would think it wrong to make such a declaration.

CAIRNS LJ.

I entirely agree, and have nothing to add.

DAVIES LJ.

I also agree, and only add a footnote on a point which, in view of the decision at which this court has arrived, is really irrelevant to the present appeal. That concerns the order that was drawn up as a result of the learned judge's judgment. It is on a printed form, form 141(3), and, leaving out formal matters, it says: 'Cause of action: Damages, injunction, etc'; 'Date of judgment'--so-and-so; 'Amount of judgment: See written judgment'--the learned judge having given a written judgment. That obviously is a quite unsatisfactory document if it was meant to include a decree of specific performance, which apparently it was. There is in the county court forms an appropriate form for a decree of specific performance. It is in the County Court Practice[d], and it is form 234: 'Judgment in Action for Specific Performance': and then it gives various standard forms that can be used or adapted for that purpose. It would appear, therefore, from the document to which I have just been referring that the staff at the Tonbridge County Court were not really carrying out their duties with the precision and accuracy which, of course, they should have shown.

d (1973), p 794

Apart from that I have nothing to add to what Stamp LJ has said, and I entirely agree with the result.

Appeal allowed. Decree of specific performance set aside. Case remitted to county court for assessment of damages.

Solicitors: Wedlake Bell agents for Pearless, de Rougement & Co, East Grinstead (for the defendant); Barnett & Barnett (for the plaintiffs).

F A Amies Esq Barrister.

11

2011 ONCA 125
Ontario Court of Appeal

Maynes v. Allen-Vanguard Technologies Inc.

2011 CarswellOnt 792, 2011 ONCA 125, [2011] O.J. No. 644, 198 A.C.W.S. (3d) 586, 274 O.A.C. 229

Steve Maynes, 6223087 Canada Inc., 6223362 Canada Inc., Jean Robichaud and Ken Gingrich, Plaintiffs (Appellants) and Allen-Vanguard Technologies Inc. (formerly Med-Eng Systems Inc.), Maurice J.M. Baril, Pierre Boivin, Thomas Csathy, Paul Echenberg, Mathieu Gauvin, Cecile Ducharme, Mark Norton, Danny Osadca, Richard L'Abbé, (Collectively, the "Original Defendants") Allen-Vanguard Corporation, 1062455 Ontario Inc., GrowthWorks Canadian Fund Ltd., Schroder Venture Managers (Canada) Limited in its capacity as general partner of each of Schroder Canadian Buy-Out Fund II Limited Partnership CLP1, Schroder Canadian Buy-Out Fund II Limited Partnership CLP2, Schroder Canadian Buy-Out Fund II Limited Partnership CLP3, Schroder Canadian Buy-Out Fund II Limited Partnership CLP4, Schroder Canadian Buy-Out Fund II Limited Partnership CLP5, Schroder Canadian Buy-Out Fund II Limited Partnership CLP6, Schroder Ventures Holding Limited, in its capacity as general partner of Schroder Canadian Buy-Out Fund II UKLP, and on behalf of Schroder Canadian Buy-Out Fund II Coinvestment Scheme and SVG Capital plc (formerly, Schroder Ventures International Investment Trust plc), and Computershare Trust Company of Canada, (Collectively, the "Added Defendants"), Defendants (Respondents)

David Watt J.A., Karakatsanis J.A., Karen M. Weiler J.A.

Heard: December 16, 2010
Judgment: February 14, 2011
Docket: CA C52263, C52584

Counsel: John P. O'Toole, Mandy E. Moore, for Plaintiffs
Ronald G. Slaght, Q.C., Eli S. Lederman, for Defendants, Allen-Vanguard Technologies Inc. (formerly Med-Eng Systems Inc.), Allen-Vanguard Corporation
K. Scott McLean, Christopher R.N. McLeod, for Defendants, Maurice J.M. Baril, Pierre Boivin, Thomas Csathy, Paul Echenberg, Mathieu Gauvin, Cecile Ducharme, Mark Norton, Danny Osadca, Richard L'Abbé
Thomas G. Conway, Christopher J. Hutchison, for Defendants, Richard L'Abbé, 1062455 Ontario Inc., GrowthWorks Canadian Fund Ltd., Schroder Venture Managers (Canada) Limited, Schroder Ventures Holding Limited

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Pleadings — Application to strike — Absence of reasonable cause of action

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Pleadings — Application to strike — Abuse of process

Plaintiff shareholders brought two actions (Ongoing Actions) against M Inc. and its Board of Directors (Original Defendants) regarding M Inc.'s repurchase of plaintiffs' shares — M Inc. was taken over by A Co. pursuant to agreement with majority of shareholders (Offeree Shareholders) — Plaintiffs' shares were purchased by A Co. — After close of pleadings in Ongoing Actions, plaintiffs sought to combine Ongoing Actions and add as defendants Offeree Shareholders, A Co. and escrow agent (collectively Added Defendants) — Plaintiffs brought New Action against Original and Added Defendants, claiming declaratory relief in addition to relief sought in Ongoing Actions, and sought joinder or consolidation of New Action to Ongoing Actions — Defendants brought motion to strike statement of claim in New Action — Plaintiffs brought cross-motion for leave to amend claim or join new claim to Ongoing Actions — Motions judge granted defendants' motion and dismissed plaintiffs' cross-motion — Plaintiffs appealed — Appeal dismissed — Motion judge held statement of claim was abuse of process — Motions judge was agreed with — Statement of claim was abuse of process because it duplicated claims in two Ongoing Actions with respect to Original Defendants and undermined integrity of administration of justice by circumventing R. 26.02(c) of Rules of Civil Procedure with respect to Added Defendants — Statement of claim in New Action repeated substantially same allegations against same defendants as in Ongoing Actions — As against Added Defendants, new statement of claim circumvented requirement in R. 26.02(c) to obtain leave of court to add non-consenting party to action after pleadings are closed.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Miscellaneous

Plaintiff shareholders brought two actions (Ongoing Actions) against M Inc. and its Board of Directors (Original Defendants) regarding M Inc.'s repurchase of plaintiffs' shares — M Inc. was taken over by A Co. pursuant to agreement with majority of shareholders (Offeree Shareholders) — Plaintiffs' shares were purchased by A Co. — Pursuant to share purchase agreement, Escrow Fund was established to create fund to which A Co. could have recourse if representations and warranties of M Inc. and/or Offeree Shareholders proved to be incorrect — After close of pleadings in Ongoing Actions, plaintiffs sought to combine Ongoing Actions and add as defendants Offeree Shareholders, A Co. and escrow agent (collectively Added Defendants), then join all plaintiffs in enhanced claim against Added Defendants to seek relief in relation to Escrow Fund — Plaintiffs brought New Action against Original and Added Defendants, and sought joinder or consolidation of New Action to Ongoing Actions — Defendants brought motion to strike plaintiff's statement of claim in New Action — Plaintiffs brought cross-motion for leave to amend claim or join claim to Ongoing Actions — Motions judge granted defendants' motion and dismissed plaintiffs' cross-motion — Plaintiffs appealed, alleging entitlement to imposition of constructive trust against Added Defendants on basis of oppression remedy pleaded against Original Defendants — Appeal dismissed on other grounds — Motions judge did not err in holding that there were no facts pleaded that would form basis on which resulting trust might be found — It was plain and obvious there was no basis in law for court to impose constructive trust over Added Defendants' Escrow Fund as oppression remedy against Original Defendants — Pleading disclosed no basis on which to grant remedy over Escrow Fund, thus no basis existed for joinder or consolidation of New and Ongoing Actions.

Table of Authorities

Cases considered by *Karen M. Weiler J.A.*:

BCE Inc., Re (2008), *(*sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 383 N.R. 119, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, *(*sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 301 D.L.R. (4th) 80, 2008 SCC 69, *(*sub nom. *BCE Inc. v. 1976 Debentureholders)* [2008] 3 S.C.R. 560, 2008 CarswellQue 12595, 2008 CarswellQue 12596 (S.C.C.) — referred to

Becker v. Pettkus (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — referred to

C.I. Covington Fund Inc. v. White (2000), 22 C.B.R. (4th) 183, 10 B.L.R. (3d) 173, 10 C.P.R. (4th) 49, 2000 CarswellOnt 4680 (Ont. S.C.J.) — referred to

Gorecki v. Canada (Attorney General) (2005), 2005 CarswellOnt 3683, 2005 C.E.B. & P.G.R. 8168 (Ont. S.C.J.) — considered

Hodgkinson v. Simms (1994), 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1 (S.C.C.) — referred to

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — referred to

Kourtessis v. Minister of National Revenue (1993), 93 D.T.C. 5137, 153 N.R. 1, [1993] 2 S.C.R. 53, 102 D.L.R. (4th) 456, 81 C.C.C. (3d) 286, 78 B.C.L.R. (2d) 257, 14 C.R.R. (2d) 193, 27 B.C.A.C. 81, 45 W.A.C. 81, [1993] 4 W.W.R. 225, 20 C.R. (4th) 104, 1993 CarswellBC 1259, 1993 CarswellBC 1213, [1993] 1 C.T.C. 301 (S.C.C.) — considered

Maynes v. Med-Eng Systems Inc. (2010), 2010 ONSC 4704, 2010 CarswellOnt 6811 (Ont. Master) — referred to

Peixeiro v. Haberman (1997), 30 M.V.R. (3d) 41, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 217 N.R. 371, 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, [1997] 3 S.C.R. 549, 46 C.C.L.I. (2d) 147, 12 C.P.C. (4th) 255 (S.C.C.) — followed

Perez v. Galambos (2009), 97 B.C.L.R. (4th) 1, [2009] 12 W.W.R. 193, (sub nom. *Galambos v. Perez*) [2009] 3 S.C.R. 247, 394 N.R. 209, 70 C.C.L.T. (3d) 167, 312 D.L.R. (4th) 220, 276 B.C.A.C. 272, 468 W.A.C. 272, 2009 CarswellBC 2787, 2009 CarswellBC 2788, 2009 SCC 48 (S.C.C.) — referred to

Scion Capital, LLC v. Gold Fields Ltd. (2006), 15 B.L.R. (4th) 331, 2006 CarswellOnt 699 (Ont. S.C.J.) — considered

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — considered

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Waxman v. Waxman (2002), 2002 CarswellOnt 2308, 25 B.L.R. (3d) 1 (Ont. S.C.J.) — distinguished

Waxman v. Waxman (2004), 2004 CarswellOnt 1715, 44 B.L.R. (3d) 165, 186 O.A.C. 201 (Ont. C.A.) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 248 — referred to

s. 248(3) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 97 — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
s. 4 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 20 — referred to

R. 21.01(1)(b) — referred to

R. 21.01(3)(d) — referred to

R. 25.11(c) — referred to

R. 26.01 — considered

R. 26.02 — considered

R. 26.02(b) — considered

R. 26.02(c) — considered

R. 37.05(3) — considered

APPEAL by plaintiffs from judgment granting defendants' motion to strike plaintiffs' statement of claim in new action and dismissing plaintiff's cross-motion for leave to amend or join new claim to ongoing actions.

***Karen M. Weiler J.A.*:**

Overview

1 The issue on this appeal is whether the motions judge erred in granting the defendants' motion to strike the plaintiffs' statement of claim in their New Action (Ottawa Court File No. 09-45392) and in dismissing the plaintiffs' cross-motion seeking leave to amend that claim or to join that claim to two pre-existing Ongoing Actions (Ottawa Court Files 06-CV-36222 and 07-CV-38942).

2 I agree with the motions judge that the statement of claim in the New Action is an abuse of process (rules 21.01(3)(d) and 25.11(c)). It repeats substantially the same allegations against the same defendants, known as the Original Defendants, as in the two other Ongoing Actions. As against the Added Defendants (i.e. those defendants who had not been named in the Ongoing Actions [1]), the statement of claim in the New Action circumvented the requirement in rule 26.02(c) to obtain leave of the court to add a non-consenting party to an action after pleadings are closed.

3 The motions judge also held that, as against the Added Defendants, the claim in the New Action disclosed no reasonable cause of action (rule 21.01(b)). I agree with the motions judge. As I understand it, however, the plaintiffs further argue that even if they have not pled a cause of action against the Added Defendants, they may nevertheless be entitled to the imposition of a constructive trust against the Added Defendants on the basis of the oppression remedy pleaded against the Original Defendants. For the reasons that follow, I do not agree that the Added Defendants are properly parties on this basis.

4 Having regard to my reasons, the appeal of the motions judge's refusal to grant leave to amend the statement of claim in the New Action is dismissed, as is his refusal to grant joinder or consolidation. Accordingly, I would dismiss this appeal.

The Litigation

i. The pleaded facts relating to the Ongoing Actions and the Original Defendants

5 The plaintiffs Steve Maynes, Jean Robichaud, and Ken Gingrich were all senior executives of Med-Eng Systems Inc. ("Med-Eng"), an Ontario corporation that specialized in the research, design, and manufacture of personal protective military equipment. In the course of their employment, they each acquired a number of Class A common shares in Med-Eng through the company's employee stock option plan ("the Plan"). Maynes also transferred some of his shares to his two corporations, 6223362 Canada Inc. and 6223087 Canada Inc., which are the remaining plaintiffs.

6 Under the Plan, Med-Eng was entitled under certain circumstances to elect to repurchase the shares at fair market value, which was determined by Med-Eng's Board of Directors. The Plan stipulated that if Med-Eng were to exercise this share repurchase option, it had to give written notice to the employee shareholder and state what the Board determined to be the fair market price.

7 All of the Med-Eng shares that the plaintiffs held were deposited with Richard L'Abbé, a director of Med-Eng, who held the shares in trust as Trustee under a Voting Trust Agreement. Under that agreement, L'Abbé could exclusively exercise all shareholders' rights on behalf of the plaintiffs.

8 In February 2006, Med-Eng issued a notice of repurchase to both Maynes and Robichaud, stipulating a fair market price of $1.60 per share. The notices contained a number of errors and deficiencies that were not resolved to the plaintiffs' satisfaction. Subsequent to issuing the notices, the Board of Directors twice assigned a new fair market value to Med-Eng's common shares — first at $2.00 per share in April 2006, then at $4.00 per share in July 2006 — but did not advise Maynes or Robichaud of the second valuation and did not seek to amend or reissue the repurchase notices to them.

9 Similarly, Med-Eng issued two written notices to Gingrich in May and June 2006 informing him that the company was exercising its option to repurchase his shares at a fair market value of $2.00 per share. As in the case of Maynes and Robichaud, the notices contained a number of errors and deficiencies that were not resolved to Gingrich's satisfaction. When the Board of Directors re-evaluated Gingrich's common shares in Med-Eng at $4.00 per share in July 2006, they failed to advise him of the new valuation and did not amend or reissue the repurchase notices.

10 The plaintiffs claim that the repurchase of their shares by Med-Eng was invalid, ineffectual and void because the repurchase notices did not conform to the requirements of the Plan, and the Board of Directors was acting oppressively and did not determine the fair market value listed in the notices in good faith. The plaintiffs allege that the actual market

value of the shares was considerably higher than what was stated in the notices, and so the stock repurchases constituted an unlawful expropriation from the plaintiffs. They further allege that the shares that Maynes had transferred to 6223362 Canada Inc. and 6223087 Canada Inc. were not subject to the Plan. Finally, they allege that L'Abbé breached his fiduciary duties to the plaintiffs as trustee of their shares by endorsing and delivering their share certificates to Med-Eng without their authorization under the terms of the Voting Trust Agreement.

ii. Procedural history respecting the Ongoing Actions and the Original Defendants

11 On October 18, 2006, Maynes, Robichaud, 6223362 Canada Inc. and 6223087 Canada Inc. initiated proceedings against Med-Eng and its directors (collectively, "the Original Defendants"), [2] by way of a statement of a claim. On August 7, 2007, Gingrich followed suit and filed a statement of claim against the Original Defendants, asserting substantially the same claims.

12 In summary, the plaintiffs in these two actions seek: a declaration that the Original Defendants breached their fiduciary duties to them; a declaration that Richard L'Abbé breached his duties as trustee under the Voting Trust Agreement; a declaration that the repurchase transactions were invalid and so they continue to be registered shareholders of Med-Eng; and an order directing Med-Eng to pay the plaintiffs all unpaid dividends accruing in respect of their shares. In the alternative, the plaintiffs advance an oppression claim against the Original Defendants pursuant to s. 248 of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"). They seek as an oppression remedy an order directing Med-Eng, now Allen-Vanguard Technologies Inc., to repurchase their shares at a price equal to fair market value.

13 The proceedings for these two actions are ongoing. The pleadings have closed and documentary and oral discovery is substantially complete.

iii. The pleaded facts relating to the genesis of the New Action and the Added Defendants

14 Subsequent to Med-Eng's repurchase of the plaintiffs' shares and the plaintiffs' commencement of proceedings against Med-Eng and the other Original Defendants, Med-Eng became the target of a takeover bid. On or about August 2, 2007, Allen-Vanguard Corporation ("AVC") offered to pay $600 million to purchase 100% of the issued and outstanding shares of Med-Eng from certain shareholders ("the Offeree Shareholders" [3]) whose combined interests constituted 70% of Med-Eng's capital stock. Since the Offeree Shareholders had a majority stake in Med-Eng, pursuant to a shareholders' agreement they could compel all minority shareholders to sell their shares to AVC in accordance with the terms of the accepted offer.

15 On or about August 23, 2007, the Offeree Shareholders accepted AVC's offer by way of a share purchase agreement. They compelled the minority shareholders to sell their Med-Eng shares to AVC. The plaintiffs also each sold their non-disputed shareholdings (i.e. shares that were not purchased through Med-Eng's employee stock option plan) to AVC pursuant to the shareholders' agreement. The minority shareholders were advised that the purchase price would be in the range of $11.50 to $12.00 per share. The plaintiffs allege that at all material times, the Offeree Shareholders and AVC were fully aware of the litigation against Med-Eng and the Original Defendants.

16 The share purchase transaction closed on or about September 17, 2007. Following the closing, two developments occurred.

17 AVC eventually merged Med-Eng with another of its subsidiaries to form Allen-Vanguard Technologies Inc. The successor corporation remains an Original Defendant in the Ongoing Actions.

18 As well, pursuant to the share purchase agreement, an Escrow Fund was established in the amount of $40 million. The purpose of the Escrow Fund was to create a fund to which AVC could have recourse if the representations and warranties of Med-Eng and/or the Offeree Shareholders proved to be incorrect. To the extent that the Escrow Fund is

not applied in satisfaction of successful claims asserted by AVC, the Escrow Fund will be released to all shareholders of Med-Eng who sold their shares to AVC under the share purchase agreement. AVC has asserted a claim against the entirety of the Escrow Fund, which is now the subject of separate litigation.

iv. The Added Defendants

19 After the close of pleadings in the Ongoing Actions, the plaintiffs sought to combine the Ongoing Actions and also to add as defendants the Offeree Shareholders, AVC and the escrow agent Computershare Trust Company of Canada (collectively, "the Added Defendants"). Counsel for the plaintiffs sent a letter dated June 4, 2009, to the Original Defendants with a draft Fresh As Amended Statement of Claim. The letter stated, "As you will see, we propose to combine the Maynes/Robichaud action with the Gingrich action. All Plaintiffs then join in an enhanced claim against the 'Added Defendants' to seek relief in relation to the Escrow Fund that was established in the context of the Allen-Vanguard share purchase transaction." The plaintiffs did not obtain the consent required by rule 26.02(b) of the *Rules of Civil Procedure* to add a party after pleadings have closed.

20 Rule 26.02 provides:

> 26.02 A party may amend the party's pleading,
>
> (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
>
> (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
>
> (c) with leave of the court.

21 When the consent of the defendants was not given, the plaintiffs did not seek leave of the court under rule 26.02(c) to have the proposed Added Defendants added as parties to the Ongoing Actions. Nor did they bring a motion pursuant to rule 26.01, which obliges the court to grant an amendment to a pleading "on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."

22 Instead, on June 18, 2009, the plaintiffs initiated a New Action against both the Original and Added Defendants, and sought joinder or consolidation of the New Action to the Ongoing Actions.

v. What is sought in the New Action

23 The New Action duplicated the same five claims the plaintiffs made against the Original Defendants in the Ongoing Actions. However, under the heading, "Claims Arising From the Allen-Vanguard Share Purchase and Related Events", the statement of claim in the New Action also stated that:

- The individual Original Defendants (i.e. the former directors of Med-Eng) and the Offeree Shareholders each obtained a financial benefit (directly or indirectly) from the purported Med-Eng share repurchases upon the conclusion of AVC's purchase of the Med-Eng shares in September 2007.

- The plaintiffs are the lawful owners of certain shares in Med-Eng and, as such, "are entitled to compensation and payment by way of distribution of a portion of the Escrow Fund".

- The Escrow Fund is subject to an express, implied or resulting trust in the plaintiffs' favour.

- The Added Defendants have a form of discretion or power in relation to the Escrow Fund that could unilaterally be exercised so as to prejudice the plaintiff's interests and that the plaintiffs are "particularly vulnerable to the Added Defendants in respect of the Escrow Fund". As such the Added Defendants are fiduciaries of the Plaintiffs.

• If the Escrow Fund were to be paid out or distributed without regard to their claims, the individual Original Defendants and the Offeree Shareholders would be unjustly enriched.

24 The plaintiffs sought a series of declarations in "Claim Six" against the Added Defendants:

• A declaration that the Added Defendants are fiduciaries of the plaintiffs in relation to the Escrow Fund.

• A declaration that some of the Added Defendants have been unjustly enriched to the extent of the plaintiffs' interest in the Escrow Fund.

• A declaration that the Escrow Fund (or a portion thereof) is subject to an express, implied or resulting trust in favour of the plaintiffs (the plaintiffs later conceded at the motions hearing that they were pursuing a declaration of a resulting trust only).

• A declaration that the Added Defendants are constructive trustees of the Escrow Fund to the benefit of the plaintiffs, and an order imposing a remedial constructive trust and primary first charge over the Escrow Fund in favour of the plaintiffs.

• Some other declaration that the plaintiffs are entitled to compensation and payment by way of distribution of a portion of the Escrow Fund, and an order that Computershare pay this entitlement out to them from the Escrow Fund.

25 In the alternative, the plaintiffs sought damages by way of restitution and compensation for the "wrongful conduct of the Added Defendants".

26 All the defendants in the Ongoing and New Actions moved to strike the claim in the New Action.

Issues and Analysis

27 I propose to deal with the abuse of process issue first.

28 The motions judge considered whether the New Action was an abuse of process. With respect to the Original Defendants, given that Claims One through Five were already the subject of Ongoing Actions before the Superior Court of Justice, he held that the New Action created a multiplicity of proceedings that constituted an abuse of process. In relation to the Added Defendants, he held that the New Action was an attempt to re-litigate issues that should have been raised by the plaintiffs in the Ongoing Actions. The motions judge remarked that key representatives of the Added Defendants were already involved in the Ongoing Actions. For example, Richard L'Abbé is an Original Defendant, though he was being named again as an Added Defendant in his capacity as an Offeree Shareholder. Also, the Original Defendants Echenberg, Gauvin and Ducharme were representatives of the Schroder shareholders' interests. If the Plaintiffs succeeded in the Ongoing Actions they would be able to execute against the Original Defendants. The motions judge held that the statement of claim in the New Action was nothing more than an attempt to file execution against the Escrow Fund without having to prove a claim against the Added Defendants.

i. Did the motions judge err in striking the New Action on the basis that it constituted an abuse of process?

29 As the plaintiffs concede, Claims One through Five in the New Action are substantively identical to claims already being asserted in the two Ongoing Actions. Specifically, Claims One through Four are the subject of ongoing proceedings against the Original Defendants in the action initiated on October 18, 2006.[4] Claim Five is the subject of ongoing proceedings commenced as against the Original Defendants in the action initiated on August 7, 2007.[5]

30 The plaintiffs submit that the motions judge erred in holding that Claim Six constituted an abuse of process. They state in their factum that the claims against the Added Defendants arose in September 2007 with the completion

of the Allen-Vanguard share purchase transaction — that is, after the litigation against the Original Defendants had begun. Consent to amend the pleadings in the Ongoing Actions was not requested from the Original Defendants until June 4, 2009, at which time it was refused. The plaintiffs' reason for not bringing a motion to seek leave from the court to amend their pleadings, pursuant to rule 26.02(c), is that "a potential limitation period was approaching" and they were concerned that the motion would not be heard prior to the expiry of the limitation period. As I understand it, the potential limitation period that the plaintiffs were concerned about was the basic two-year limitation period, which would have ended two years after the closing of the Allen-Vanguard share purchase transaction, or September 2009: see *Limitations Act, 2002*, S.O. 2002, c. 24, s. 4.

31 The plaintiffs' reason for not seeking leave of the court to amend their pleading to add the Added Defendants is not tenable for three reasons.

32 First, the limitation period may not have begun to run until October 2008. If the affidavit of Maynes, filed in opposition to the motion to strike, is accepted, the court might have agreed that "[i]t was not until after the completion of the Examinations for Discovery in the Original Actions in October of 2008 that the Plaintiffs *discovered* they had a basis upon which to ... assert enhanced claims against the Offeree Shareholders" (emphasis added). Having regard to the discoverability principle in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), the limitation period would only have begun to run when the plaintiffs discovered they had "a cause of action" or a basis on which to make a claim.

33 Second, assuming they had a cause of action (an issue I will address below), and that the limitation period did begin in September 2007, the plaintiffs had all the information they needed to try and obtain the defendants' consent or to obtain leave of the court to amend their pleadings in the Ongoing Actions after discovery in October 2008. Paragraph 68 of their factum even acknowledges:

> The doctrine of abuse of process, which underlies Rule 21.01(3)(d), seeks to prevent a multiplicity of proceedings or the litigation of issues that could have been raised in earlier proceedings but the party now raising the issues before the Court chose not to do so.

34 The plaintiffs chose to do nothing from October 2008 until June 2009; that is, about seven months.

35 Third, even if a limitation period was imminent, the plaintiffs could have invoked rule 37.05(3), which provides, "An urgent motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions, even if a lawyer estimates that the hearing is likely to be more than two hours long." The plaintiffs' other arguments that the motions judge misapplied the doctrine of abuse of process similarly have no merit.

36 The doctrine of abuse of process seeks to promote judicial economy and to prevent a multiplicity of proceedings: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.), at para. 37. The motions judge correctly identified Claims One to Five against the Original Defendants in the New Action as being an abuse of process because they were virtually identical to the claims asserted against them in the Ongoing Actions. If Claims One to Five in the New Action were allowed to proceed, it would amount to a relitigation of the same issues as between the same parties. The rationale against this approach is found in para. 51 of *Toronto (City) v. C.U.P.E., Local 79*:

> First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is difficult from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

37 The plaintiffs submit that the motions judge was wrong to strike the entirety of their statement of claim as an abuse of process because while Claims One to Five are already being litigated in the Ongoing Actions, Claim Six has never been asserted before and could not have been raised when the statements of claim for the Ongoing Actions were filed.

They submit that if the motions judge found that Claim Six was deficient because it was not sufficiently particularized, he should have allowed leave to amend. They also argue he should have granted the plaintiffs an order to join Claim Six with the Ongoing Actions. During oral submissions, counsel for the plaintiffs submitted that Claim Six may stand on its own even if Claims One through Five are struck as an abuse of process.

38 In addition to avoiding a multiplicity of actions, the doctrine of abuse of process seeks to uphold the integrity of the administration of justice: see *Toronto (City) v. C.U.P.E.* at paras. 35-37. In the present case, the plaintiffs' assertions in Claim Six are intricately linked to Claims One through Five, which are already being pursued in the Ongoing Actions. The plaintiffs should have sought leave of the court to name the Added Defendants in the Ongoing Actions and to amend their pleadings to plead any relief they had not already claimed, either pursuant to rule 26.02(c) or rule 26.01. As mentioned, rule 26.01 obliges the court to amend a pleading "on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment."

39 Instead, the plaintiffs commenced the New Action for the purpose of naming the Added Defendants as parties to the related litigation and sought declaratory relief against them in Claim Six. By doing so, the plaintiffs effectively circumvented the express procedural requirement in rule 26.02(c) that leave of the court be obtained to add a non-consenting party to the proceeding after pleadings have closed. This was an abuse of process. By starting the New Action instead of moving to amend their pleadings in their existing actions to claim "enhanced relief" against the Added Defendants, the plaintiffs circumvented the court's jurisdiction to: (1) assess whether the defendants would be prejudiced by an amendment and to determine whether that prejudice can be compensated for by costs; (2) to impose costs in favour of the defendants for granting the amendment; and (3) to impose other terms that are just.

40 The filing of the statement of claim in the New Action also placed an inappropriate burden on the defendants who had to bring a motion to strike the New Action, when the onus should have properly been on the plaintiffs to convince the court that leave should be granted to amend their pleadings in the Ongoing Actions.

41 My conclusion that there has been an abuse of process is buttressed by the principle of law that the court should refuse to grant a declaration when an alternate appropriate process is available. This principle was put to the plaintiffs in oral argument as a basis for upholding the motions judge's decision to strike Claim Six, which claims only declaratory relief. The plaintiffs made no comment.

42 In *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 (S.C.C.), at pp. 85-88, La Forest J. observed that two judicial policies historically prevented the use of the declaration. The first was the discretion to refuse the granting of a declaration when other remedies were available and the second was the refusal to grant it where no other relief was sought. In relation to the first barrier, La Forest J. held at p. 87:

> The policy concern against allowing declarations, even of unconstitutionality, as a separate and overriding procedure is that they will, in many cases, result in undesirable procedural overlap and delay. As long as a reasonably effective procedure exists for the consideration of constitutional challenges, I fail to see why another procedure must be provided.

43 The court's inherent jurisdiction to grant declaratory relief is not to be exercised in a vacuum. As Morawetz J. observed in *Scion Capital, LLC v. Gold Fields Ltd.* (2006), 15 B.L.R. (4th) 331 (Ont. S.C.J.), at para. 34:

> Inherent jurisdiction [to grant a declaration] is a power derived from the very nature of the court as a superior court of law, permitting the court to maintain its authority and to prevent its process being obstructed and abused. In *Re Stelco* [(2005), 75 O.R. (3d) 5], the Court of Appeal, at para. 35, states:
>
> > In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines [(1999), 7 C.B.R. (4th) 293], inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play".

44 The second barrier to granting a declaratory order, i.e. that no other relief is sought, has been removed in Ontario by the enactment of s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This reform does not detract from the plaintiffs' inability to overcome the first barrier. I note that s. 97 does not exist to enable litigants to do an end run around the *Rules of Civil Procedure*. The plaintiffs' conduct in initiating the New Action against the Added Defendants effectively eviscerates the requirements of rule 26.02(c) and robs the court of its discretion to grant leave to add parties to an action after pleadings have closed.

45 Disputes about whether parties may be added and whether a claim may be amended must be resolved through the process established by the *Rules*, not by circumventing them by the commencement of a new action seeking declaratory relief. Where, as here, the *Rules* provide an effective means to obtain a remedy, it is reasonable to assume that the legislature intended that litigants and their counsel would rely on the prescribed provisions. Otherwise, the integrity of the administration of justice is undermined, as is the goal of efficiency.

46 The present statement of claim is an abuse of process because it duplicates claims in the two Ongoing Actions with respect to the Original Defendants and undermines the integrity of the administration of justice by circumventing rule 26.02(c) with respect to the Added Defendants.

47 While my conclusion that the statement of claim in the New Action is an abuse of process is sufficient to dispose of this appeal, I will, like the motions judge, consider whether a reasonable cause of action exists against the Added Defendants.

ii. Did the motions judge err in holding no reasonable cause of action had been pleaded against the Added Defendants?

48 The motions judge identified four claims made in Claim Six, all of which relate to the Added Defendants. He found that, given the pleaded facts, none of the claims had a basis on which the court could find a reasonable cause of action or grant the relief sought. I review his decision on each claim and comment on it below.

a. Declaration of unjust enrichment

49 To briefly review the facts, AVC presented an offer to the Offeree Shareholders to buy their shares at a certain price, and the Offeree Shareholders accepted. Together, they agreed to set aside a certain portion of the consideration paid for the shares in escrow, to be used as security against any claims of incorrect representations or warranties by Med-Eng and the Offeree Shareholders in the purchase agreement. The motions judge held that any benefit to the Offeree Shareholders or any of the other Added Defendants from the Escrow Fund would be in accordance with the contract between those parties. The contract constituted a valid juristic reason for any potential enrichment. As a result, the requirements of the unjust enrichment principle could not be satisfied.

50 Although the plaintiffs submit that the motions judge accepted that the first two criteria of the unjust enrichment claim were met — namely a benefit to the Added Defendants and a corresponding deprivation to the plaintiffs — on my reading of the motions judge's reasons he formed no conclusion as to whether the pleaded facts disclosed any benefit or corresponding deprivation. He merely wrote that "there was an interesting debate amongst Counsel as to whether the competing claims of the added Defendants ... could be characterized as a 'benefit' with a corresponding deprivation".

51 I would agree with the motions judge's conclusion that, regardless of whether there was a benefit and corresponding deprivation, the escrow agreement between AVC and the Offeree Shareholders constituted a clear juristic reason for any alleged or potential enrichment. Since the Escrow Fund was purely a contractual creation between AVC and the Offeree Shareholders, any benefit enjoyed by either AVC or the Offeree Shareholders would be received as consideration from the other party under a contract.

52 I would therefore hold that the motions judge did not err in striking the claim of unjust enrichment.

b. Declaration of breach of fiduciary duty

53 The motions judge observed that novel fiduciary relationships are generally marked by three characteristics. First, the fiduciary must have the ability to exercise some discretion or power on behalf of the beneficiary. Second, a unilateral exercise of this power can affect the beneficiary's legal or practical interests. Third, the beneficiary is peculiarly "vulnerable" or at the mercy of the fiduciary holding this power or discretion. See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 408; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.). In addition, I note that a critical characteristic of a fiduciary relationship is that of loyalty: the fiduciary undertakes to act in the interests of another person. See *Perez v. Galambos*, [2009] 3 S.C.R. 247 (S.C.C.), at para. 69.

54 The motions judge held that the statement of claim failed to disclose any facts to support the proposition that the Added Defendants were in a fiduciary relationship with the plaintiffs, nor to establish the nature and scope of the discretion and power that the Added Defendants could exercise over the plaintiffs so as to place them in a vulnerable position. The statement of claim also contained no allegation that any duty was breached.

55 I would agree with the motions judge.

56 Even assuming all the plaintiffs' allegations are taken to be true, AVC is nothing more than an arm's length purchaser of Med-Eng shares, the Offeree Shareholders are merely co-shareholders with the plaintiffs, and the only role played by Computershare is to hold a sum of money in escrow for the potential benefit of the Offeree Shareholders. It cannot be said that the relationship between the plaintiffs and any of the Added Defendants is one where the Added Defendants have undertaken to act in the plaintiffs' interests.

57 The plaintiffs argue that they are vulnerable to the Added Defendants because the Added Defendants have significant power over the distribution of the Escrow Fund that, if exercised, could adversely affect their interests. However, the Supreme Court of Canada has expressly rejected the notion that a fiduciary duty may arise in "power-dependency" relationships without any express or implied undertaking by the fiduciary to act in the best interests of the other party: *Galambos* at paras. 71-74. Not all relationships involving power imbalances are fiduciary in nature, and a power dependency does not, on its own, materially determine whether a relationship is fiduciary.

58 It is therefore plain and obvious that the plaintiffs' claim for a declaration of a fiduciary relationship cannot succeed.

c. Declaration of resulting trust

59 The motions judge found that there were no facts pleaded that could suggest that the Escrow Fund was subject to a resulting trust in favour of the plaintiffs. No facts were pleaded that the plaintiffs contributed to the Escrow Fund or that the Added Defendants intended the Escrow Fund to be held in trust for them.

60 In their submissions on the resulting trust claim, the plaintiffs asked this court to consider the following passage from *Gorecki v. Canada (Attorney General)*, [2005] O.J. No. 3465 (Ont. S.C.J.), at para. 67, which was also quoted by the motions judge:

> Waters describes a resulting trust as arising "whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it" (op.cit. at p. 362). Like an express trust, the settlor's intent is important but intent is inferred as a matter of law: *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

61 There is no fiduciary relationship between the plaintiffs and the Added Defendants, and the Added Defendants never received property "for which they gave no value". The plaintiffs merely make a bare submission that it would be open to a trial judge to find that the Escrow Fund was being held as a resulting trust in favour of the plaintiffs, "either as an independent equitable remedy or as an appropriate element of" an oppression remedy.

62 The plaintiffs' submission misapprehends the law of resulting trust. An essential characteristic of all resulting trust situations is that "either the claimant [i.e. the would-be beneficiary of the resulting trust] originally transferred the

property in question to the alleged resulting trustee, or that the claimant supplied the whole or part of the purchase price when the property was bought from a third party and transferred into the alleged resulting trustee's name": Donovan W.M. Waters, Q.C., Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Canada, 2005), at pp. 365-66. In the present case, the plaintiffs seek a resulting trust over the Escrow Fund. However, as the motions judge noted, the facts as pleaded do not show that the plaintiffs were ever the original title owner of the Escrow Fund nor did they ever contribute to it. The money in the Escrow Fund originated solely from the Added Defendants, not the plaintiffs.

63 I would therefore hold that the motions judge did not err in holding that there were no facts pleaded that would form a basis on which a resulting trust might be found.

d. Oppression claim and remedial constructive trust remedy

64 The motions judge observed that a remedial constructive trust had been imposed in situations where claims based on unjust enrichment, breach of fiduciary duty or oppression had been made out. He had already held that there was no basis on which to argue unjust enrichment or breach of fiduciary duty in relation to the Added Defendants. The oppression remedy did not exist at common law but was a statutory cause of action created by the provisions of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), and had to be specifically pleaded. It was not. As a result, he held it "plain and obvious that there is no basis for a declaration that the Escrow Fund is held as a constructive or remedial trust in favour of the Plaintiffs."

65 I have already determined that even if all the pleaded facts are accepted as true, a claim for unjust enrichment or breach of fiduciary duty cannot succeed. Therefore, the only remaining ground upon which a constructive trust could possibly be imposed in this case is as a remedy for oppression.

66 Counsel for the plaintiffs made forceful oral submissions that the motions judge, in concluding that it was plain and obvious that there was no basis for a declaration of constructive trust, misinterpreted the plaintiffs' pleadings and erred in finding that they had failed to plead an oppression claim. As I have indicated, the plaintiffs' counsel explained at the oral hearing before this court that the plaintiffs do not, in fact, wish to assert a claim of oppression against the Added Defendants. Instead, they advance an oppression claim against the Original Defendants only, and seek a constructive trust over some or all of the Escrow Fund as a remedy for the Original Defendants' oppressive conduct.

67 The claim for declaratory relief in the form of a constructive trust cannot stand on its own in the present action. A constructive trust is an equitable remedy imposed by the court and cannot be declared or recognized in the abstract without a finding of a breach of an equitable obligation. Since the claims against the Original Defendants have been struck as an abuse of process, and since the plaintiffs do not assert any actionable wrong against the Added Defendants, it follows that there is no basis in the present action upon which the court could impose a constructive trust.

68 In other words, once Claims One through Five are struck, there is no cause of action from which a constructive trust remedy could flow. Otherwise, it would be akin to allowing a claim for damages to proceed without there being any pleading of an actionable wrong. The motions judge was therefore correct in holding that the statement of claim provided no basis upon which the court could declare a constructive trust over the Escrow Fund in favour of the plaintiffs.

69 This alone is a basis for dismissing this ground of appeal.

70 Having regard to the plaintiffs' cross-motion for joinder or consolidation, however, I must make further comment. Even if this court were to grant an order joining or consolidating Claim Six to the Ongoing Actions, it is still plain and obvious that there is no factual basis upon which a trial judge could impose a constructive trust over the Escrow Fund — which is essentially property belonging to third parties — as relief against the Original Defendants' oppressive conduct.

71 Section 248(3) of the OBCA provides that "the court may make any interim or final order it thinks fit" as a remedy for oppression. In some circumstances, the court has imposed a constructive trust as an oppression remedy: see e.g.

Waxman v. Waxman, *infra*, and *C.I. Covington Fund Inc. v. White* (2000), 10 B.L.R. (3d) 173 (Ont. S.C.J.). However, it must also be remembered that the constructive trust, as a general remedial device, is founded squarely on the principles of "good conscience" or preventing an unjust enrichment: Peter D. Maddaugh, Q.C., & John D. McCamus, *The Law of Restitution* (Toronto: Canada Law Book, 2010) at c. 5:200; see also *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.). [6]

72 I have already held that the plaintiffs' claim for unjust enrichment against the Added Defendants is not made out in law. The pleaded facts also do not allege that the Added Defendants breached any equitable obligation or committed any other actionable wrong against the plaintiffs.

73 The plaintiffs argue, however, that if all the pleaded allegations relating to the Original Defendants' conduct are proven and there is a finding that the Original Defendants oppressed the plaintiffs, then it is open to the trial judge to fashion a remedy that would impose a constructive trust over the property of the Added Defendants (i.e. the Escrow Fund), even though there are no pleaded facts alleging that the Added Defendants had any role in the plaintiffs' oppression. Because s. 248(3) of the OBCA allows the court to make any "order it thinks fit" to remedy oppressive conduct, the plaintiffs submit that the remedies available to the court are "virtually unlimited" and include awarding a constructive trust over third party recipients of the benefits from oppression. As support for the court's authority to fashion such a remedy, they cite *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.J.), at para. 1641, aff'd with minor variations (2004), 44 B.L.R. (3d) 165 (Ont. C.A.), at paras. 571-589.

74 In *Waxman*, two brothers, Morris (the plaintiff) and Chester (the defendant), built up a multi-million dollar scrap metal and refuse business, with each owning a 50% share in the company. While Morris was ill and preoccupied with his health problems, Chester tricked him into signing an agreement that sold his stake in the company to Chester. Chester also inappropriately allocated company bonuses to himself and his sons, and had allowed the diversion of company assets to various other corporations owned by his sons. The trial judge found, among other things, that Chester was liable for oppression and breaches of fiduciary duty, and that the share transfer agreement could be set aside on the basis of undue influence and unconscionability. The trial judge also made various findings of knowing receipt and knowing assistance against Chester and his sons. As a remedy for the invalid share transfer, the trial judge ordered that 50% of Chester's share in the company be held in constructive trust for Morris. She also ordered Chester to pay Morris 50% of the profits and distribution of equity of the company from the date of the impugned share transfer to the date of judgment. Finally, she ordered a tracing process to permit Morris to attempt to trace these profits into the hands of Chester's sons and other persons who were not bona fide purchasers for value without notice. The trial judge's decision in *Waxman* was largely upheld on appeal to this court, which found that the constructive trust was imposed on the basis of both equity (for example, as a remedy for the breaches of fiduciary duty) and as a remedy of oppression under s. 248 of the OBCA.

75 *Waxman*, however, is not authority for the proposition that the court, in fashioning an oppression remedy under s. 248, may impose a constructive trust over the property of third parties that had no role in the oppressive conduct. In *Waxman*, all parties whose property was subject to the constructive trust by virtue of the tracing order were participants in or otherwise directly benefited from the oppressive conduct. For example, Chester's son Robert and his companies were found liable for knowing receipt of the profit diversions from Morris and Chester's company as a result of Chester's oppressive acts and breach of fiduciary duty. *Waxman* is readily distinguishable from the present case, where the plaintiffs have not pleaded a cause of action against the Added Defendants in knowing receipt, and have not pleaded that AVC and the Offeree Shareholders had anything to do with the Original Defendants' alleged oppressive conduct as described in Claims One through Five.

76 The plaintiffs argue that, nevertheless, if the trial judge found that the Original Defendants had engaged in oppressive conduct it would be open to the trial judge to fashion a remedy that would impact the Added Defendants and thus in fairness they ought to be before the court.

77 I do not agree. Oppression is a fact-specific determination. The reach of the oppression remedy is limited by the reasonable expectations asserted by the claimant: *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), at paras. 59, 68, 72, 89

and 95. The plaintiffs do not plead that the shareholder agreements they had with the Original Defendants gave them a reasonable expectation that the Added Defendants would have regard to their interests. Indeed, the plaintiffs have not asserted any basis on which they had a reasonable expectation that the Added Defendants — namely, the Offeree Shareholders, AVC and Computershare — would protect their economic interests.

78 In assessing a claimant's reasonable expectations, the court looks to a variety of factors, including commercial practice and any shareholder agreements: see *BCE* at paras. 73 and 79. The Supreme Court stated that the latter "may be viewed as reflecting the reasonable expectations of the parties".

79 The plaintiffs do not suggest that the escrow agreement established to compensate AVC in the event of a breach of Med-Eng's and the Offeree Shareholders' representations and warranties is a departure from commercial practice. Nor do they submit that anything in any shareholder agreements creates a reasonable expectation that AVC and the Offeree Shareholders would have regard to the plaintiff's interests. The same is all the more true with respect to the agreement with the escrow agent Computershare. Consequently, I would hold that it is plain and obvious that there is no basis in law for the court to impose a constructive trust over the Added Defendants' Escrow Fund as an oppression remedy against the Original Defendants.

80 It is plain and obvious that Claim Six must be struck in its entirety.

iii. Did the motions judge err in dismissing the plaintiffs' cross-motion?

81 The motions judge did not err in denying the plaintiffs leave to amend their statement of claim. As I have indicated the New Action constituted an abuse of process. To grant the plaintiffs request for joinder or consolidation would only continue the abuse of process.

82 I would also agree with the motions judge that, as against the Added Defendants, the claim disclosed no reasonable cause of action (rule 21.01(1)(b)). The pleading discloses no basis on which to grant a remedy over the Escrow Fund. Thus, a basis for joinder or consolidation of the New Action with the Ongoing Actions does not exist.

83 I would therefore uphold the motions judge's decision to refuse a joinder or consolidation.

iv. Are there inconsistent judgments?

84 In advance of the appeal hearing, counsel for the plaintiffs referred this court to a recent motion decision in one of the Ongoing Actions (Ottawa Court File 06-CV-36222) that was rendered by Master C.U.C. MacLeod on August 27, 2010: *Maynes v. Med-Eng Systems Inc.*, 2010 ONSC 4704 (Ont. Master). That decision was released just shortly before the present appeal was perfected.

85 Counsel for the plaintiffs submits that the motions judge's decision (which is the subject of the current appeal) is at odds with Master MacLeod's ruling. The plaintiffs argue that while the motions judge found that there was no basis on which to award a constructive trust, Master MacLeod states that if the former directors were found liable for an oppression claim, then the court would clearly have jurisdiction to structure a remedy that would extend beyond those individual defendants. The plaintiffs submit that Master MacLeod's decision allows for a constructive trust to be imposed on the Escrow Fund.

86 I disagree. Master MacLeod's decision concerns a Rule 20 motion for partial summary judgment brought by the former directors of Med-Eng (who, along with Med-Eng itself, constitute the Original Defendants in the Ongoing Actions). He found that the question of whether or not the former directors of Med-Eng were acting oppressively when they set the strike price and triggered the buyback provisions was a genuine issue requiring a trial. He also found that the former directors were proper parties in the litigation because an oppression remedy may be made against them personally. In the process of coming to this conclusion, he wrote:

> The OBCA permits orders binding directors and officers of a corporation following a finding of oppression .... Here however we are dealing with former officers and directors who for the most part were also the shareholders ultimately benefitting from the concentration of shares. ... Given that AVTI [Allen-Vanguard Technologies Inc.] has subsequently been sold, it is far more likely that a court would order a remedy in damages against the enriched former shareholders than against the merged subsidiary of Allen-Vanguard. The personal defendants [i.e. the former Med-Eng board members] are therefore in my view proper parties.

87 As the above passage makes clear, in referring to the court's ability to fashion an appropriate remedy, Master MacLeod refers only to the possibility that the former officers and directors of Med-Eng, as "enriched former shareholders" benefiting from the alleged oppression, may be found liable for damages. Master MacLeod makes no mention of a constructive trust, the Escrow Fund, or any of the Added Defendants. His statements certainly cannot be read as stating that an oppression remedy can involve imposing a constructive trust over the funds of parties which shares no nexus whatsoever to the oppression pleaded. Master MacLeod's decision has no relevance to the present appeal.

Conclusion

88 For the reasons given, I would dismiss the appeal.

Costs

89 I would award the costs of the appeal on a partial indemnity basis to the defendants as follows: $12,000 to the individual Original Defendants; $20,000 to Allen-Vanguard Corporation and Allen-Vanguard Technologies Inc.; and $18,500 to the Added Defendants Richard L'Abbé, 1062455 Ontario Inc., GrowthWorks Canadian Fund Ltd., Schroder Venture Managers (Canada) Limited, and Schroder Ventures Holding Limited.

***David Watt J.A.*:**

I agree

***Karakatsanis J.A.*:**

I agree

Appeal dismissed.

Footnotes

1 There is one exception. Richard L'Abbé is named as an Original Defendant in his capacity as former director of Med-Eng Systems Inc. and Trustee of a Voting Trust Agreement among participating shareholders of the corporation. He is also being sued in the New Action as an Added Defendant in his capacity as a shareholder.

2 The former directors of Med-Eng who are being sued as Original Defendants are Maurice J.M. Baril, Pierre Boivin, Thomas Csathy, Paul Echenberg, Mathieu Gauvin, Cecile Ducharme, Mark Norton, Danny Osadca, and Richard L'Abbé. As mentioned, Richard L'Abbé was also Trustee under a Voting Trust Agreement among participating shareholders. He has also been named as an Added Defendant in his capacity as a Med-Eng shareholder.

3 The Offeree Shareholders, as defined in their share purchase agreement with AVC and Med-Eng, are: 1062455 Ontario Inc., GrowthWorks Canadian Fund Ltd., Schroder Canada Ventures Managers (Canada) Limited (in its capacity as general partner of each of Schroder Canadian Buy-Out Fund II Limited Partnership CLP1, Schroder Canadian Buy-Out Fund II Limited Partnership CLP2, Schroder Canadian Buy-Out Fund II Limited Partnership CLP3, Schroder Canadian Buy-Out Fund II Limited Partnership CLP4, Schroder Canadian Buy-Out Fund II Limited Partnership CLP5, and Schroder Canadian Buy-Out Fund II Limited Partnership CLP6), and Schroder Ventures Holding Limited (in its capacity as general partner of Schroder Canadian Buy-Out Fund II UKLP, and on behalf of Schroder Canadian Buy-Out Fund II Coinvestment Scheme and SVG

Capital plc (formerly Schroder Ventures International Investment Trust plc)). The Offeree Shareholders were co-shareholders of Med-Eng with the plaintiffs.

4 Ottawa Court File No. 06-CV-36222.

5 Ottawa Court File No. 07-CV-38942.

6 In *Soulos*, McLachlin J. recognized that "under the broad umbrella of good conscience," constructive trusts serve to remedy both: (1) situations where the formal elements of unjust enrichment are made out; and (2) situations where a person charged with an equitable obligation has committed a wrongful act, but there has been no enrichment and corresponding deprivation: *Soulos* at para. 43. She held the view that a constructive trust may not only be a remedy for an unjust enrichment but can also serve "to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions": *Soulos* at para. 14. McLachlin J. thus determined that although the case before the Court did not have the formal characteristics of an unjust enrichment, a constructive trust could nonetheless be imposed based on the concept of "good conscience", because the defendant had breached an equitable obligation to the plaintiff. However, Maddaugh & McCamus note at c. 5:200.50 that the Court did not need to recognize a separate type of constructive trust based upon the notion of "good conscience", because even such cases can be subsumed within a broader reading of "unjust enrichment".

End of Document

12

ICLR: Chancery Division/1885/Volume 31/LONDON AND BLACKWALL RAILWAY COMPANY v. CROSS. [1885. L. 3012.] - (1885) 31 Ch.D. 354

(1885) 31 Ch.D. 354

[COURT OF APPEAL]

LONDON AND BLACKWALL RAILWAY COMPANY v. CROSS. [1885. L. 3012.]

1885 Dec. 11.

CHITTY, J.

1886 Jan. 11, 12.

LINDLEY, FRY and LOPES, L.JJ.

Arbitration - Unauthorized use of Name - Injunction to restrain - Jurisdiction - Lands Clauses Consolidation Act, 1845.

The lessee of a ferry served a notice on a railway company on behalf of himself and his lessors claiming compensation for injury to the ferry, and requiring the dispute to be submitted to arbitration under the *Lands Clauses Act*. The lessors had not en authority to use their names; the Act of the railway company provided for compensating the lessors of the ferry but did not mention their lessee; and the notice claimed one lump sum without distinguishing the interests of the lessors and the lessee. The railway company brought an action for an injunction to restrain the lessee from proceeding to arbitration under the notice:-

Held, by *Chitty*, J., that a proceeding in the name of a person who had given no authority ought to be stayed, and that an injunction ought to be granted, the unauthorized use of the name of the lessors distinguishing the case from *North London Railway Company v. Great Northern Railway Company*(1):-

Held, on appeal, that though the Court in which an action is brought has jurisdiction to stay

proceedings in it if it has been brought without authority, the Court has no general jurisdiction to restrain persons from acting without authority, and that an injunction could not be granted to restrain a person from taking proceedings out of Court in the name of a person who had given no authority to use it.

THE *Poplar and Greenwich Ferry Company* was incorporated by 52 Geo. 3, c. cxlviii. for the purpose of establishing a ferry between *Greenwich* and the *Isle of Dogs* and making roads and approaches to it, and was authorized by the Act to claim certain tolls for animals passing along any part of the roads, and certain other tolls for animals, carriages, goods, wares, and merchandize carried across the river. By 54 Geo. 3, c. clxxi. the company was empowered to demand a toll of 1*d.* for each person carried across. In 1868 the company demised to the *Potters Ferry Society* for a term of forty-eight years from Christmas, 1866, the toll of 1*d.* authorized by the last-mentioned Act, and the rights of ferryage conferred by the earlier Act, but not the right to

(1) 11 Q. B. D. 30.

tolls for using the roads. *Cross* became the assignee of the interest conferred by this lease, which contained a power of attorney authorizing the lessees and their assigns to use the name of the lessors for the purpose of enforcing payment of the toll assigned.

By the *London and Blackwall Railway (Steamboats*) Act, 1873, the railway company were empowered to run steam vessels for the conveyance of passengers between their railway and the existing landing-place at *Greenwich*, and by sect. 6 it was enacted that: "The *Poplar and Greenwich Ferry Company* shall be entitled to compensation from the company for any loss, damage, and injury which may be occasioned to them by reason of the exercise of the powers of this Act in respect of the conveyance of animals, carriages, goods, wares, and merchandize, and the persons travelling with the same, to which the *Poplar and Greenwich Ferry Company* may have the exclusive right, across the River *Thames* between the *Isle of Dogs* and *Greenwich*, and in respect of the right of that company to take the toll authorized by sect. 2 of an Act of 54 Geo. 3, c. clxxi., intituled, &c., and such compensation in case of dispute shall be settled in manner provided by the *Lands Clauses Consolidation Act*, 1845, for the settlement of disputed cases of

compensation." By sect. 14 it was provided that nothing in the Act should prejudice, alter, or affect any rights, powers, tolls, or privileges to which the ferry company were then entitled under the above Acts of 52 Geo. 3, and 54 Geo. 3.

By the *Metropolitan Board of Works (Bridges) Act*, 1883, (46 & 47 Vict. c. clxxvii.), the Board were empowered and directed to purchase the undertaking of the ferry company. Sect. 52 provided for the transfer of the undertaking to the Board, and that the transfer should be subject to the lease of 1868, and that the lease should remain in force for the residue of the term, and should after the transfer be read as if the Board of Works were the lessors instead of the ferry company. The 52nd section provided that the ferry company, after the completion of the transfer and the winding-up of their affairs should be dissolved. The terms of the purchase were settled and the purchase-money paid in 1885, but the ferry company was not yet actually dissolved.

(1885) 31 Ch.D. 354 Page 356

On the 5th of November, 1885, *Cross* served on the railway company a notice which, after reciting in full the 6th section of the *London and Blackwall Railway (Steamboats) Act*, 1873, proceeded: "And whereas we the said *Poplar and Greenwich Ferry Company*, and I, *George James Cross*, as owner and lessee respectively of the rights and tolls above-mentioned, have suffered such loss, damage, and injury as hereinbefore mentioned, Now we do respectively give you notice that the amount of our claim in respect of such loss, damage, and injury is the sum of £50,000, and that, unless you the said *London and Blackwall Railway Company* come to an agreement with us to pay us such amount, we further give you notice that we desire to have the amount of compensation payable to us under the above recited 6th section of the *London and Blackwall Railway (Steamboats) Act*, 1873, settled by arbitration in manner prescribed by the *Lands Clauses Consolidation Act*, 1845." This notice was signed by *Cross* on his own behalf and also by him as attorney for the ferry company.

The railway company commenced this action against *Cross*, asking for an injunction to restrain them from proceeding to arbitration under the notice. It appeared that he had used the name of the ferry company in the belief that the power of attorney contained in the lease enabled him to do so. He had applied to that company for leave to use their name, which had been refused on the ground that, as the lease contained that power, any further consent on their part was unnecessary.

The motion was heard before Mr. Justice *Chitty* on the 11th of December, 1885.

Romer, Q.C., and ***Nasmith***, in support of the motion:-

Unless the defendant can shew, which he cannot, that he has a power of attorney from the ferry company to claim compensation in their name in the proceedings before the arbitrator under sect. 6 of the Act of 1873, we are entitled to restrain him from the unauthorized use of their name. The lease of the tolls from the ferry company of February, 1868, of which the Defendant is assignee, does not give him any such authority. It merely provides that on giving a bond the lessees are to be at liberty to defend any proceedings that may be taken against the company

(the lessors) in respect of their not having kept up the ferry, and it gives them the right to use the name of the company in enforcing payment of the tolls and getting in the tolls, but that does not give the lessees (or their assignee) the right to use the name of the company for the purposes of sect. 6 of the Act of 1873.

Pollard, for the Defendant:-

I submit that the lease of 1868, which has been confirmed by the Act of 1883, under which, subject to our lease, the Metropolitan Board of Works took over the undertaking of the ferry company, gives the Defendant the right to use the name of the lessors in the arbitration proceedings; and this is confirmed by the answer of the company, when we applied for express authority, that none was necessary having regard to the lease.

[CHITTY, J.:- That does not matter; you have no power from them unless it is in the lease. They may be wrong in their law.]

The lease is a demise of the whole of the objects of the company for the remainder of their existence, and whatever rights the company have, including the claim to compensation, pass to the lessees. But assuming that the Defendant has no title under the lease, and that any right to compensation still remains in the ferry company, then the arbitration will be merely futile, and there will be a good defence to any action brought on the award against the Plaintiffs, so that they are not damnified in any way. If they think the Defendant has no claim they need not attend the arbitration.

[CHITTY, J. referred to *Aslatt v. Corporation of Southampton* (1).]

It has been expressly decided that the Court has no jurisdiction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, even though such arbitration proceedings may be futile and vexatious, and if allowed to proceed will cause delay: *North London Railway Company v. Great Northern Railway Company* (2); the only case in which the Court

(1) 16 Ch. D. 143.

(2) 11 Q. B. D. 30.

has interfered to restrain an arbitrator from acting is where he is unfit or incompetent to act: *Beddow v. Beddow* (1).

[CHITTY, J.:- The Plaintiffs do not ask to restrain you from proceeding to arbitration, but to restrain you from using the company's name.]

It is not the ferry company which is here seeking to prevent my use of their name, but the opposite party. It is not like an action, in which the railway company might apply to set aside the proceedings if it should be decided that I had no right to use the name of the ferry company. The arbitrator does not decide the title but simply assesses the compensation which is payable, and that compensation when paid to the ferry company will come to the Defendant by virtue of the lease. Is not the Defendant, therefore, as the sole person interested in that compensation, entitled to use the name of the ferry company in an arbitration, as distinguished from an action, in order to get that assessed which will come to him if the arbitrator awards anything in respect of it? And, further, after the decision in *North London Railway Company v. Great Northern Railway Company* (2) this Court has no jurisdiction to restrain me from proceeding with the arbitration.

Romer, in reply:-

We rely on the general principle that where an action or any legal proceeding is taken in the name of another person without his authority, the Court has jurisdiction to stop it. All that the Court of Appeal decided in the case of *North London Railway Company v. Great Northern Railway Company*, relied upon by the Defendant, was, that if a person claims compensation who is not entitled to compensation, that in itself gives no right to apply for an injunction. But that is not this case, where the claim purports to be made by a person who is entitled to compensation. If a claim is put forward by a person who has no right whatever, I can afford to treat it with contempt, but when

a claim purports to be made by a person (here the ferry company) who has a right, how can I afford to treat that person with contempt by not going

(1) 9 Ch. D. 89.

(2) 11 Q. B. D. 30.

into the arbitration. If it had been an action, clearly I could have stopped it, and if it had been a petition it is also clear I could have stopped it. I have no other remedy. If I stand by and allow an award to go as against me in the name of the ferry company, how can I afterwards say that the ferry company are not entitled to it?

CHITTY, J. :-

This is a motion on behalf of the *London and Blackwall Railway Company* to restrain the Defendant from using the name of the ferry company in proceedings before an arbitrator. The proceedings intended to be brought are under sect. 6 of the *London and Blackwall Railway (Steamboats) Act*, 1873. Under that section the *Poplar and Greenwich Ferry Company* are entitled to compensation from the railway company for certain loss and damage which may be occasioned to them by reason of the exercise of the powers of that Act. The ferry company had, to put it shortly, a statutory or some other ferry, and it was perfectly consistent that the profits of the ferry would be interfered with by the undertaking authorized by the Act of 1873, and consequently the Legislature gave compensation as upon the footing, to put it generally, of disturbance to the ferry. Instead of bringing an action for disturbance, the Act of Parliament having rendered the disturbance lawful, compensation according to the usual course in such matters was given to the person disturbed. The compensation is only given to the ferry company.

Now the Defendant had a lease from the ferry company, for a term of forty-eight years, of certain rights to which they were entitled, either as statutory owners or otherwise of the ferry, in the year 1868. It was argued that the lease itself contained an express authority from the company to the

Defendant, empowering him to use the company's name for the purpose, amongst others, of this question of compensation; but when the lease is looked at, there clearly is no express power of attorney of the kind that is asserted. The lease practically demises, so far only as the company lawfully can, the toll of 1*d.* for every person crossing the River *Thames* by the ferry, and it contains an express power in the name of the lessors, their executors and

assigns, to demand, sue for, and recover the sum or toll of 1*d.* Now a proceeding under sect. 6 of the Act of 1873, is not a proceeding to recover the toll of 1*d.*, consequently that clause does not contain the authority that was alleged.

Then there is a proviso, the substance of which may be thus stated, that in proceedings instituted against the ferry company, compelling them to re-establish or maintain the statutory ferry, or for other purposes, then a certain notice may be given, and a power of re-entry in certain events, and an express power is conferred on the lessees in the name of the lessors to prosecute to final determination all proper and lawful defences to the proceedings there mentioned. That confers no power, therefore, to bring any action generally, or to make any demand under sect. 6. Then it is suggested, rather than argued, for the Defendant, that the ferry company had parted with the whole of their undertaking to the Defendant, and consequently that Mr. *Cross* was the equitable assignee, but when the instrument is looked at, it is plain that it is but a lease. There are covenants on the part of the lessee, there is a small rent reserved, and it is quite plain that that proposition cannot be maintained.

It would be almost as extravagant to say that in an ordinary case a lessee, where any injury is done to the property, can use the name of his lessor for the purpose of protecting the particular tenement. That fell to the ground. The result, therefore, is that no authority is shewn. Some suggestion was made with reference to the affidavits on this point, but it appears by the affidavits on the part of the Plaintiffs, that they received a letter from the ferry company to the effect that no authority whatever has been conferred upon the Defendant to use their name in the notice he has given, which is a notice that he shall bring the parties before the arbitrator.

That being the state of the case, it appears to me the Defendant is using the name of the ferry company without authority. Thereupon a point of law is urged and it is said that the Court, notwithstanding the Judicature Act, has no power to grant an injunction, and the decision of the Court of Appeal in *North London Railway Company v. Great Northern Railway Company* (1)

(1) 11 Q. B. D. 30.

has been relied upon, for the purpose of shewing that the principle upon which the Court grants injunctions has not been extended by the *Judicature Act*. In that particular case it was held that there was no jurisdiction to grant an injunction to restrain a party from proceeding with an arbitration in a matter which was outside the agreement, though the arbitration proceeding would be futile and vexatious. That is the rule which the Court of Appeal has adopted with reference to what is "just and convenient" within the meaning of the words in sect. 25, and although their decision is unquestionably at variance with what was done by the late Master of the Rolls, I am bound by it, and it is no part of my duty even to comment upon the decision. It might have appeared that it was very useful to stop a course which led to very great expense at the commencement, but the Court of Appeal says, and I am bound by it, that at any rate in a case in which a proceeding in an arbitration would be futile and vexatious, it is better to let the futile and vexatious proceedings go on than to restrain them at the beginning, for in that case the idleness of the proceedings will be afterwards discovered when an action is brought on the award. As I have said that binds me. The question is, whether the principle of that case applies to the one before me.

Now it is undoubted that if an action is commenced in the name of a certain person as plaintiff, not only may that person himself intervene, but the law of the present day is that the defendant may bring the matter before the Court, shewing that the name has been used without authority. That has been repeatedly done of late, and there is no question about it. That might be done by the Court, if an action be brought or a petition be presented, or there was a summons, or indeed if any other proceeding were taken in the Court itself. Then the question is, whether I should be right in acting on that same principle with reference to a proceeding which is not in this Court, but is a proceeding before an arbitrator. I think there is great force in what has been urged for the Plaintiffs.

If the Defendant goes on using the name of the ferry company without authority he will possibly obtain an award. I will assume that he will, and that he will obtain an award for compensation payable to the ferry company, and upon that award he may bring

his action. It may be still open to the Court to consider the point which I am now considering, namely, that the name was used without authority, and to say, therefore, that although the name was used, the action could not be maintained, because in fact there was no authority, but I think there would be great difficulty about it. The present Plaintiffs, it would be said, would have gone into arbitration, for most prudent men would go into an arbitration even when they are advised that the proceedings in the arbitration are altogether wrong; they do not like to run the risk of treating them as futile and letting a much larger sum go against them even on the futile proceedings than would be

awarded if they were to go in. It certainly would seem a strong case against the Plaintiffs if they had gone into the arbitration and defended themselves against the claim, and treated this as the claim of the ferry company. I do not pretend to be extending the principle on which injunctions are granted, but I think it is right in such a case as this to intervene at the beginning, there being shewn to be no authority, and to grant an injunction restraining the Defendant from using the name of the ferry company.

F. G. A. W.

The Defendant appealed, and the appeal was heard on the 11th and 12th of January. 1886.

Pollard, for the Appellant:-

The Court cannot grant this injunction. The case is covered by *North London Railway Company v. Great Northern Railway Company* (1). There is no legal injury even if the proceeding is ill founded and frivolous. Summary judgment cannot be obtained in a proceeding under the *Lands Clauses Act*, for nothing is within the jurisdiction of the arbitrator but the quantum of compensation. The claimant cannot get judgment except by bringing an action on the award, and at the trial of that action it will be determined whether the sum awarded belongs to the claimant. Mr. Justice *Chitty* considered that the procedure as to stopping an action commenced in a person's name without his authority applied here, but the cases on that subject relate to solicitors, who are

(1) 11 Q. B. D. 30.

officers of the Court, using a person's name without authority, and the application was made in the action itself, not in an action for the purpose of obtaining an injunction. They turn on the power of the Court over its own record.

Romer, Q.C., and ***Nasmith***, *contrà*:-

The *London and Blackwall Railway (Steamboats) Act* provides that compensation shall be paid to

the ferry company. Proceedings are taken in the name of the ferry company for compensation, and the railway company are informed that the ferry company has given no authority to use its name. It is a legal wrong that proceedings should be taken against me in the name of a person who has given no authority to use his name. How am I to get my costs if the proceedings fail?

[LOPES, L.J.:- Could an injunction have been obtained in a case like this before the *Judicature Acts*?]

We submit that it could, but there is no authority on the point, as the question arose only with respect to actions, and the course of applying in the action itself furnished a more convenient remedy than applying for an injunction in an action brought for the purpose. Suppose an action is brought against me in a Court which has no jurisdiction in the matter, is there to be no way of stopping the proceedings? Under the old practice I could have demurred to the jurisdiction.

[LOPES, L.J.:- Can you, after the decision in the Queen's Bench Division which has been referred to, maintain the injunction in the present case?]

Yes; on the ground that the claim is frivolous, and that its being prosecuted will subject me to costs. B. claims saying he has authority from A. If he has not, if obliged to go on, I shall incur costs for nothing. The ferry company, which did not take any proceedings, might ratify these proceedings in the course of them if they are allowed to go on, and I ought not to be kept in this state of suspense.

[LINDLEY, L.J.:- I doubt whether they could. A notice to quit given without authority cannot be effectually ratified.

(1885) 31 Ch.D. 354 Page 364

FRY, L.J.:- I share that doubt. An unauthorized act, the effect of which if authorized would be to create a liability in a third party, cannot be made effectual for that purpose by subsequent ratification. How do you distinguish this from the case in the Queen's Bench Division?]

On the ground that what was done in that case would not result in any legal injury; the case was simply one of a person making a wrongful claim. Here if *cross* had no authority, he is committing a wrong in asserting that he has, and an action would lie against him for asserting that he has it if the assertion causes damage. This proceeding is maintenance.

[LINDLEY, L.J.:- *Cross* appears to have used the name of the ferry company in the *bonâ fide* belief that the power of attorney in the lease authorized him to do so.]

If it had been clear maintenance the railway company might have disregarded the proceeding, but if there is any reason for supposing that there may be authority they could not safely do so, as the award would probably be for an excessive sum if the proceeding went on *ex parte*. The Court, then, ought now to settle the point. The Court, on an application in an action stops the action if the party's name has been used without authority. It does so in the action itself, because the Court has jurisdiction in that action, but the ground is, that the institution of such an action is a wrong.

[FRY, L.J.:- The Court in such a case gives costs, charges, and expenses.]

That we submit is in our favour, it shews that the Court is giving damages for a wrong.

[FRY, L.J.:- If *Cross* has authority your ground fails; if he has not authority you need not attend the proceeding.]

That argument might be used in every case where a defendant asks for costs, it may be said: "As the plaintiff is in the wrong you need not have attended." If this had been a proceeding before any Court, an order could have been obtained for staying it, and it would be a scandal in our jurisprudence if it cannot be stayed because it is under the provisions in the *Lands*

Clauses Act. The claim is of the most untenable description; in addition to the want of authority to use the name of the ferry company, the notice is bad, because it combines in one the claims of the lessor and lessee, who are entitled to compensation separately, if at all; and moreover, the Act provides for compensating the ferry company, but not for compensating their lessees. In the case in the Queen's Bench Division the parties had submitted disputes to arbitration, here they have not.

Pollard was not called upon to reply, but referred to the observations of the Lord Justice *Knight Bruce*, in *Pennell v. Roy* (1): "It is not a duty or function, or within the power, of this Court, to restrain men from prosecuting frivolous, litigious, and desperate suits, merely because they are so," and of Lord Justice *Turner*(2): "If we were to maintain this injunction we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the Courts in which parties should bring their suits, without there being anything to affect the consciences of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained, and thus we should be bringing under the decision of this Court the question whether suits in other Courts could be maintained - a question which it is for those Courts, and not for this Court, to decide."

LINDLEY, L.J. :-

This is an appeal from an order made by Mr. Justice *Chitty*, restraining the Defendant, Mr. *Cross*, from proceeding with a claim for compensation made by him in his own name and in the name of the *Poplar and Greenwich Ferry Company* under circumstances which I will shortly explain. The *Poplar and Greenwich Ferry Company*, which is a company incorporated under an Act of 52 Geo. 3, leased in 1868 a portion of its rights for forty-eight years, and Mr. *Cross* is the assignee of that lease. It appears that for some years the ferry created by the Act of Geo. 3 which I have mentioned had fallen more or less into disuse, so that Mr. *Cross* did not derive much benefit from the lease which had been assigned to him, but at the same time he retained his rights

(1) 3 D. M. & G. 126, 133.

(2) 3 D. M. & G. 139.

under it. In 1883 the Metropolitan Board of Works were empowered to buy up the rights of the ferry company subject to this lease. The Board of Works has done so, and the ferry company has practically ceased to exist, though theoretically it still continues, as it has not yet technically been dissolved.

Under those circumstances Mr. *Cross* has, and, as the Plaintiffs contend, without any authority from the *Poplar and Greenwich Ferry Company*, served the *London and Blackwall Railway Company* with a notice dated the 5th of November, 1885, purporting to be signed by him as attorney for the ferry company as well as in his own right, in which, after reciting the 6th section of the *London and Blackwall Railway (Steamboats) Act*, 1873, upon which he founds his rights, he says: "And whereas we, the said *Poplar and Greenwich Ferry Company* and *T. G. J. Cross*, as owner and lessee respectively of the rights and tolls above-mentioned, have suffered such loss, damage, and injury as hereinfore mentioned, now we do respectively give you notice that the amount of our claim in respect of such loss, damage, and injury is the sum of £50,000," and that unless the railway company come to an agreement with them to pay that amount, they desire to have the amount of compensation settled by arbitration according to the *Lands Clauses Act*. The *Blackwall Railway Company* object to that notice, and say they are entitled to restrain Mr. *Cross* by injunction from

proceeding upon it. Their objections to the notice are very formidable. They say, first of all, you, Mr. *Cross* have no right in point of law to use the name of the *Poplar and Greenwich Ferry Company*. They say, secondly, if you had such authority, your notice is bad in form, inasmuch as you have lumped up in one sum that which is payable to the ferry company as reversioner and that which is payable to yourself as tenant; and thirdly, the 6th section of the Act on which you rely provides only for payment of compensation to the ferry company and not to you.

The first question which we have to consider is this, how those questions are to be determined and when. Now it is familiar to most of us who have studied the *Lands Clauses Consolidation Act* and the course of proceedings under it, that there was at one time before 1851 some ground for contending that where a person made an unfounded claim under the *Lands Clauses Act* his right

to substantiate that claim could be tried by an injunction, and Lord *Cottenham* on more than one occasion granted an injunction to restrain proceedings under the *Lands Clauses Act* by persons who had no right to compensation. One such instance will be found in the well-known case of *London and North Western Railway Company v. Smith* (1). That practice was discussed and considered with great care by Lord Truro in *East and West India Dock Company v. Gattke* (2), decided in 1851. Ever since the decision of Lord *Truro* in that case the practice has been perfectly well settled, that the proper way of trying the right of a person to compensation under the *Lands Clauses Act* is not by injunction, and an injunction to restrain such proceedings has never that I know of been granted since 1851. Leaving out of consideration the fact that Mr. *Cross* is professing to act as attorney for the company, let us take the case where a person having no right to compensation nevertheless claims compensation under the *Lands Clauses Act* and proceeds under the arbitration clauses in that Act, and where the railway company against whom he is proceeding contend that whatever award he may get from the arbitrator he is not entitled to any compensation at all, and that they ought therefore to be protected from the vexation of having to go into arbitration proceedings. That is of course a strong case, but, as I say, ever since *East and West India Dock Company v. Gattke* it has been settled that in such a case it is not right for the Court of Chancery to investigate the question of title or no title at that stage of the proceedings, and that the proper way of trying the question is to leave the claimant to bring an action on the award, when, if he has no title he will get nothing, and if he has a title he will get the sum awarded.

Now let us observe the position in which railway companies are put by this state of things. Supposing a claimant having no real ground of claim proceeds to arbitration and gets an award in his favour, and brings an action upon it, and fails, he will have to pay the costs of the action, but I am not aware that there is any method by which the railway company can make him pay them any costs which they have incurred in the arbitration. I do not say that there is none, but I am not aware that there is

(1) 1 Mac. & G. 216.

(2) 3 Mac. & G. 155.

any. Now, notwithstanding the argument that if the claimant is wrong he cannot recover on the award, and therefore the company need not attend before the arbitrator, it is quite obvious that all prudent men, (and railway companies must act as prudent people), would watch the proceedings before the arbitrator, and must therefore incur costs. Notwithstanding that, and notwithstanding the apparent enlargement by the *Judicature Act*, 1873, sect. 25, of the power of the Court to grant an injunction, the Court of Appeal has decided, in *North London Railway Company v. Great Northern Railway Company* (1), that the practice settled by Lord Truro in *East and West India Dock Company v. Gattke* (2), as long ago as 1851, has not been altered by the *Judicature Acts*, and that there is still no right or jurisdiction in the Chancery Division of the High Court to restrain a person from proceeding for compensation under the *Lands Clauses Consolidation Act*, on the ground that he is not entitled to compensation. The decision in that case must not be understood as going further than that. The grounds upon which it proceeds are perfectly explained by the Master of the Rolls and by Lord Justice *Cotton*. The case does not decide that in no case is it right to restrain persons from proceeding to arbitration; there are cases in which it is quite right to do so. One of such cases came before Vice-Chancellor *Wood, Maunsell v. Midland Great Western (Ireland) Railway Company* (3). It was an action by a shareholder on behalf of himself and the other shareholders in the company, against the company and its directors and another company, to restrain them from proceeding to arbitration under an agreement in respect of breaches of clauses which were *ultrà vires*. That case, and cases of that kind, are wholly unaffected by the decision to which I am alluding. The case must not be supposed to go this length, that there is no authority whatever in the Court of Chancery to restrain proceedings before an arbitrator, but I think it goes this length, that in all cases under the *Lands Clauses Act* the practice is that the question of right or no right to compensation is to be tried by an action on the award, and not by an action for an injunction in the earlier stage of the proceedings. One can easily see that there

(1) 11 Q. B. D. 30.

(2) 3 Mac. & G. 155.

(3) 1 H. & M. 130.

are conveniences on the one side and on the other, but in my opinion the balance of convenience is in favour of declining to interfere by injunction.

Having arrived at the real grounds of the decision in *North London Railway Company v. Great Northern Railway Company* (1), we have to consider whether there is any substantial difference between that case and this. That there is a difference has been pointed out by Mr. *Romer*, viz., that Mr. Gross here is assuming to take proceedings in the name of the ferry company, and, it is alleged, without authority. Now, supposing he has no authority, what will be the position of the *Blackwall Railway Company*? Mr. *Cross* must go on under the *Lands Clauses Act* at his own risk as to costs, and will, I assume, obtain an award. If Mr. Romer is right, and so far as I can see he is right, Mr. cross will fail when he brings an action on that award, and the company will obtain the costs of that action. They may - I do not say will - fail in getting from Mr. *Cross* the costs which they will have incurred as prudent people in watching his proceedings before the arbitrator. Supposing they do so fail, they will be in no worse position than in any other case where a claimant under the *Lands Clauses Act* obtains an award and fails in an action to enforce it. Indeed I am not sure that they will not be in a better position, because it may be that Mr. *Romer* is right in contending that an action will lie against Mr. *Cross* upon his warranty of authority. I do not say that such an action will lie but, if it will, so much the better for them. But assuming that they can recover from him those costs in an action of that kind, it does not follow that this Court ought to interfere now at this stage of the proceedings by injunction. I should say that the right to bring such an action tends rather the other way. The very first principle of injunction law is that *primâ facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the proper remedy. If we look at the principle of the thing, it appears to me that the distinction between this case and the case of *North London Railway Company v. Great Northern Railway Company* is a distinction without a real difference of principle, and that it would, upon a balance of convenience in proceedings under the *Lands Clauses*

Act, be more

(1) 11 Q. B. D. 30.

inconvenient to entertain the question of authority now, than to leave it to be disposed of in the ordinary way by an action on the award.

It is right that I should make a few observations upon the reason given by Mr. Justice *Chitty* for distinguishing this case from that of *North London Railway Company v. Great Northern Railway Company* (1). He put it on this ground, that Mr. *Cross* was proceeding without authority, and that therefore there was jurisdiction to restrain him from using the names of his alleged principals, and he referred to the doctrine that if an action is brought by a person without authority it can be stopped. That is, no doubt, quite true, but upon what principle is that done? It is upon the principle that the Court can control the proceedings before itself, and if a person without authority is bringing an action in the name of another it is an abuse of the process of the Court, and the Court can stop it. That seems to me not to apply to a case of this kind, and I think that this is not the right way of raising the question whether Mr. *Cross* has authority to go on. He must go on at his peril. If we were to grant an injunction we should be reintroducing the course taken by Lord *Cottenham* in 1851, which has been abandoned ever since *East and West India Dock Company v. Gattke* (2). It appears to me that this order ought to be discharged.

FRY, L.J. :-

I also feel myself unable to agree with the conclusion of the learned Judge. The injunction in this case has been granted upon two propositions: first, that the Defendant *Cross* had no authority to proceed under sect. 6 of the *London and Blackwall Railway (Steamboats) Act*, 1873, in making a claim under that section in the name of the ferry company; and secondly, that if *Cross* had no such authority to proceed as agent or attorney of the company he ought to be restrained by the injunction of this Court. Of course both those propositions are denied by the Defendant. With regard to the first of those propositions, I do not intend to express any conclusion, but I would only say that I do

not proceed, in the conclusion in which I have arrived, upon any

(1) 11 Q. B. D. 30.

(2) 3 Mac. & G. 155.

supposition that the Plaintiffs are wrong in their contention that *Cross* had no authority. As far as I can gather, the notice *Cross* gave was bad, but I do not desire to express a conclusive opinion on the question, which may be the subject of judicial decision hereafter. Assuming, therefore, that the Plaintiffs are right in their first proposition, then are they right in their second, that if *Cross* had no authority to proceed in the name of the ferry company he ought now to be restrained by an injunction? The case made is a case of false representation on the part of the Defendant. If that case be true, it follows that the notice which *Cross* has given in the name of his alleged principal is a nullity, that any award made in pursuance of that notice will be futile, and that any action which may be brought to enforce that award by the company or by *Cross* in their name must fail, and be dismissed with costs. It appears to me that the right time to determine the question whether that award can be enforced or not is the time when that action is tried. It is to be observed that this is not a case in which there has been a false assumption of authority in respect of a proceeding in the Court itself. That class of cases, in my judgment, is totally distinct from any other class of cases of the false assumption of authority. In that class of cases the Court stays the proceedings because it finds that there has been an abuse of its own process, and because it has a duty to keep its records truthful and prevent proceedings taken before it from being other than what they are represented to be. But in my judgment the Court has no general jurisdiction to restrain by injunction the false assumption of authority. I do not see why, if we interfere in this case, we should not interfere in every case in which *A.* erroneously represents that he is the agent of *B.*, and as such makes a claim against *C.* It is remarkable that no authority can be produced to shew that the Court ever has granted an injunction in cases of that description. In my judgment the practice and procedure of the Court do not favour the conclusion that there is any such general jurisdiction to interfere by injunction upon a false assumption of authority, and I think that such an assumption of jurisdiction would be entirely wrong, because it would be calling upon the Court to interfere in a very large number of cases, many of which may be

trivial, and many of which would never come to anything if the Court allowed the matters to go on. In my judgment the time to try the question of authority is when proceedings are taken on the footing of acts done by the claimant or the claim is made by the claimant.

The authorities to which Lord Justice *Lindley* has referred shew that there is a strong analogy in favour of the principle I have laid down. In the case of the *Lands Clauses Act*, where claims are falsely made by persons who assert that they have a right under the Act, the course of the Court has been, not to pick out, so to speak, the particular question of authority and determine that upon injunction, but to leave the whole matter to be determined in an action to be brought on the award which is the result of the proceedings under the Act. That course of procedure has been authorized by the recent decision in *North London Railway Company v. Great Northern Railway Company* (1), on which Mr. Pollard relies. I conclude, therefore, that this case, assuming Mr. *Cross* falsely alleges he is the agent of the company, is not a case in which the Court can or ought to interfere by injunction at this stage of the proceedings.

Another argument was thrown out, but not emphasised, by Mr. *Romer*, that this is a case of maintenance. It is enough for me to say that, in my judgment, this is not a case of maintenance. Mr. *Cross*, for anything I can see or know, honestly believes he has a right to represent the company, and he seems to be a person largely interested in the matter in controversy. I cannot consider for a moment that this is a case which can be brought within the law of maintenance, and that we can, on that ground, restrain Mr. *Cross* from proceeding. I think, therefore, that this appeal must be allowed, and the original order must be discharged.

LOPES, L.J. :-

Mr. Justice *Chitty* granted an injunction in this case to restrain the Defendant from proceeding to arbitration under a notice, dated the 5th of November, 1885, and from using the name of the *Poplar and Greenwich Ferry Company* for the purpose of that

(1) 11 Q. B. D. 30.

arbitration. The main question that has been raised in this case is, whether the Court had power to grant that injunction. It appears to me that this case falls in principle within the decision in *North London Railway Company v. Great Northern Railway Company* (1). There is, no doubt, a distinction with regard to an assumption of authority, but the present case seems to me still to fall within the principle of that decision. As I understand that case, it has decided that however futile and vexatious the arbitration may be, there was no jurisdiction to grant an injunction to restrain it, that there was no power to grant such an injunction before the *Judicature Act*, and that the 25th section, sub-sect. 8 of the *Judicature Act* has not extended the power.

Mr. Justice *Chitty*, in his judgment, appears to distinguish the present case from the case to which I have referred, on the ground that there was here a false assumption of authority by *Cross*, and he treats the case as analogous to a case where a person is made plaintiff or defendant in an action without his authority in a proceeding before the Court. It does not appear to me that the analogy is correct, for there the Court would strike out the name of the plaintiff or defendant, or stay the proceedings, as the case might be, on the ground that it had full authority to prevent any abuse of its own proceedings. Here the arbitrators are an independent tribunal, and I think that disposes of the distinction which is made by Mr. Justice *Chitty*. But even if there was jurisdiction to grant an injunction in this case, I think it would be premature to interfere by injunction. It appears to me that the claimant ought to be left to bring his action on the award. If he brings such an action, he will fail if he is unable to make out a legal claim, and the very worst, it appears to me, that can happen to the company will be, that they will have to pay their own costs of the arbitration. Surely that is not a ground for interfering by injunction at this stage of the proceedings. I think, therefore, that this appeal ought to be allowed.

Solicitors for the company: *Hollingsworth, Tyerman, & Andrewes*.

Solicitors for Defendant: *Cattarns, Jehu, & Hughes*.

(1) 11 Q. B. D. 30.

H. C.J.

13

2014 ONCA 467
Ontario Court of Appeal

Pointe East Windsor Ltd. v. Windsor (City)

2014 CarswellOnt 8045, 2014 ONCA 467, 23 M.P.L.R. (5th) 173, 241 A.C.W.S. (3d) 193, 374 D.L.R. (4th) 380

Pointe East Windsor Limited, Applicant (Appellant) and Corporation of the City of Windsor, Respondent (Respondent)

J.C. MacPherson, Janet Simmons, E.E. Gillese JJ.A.

Heard: June 10, 2014
Judgment: June 16, 2014
Docket: CA C58185

Counsel: Raymond G. Coulautti, for Appellant
Mark P. Nazarewich, for Respondent

Subject: Civil Practice and Procedure; Contracts; Property; Public; Torts; Municipal

Headnote

Municipal law --- Municipal liability — Miscellaneous

Remedy for breach of contract — As part of manufacturing company's agreement to locate in respondent municipality of W, company required W to arrange for rail line to be provided to its facility — Suitable location was found with nearby main railway line that could be extended to manufacturing facility by rail spur — Corporate applicant P Ltd. owned undeveloped land suitable for rail spur — W's agreement with P Ltd. to purchase 60 acres of its land included commitment to extend road to P Ltd.'s remaining land — Before road extension could be constructed over rail line, environmental assessment had to be conducted — Assessment did not recommend that road extension follow route specified in agreements between P Ltd. and W; it recommended alternative configuration for road extension — P Ltd. applied for order compelling W to comply with its obligations to construct road extension in accordance with agreed-upon route — W acknowledged it was in breach of agreements and agreed to pay damages — P Ltd. took position that W should be ordered not to build rail spur and extend road according to agreed-upon route — Application judge found that W had acted in good faith when it entered into agreements and that P Ltd. would not suffer substantial prejudice or irreparable harm if road extension were built indirectly so as to accommodate rail spur — Application judge found that damages would be adequate remedy and dismissed application — P Ltd. appealed — Appeal dismissed — As application judge found that damages were adequate remedy, there was no error in declining to order equitable relief — Application judge did not err in dismissing application in its entirety rather than granting declarations that W was in breach of its agreements and ordering trial of issue to assess damages — P Ltd. only sought permanent injunction; it did not seek damages in alternative and it did not request application judge to award or assess damages — Because P Ltd. made tactical decision not to claim damages, evidentiary record was insufficient to assess damages — Application judge did not err in declining to address issue of damages.

Remedies --- Injunctions — Rules governing injunctions — Discretionary nature of injunction — Exercise of discretion

As part of manufacturing company's agreement to locate in respondent municipality of W, company required W to arrange for rail line to be provided to its facility — Suitable location was found with nearby main railway line that could be extended to manufacturing facility by rail spur — Corporate applicant P Ltd. owned undeveloped land suitable for rail spur — W's agreement with P Ltd. to purchase 60 acres of its land included commitment to

extend road to P Ltd.'s remaining land — Before road extension could be constructed over rail line, environmental assessment had to be conducted — Assessment did not recommend that road extension follow route specified in agreements between P Ltd. and W; it recommended alternative configuration for road extension — P Ltd. applied for order compelling W to comply with its obligations to construct road extension in accordance with agreed-upon route — W acknowledged it was in breach of agreements and agreed to pay damages — P Ltd. took position that W should be ordered not to build rail spur and extend road according to agreed-upon route — Application judge found that W had acted in good faith when it entered into agreements and that P Ltd. would not suffer substantial prejudice or irreparable harm if road extension were built indirectly so as to accommodate rail spur — Application judge found that damages would be adequate remedy and dismissed application — P Ltd. appealed — Appeal dismissed — Application judge did not err in declining to exercise his discretion to order permanent injunction that prevented W from constructing rail spur — Damages were usually ordered for breach of contract; it was only where damages were not adequate that equitable relief might be available — As application judge found that damages were adequate remedy, there was no error in declining to order equitable relief.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Permanent injunctions — Threshold test — Adequacy of damages

As part of manufacturing company's agreement to locate in respondent municipality of W, company required W to arrange for rail line to be provided to its facility — Suitable location was found with nearby main railway line that could be extended to manufacturing facility by rail spur — Corporate applicant P Ltd. owned undeveloped land suitable for rail spur — W's agreement with P Ltd. to purchase 60 acres of its land included commitment to extend road to P Ltd.'s remaining land — Before road extension could be constructed over rail line, environmental assessment had to be conducted — Assessment did not recommend that road extension follow route specified in agreements between P Ltd. and W; it recommended alternative configuration for road extension — P Ltd. applied for order compelling W to comply with its obligations to construct road extension in accordance with agreed-upon route — W acknowledged it was in breach of agreements and agreed to pay damages — P Ltd. took position that W should be ordered not to build rail spur and extend road according to agreed-upon route — Application judge found that W had acted in good faith when it entered into agreements and that P Ltd. would not suffer substantial prejudice or irreparable harm if road extension were built indirectly so as to accommodate rail spur — Application judge found that damages would be adequate remedy and dismissed application — P Ltd. appealed — Appeal dismissed — Application judge did not err in declining to exercise his discretion to order permanent injunction that prevented W from constructing rail spur — Damages were usually ordered for breach of contract; it was only where damages were not adequate that equitable relief might be available — As application judge found that damages were adequate remedy, there was no error in declining to order equitable relief — Application judge did not err in dismissing application in its entirety rather than granting declarations that W was in breach of its agreements and ordering trial of issue to assess damages — P Ltd. only sought permanent injunction; it did not seek damages in alternative and it did not request application judge to award or assess damages — Because P Ltd. made tactical decision not to claim damages, evidentiary record was insufficient to assess damages — Application judge did not err in declining to address issue — If P Ltd. wanted to seek damages, it had to do so in properly pleaded manner.

Contracts --- Remedies for breach — Injunction

As part of manufacturing company's agreement to locate in respondent municipality of W, company required W to arrange for rail line to be provided to its facility — Suitable location was found with nearby main railway line that could be extended to manufacturing facility by rail spur — Corporate applicant P Ltd. owned undeveloped land suitable for rail spur — W's agreement with P Ltd. to purchase 60 acres of its land included commitment to extend road to P Ltd.'s remaining land — Before road extension could be constructed over rail line, environmental assessment had to be conducted — Assessment did not recommend that road extension follow route specified in agreements between P Ltd. and W; it recommended alternative configuration for road extension — P Ltd. applied for order compelling W to comply with its obligations to construct road extension in accordance with agreed-upon route — W acknowledged it was in breach of agreements and agreed to pay damages — P Ltd. took position that

W should be ordered not to build rail spur and extend road according to agreed-upon route — Application judge found that W had acted in good faith when it entered into agreements and that P Ltd. would not suffer substantial prejudice or irreparable harm if road extension were built indirectly so as to accommodate rail spur — Application judge found that damages would be adequate remedy and dismissed application — P Ltd. appealed — Appeal dismissed — Application judge did not err in declining to exercise his discretion to order permanent injunction that prevented W from constructing rail spur — Damages were usually ordered for breach of contract; it was only where damages were not adequate that equitable relief might be available — As application judge found that damages were adequate remedy, there was no error in declining to order equitable relief — Application judge did not err in dismissing application in its entirety rather than granting declarations that W was in breach of its agreements and ordering trial of issue to assess damages — P Ltd. only sought permanent injunction; it did not seek damages in alternative and it did not request application judge to award or assess damages — Because P Ltd. made tactical decision not to claim damages, evidentiary record was insufficient to assess damages — Application judge did not err in declining to address issue — If P Ltd. wanted to seek damages, it had to do so in properly pleaded manner — Application judge could not be faulted for failing to order relief that P Ltd. did not seek, namely, trial on issue to quantify damages.

Table of Authorities

Cases considered:

UBS Securities Canada Inc. v. Sands Brothers Canada Ltd. (2009), 95 O.R. (3d) 93, 2009 CarswellOnt 2082, 2009 ONCA 328, 248 O.A.C. 146, 58 B.L.R. (4th) 60 (Ont. C.A.) — referred to

APPEAL brought by company from dismissal of its application for order compelling respondent municipality to construct road extension set out in agreement of purchase and sale.

***Per curiam*:**

Background

1 In late 2010, the City of Windsor (the "City") negotiated with a company that manufactures wind towers to "set up shop" in Windsor. As part of its agreement to locate in Windsor, the company required the City to arrange for a rail line to be provided to its facility. A suitable location was found, with a nearby main railway line that could be extended to the proposed facility by a rail spur.

2 Pointe East Windsor Limited (the "appellant) owned undeveloped land in the vicinity of the proposed facility. A part of its land was suitable for the rail spur.

3 The City negotiated with the appellant to purchase a part of its lands. Through two agreements of purchase and sale, completed in December 2010, the appellant sold 60 acres of land to the City. The purchase agreements between the appellant and the City obligated the City to extend a road to the appellant's remaining lands, when those lands were ready to be developed (the "road extension").

4 The appellant's remaining lands consisted of approximately 160 acres of vacant land, located to the east of the land that the City had purchased. Twin Oaks Drive is a road that services an industrial area located to the west of the appellant's remaining lands. The agreements specify that Twin Oaks Road is to be extended in a straight line from its terminus, in an easterly direction, to the boundary of the appellant's remaining lands.

5 The City then sold the property to the wind turbine company. Under the terms of the agreement, the City became obligated to provide rail access to the property by means of a rail spur.

6 Before the road extension could be constructed over a rail line, legislation required that an environmental assessment be undertaken. The environmental assessment did not recommend that the road extension follow the route specified in the agreements between the appellant and the City because it would create a substandard road/rail at-grade crossing with poor sightlines. The environmental report recommended an alternative configuration for the road extension. Instead of being constructed directly east, as specified in the agreements between the City and the appellant, the road extension would be built indirectly to the appellant's remaining lands.

7 Absent significant expense, the rail spur cannot be built in any other configuration due to the standards that must be applied, given the land available and the size of the loads expected to travel along the line.

8 It was only after the environmental assessment was performed that the City became aware that the road extension to the appellant's lands could not be constructed in accordance with the agreed-upon route.

9 The appellant brought an application for an order compelling the City to comply with its obligation to construct the road extension in accordance with the agreed-upon route.

10 The City responded by acknowledging that as a result of building the rail spur, it would be unable to construct the road extension according to the agreed-upon route. It also acknowledged that this was a breach of a term of its agreements with the appellant and that it would pay such damages as were appropriate.

11 The appellant's position on the application was that the City should be ordered to: (1) not build the rail spur; and (2) extend the road according to the agreed-upon route. The appellant argued that not constructing the road extension according to the agreed-upon route would cause it substantial prejudice and irreparable harm.

12 Specifically, the appellant contended that failure to construct the road extension according to the agreed-upon route would have an adverse effect on its ability to attract a "big box" store to locate on its remaining lands and that its remaining lands would be devalued. It led evidence from an expert with planning, but not marketing, credentials indicating that the alternative road extension route would adversely affect the value and marketability of the appellant's lands.

13 The City provided evidence from an expert with expertise in both planning and retail marketing and development. This expert opined that the proposed alternative route would cause little or no adverse effects on the development of the appellant's remaining lands. In his view, it would not hinder the appellant's ability to attract the type of development it wished. Among other things, the expert noted that the additional trip duration caused by the re-alignment would be very short and the vast majority of visitors to the site would use other roads that give access to the appellant's remaining lands.

14 The application judge found that the City had acted in good faith when it entered into the agreements with the appellant and the wind turbine company. He further found that the evidence did not establish that the appellant would suffer substantial prejudice or irreparable harm if the road extension were built indirectly so as to accommodate the rail spur. He also found that damages would be an adequate remedy for the City's breach of contract.

The Issues

15 On appeal, the appellant submits that:

(i) the application judge erred in not ordering a permanent injunction preventing the City from constructing the rail spur;

(ii) alternatively, the application judge erred in dismissing the application in its entirety, rather than granting declarations that the City was in breach of its agreements and ordering a trial of an issue to determine damages.

Analysis

16 We accept neither submission.

17 We see no error in the application judge declining to exercise his discretion to order a permanent injunction preventing the City from constructing the rail spur. Damages are typically ordered for breach of a contract and it is only where damages are inadequate that equitable relief may be available: *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, [2009] O.J. No. 1606 (Ont. C.A.), at para. 96. In this case, the application judge found that damages were an adequate remedy so there could have been no error in his declining to order equitable relief.

18 The appellant's alternative argument must similarly fail. In the application, the appellant sought a permanent injunction. It did not seek damages in the alternative nor did it request the application judge to award or assess damages.

19 The City maintains that because of the appellant's tactical decision to not claim damages, the evidentiary record was insufficient to assess damages and the application judge committed no error in declining to address the issue. We agree. The application judge determined that damages are an adequate remedy for the breach of contract. If the appellant wishes to seek damages, it must do so in a properly pleaded fashion. We would add a comment in this regard. The appellant expressed concern that if it had to bring a proceeding to have damages quantified, there was the possibility of inconsistent verdicts. In light of the City's admission that it would be in breach of the agreements because the road extension would not be constructed according to the agreed-upon route and the recording of this admission in the application, we do not see the possibility of an inconsistent position being taken on liability.

20 As for the alleged error in failing to order the trial of an issue to quantify damages, the application judge can scarcely be faulted for failing to order relief that the appellant did not seek.

Disposition

21 Accordingly, the appeal is dismissed with costs to the City fixed at $15,000, all inclusive.

Appeal dismissed.

End of Document

14

2009 ONCA 328
Ontario Court of Appeal

UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.

2009 CarswellOnt 2082, 2009 ONCA 328, [2009] O.J. No. 1606, 177 A.C.W.S. (3d) 383, 248 O.A.C. 146, 58 B.L.R. (4th) 60, 95 O.R. (3d) 93

UBS Securities Canada, Inc. (Applicant / Respondent) and Sands Brothers Canada, Ltd. (Respondent / Appellant)

Gillese, MacFarland, LaForme JJ.A.

Heard: January 29, 2009
Judgment: April 22, 2009
Docket: CA C48839

Proceedings: affirming *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.* (2008), 45 B.L.R. (4th) 105, 2008 CarswellOnt 2503 (Ont. S.C.J.); affirming *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.* (2008), 2008 CarswellOnt 3436 (Ont. S.C.J.)

Counsel: Tom Curry, Anne Posno for Appellant
John Fabello, Emily Head for Respondent

Subject: Contracts; Corporate and Commercial; Securities; Civil Practice and Procedure

Headnote

Remedies --- Specific performance — Availability in particular contracts — Sale of shares

U Inc. was granted declaration that S Ltd. unconditionally agreed to sell common shares to U Inc. for $50 per share for settlement on January 3, 2007 and order for specific performance of that agreement — S Ltd. received TSX shares and $4,876,995.33 in cash — Instead of shares and cash, S Ltd. was entitled to receive all shares — Counsel attended before court to address form of judgment — Hearing was set to determine how agreement should be performed in circumstances, interest, issues of undertaking as to damages and any other relief requested in notice of application, and whether to entertain S Ltd. for information on third party purchaser — U Inc. successfully requested order that specific performance of agreement be effected by U Inc. paying $5 million to S Ltd. and by S Ltd. acquiring 97,333 TSX shares with cash it received and delivering those shares with 136,187 shares and remaining proceeds to U Inc. — S Ltd. appealed — Appeal dismissed — Trial judge did not err in statement of objective test for whether parties intended to contract, nor did she implicitly apply subjective test — Nothing argued undermined trial judge's conclusion that objective reasonable bystander would have concluded that parties reached agreement — Order of specific performance was exercise of discretion by trial judge — As trial judge applied correct legal principles and had due regard to relevant facts, there was no basis to interfere with exercise of discretion.

Business associations --- Specific corporate organization matters — Shares — Transfer — General principles

U Inc. was granted declaration that S Ltd. unconditionally agreed to sell common shares to U Inc. for $50 per share for settlement on January 3, 2007 and order for specific performance of that agreement — S Ltd. received TSX shares and $4,876,995.33 in cash — Instead of shares and cash, S Ltd. was entitled to receive all shares — Counsel attended before court to address form of judgment — Hearing was set to determine how agreement should be performed in circumstances, interest, issues of undertaking as to damages and any other relief requested in notice of application, and whether to entertain S Ltd. for information on third party purchaser — U Inc. successfully requested order that specific performance of agreement be effected by U Inc. paying $5 million to S Ltd. and by S Ltd. acquiring

97,333 TSX shares with cash it received and delivering those shares with 136,187 shares and remaining proceeds to U Inc. — S Ltd. appealed — Appeal dismissed — Trial judge did not err in statement of objective test for whether parties intended to contract, nor did she implicitly apply subjective test — Nothing argued undermined trial judge's conclusion that objective reasonable bystander would have concluded that parties reached agreement — Order of specific performance was exercise of discretion by trial judge — As trial judge applied correct legal principles and had due regard to relevant facts, there was no basis to interfere with exercise of discretion.

Table of Authorities

Cases considered by *Gillese J.A.*:

Baud Corp., N.V. v. Brook (1978), 1978 CarswellAlta 268, 1978 CarswellAlta 302, [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, *(*sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* 89 D.L.R. (3d) 1, *(*sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* 23 N.R. 181, 12 A.R. 271, 5 B.L.R. 225 (S.C.C.) — distinguished

Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 79 D.L.R. (4th) 97, 53 O.A.C. 314, 1991 CarswellOnt 836 (Ont. C.A.) — considered

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, *(*sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, *(*sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, *(*sub nom. *F.H. v. McDougall)* 380 N.R. 82, *(*sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, *(*sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74 (S.C.C.) — considered

Double N Earthmovers Ltd. v. Edmonton (City) (2005), 6 M.P.L.R. (4th) 25, 41 Alta. L.R. (4th) 205, 2005 ABCA 104, 2005 CarswellAlta 276, 363 A.R. 201, 343 W.A.C. 201, [2005] 10 W.W.R. 1 (Alta. C.A.) — considered

Double N Earthmovers Ltd. v. Edmonton (City) (2007), 2007 CarswellAlta 36, 2007 CarswellAlta 37, 2007 SCC 3, 391 W.A.C. 329, 401 A.R. 329, 275 D.L.R. (4th) 577, 28 B.L.R. (4th) 169, [2007] 1 S.C.R. 116, 29 M.P.L.R. (4th) 1, 68 Alta. L.R. (4th) 1, 58 C.L.R. (3d) 4, [2007] 3 W.W.R. 1, 356 N.R. 211 (S.C.C.) — referred to

Dynamic Transport Ltd. v. O.K. Detailing Ltd. (1978), 85 D.L.R. (3d) 19, [1978] 2 S.C.R. 1072, 20 N.R. 500, 6 Alta. L.R. (2d) 156, 9 A.R. 308, 4 R.P.R. 208, 1978 CarswellAlta 62, 1978 CarswellAlta 298 (S.C.C.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd. (2003), 34 B.L.R. (3d) 12, 10 R.P.R. (4th) 98, 63 O.R. (3d) 304, 168 O.A.C. 252, 223 D.L.R. (4th) 541, 2003 CarswellOnt 342 (Ont. C.A.) — referred to

Kempling v. Hearthstone Manor Corp. (1996), 41 Alta. L.R. (3d) 169, [1996] 8 W.W.R. 735, 137 D.L.R. (4th) 12, 184 A.R. 321, 122 W.A.C. 321, 3 R.P.R. (3d) 291, 1996 CarswellAlta 611 (Alta. C.A.) — considered

Klemke Mining Corp. v. Shell Canada Ltd. (2007), 2007 CarswellAlta 349, 2007 ABQB 176, 419 A.R. 1 (Alta. Q.B.) — considered

Klemke Mining Corp. v. Shell Canada Ltd. (2008), 71 C.L.R. (3d) 1, 429 W.A.C. 172, 433 A.R. 172, [2008] 9 W.W.R. 203, 2008 ABCA 257, 2008 CarswellAlta 874, 93 Alta. L.R. (4th) 225 (Alta. C.A.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — followed

MacDougall v. MacDougall (2005), 2005 CarswellOnt 7257, 205 O.A.C. 216, 262 D.L.R. (4th) 120 (Ont. C.A.) — considered

McCauley v. McVey (1979), [1980] 1 S.C.R. 165, 9 R.P.R. 35, 98 D.L.R. (3d) 577, 27 N.R. 604, 1979 CarswellOnt 694, 1979 CarswellOnt 650 (S.C.C.) — considered

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — referred to

W.C. Pitfield & Co. v. Jomac Gold Syndicate Ltd. (1938), [1938] O.R. 427, [1938] 3 D.L.R. 158, 1938 CarswellOnt 33 (Ont. C.A.) — considered

Wu Estate v. Zurich Insurance Co. (2006), 27 C.P.C. (6th) 207, 37 C.C.L.I. (4th) 222, 23 E.T.R. (3d) 205, [2006] I.L.R. l-4504, 211 O.A.C. 133, 268 D.L.R. (4th) 670, 2006 CarswellOnt 2971 (Ont. C.A.) — considered

Wu Estate v. Zurich Insurance Co. (2006), 228 O.A.C. 398 (note), 2006 CarswellOnt 7712, 2006 CarswellOnt 7713, 362 N.R. 399 (note) (S.C.C.) — referred to

Zhilka v. Turney (1959), [1959] S.C.R. 578, 18 D.L.R. (2d) 447, 1959 CarswellOnt 81 (S.C.C.) — considered

APPEAL by defendant from judgments reported at *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.* (2008), 2008 CarswellOnt 3436 (Ont. S.C.J.) and *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.* (2008), 45 B.L.R. (4th) 105, 2008 CarswellOnt 2503 (Ont. S.C.J.).

***Gillese J.A.*:**

1 When have parties entered into a binding agreement for the purchase and sale of shares? Ought specific performance to be ordered for an anticipatory breach of such an agreement? This appeal addresses those questions.

Background

2 The following summary draws heavily from the reasons of the trial judge, Pepall J.

3 UBS Securities Canada, Inc. ("UBS") is the Canadian operation of a global network of securities dealers and brokers. It has a history of investing in securities exchanges around the world.

4 In 2000, UBS acquired shares of the Bourse de Montréal Inc. ("Bourse") for its own account. At that time, Bourse was the private Quebec company that operated the Montreal Stock Exchange.

5 In 2005, UBS decided that it wanted to increase its holdings of Bourse shares. The task of acquiring additional shares was given to Asheef Lalani, a portfolio manager with approximately four years of experience in the securities field.

6 Sands Brothers Canada, Ltd. ("Sands Canada") owned 100,000 Bourse shares (the "Shares"). It acquired the Shares in May 2000 when it purchased an investment dealer, J. Pasztor & Associates Inc. Sands Canada was incorporated in Ontario in 1985 but has not carried on business in Canada since 2002.

7 Steven Sands ("Mr. Sands") is a director, officer and principal of Sands Canada. He lives in New York City and is acknowledged to be a sophisticated businessman. He has over 25 years experience in the securities industry. He and his brother operate a number of businesses in the investment field.

8 Because Bourse was a private company, its shares were not traded on a stock exchange. Sales of its shares were controlled by various rules set out in the Bourse by-laws (the "By-laws"). Under the By-laws, only registered broker-dealers or Bourse employees could own its shares. In addition, any sale of Bourse shares required its written approval, which was to be granted only upon a review of application materials. Further, no shareholder could own, directly or indirectly, more than 10% of its shares (the "10% limit"). If a shareholder exceeded the 10% limit, it faced adverse consequences, including that Bourse was prohibited from:

(i) accepting any further subscriptions for shares by that shareholder;

(ii) issuing any further shares to that shareholder;

(iii) registering the transfer of shares to that shareholder; and

(iv) allowing that shareholder to vote any of its shares.

9 Under the By-laws, a shareholder who exceeded the 10% limit could be forced to divest itself of the excess shares.

10 After some research, Mr. Lalani learned that Sands Canada owned the Shares and that Sands Canada was represented by Laidlaw & Co. Ltd. ("Laidlaw"). In late October 2005, Mr. Lalani contacted Mr. Hugh Regan at Laidlaw to express UBS' interest in acquiring the Shares. He was told that the Shares were not for sale. Mr. Regan advised Mr. Sands of the contact.

11 On November 14, 2006, Mr. Lalani called Mr. Regan again to ask whether the Shares were available for purchase. Mr. Regan told him that Sands Canada owned the Shares and directed Mr. Lalani to speak to Mr. Sands.

12 Mr. Lalani's telephone calls were timed by UBS' telephone logs, but his words were not recorded because he was trading for the house. Each call that Mr. Lalani made to Mr. Sands followed this pattern: Mr. Lalani would call a receptionist at Laidlaw and the receptionist would then transfer the call from Mr. Lalani to Mr. Sands' office.

13 That same day (November 14, 2006), Mr. Lalani called Mr. Sands and spoke with him. In this conversation, Mr. Sands confirmed that he controlled Sands Canada, had the authority to sell the Shares, and indicated that he might be interested in so doing. Mr. Lalani said that based on recent transactions reported in the press, UBS would pay $50 per share for the Shares. Mr. Sands speculated on why the Shares might have appreciated so much and asked Mr. Lalani to send him some research. Mr. Sands also asked Mr. Lalani to document the bid in an email. He gave Mr. Lalani his email address and asked that he correspond with him through that.

14 At this time, Mr. Lalani had access only to publicly traded information about Bourse. The same information would have been readily available to Sands Canada.

15 Mr. Lalani followed up with an email that day (November 14, 2006), in which he confirmed UBS' indication of interest in purchasing the Shares at C$50 per share. The email went on to say: "If you are interested in this price level then we can discuss the steps we need to take to move forward, if possible". He also sent some information on Canadian economic trends.

16 It is standard practice in the securities industry for parties to perform their own due diligence prior to entering into agreements to trade.

November 21, 2006

17 On November 21, 2006, Mr. Lalani placed five calls to Mr. Sands. He spoke with him on two occasions.

18 The first call in which the two actually spoke took place at 13:50 and lasted two minutes and twelve seconds. The trial judge found that the following took place during this call. Mr. Lalani asked Mr. Sands whether he had decided to accept the offer and Mr. Sands responded that he was interested but wanted to settle the transaction in 2007 for tax reasons. Mr. Lalani told Mr. Sands that his proposal was acceptable and they agreed to settle the transaction on January 3, 2007. Mr. Sands asked if he should contact Credit Suisse for another bid or another institution for an independent valuation and Mr. Lalani told Mr. Sands that he should do what he felt was necessary. Mr. Sands said that he wanted to get out of the transaction before settlement, if a material event affecting the value of the shares was announced before settlement. Mr. Lalani had not seen a "material event out" clause before so he said that he would speak with his superior.

19 Mr. Lalani spoke to his supervisor, Mr. Finemore, about the material event out clause. Mr. Finemore told him that, consistent with UBS' practice, it would not give Sands Canada such a clause. Mr. Lalani reported this to Mr. Sands in the second phone conversation they had on November 21, 2006. This second conversation took place at 14:02 and lasted for six minutes and six seconds. The trial judge found that during this call, Mr. Lalani asked Mr. Sands if they had a deal at $50 per share for 100,000 shares settling on January 3, 2007, even though UBS would not offer a material event out clause and Mr. Sands indicated that they had a deal and UBS should "draw up the papers". Mr. Lalani told Mr. Sands that in reliance on the agreement, UBS would be entering into an agreement with a third party to dispose of the Bourse shares that exceeded the 10% limit (the "Third Party Sale"). According to Mr. Lalani, Mr. Sands said that he understood.

20 Between the end of this conversation at 14:08 and 14:29, Mr. Lalani reported to Mr. Finemore on the arrangements he had made with Mr. Sands. Mr. Finemore asked Mr. Lalani to confirm that he had completed a transaction to purchase the Shares.

21 At 14:29, Mr. Lalani sent an email to Mr. Sands, with a copy to Irene Winel, UBS' chief compliance officer. The email reads as follows:

> Please confirm that Sands Brothers Canada / Laidlaw & Company has agreed to sell 100K shares of the Montreal Exchange for C$50 per share to UBS with settlement on January 3, 2007. Please find attached the documents required to be completed by the seller in order to facilitate the sale of the Montreal Exchange shares. Our point person for completing the transaction is Irene Winel (416-814-1445). She will draw up the share purchase agreement that will incorporate the agreed terms.

22 The documents attached to the email set out the Bourse requirements for a transfer of shares. Among other things, the documents indicated that the seller had to provide the share certificates and board of directors' resolutions. Ms. Winel testified that before this email was sent, Mr. Lalani told her that he had made a deal.

23 After sending the email message, Mr. Lalani made three attempts to reach Mr. Sands by telephone, without success. The purpose of his calls was to obtain confirmation of the agreement.

November 22, 2006

24 On November 22, 2006, Mr. Lalani called Mr. Sands three times. The first two telephone calls lasted 66 and 18 seconds respectively. In neither did Mr. Lalani speak to Mr. Sands. The third call, at 14:30, lasted 48 seconds. The trial judge accepted Mr. Lalani's evidence that during this call, Mr. Sands acknowledged and accepted the terms of the agreement, discussed the possibility of settling the transaction in U.S. funds once Mr. Sands confirmed that matter with his partners, and suggested that their respective legal counsel would get in touch to take care of the closing.

25 Mr. Sands testified that Mr. Lalani agreed to send him a draft shareholder's agreement for his review and that it was premature to discuss completing an agreement or the terms. The trial judge did not accept this evidence, stating that she preferred the evidence of Mr. Lalani.

26 At 14:51, Mr. Lalani sent Mr. Finemore an email which stated:

> Spoke to Steven Sands - confirmed that we have a deal. His legal is working through the appropriate documentation. He may choose to lock in a USD price. I said this will be no problem as we can always hedge currency on our side if we wish.

27 In reliance on the agreement and to meet the 10% limit, UBS arranged to sell 41,000 Bourse shares to a third party, Greenfair, for a price of $56 per share. UBS had a longstanding, important relationship with Greenfair. The agreement between UBS and Greenfair was oral and conditional on the closing of the Sands Canada transaction. It was to close on the same day as the Sands Canada transaction.

November 23, 2006

28 Late on November 23, 2006, Mr. Lalani sent an email to Mr. Sands confirming the agreement. The email reads as follows:

> As we finalized yesterday, UBS has agreed to purchase 100K shares of the Montreal Exchange from Sands Canada / Laidlaw & Company for C$50 per share. I understand that you have provided the list of documents required by the MX to your lawyers to prepare. In order to accelerate the process, please feel free to provide the best person for Irene Winel to contact in order to help draft the share purchase agreement. Irene has been involved in the process several times and may be useful if your team run's [sic] into any roadblocks.

November 27 to December 11, 2006

29 On November 27, 2006, Mr. Sands called Mr. Lalani and asked him to identify the best person at UBS to complete the transaction. Mr. Lalani referred Mr. Sands to the previous emails he had sent in which he provided Ms. Winel's contact information.

30 On November 29, 2006, Sands Canada's US attorney sent Ms. Winel an email saying:

> Steven Sands has asked me to help with the sale of shares of Montreal Bourse stock owned by Sands Brothers Canada, Ltd. He has given me the list of requirements of the Montreal Bourse for share transfer. I understand you will be handling this transaction for UBS and will prepare a share purchase agreement.
>
> Will you kindly contact me so we can start the process of documenting and completing this sale.

31 The two solicitors discussed various aspects of the trade, including the date for settlement, number of shares that would be sold, and the issuer. Ms. Winel told Ms. Henderson that she would send her the UBS standard form agreement for private share transfers. Ms. Henderson indicated that she wanted to get on with the transaction. Ms. Winel agreed.

32 The following day Ms. Winel sent the draft share purchase agreement, as promised, under cover of the following email message:

> Further to our telephone conversation, I attach for your review and comment our draft share purchase agreement. Can you please confirm that Sands is a Canadian resident for tax purposes, otherwise we would have potential withholding tax issues.

33 The draft share purchase agreement was stated to be "dated as of November___, 2006" with the closing date described as "on or before January ___, 2007". The seller was described as Sands Brothers Canada, Ltd. and the purchaser as UBS.

34 On December 1, 2006, Bourse announced that it was listing its shares and that the listing was expected to occur in March or April, 2007. Bourse shareholders, including UBS and Sands Canada, were sent the press release on November 30, 2006.

35 Ms. Winel heard nothing further from Ms. Henderson so she sent a follow-up email on December 4, 2006, asking if she had any comments on the draft agreement. Ms. Henderson replied that Roger Bendelac was handling the matter. Mr. Bendelac advised Ms. Winel that he was out of town but would provide Sands Canada's comments on the draft agreement on December 12, 2006.

36 On December 7, 2006, Mr. Sands called Mr. Lalani and complained that he had not heard from Mr. Lalani following the announcement of the listing. They disagreed about whether they had a binding agreement for the sale of the Shares.

37 On December 11, 2006, UBS wrote to Sands Canada demanding that it fulfill its obligations. It quoted the price, number of shares, and settlement date.

38 Mr. Sands sent an email to UBS in which he set out his version of the events and asserted that no concluded agreement had been reached, as many matters had been left unaddressed.

39 On December 11, 2006, Mr. Martin Sands called Mr. Lalani and advised that Sands Canada would not deliver the Shares.

The Legal Proceedings

40 UBS immediately commenced legal proceedings. It brought an application, returnable on December 14, 2006, in which it sought a declaration that Sands Canada had unconditionally agreed to sell 100,000 Bourse common shares to it for C$50 per share, for settlement on January 3, 2007. It also asked the court to order specific performance of the agreement.

41 A trial took place on December 20 and 21, 2006. The trial judge found in favour of Sands Canada. However, on May 29, 2007, this court set aside the judgment and remitted the matter for a new trial. An application for leave to appeal to the Supreme Court of Canada was dismissed on November 29, 2007.

42 The second trial took place before Pepall J. (the "trial judge") on April 23, 24 and 25, 2008. It proceeded on the same basis as the first, namely, that the witnesses' affidavits would constitute their examinations in chief. The witnesses were Mr. Lalani and Ms. Winel for UBS, and Mr. Sands for Sands Canada. At the commencement of trial, the parties agreed that the notice of application and the affidavits constituted the pleadings.

43 The trial judge gave thorough, thoughtful reasons for judgment. She found that an oral agreement was made between the parties and reiterated in the telephone call on November 22, 2006, at which time Mr. Lalani confirmed that Mr. Sands, on behalf of Sands Canada, agreed to sell the Shares to UBS for C$50 per share, with settlement to take place on January 3, 2007 (the "Agreement"). She found that in reliance on the Agreement, the parties proceeded to draft closing documents and UBS entered into the Third Party Sale. She also found an anticipatory breach of the Agreement on the part of Sands Canada, and ordered that the Agreement be specifically performed.

44 On May 1, 2008, the Bourse merged with the Toronto Stock Exchange. As a result of the merger, Sands Canada became entitled to 136,187 TSX shares and $4,876,995.33 in cash. It received the shares and cash on May 2, 2008.

45 In a supplementary order dated May 14, 2008, the trial judge made detailed orders on how to implement the order for specific performance of the Agreement. She ordered Sands Canada to transfer to UBS 136,187 common shares of the TSX and to pay to UBS the sum of $4,876,995.33. UBS was ordered to deliver to Sands Canada the $5 million purchase price under the Agreement, plus pre-judgment interest. In addition, Sands Canada was ordered to pay to UBS the amount it had received by way of dividends on the shares from January 3, 2007, to April 30, 2008, inclusive of pre-judgment interest.

46 Sands Canada appeals. It submits that the trial judge made both factual and legal errors in concluding that a binding agreement had been made and that she erred in law in ordering specific performance.

The Trial Decision

47 As has been mentioned, the trial judge gave thorough, thoughtful reasons for decision. After setting out the facts in detail, she reviewed certain basic principles of contract formation. Those principles can be summarized as follows. For a contract to exist, there must be a meeting of minds, commonly referred to as consensus ad idem. The test as to whether there has been a meeting of the minds is an objective one - would an objective, reasonable bystander conclude that, in all the circumstances, the parties intended to contract? As intention alone is insufficient to create an enforceable agreement, it is necessary that the essential terms of the agreement are also sufficiently certain. However, an agreement is not incomplete simply because it calls for the execution of further documents.

48 The trial judge applied the law and found that a reasonable person would conclude that the parties intended to contract to effect a trade whereby Sands Canada would sell the Shares to UBS for C$50 per share, to settle on January 3, 2007. Her reasons for reaching that conclusion are contained in paras. 45 through 50 of the decision, the key aspects of which read as follows:

> Firstly, both parties were sophisticated securities industry participants. Mr. Sands had been in the industry for 28 years. While Mr. Lalani had only worked at a securities trading desk for three years, during that time he had been involved in hundreds of trades. It is customary in the securities industry, in both proprietary trading and trading as an agent for third parties, to consummate trades by verbal agreement. This trade involved a proprietary trade and consistent with the custom, the parties intended to make a trade.
>
> Secondly, I did not find Mr. Sands to be credible. Where his evidence and that of Mr. Lalani conflict, I prefer Mr. Lalani's evidence to that of Mr. Sands. His affidavit which constituted his evidence in chief was conveniently lacking in particulars even though it was sworn shortly after the events in issue. In his cross-examination, he seemed to have little recall of many of the events and there were instances where his evidence before me initially differed from that given at the first trial. ...
>
> I am also satisfied that an agreement was reached between the parties and was reiterated when Mr. Lalani and Mr. Sands spoke by telephone on November 22, 2006 at which time Mr. Lalani confirmed that Mr. Sands had agreed to sell 100,000 shares of the Bourse for $50 per share to settle on January 3, 2007. I do not accept that there was no offer or acceptance or that the length of the various conversations would preclude such discussions.
>
> There was also reliance on the agreement made. The parties proceeded to draft documents for closing and at no time did Sands Canada take issue with the terms of the agreement reached or raise the material event out clause. In reliance on the agreement, UBSSC contracted with a third party. Mr. Sands was told on November 21, 2006 that in reliance, UBSSC would be entering into a third party agreement because of the Bourse's 10% holding limit.

49 The trial judge then considered whether the essential terms of the agreement could be determined with a reasonable degree of certainty. She concluded that they could. In para. 54 of the reasons, she explains:

> Having accepted Mr. Lalani's evidence over that of Mr. Sands', I am satisfied that the parties were ad idem on the parties, the purchase price, the absence of any material out clause, and the date of closing. I do not view the place of closing and the representations and warranties to be essential terms as between the two parties to the agreement. In this regard, I note the evidence on the custom and practice in the securities industry to the effect that the essential terms in a share purchase agreement are the number of shares, the price and the closing date. As to whether currency of payment was in Canadian or US funds, Mr. Sands inquired as to the currency and Mr. Lalani responded that this was not a problem. There was agreement on currency - it just had not been specified. In my view, the lack of specification was not material. The purchase price had been determined and it was C$50 per share with settlement to take place on January 3, 2007.

50 The trial judge viewed the 10% limit on Bourse shares as an "issue of mechanics" in the sense that the Bourse approval requirements were simply a mechanism to facilitate the transfer of its shares.

51 The trial judge referred again to the fact that the evidence demonstrated that it was customary in the securities industry to consummate trades by verbal agreement and without such a custom, the industry could not operate effectively. She concluded in para. 58:

> In my view the parties entered into a binding enforceable contract in which Sands Canada agreed to sell 100,000 shares of the Bourse for $50 per share with a closing date of January 3, 2007. Both parties committed themselves to the essential and material terms of the agreement and both reasonably expected to be bound to the terms they agreed to. Having concluded that the deal he made was not sufficiently advantageous, Mr. Sands reneged on the agreement. With not a shred of evidence to support his position, he alleged that UBSSC had insider information and then tried to concoct a version of events in an effort to avoid his bargain. In my view, Sands Canada should be held to the agreement reached. UBSSC asserted that Sands Canada was in anticipatory breach of its agreement with UBSSC. No issue was taken with that position and I accept UBSSC's submission in that regard.

52 The trial judge then considered the appropriate remedy. She noted that Bourse was set to merge with the Toronto Stock Exchange and that Sands Canada had not carried on business in Canada since 2002. Further, its only asset was the Shares, and the share certificates were held in New York City. She recited UBS' concerns about Sands Canada's ability to meet any financial commitments flowing from these legal proceedings.

53 The trial judge articulated the legal principles that inform the exercise of discretion in ordering specific performance of a contract for the sale of shares. She saw the present case as similar to *W.C. Pitfield & Co. v. Jomac Gold Syndicate Ltd.*, [1938] O.R. 427 (Ont. C.A.), in that UBS had pursued its claim for specific performance with "extraordinary dispatch" and entered into the Third Party Sale in reliance on the Agreement. In light of the "special circumstances" of the case and the "substantial and legitimate interest represented by an order for specific performance", she concluded that "there is a fair, real and substantial justification for granting" an order for specific performance of the Agreement.

54 The trial judge distinguished the facts in the present case from those in *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.) [hereinafter Asamera]. In *Asamera*, the litigation had been in the courts for 18 years whereas UBS had moved quickly. Further, UBS was not speculating at Sands Canada's expense. In addition, the shares in question were not publicly traded until March 2007. Before then, they traded on the grey market and valuation problems were likely to arise if an assessment of damages was required. Furthermore, the Third Party Sale, although conditional, was a binding agreement with implications for UBS' reputation.

The Issues

55 Sands Canada asks this court to decide whether the trial judge erred in:

(1) holding that the parties entered into a binding agreement;

(2) failing to treat the requirement of Bourse approval as a true condition precedent; and

(3) ordering specific performance.

56 Before considering these issues, it is necessary to consider the standard of review.

The Standard of Review

57 The standard of review in civil matters is clear. On questions of law, the standard of review is correctness. Findings of fact, on the other hand, are not to be reversed, absent palpable and overriding error. Palpable errors include findings that are clearly wrong, unreasonable or unsupported by the evidence: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10 and *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.), at para. 110.

58 Sands Canada maintains that a standard of correctness applies to all three issues as each, it is contended, is a question of law.

59 UBS, on the other hand, maintains that the issues are questions of fact or of mixed fact and law. UBS submits that for Sands Canada to succeed on any issue, it must demonstrate that the trial judge made a palpable and overriding error, with an especially high level of deference to be afforded to the trial judge's findings of credibility.

60 As I will explain, the alleged errors made by the trial judge on the first issue relate primarily to findings of fact and inferences drawn from the facts. Consequently, the standard of review in relation to those alleged errors is that of palpable and overriding error.

61 The second issue raises a question of contractual interpretation. However, the alleged error relates primarily to the trial judge's findings of fact and her consideration of the evidence as a whole. Thus, the question is one of fact or, at its highest for the appellant, one of mixed fact and law. The standard of review for questions of mixed fact and law is palpable and overriding error unless the error is "extricable" in that it can be attributed to an error in principle: *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120 (Ont. C.A.), at paras. 30-33 and *Double N Earthmovers Ltd. v. Edmonton (City)* (2005), 363 A.R. 201 (Alta. C.A.), at paras. 16-17, aff'd *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116 (S.C.C.).

62 The third ground of appeal is based on the trial judge's exercise of discretion in ordering specific performance. The exercise of her discretion ought not to be interfered with unless it is based on an erroneous principle: see *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 54, per Sopinka J., dissenting, but not on this point.

Was There a Binding Agreement Between the Parties?

63 Sands Canada submits that the trial judge made numerous factual and legal errors in concluding that the parties had entered into a binding agreement. For the reasons that follow, I would reject this submission in whole.

Misapprehension of Evidence

64 Effectively, Sands Canada argues that the trial judge misapprehended the evidence on two points. First, it submits that the trial judge was incorrect in her finding that Mr. Lalani's email to Mr. Sands on November 21, 2006, preceded Mr. Lalani's conversation with Mr. Finemore that same day. Sands Canada argues that this error is significant because UBS took the position that the Agreement arose from the second conversation on November 21, 2006 at 14:02. In Sands Canada's submission, the fact that Mr. Finemore wanted confirmation in writing from UBS indicated that UBS did not think there was a binding agreement at that time. Second, Sands Canada submits that the trial judge erred in finding that Mr. Lalani said that he was told by Mr. Sands that they had a deal during the 14:02 call when that was not his evidence.

65 I would reject both arguments. The trial judge did not say that Mr. Lalani's email preceded the conversation with Mr. Finemore. She simply stated that on November 21, 2006, "Mr. Lalani reported on the matter to Mr. Finemore who asked him to be doubly sure there was a transaction." Contrary to Sands Canada's submission, the fact that Mr. Finemore wanted confirmation of the Agreement is not inconsistent with the Agreement having been concluded at that time. A confirmation is exactly that - confirmation or assurance that a prior agreement had been reached.

66 Second, the trial judge did not misapprehend Mr. Lalani's evidence regarding the 14:02 call. The trial judge did *not* say that Mr. Lalani's evidence was that Mr. Sands told him that the parties had a deal on November 21, 2006. Rather, she accepted Mr. Lalani's evidence that Mr. Sands "indicated" that they had a deal, a conclusion which was consistent with what she found to be Mr. Sands' unequivocal instruction to Mr. Lalani, during that call, to "draw up the papers".

Other Alleged Factual Errors

67 Sands Canada submits that the trial judge committed a number of other factual errors in concluding that the parties reached a binding agreement. Its arguments may be summarized as follows:

1. Failure to consider the 10% limit - the trial judge noted that under the By-laws, a shareholder who exceeds the 10% limit can be forced to divest itself of shares in excess of the 10% threshold. However, it is submitted that she failed to consider that to the knowledge of UBS, in addition to requiring a divesture, the By-laws prohibited the acquisition of more than 10% of the shares either legally or beneficially.

2. No negotiation as to price - the trial judge did not reconcile the lack of negotiation over the price to be paid for the Shares despite Mr. Lalani's admission that he had authority to pay more than $50 per share and his testimony that, at the relevant time, the value of Bourse shares was estimated to be in the range of $76. Given Mr. Sands' experience and background, Sands Canada argues that it makes no sense that Mr. Sands would not negotiate the price especially when UBS would not agree to a material event out clause.

3. The material event out clause - the trial judge believed that the request for this clause was made but that it was dropped, for no consideration, in a matter of a few minutes. She made this finding despite the fact that in the same conversation, Mr. Sands said he did not wish to be embarrassed before his partner if there was a listing or merger. This, it is contended, makes no sense and is inconsistent with the trial judge's finding that Mr. Sands was sophisticated in securities matters.

4. Credibility - in rejecting Mr. Sands' evidence, the trial judge made a blanket statement that she preferred Mr. Lalani's evidence wherever it conflicted with that of Mr. Sands. She specifically accepted Mr. Lalani's evidence that he did not offer Mr. Sands alternative language when UBS rejected the material event out clause. Sands Canada claims it was not reasonable for the trial judge to have accepted Mr. Lalani's evidence on this point. Mr. Lalani claimed he confirmed the terms of the Agreement, including the lack of a material event out clause, the issue of currency and the drafting of an agreement in 48 seconds, including the time necessary to place the call through Laidlaw. Having regard to the length of all the calls where words were exchanged between the two, Sands Canada says this would have been "impossible".

5. No trade ticket - the trial judge did not reconcile Mr. Lalani's failure to book the purchase of the Shares with his compliance department. If he had completed a transaction and acquired the Shares, it is claimed, he would have had to show the Shares as an asset and reserve the funds to pay for them. Moreover, the transaction was not recorded by a ticket or other means.

6. Third Party Sale - the trial judge failed to consider Mr. Lalani's acknowledgement that his affidavit of December 12, 2006, dealing with the Third Party Sale was inaccurate. In cross-examination, Mr. Lalani admitted that the Third Party Sale was conditional on UBS completing the transaction with Sands Canada. The Third Party Sale could have been completed by selling some of the nearly 800,000 Bourse shares in UBS' portfolio. UBS' representation that it

would suffer irreparable harm if it did not complete the Sands Canada purchase was not accurate. Time was not of the essence in the Third Party Sale and UBS had already hedged against the possibility that it might not complete the Sands Canada purchase.

68 I do not accept that the trial judge made any of the alleged errors.

69 The first argument is, with respect, simply incorrect. Contrary to Sands Canada's submission, the trial judge did consider that the By-laws prohibited the acquisition of more than 10% of the Bourse shares. At para. 8 of her reasons, the trial judge noted: "[t]he Bourse's by-laws require that no entity hold more than 10% of the Bourse's issued and outstanding common shares." She later referred to the 10% limit several times in her reasons in the discussion of the Third Party Sale, the purpose of which was to ensure that UBS complied with the 10% limit.

70 Second, the fact that the trial judge did not expressly refer to the absence of negotiation of the price to be paid for the Shares does not mean that she committed a palpable and overriding error in finding that the parties had concluded an agreement for C$50 per share. A trial judge is not obliged to accept all of the evidence before her or to advert to every possible argument or defence. What is essential is that there is evidence to support the findings that she does make. There was considerable evidence to support the trial judge's conclusion that the parties struck an oral agreement in November 2006 at a price of C$50 per share. That conclusion was based, in large part, on the trial judge's credibility findings.

71 The trial judge accepted Mr. Lalani's evidence that the parties had concluded an oral agreement and disbelieved Mr. Sands' evidence that the parties were negotiating and moving towards the conclusion of a written agreement with a material event out clause. She offered cogent reasons for her credibility findings: see, especially, para. 46 of her reasons, set out above. In the end, she accepted Mr. Lalani's version of events and found that Mr. Sands adduced evidence, which was "conveniently lacking in particulars" and was an effort to "concoct a version of events in an effort to avoid his bargain." There is no reason to interfere with those determinations, especially in light of the Supreme Court's admonition that the task of "[a]ssessing credibility is clearly in the bailiwick of the trial judge" and that "heightened deference must be accorded to the trial judge on matters of credibility": *C. (R.) v. McDougall* (2008), 297 D.L.R. (4th) 193 (S.C.C.), at para. 72.

72 The trial judge's credibility findings provide an answer to Sands Canada's third and fourth arguments. Based on those findings, the trial judge was entitled to infer that Mr. Sands decided against insisting on a material event out clause and that the parties were *ad idem* on the lack of such a clause. Contrary to Sands Canada's submission, that inference is not inconsistent with the trial judge's finding that Mr. Sands was sophisticated in securities matters. A sophisticated businessperson, such as Mr. Sands, may have simply assessed the risk of insisting on a clause which the purchaser was not willing to give and determined that it was not worth jeopardizing a desired transaction.

73 In my view, nothing turns on the fact that the telephone calls were completed in a short time. As the trial judge found, the transaction was not complicated and the parties were sophisticated. In this context, it is reasonable to conclude, as the trial judge did, that the Agreement took a relatively short amount of conversation time to be consummated.

74 Fifth, it was Mr. Lalani's evidence that a trade ticket was not required. For the reasons already given, the trial judge was entitled to accept that evidence.

75 Sixth, the trial judge took into account that the Third Party Sale was conditional on the Agreement between UBS and Sands Canada. She did not view this as being inconsistent with a binding Agreement having been concluded. The Third Party Sale was made conditional on settlement, not because the Agreement had not been completed, but for the practical reason that the source of the shares sold under the Third Party Sale was to be the shares obtained from Sands Canada rather than UBS' own inventory. The fact that UBS could theoretically have completed the Third Party Sale by selling shares from its own inventory does not detract from the trial judge's conclusion that the parties had reached a binding agreement in November 2006. Indeed, to conclude otherwise would have been inconsistent with the evidence of UBS' strategy to acquire as many Bourse shares as was legally possible.

Alleged Legal Errors

76 Sands Canada submits that the trial judge made a number of legal errors in finding the requisite intention to contract.

77 First, it submits that the trial judge erred in using evidence that it is customary in the securities industry to consummate trades by verbal agreement as objective evidence of an intention to contract. Sands Canada contends that it is not possible to draw that conclusion because the Shares did not trade on an exchange and a written agreement was a necessary condition of the agreement to trade.

78 I would reject this argument. The trial judge properly relied on the uncontradicted evidence of UBS that it is customary in the securities industry to make binding agreements orally and that without this custom, the securities industry could not operate effectively. That evidence formed a necessary part of the context of the parties' communications and was relevant to determining whether the parties had concluded the Agreement in November 2006 or whether they had merely reached an agreement to agree.

79 Based in part on this evidence, the trial judge found that the parties had concluded the Agreement and that the essential terms were the price, quantity of shares and the closing date. Thus, the trial judge found that a written share purchase agreement was not a "condition of the bargain" but merely "an indication or expression of a desire as to the manner in which the contract already made will be implemented": *Klemke Mining Corp. v. Shell Canada Ltd.*, 2007 ABQB 176 (Alta. Q.B.), at para. 183, aff'd (2008), 433 A.R. 172 (Alta. C.A.); see also *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), at pp. 103 -104. I see no error in that conclusion.

80 Second, Sands Canada contends that the trial judge's analysis is flawed because she equated the rejection of a material event out clause with the conclusion of the Agreement.

81 Contrary to Sands Canada's contention, the trial judge did not conflate these two things. Rather, she found that the parties had concluded an oral agreement and were "ad idem on the parties, the purchase price, the absence of any material event out clause, and the date of closing." The trial judge offered cogent reasons for accepting Mr. Lalani's evidence and rejecting the alternative version of events put forward by Mr. Sands. Those credibility assessments are entitled to considerable deference on appeal.

82 Third, Sands Canada contends that the trial judge erred by taking a subjective approach to the issue of whether the parties had reached an agreement. It argues that the trial judge erred in referring to Mr. Lalani's evidence regarding the 14:02 call on November 21, 2006, which, in her view, indicated that the parties had made a deal. Sands Canada contends that what Mr. Lalani thought was irrelevant to whether there was a binding agreement.

83 Sands Canada submits that the objective evidence indicated that the parties did not reach a binding agreement. After Mr. Lalani concluded the second conversation with Mr. Sands on November 22, 2006, he sent an email to Mr. Finemore indicating that he had spoken "to Mr. Sands and confirmed we have a deal". The trial judge considered this to be evidence she could rely on to show an intention to contract. Sands Canada contends that there are two problems with that conclusion, however. First, it is not evidence that proves Sands Canada's intention. Second, if it shows anything, it is consistent with Mr. Sands' evidence that UBS had offered a price for the shares and that Sands Canada's "legal is working through the appropriate documentation."

84 Sands Canada argues that Mr. Lalani's electronic message to Mr. Sands the next day, November 23, 2006, was meant to confirm the sale but is worded, in effect, like his prior offers to purchase. It is framed from UBS' perspective as a buyer and can be contrasted with Mr. Lalani's note of November 21, 2006, in which he sought confirmation that Sands Canada had "agreed to sell". Mr. Sands did not confirm the sale. Sands Canada argues that the implications of this contradiction undermine Mr. Lalani's credibility and UBS' contention that it had a concluded agreement with Sands Canada in November 2006.

85 Sands Canada also points to other factors which, in its submission, show that the parties had not reached an agreement from an objective point of view. For example, it points to the draft purchase and sale agreement which contained significant terms that had not been discussed by the parties, including an "entire agreement" clause.

86 It is clear that the trial judge did not err in the statement of the objective test for whether the parties intended to contract. The trial judge was alive to the fact that the test for consensus ad idem is objective. At para. 40 of the reasons, she recites the objective test and then applies it before reaching her conclusion.

87 Nor did the trial judge implicitly apply a subjective test. She did not consider Mr. Lalani's evidence regarding the 14:02 call in isolation. Rather, she considered the totality of the evidence before concluding that the objective test had been met and that the parties had agreed to a contract on the essential terms in November 2006.

88 In my view, nothing that has been argued undermines the trial judge's conclusion that an objective reasonable bystander would have concluded that the parties reached an agreement in November 2006. To the contrary. Mr. Lalani's email to Mr. Sands on November 23, 2006, is not framed as an offer to purchase but as confirmation of the Agreement. In that email, Mr. Lalani stated that, as finalized on November 22, 2006, "*UBS has agreed to purchase* 100K shares of the Montreal Exchange from Sands Canada/Laidlaw & Company" (emphasis added). I fail to see a distinction between a confirmation that UBS had agreed to purchase the Shares from Sands Canada and a confirmation that Sands Canada has agreed to sell the Shares to UBS.

89 With respect to the terms in the written draft agreement, again, the trial judge's findings regarding the essential terms of the transaction were supported by the evidence of the securities industry custom that such agreements are customarily oral and that the essential terms of such agreements are the price, quantity and closing date. It was further buttressed by her credibility determinations. Given her conclusion that the parties had concluded an oral agreement, the "entire agreement clause" in the draft purchase and sale agreement was non-essential.

Was Bourse Approval a Condition Precedent?

90 A true condition precedent is one that is agreed to by the parties and is about a "future uncertain event, the happening of which depends entirely on the will of a third party": see *Zhilka v. Turney*, [1959] S.C.R. 578 (S.C.C.), at p. 583. When determining whether a contractual term is a "true condition precedent", the intentions of the parties must be considered. It is a question of construction whether the obligations of a contract are absolute and immediately binding or are contingent on an external event: *Wu Estate v. Zurich Insurance Co.* (2006), 268 D.L.R. (4th) 670 (Ont. C.A.), at para. 22, leave to appeal to S.C.C. refused (2006), 228 O.A.C. 398 (note) (S.C.C.), citing *Kempling v. Hearthstone Manor Corp.* (1996), 184 A.R. 321 (Alta. C.A.), at para. 32.

91 On the findings of the trial judge, there was no agreement between the parties that Bourse approval of the transfer of the Shares was a condition to be satisfied in order for a binding agreement to be effective. On the contrary, the trial judge found that the agreement reached by the parties was "unconditional". The record amply supports this finding.

92 Sands Canada and UBS were both aware of the Bourse's role in the transfer of shares and of the Third Party Agreement. There is nothing in the record to suggest that either party made Bourse approval a condition precedent to the Agreement. Indeed, the evidence is to the contrary. UBS' conduct indicates that it assumed any risk associated with a failure to obtain Bourse approval.

93 Part of Sands Canada's argument on this issue is that the trial judge erred by confusing the 10% limit with the need for Bourse approval. While she discusses both in para. 55 of her reasons, I see no such confusion. The first two sentences of that paragraph speak to the 10% limit. However, in the balance of the paragraph, she clearly deals with the matter of Bourse approval. She begins by quoting from S.M. Waddams, *The Law of Contracts*, 4th ed. (Aurora: Canada Law Book, 1999), at p. 42. In the current edition, [1] Professor Waddams points out that where the consent of a third party is necessary, it may be a condition precedent to an agreement. However, he goes on to note that "[m]ore commonly", it

is justifiable to assume that the approval constituted a condition, not of the agreement but of its performance. The trial judge concluded that the Bourse approval requirements were but a mechanism to facilitate the transfer of shares -that is, that they were an aspect of performance of the Agreement and not a condition to its existence. On the record, there is no justification for interfering with that determination.

94 In any event, Sands Canada cannot rely on the lack of Bourse approval to avoid performing under the Agreement. Even where a third party consent is a condition of performance of a contract, each party is obliged to perform the contract pending the necessary third party consent. Sands Canada cannot avoid its bargain by arguing that there was an unfulfilled condition precedent of Bourse approval when Bourse approval was never sought because Sands Canada refused to tender the Shares or provide the required trade execution information to the Bourse. That is, Sands Canada cannot rely on its own failures to take the necessary steps to obtain Bourse approval to deny the enforceability of the Agreement: see *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.), at pp. 1082-84 and *McCauley v. McVey* (1979), [1980] 1 S.C.R. 165 (S.C.C.), at p. 169.

95 Accordingly, I would dismiss this ground of appeal.

Did the Trial Judge Err in Ordering Specific Performance?

96 There is no dispute about the applicable legal principles. When fashioning a remedy for a breach of contract, the object is to place the injured party in the position that he or she would have been had the contract been performed. Typically, damages are ordered. However, where damages are inadequate to compensate an injured party for its losses, specific performance may be ordered. Accordingly, specific performance may be ordered where the subject matter of a bargain is unique or irreplaceable because, in those circumstances, damages may be inadequate. The remedy for an anticipatory breach of contract is discretionary. The exercise of discretion requires an assessment of the parties' conduct and the factual context.

97 Sands Canada submits that the trial judge erred in ordering specific performance of the Agreement. Its arguments can be summarized as follows. First, it says that there was nothing unique about the Shares which would warrant an order for specific performance. Thus, it submits, the trial judge erred in distinguishing *Asamera* based on her assumption that there was no market for the Shares. Nor was there evidence to suggest that UBS could not prove damages or that damages would be inadequate. Second, it contends that the trial judge was improperly influenced by two factual matters: the fact that Sands Canada had no assets in Ontario and a finding that UBS' reputation would suffer if it failed to complete the Third Party Sale. Third, it argues that the initial error in ordering specific performance was compounded by maintaining that order after the Shares no longer existed following their conversion into TSX shares and cash. This, Sands Canada submits, resulted in a windfall for UBS, particularly as it relieved UBS of its obligation to comply with the 10% limit and of its duty to mitigate.

98 For the reasons that follow, I do not agree. The order for specific performance was an exercise of discretion by the trial judge. As she applied the correct legal principles and had due regard to the relevant factual considerations, I see no basis on which to interfere with that exercise of discretion.

Adequacy of damages

99 Specific performance may be ordered in connection with the shares of a private company because, as in the present case, such shares may not be readily available on the market and valuation can be difficult. Contracts for the sale of publicly traded shares are also candidates for specific performance in circumstances such as those of the present case where the vendor is subject to an injunction restraining it from selling the shares, the purchaser has diligently pursued its claim for specific performance from the outset, and the plaintiff has entered into additional contracts for the resale of some of the shares: see *W.C. Pitfield* at pp. 457-58.

100 The uniqueness of the property that is the subject of the contract is one, non-determinative factor in deciding the appropriateness of specific performance. The underlying principle is that if the property is unique, it should be delivered

up because damages would not put the party in the position they would have been in but for the breach. The trial judge considered this factor and concluded that the Shares were unique. During the relevant timeframe (i.e. prior to the public listing of the shares in March 2007) there was no readily available substitute for the Shares. In this regard, it is important to note that the time to assess the uniqueness of the property is the date of the anticipatory breach, not the date of trial or judgment: *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2003), 63 O.R. (3d) 304 (Ont. C.A.), at paras. 40 and 43. Furthermore, the Shares were unique because of the special value they had for UBS. In that regard, it will be recalled, UBS had a plan to accumulate as many Bourse shares as possible. Finally, the value and availability of the Shares at the time of breach was not certain.

101 I see no error in the distinctions drawn by the Trial Judge between the facts of the present case and those in *Asamera*.

Sands Canada's financial position

102 The trial judge found, on uncontradicted evidence, that Sands Canada is a shell company with no assets in Ontario. It has not carried on business in Canada since 2002 and the Shares, its only asset, were held in New York City.

103 I see no error in the trial judge having considered Sands Canada's financial position when deciding the matter of remedy. Whether a defendant is in a position to pay damages and, thus, whether the plaintiff is likely to recover them, is relevant to the issue of the adequacy of damages. As Sharpe J.A. states in *Injunctions and Specific Performance*, loose leaf, (Aurora: Canada Law Book, 2007), at para. 7.260:

> If the defendant is unable to pay a damages award, then however accurate the assessment of the plaintiff's loss may have been, the remedy of damages can hardly be described as adequate.

104 Similarly, I see no reason to question the trial judge's consideration of the reputational aspects of a failure by UBS to conclude the Third Party Sale. She recognized that the Third Party Sale was conditional. On the record, that was no bar to her finding that UBS' reputation would have been harmed had the Agreement not been honored and UBS thereby become unable to perform the Third Party Sale as contemplated.

No windfall

105 By ordering specific performance, UBS was placed in the position that it would have been had the Agreement been performed. As I have already explained, the trial judge was fully justified in concluding that damages were inadequate in the circumstances of this case. Consequently, I do not view UBS as having received a windfall, despite what has occurred as a result of the merger of Bourse and the Toronto Stock Exchange. The fact that UBS is no longer constrained by the 10% limit does not mean the Third Party Sale is not enforceable. However, the enforceability of the Third Party Sale agreement is a matter between UBS and the third party, not UBS and Sands Canada.

106 The case law provides a full answer to the argument that UBS was unfairly benefited as it had no duty to mitigate. In *Asamera*, Estey J. explained that in circumstances where there is a prompt claim for specific performance and a fair, real and substantial justification for the claim, the plaintiff may not be required to acquire replacement property. At pp. 667-68 of *Asamera*, he stated:

> On principle it is clear that a plaintiff may not merely by instituting proceedings in which a request is made for specific performance and/or damages, thereby shield himself and block the court from taking into account the accumulation of losses which the plaintiff by acting with reasonable promptness in processing his claim could have avoided. Similarly, the bare institution of judicial process in circumstances where a reasonable response by the injured plaintiff would include mitigative replacement of property, will not entitle the plaintiff to the relief which would be achieved by such replacement purchase and prompt prosecution of the claim. *Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found.*

[Emphasis added.]

He continued at pp. 668-69:

> [*I*]*n the case of anticipatory breach, there is a substantial and legitimate interest in looking to performance of a contractual obligation. So a plaintiff who has agreed to purchase a particular piece of real estate, or a block of shares which represent control of a company, or has entered into performance of his own obligations and where to discontinue performance might aggravate his losses, might well have sustained the position that the issuance of a writ for specific performance would hold in abeyance the obligation to avoid or reduce losses by acquisition of replacement property.* Yet, even in these cases, the action for performance must be instituted and carried on with due diligence. This is but another application of the ordinary rule of mitigation which insists that the injured party act reasonably in all of the circumstances. Where those circumstances reveal a substantial and legitimate interest in seeking performance as opposed to damages, then a plaintiff will be able to justify his inaction.
>
> [Emphasis added.]

107 The trial judge relied on this passage and found that UBS was entitled to specific performance. On the record, there is no reason to interfere with that determination. UBS elected to seek specific performance in the face of Sands Canada's anticipatory breach. Its application to enforce the Agreement was brought with "extraordinary dispatch". As has already been mentioned, a block of 100,000 Bourse shares was not readily available at the date the contract was breached. The trial judge found, in the circumstances, that there was a fair, real and substantial justification to a claim for specific performance.

Disposition

108 Accordingly, I would dismiss the appeal with costs to UBS fixed at $22,000, inclusive of disbursements and G.S.T.

***MacFarland J.A.*:**

I agree.

***LaForme J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 S.M. Waddams, *The Law of Contracts*, 5th ed. (Aurora: Canada Law Book, 2005), at p. 40.

15

2008 CarswellOnt 6759
Ontario Superior Court of Justice (Divisional Court)

Mascia v. Dixie X-Ray Associates Ltd.

2008 CarswellOnt 6759, [2008] O.J. No. 4554, 170 A.C.W.S. (3d) 756, 55 B.L.R. (4th) 186

Anthony Mascia & Northern Magnetic Corporation v. Dixie X-Ray Associates Limited, Cedarwood Management and Financial Consultants Inc., Cirrus Management Incorporated, Karing Management Limited, Sadara Management Corporation, Daniel Slipacoff, Allan Yee, Kwan Cheung Tsui, Isadore Czosniak, Ron Polson and Soe Lwin Kyone

Cunningham A.C.J. Ont. S.C.J., Carnwath, Bellamy JJ.

Heard: November 12, 2008
Judgment: November 17, 2008
Docket: Toronto 211-08

Proceedings: reversing *Mascia v. Dixie X-Ray Associates Ltd.* (2008), 2008 CarswellOnt 1624 (Ont. S.C.J.); additional reasons at *Mascia v. Dixie X-Ray Associates Ltd.* (2009), 2009 CarswellOnt 72 (Ont. Div. Ct.)

Counsel: Barry H. Bresner, Markus Kremer for Respondents / Appellants, Dixie et al.
Lisa S. Corne for Applicants / Cross-Appellants, Anthony Mascia, Northern Magnetic Corporation

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Business associations --- Specific corporate organization matters — Shareholders — Shareholder agreements — General principles

Penalty clause — N was shareholder of company — Company provided professional services to hospital — M was N's principal shareholder and radiologist at hospital — Section 21 of agreement permitted majority shareholders to require shareholder to sell all of its shares at any time — Other shareholders of company exercised their rights under s. 21 of agreement and acquired N's shares in company — Section 21(d) of agreement required that on closing date, selling shareholder must resign position at hospital or purchase price of seller's shares would be reduced to 25 per cent of original value — M did not resign — M and N brought application for relief from oppression under s. 248 of Business Corporations Act — Application dismissed — Application judge found that last portion of s. 21(d) of shareholders' agreement was unenforceable penalty clause — Company and other shareholders appealed — Appeal allowed — Interpretation of s. 21(d) was question of pure law and standard of review was correctness — Application judge should have started with proposition that s. 21(d) was prima facie enforceable and that there was presumption that s. 21(d) was genuine pre-estimate of damages — Onus to displace presumption rested with M — M adduced no evidence to prove that section was penalty or that it was unenforceable — It was error by application judge to misplace onus and to have assumed that reduction in purchase price was greater than company's losses — There was nothing unconscionable in holding M to bargain he voluntarily made when he signed shareholders agreement — Section 21 did not prohibit M from working at hospital or anywhere else but simply imposed reasonable economic consequence for doing so by offsetting loss of income that company would suffer — It was within M's power to avoid reduction by resigning from hospital.

Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Relief from oppression — Miscellaneous issues

N was shareholder of company — Company provided range of diagnostic imaging services and provided professional services to hospital — M was N's principal shareholder and radiologist at hospital — Section 21 of agreement permitted majority shareholders to require shareholder to sell all of its shares at any time — Other shareholders of company exercised their rights under s. 21 of agreement and acquired N's shares in company — Section 21(d) of agreement required that on closing date, selling shareholder must resign as radiologist or any other position he held at hospital and if he failed to do so, purchase price of seller's shares would be reduced to 25 per cent of original value — M did not resign — M and N brought application for relief from oppression under s. 248 of Business Corporations Act — Application dismissed — Application judge held that there was no oppression — M and N appealed — Appeal dismissed — Burden of proof was on M — Company was not required to prove that it did not act oppressively — Application judge examined affidavits and analyzed each issue with respect to whether any conflicting evidence was material to her conclusion and whether any discrepancy made it necessary for any part of application to proceed to trial — Application judge correctly considered reasonable expectations of shareholder parties — Application judge correctly found that there was no oppression based on evidence that books and records were open to M, financial information was provided to M in timely manner, valuation was fair and expenses were not untoward.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

N was shareholder of company — Company provided range of diagnostic imaging services and provided professional services to hospital — M was N's principal shareholder and radiologist at hospital — Section 21 of agreement permitted majority shareholders to require shareholder to sell all of its shares at any time — Other shareholders of company exercised their rights under s. 21 of agreement and acquired N's shares in company — Section 21(d) of agreement required that on closing date, selling shareholder must resign as radiologist or any other position he held at hospital and if he failed to do so, purchase price of seller's shares would be reduced to 25 per cent of original value — M did not resign — M and N brought application for relief from oppression under s. 248 of Business Corporations Act — Application dismissed — Application judge held that there was no oppression — M and N appealed — M brought motion for order permitting introduction of fresh evidence — Motion dismissed — There was no new evidence — No evidence was entered to support M's allegations — Interests of justice did not call for admission of fresh evidence and it was not required to determine whether business affairs of company were carried out in oppressive manner.

Table of Authorities

Cases considered:

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Infinite Maintenance Systems Ltd. v. ORC Management Ltd. (2001), 139 O.A.C. 331, 5 C.P.C. (5th) 241, 2001 C.L.L.C. 210-021, 2001 CarswellOnt 59 (Ont. C.A.) — considered

Kabutey v. New-Form Manufacturing Co. (1999), 1999 CarswellOnt 3057, 49 C.C.E.L. (2d) 252 (Ont. S.C.J.) — considered

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — considered

R. v. Palmer (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.) — followed

Tomaszewska v. College of Nurses (Ontario) (2007), 2007 CarswellOnt 2760, 226 O.A.C. 177 (Ont. Div. Ct.) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 248 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 62.02 — referred to

APPEAL and CROSS APPEAL from judgment reported at *Mascia v. Dixie X-Ray Associates Ltd.* (2008), 2008 CarswellOnt 1624, 55 B.L.R. (4th) 163 (Ont. S.C.J.), dismissing application for relief for oppression under *Business Corporations Act*.

***Per curiam*:**

1 This is an appeal and cross-appeal from a decision of Madam Justice A. Hoy dated March 25, 2008.

2 Dixie et al. ("Dixie") appeal the finding that the last sentence of section 21(d) of the shareholders agreement was an unenforceable penalty clause. Dr. Anthony Mascia and Northern Magnetic Corporation ("Dr. Mascia") cross-appeal the denial of a request for an adjournment, the refusal to grant an order directing that the application proceed to trial, and the finding that there had been no oppression.

3 For reasons that follow, the appeal is allowed and the cross-appeal is dismissed.

The Appeal

4 Justice Hoy concluded that the last sentence of section 21(d) of the shareholders agreement was unenforceable because it was a penalty and that "it would be unconscionable or seriously unfair, in the circumstances of this case, at the time when the clause is relied on, to enforce the clause as written." In the appellants' favour, she concluded that Dixie was entitled to conduct the forced buy-out of Northern's shares, that Dr. Mascia was in breach of the shareholders agreement for failing to resign, that Dixie was entitled to recover provable damages for the breach, and that there was no oppression within the meaning of the Ontario *Business Corporations Act*.

5 There were no facts in dispute about the content of the section in the shareholders agreement or the circumstances under which Dr. Mascia agreed to it. The only question was one of interpreting the section in relation to the law regarding penalty clauses.

6 Dixie submits that the standard of review for a question of law is correctness. Dr. Mascia submits that the setting aside of the section was based upon the exercise of Justice Hoy's discretion which emanated from her power to grant an equitable remedy against a penalty. As such, it must be shown that the discretion was exercised arbitrarily or capriciously, or was based upon a wrong or inapplicable principle of law rendering her conclusion clearly wrong.

7 The decision with respect to the interpretation of the last sentence of section 21(d) of the shareholders agreement is a question of pure law and the standard of review is one of correctness. The Supreme Court of Canada most recently addressed the standard of review of an appeal from a judge's decision in *Housen v. Nikolaisen* (2002), 211 D.L.R. (4th) 577 (S.C.C.), at para. 8:

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

8 The onus of proving that a clause is a penalty lies with the party alleging the clause is a penalty. That party must prove that the clause is a penalty with regard to the circumstances at the time of formation. Then, if the clause is found to be a penalty, the party must prove that enforcement would be unconscionable at the time it is invoked, that is, that the penalty is "extravagant and exorbitant in comparison with the greatest loss which could conceivably have flowed from the breach": *Infinite Maintenance Systems Ltd. v. ORC Management Ltd.*, [2001] O.J. No. 77 (Ont. C.A.), para. 13.

9 In our view, the application judge should have started with the proposition that the section was *prima facie* enforceable and that there was a presumption that the section was a genuine pre-estimate of damages. The onus to displace that presumption rested with Dr. Mascia. He, not Dixie, was the one who was required to demonstrate that the last sentence of section 21(d) did not represent a genuine pre-estimate of damages at the time he entered into the shareholders agreement and, further, that it would be unconscionable to apply the last sentence of section 21(d) on the facts of this case.

10 Dr. Mascia adduced no evidence to prove that the section was either a penalty or that it should be unenforceable. He also failed to prove either that the reduction in the purchase price required by section 21(d) was not a genuine pre-estimate of damages or that its enforcement would be unconscionable.

11 While not required to do so, Dixie did present evidence in support of the presumption that the section was an enforceable clause for liquidated damages. Its evidence was uncontested and established that Dixie's loss in income resulting from Dr. Mascia's decision to remain at Humber River Regional Hospital ("HRRH") was approximately $400,000 per year resulting in $1.2 million for the three years during which the agreement prohibited him from working at HRRH.

12 The application judge appears to have reversed the onus and to have placed it on Dixie instead of on Dr. Mascia. It was an error for the application judge to have misplaced this onus and to have assumed that the reduction in the purchase price was greater than Dixie's losses.

13 Further, even if Dr. Mascia had discharged his onus, the section would still have been enforceable unless he could prove that applying the clause would be unconscionable in the circumstances of this case. Hoy, J. did find that Dixie's actions were not oppressive within the meaning of s.248 of the Ontario *Business Corporations Act*; yet she provided no reasons for her conclusion that "it would be unconscionable or seriously unfair" to enforce the section as written.

14 Generally, courts will not interfere with an agreement made by sophisticated parties acting at arms' length and, in particular, will not set aside a shareholders agreement "that has been entered into in good faith by experienced persons who have had independent legal advice": *Kabutey v. New-Form Manufacturing Co.*, [1999] O.J. No. 3635 (Ont. S.C.J.), at para. 12. Where parties have agreed upon a formula for determining the price at which departing shareholders will be bought out of a company, the expectation is that they will live with that formula.

15 When he entered into the shareholders agreement, Dr. Mascia had the benefit of both independent legal advice as well as independent financial advice. He negotiated the terms on which he was prepared to invest in Dixie. The evidence disclosed that without the protection afforded by the section, the price paid by Dr. Mascia and the six other Dixie

shareholders may well have been less, to reflect the anticipated losses that would result if departing shareholders were free to continue to compete for work at HRRH with Dixie's radiologists.

16 There was nothing unconscionable in holding Dr. Mascia to the bargain he voluntarily made when he signed the shareholders agreement, an agreement that applied equally to all seven shareholders, each of whom would also be bound by the section. Indeed, in our view, it would be inequitable for the Dixie shareholders who had the value of their shares protected while they were shareholders to now deny that same protection to Dixie's remaining shareholders, each of whom bought their shares at a value which presumably reflected their position.

17 The section neither prohibited Dr. Mascia from continuing to work at HRRH nor anywhere else. It simply imposed a reasonable economic consequence for doing so by offsetting a loss of income that Dixie would suffer as a result of Dr. Mascia continuing to practice at HRRH in direct competition with Dixie. It was entirely within his power to avoid the reduction by resigning from HRRH.

18 In the result, the appeal is allowed and paragraph 2 of the judgment is overturned. The ultimate result of this decision, and what follows, is that Dr. Mascia's application is dismissed in its entirety.

The Cross-Appeal

19 For reasons given at the hearing of the cross-appeal, the cross-appeal to set aside paragraph 1 of the judgment was dismissed. We concluded that the motion for an order adjourning the application and converting it to an action was an interlocutory motion which required leave to appeal pursuant to Rule 62.02 of the Rules of Civil Procedure. Leave to appeal had not been sought.

20 Dr. Mascia also cross-appealed paragraph 3 of the judgment whereby Hoy, J. dismissed the balance of the oppression application under section 248 of the Ontario Business Corporations Act. Citing twenty-six grounds of appeal, Dr. Mascia sought an order directing that the application be converted into an action and proceed to trial on certain terms.

21 Dr. Mascia has not specifically addressed the standard of review to be applied on his cross-appeal.

22 In *Housen (supra)*, the Court held that the standard of review of a judge's findings on a question of law is correctness, while a judge's findings of fact can be reversed only if the judge's decision evidences a "palpable and overriding error." This statement has been interpreted as requiring a decision to be "clearly wrong" in the sense of being "not reasonably supported by the evidence": *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.) at para. 110. Justice Hoy's findings of fact cannot be reversed unless she made a palpable and overriding error. We see no such error.

23 To the extent that Hoy, J. formulated the legal test for deciding whether there was oppression, the test is one of correctness. Again, we see no error that would require us to substitute our own conclusion.

24 This was an oppression application. In such an application, the burden of proof rests on the party seeking relief which, in this case, was Dr. Mascia. Dixie was not required to prove that it did not act oppressively.

25 Justice Hoy carefully reviewed all the affidavit material and the exhibits before her. It is true that she was presented with conflicting affidavits. That was because the parties elected not to cross-examine on the affidavits. In particular, Dr. Mascia chose to proceed by way of an application; he chose not to cross-examine any witnesses on their affidavits; he chose not to provide any evidence other than his own; and he chose not to call anyone from Ernst & Young. Dr. Mascia was bound by those choices.

26 Justice Hoy vigilantly examined the affidavits and analyzed each issue with respect to whether any conflicting evidence was material to her conclusion and whether any discrepancy made it necessary for any part of the application to proceed to trial to determine the issue. Repeatedly, she reviewed each inconsistency in the context of the legal issue

requiring determination. In every case, after thoughtful analysis, Hoy, J. concluded that the conflicting evidence was not material to the facts in dispute and did not make it necessary to proceed to trial.

27 Throughout, Justice Hoy correctly considered the reasonable expectations of the shareholder parties. Having considered the evidence that the books and records were open to Dr. Mascia, that financial information was provided to him and his accountants on request and in a timely manner, that there was nothing untoward in the manner in which expenses were charged to Dixie, that the 2006 valuation was fair, and that Dr. Mascia's allegations were fully answered by Dixie's evidence, Justice Hoy correctly found no oppression. We see no reason to interfere with her conclusions.

Motion for Fresh Evidence

28 Dr. Mascia brought a motion for an order permitting the introduction of fresh evidence on the appeal and the cross-appeal. The fresh evidence consisted of two affidavits from Dr. Mascia and one from an accountant at Ernst & Young LLP. In bringing this motion, he argued that this is new information that came to him only after the release of Justice Hoy's decision and that it is necessary in order to deal fairly with the issues on the appeal. Declining to admit this fresh evidence, argued Dr. Mascia, would lead to a substantial injustice.

29 Having permitted the late filing of a considerable amount of material, and having heard lengthy argument on this matter, we dismiss this motion despite the able submissions of Ms. Corne.

30 There was, in fact, no new evidence. At most, Dr. Mascia made many new allegations of wrongdoing, some of them criminal in nature. He then summonsed certain individuals for examination because they would neither repeat their allegations nor would they provide affidavits in support of his motion for fresh evidence. Much of what he alleges was based on rumour, speculation and unfounded allegations; no evidence was put before us that would prove the allegations he made. To the contrary, Dixie's countering affidavit evidence and, in particular, the supporting materials, disprove the allegations.

31 The Court has the discretion to admit fresh evidence. The test for such admission is set out in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) and was recently discussed by this Court in *Tomaszewska v. College of Nurses (Ontario)*, [2007] O.J. No. 1731 (Ont. Div. Ct.) at para. 8. We find that the material Dr. Mascia seeks to introduce as fresh evidence does not meet the test for the introduction of fresh evidence, nor is this a case where the interests of justice call for the admission of the fresh evidence. It is not required to determine whether the business affairs of Dixie were carried out in a way that were oppressive or to determine whether any of Dr. Mascia's interests were unfairly disregarded or prejudiced.

Motion to Strike Allegations and an affidavit

32 Dixie moved to strike paragraph 22 of Dr. Mascia's affidavit and to strike out the affidavit of Ms. Corne's articling student. Ms. Corne quite properly agreed to withdraw both of these, so they are no longer before us.

Motion to Quash

33 Dixie brought a motion to quash three summonses issued under Rule 39 on behalf of Dr. Mascia. Given our decision with respect to the cross-appeal, this motion is moot. Had it not been moot, we would have granted the motion on the basis that finality was required and it was improper to examine witnesses at this stage of the proceeding for the collateral purpose of seeking to obtain new evidence.

Costs

34 If the parties cannot agree on the costs of these appeals and motions, Dixie may make brief written submissions within ten days of the release of this decision. Dr. Mascia will have five days to reply. All submissions are to be made through the Divisional Court office.

Appeal allowed; cross appeal dismissed.

End of Document

16

2004 BCCA 270
British Columbia Court of Appeal

MacMillan v. Kaiser Equipment Ltd.

2004 CarswellBC 1066, 2004 BCCA 270, [2004] B.C.W.L.D. 790, [2004] B.C.J. No. 969, 131 A.C.W.S. (3d) 77, 196 B.C.A.C. 117, 322 W.A.C. 117, 33 B.C.L.R. (4th) 44

Donald Mark MacMillan (Appellant / Plaintiff) and Kaiser Equipment Ltd., Kaiser International Developments Ltd., LFD Industries Ltd., Yee Bun Lee, Alfred Po-Hong Ma, Axia Incorporated and Ames Taping Tool Systems Company (Respondents / Defendants)

Donald, Saunders, Oppal JJ.A.

Heard: February 16-17, 2004
Judgment: May 14, 2004
Docket: Vancouver CA030870

Proceedings: affirming *MacMillan v. Kaiser Equipment Ltd.* (2003), 2003 BCSC 672, 2003 CarswellBC 1023 (B.C. S.C.)

Counsel: C.S. Wilson for Appellant
R.P. Attisha for Respondents, Kaiser Equipment Ltd., Kaiser International Developments Ltd., LFD Industries Ltd., Y.B. Lee, A.P. Ma
D.M. Bain for Respondents, Axia Inc., Ames Taping Tool Systems Co.

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

Headnote

Contracts --- Construction and interpretation — Words and phrases — General principles

M was inventor of tools for use in drywalling industry — In 1990, M's company C Co. was bought by defendants and M was put under contract as consultant — In November 1995, M and defendant entered into employment agreement pursuant to which M agreed to serve as C Co.'s vice-president of operations — On October 1, 1996, defendant and M signed so-called draft agreement in principle which was meant to be additional or supplementary to 1995 employment agreement and subject to latter's conditions — Draft agreement in principle allegedly promised to deliver to M shares in C Co. — On February 27, 1997, C Co. terminated M's employment, alleging cause — M brought action in small claims court against defendants, alleging negligent misrepresentation and breach of contract — Action summarily dismissed — M appealed — Appeal dismissed — Trial judge did not err in summarily dismissing M's claims — Trial judge did not err in concluding that entire agreement clause in 1995 employment agreement was not rebutted or modified by collateral promise of shares — Entire agreement clause in 1995 employment agreement ruled out any argument by M with respect to collateral promise of shares — Trial judge did not err in finding that 1996 draft agreement in principle was not enforceable — No firm agreement between parties relating to transfer of shares to M — Trial judge did not make palpable and overriding error in coming to factual conclusions based on accepted facts.

Evidence --- Parol evidence rule — Collateral agreements — General

M was inventor of tools for use in drywalling industry — In 1990, M's company C Co. was bought by defendants and M was put under contract as consultant — In November 1995, M and defendant entered into employment agreement pursuant to which M agreed to serve as C Co.'s vice-president of operations — On October 1, 1996, defendant and M signed so-called draft agreement in principle which was meant to be additional or supplementary

to 1995 employment agreement and subject to latter's conditions — Draft agreement in principle allegedly promised to deliver to M shares in C Co. — On February 27, 1997, C Co. terminated M's employment, alleging cause — M brought action in small claims court against defendants, alleging negligent misrepresentation and breach of contract — Action summarily dismissed — M appealed — Appeal dismissed — Trial judge did not err in summarily dismissing M's claims — Trial judge did not err in concluding that entire agreement clause in 1995 employment agreement was not rebutted or modified by collateral promise of shares — Entire agreement clause in 1995 employment agreement ruled out any argument by M with respect to collateral promise of shares — Trial judge did not err in finding that 1996 draft agreement in principle was not enforceable — No firm agreement between parties relating to transfer of shares to M — Trial judge did not make palpable and overriding error in coming to factual conclusions based on accepted facts.

Fraud and misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Miscellaneous issues

M was inventor of tools for use in drywalling industry — In 1990, M's company C Co. was bought by defendants and M was put under contract as consultant — In November 1995, M and defendant entered into employment agreement pursuant to which M agreed to serve as C Co.'s vice-president of operations — On October 1, 1996, defendant and M signed so-called draft agreement in principle which was meant to be additional or supplementary to 1995 employment agreement and subject to latter's conditions — Draft agreement in principle allegedly promised to deliver to M shares in C Co. — On February 27, 1997, C Co. terminated M's employment, alleging cause — M brought action in small claims court against defendants, alleging negligent misrepresentation and breach of contract — Action summarily dismissed — M appealed — Appeal dismissed — Trial judge did not err in summarily dismissing M's claims — Trial judge did not err in concluding that entire agreement clause in 1995 employment agreement was not rebutted or modified by collateral promise of shares — Entire agreement clause in 1995 employment agreement ruled out any argument by M with respect to collateral promise of shares — Trial judge did not err in finding that 1996 draft agreement in principle was not enforceable — No firm agreement between parties relating to transfer of shares to M — Trial judge did not make palpable and overriding error in coming to factual conclusions based on accepted facts.

Civil practice and procedure --- Pleadings — General requirements — Where constituting abuse of process

M was inventor of tools for use in drywalling industry — In 1990, M's company C Co. was bought by defendants and M was put under contract as consultant — In November 1995, M and defendant entered into employment agreement pursuant to which M agreed to serve as C Co.'s vice-president of operations — On October 1, 1996, defendant and M signed so-called draft agreement in principle which was meant to be additional or supplementary to 1995 employment agreement and subject to latter's conditions — Draft agreement in principle allegedly promised to deliver to M shares in C Co. — On February 27, 1997, C Co. terminated M's employment, alleging cause — M brought action in small claims court against defendants, alleging negligent misrepresentation and breach of contract — Action summarily dismissed — M appealed — Appeal dismissed — Trial judge did not err in summarily dismissing M's claims — Trial judge did not err in concluding that entire agreement clause in 1995 employment agreement was not rebutted or modified by collateral promise of shares — Entire agreement clause in 1995 employment agreement ruled out any argument by M with respect to collateral promise of shares — Trial judge did not err in finding that 1996 draft agreement in principle was not enforceable — No firm agreement between parties relating to transfer of shares to M — Trial judge did not make palpable and overriding error in coming to factual conclusions based on accepted facts.

Table of Authorities

Cases considered by *Oppal J.A.*:

Gutierrez v. Tropic International Ltd. (2002), 2002 CarswellOnt 2599, 162 O.A.C. 247, 63 O.R. (3d) 63, 33 B.L.R. (3d) 18 (Ont. C.A.) — considered

Hawrish v. Bank of Montreal (1969), [1969] S.C.R. 515, 2 D.L.R. (3d) 600, 66 W.W.R. 673, 1969 CarswellSask 9 (S.C.C.) — considered

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199, 1989 CarswellBC 69 (B.C. C.A.) — considered

Orangeville Raceway Ltd. v. Wood Gundy Inc. (1995), 6 B.C.L.R. (3d) 391, 40 C.P.C. (3d) 226, 59 B.C.A.C. 241, 98 W.A.C. 241, 1995 CarswellBC 274 (B.C. C.A.) — considered

Placer Development Ltd. v. Skyline Explorations Ltd. (1985), 67 B.C.L.R. 366, 1985 CarswellBC 336 (B.C. C.A.) — considered

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — considered

Turner v. Visscher Holdings Inc. (1996), 23 B.C.L.R. (3d) 303, 77 B.C.A.C. 48, 126 W.A.C. 48, 1996 CarswellBC 1052 (B.C. C.A.) — distinguished

Zippy Print Enterprises Ltd. v. Pawliuk (1994), 100 B.C.L.R. (2d) 55, [1995] 3 W.W.R. 324, 20 B.L.R. (2d) 170, 1994 CarswellBC 4 (B.C. C.A.) — distinguished

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 18A — referred to

APPEAL by plaintiff of judgment reported at *MacMillan v. Kaiser Equipment Ltd.* (2003), 2003 BCSC 672, 2003 CarswellBC 1023 (B.C. S.C.), dismissing action in negligent misrepresentation and breach of contract.

***Oppal J.A.*:**

INTRODUCTION

1 After a five-day summary trial held under Rule 18A of the *Rules of Court*, Allan J. dismissed the action of the appellant, Donald Mark MacMillan, for negligent misrepresentation, breach of contract, inducing breach of contract and unjust enrichment. The neutral citation of her reasons for judgment is 2003 BCSC 672 (B.C. S.C.).

2 In this appeal Mr. MacMillan has raised the following grounds:

1. whether the trial judge erred in proceeding under Rule 18A of the *Rules of Court*;

2. whether the trial judge erred in concluding that the entire agreement clause in a written contract was not rebutted or modified by a collateral agreement; and

3. whether the trial judge erred in finding that a draft agreement made in 1996 was not enforceable.

BACKGROUND

3 Mr. MacMillan is an inventor of tools for use in the drywalling industry. In 1990 and 1991, through Concorde Tool Corporation ("Concorde"), Mr. MacMillan applied for patents for five inventions. One such patent, for an adjustable length handle, proved to be quite valuable. Prior to 13 June 1990 all outstanding shares in Concorde were owned by Mr. MacMillan and Raymond Bernier.

4 In 1990, the respondents Yee Bun Lee and David Fung, as well as one David Dick, incorporated the respondent LFD Industries Ltd. ("LFD"). Mr. Lee, through the respondent Kaiser International Developments Ltd. ("Kaiser"), owned 60% of the outstanding shares of LFD. Mr. Fung, through ACDEG International Ltd. ("ACDEG") held 20%. Mr. Dick personally held the remaining 20% of LFD's shares.

5 In June 1990, the parties entered into two agreements. The first was a share purchase agreement (the "1990 Share Purchase Agreement") between Concorde, LFD and Messrs. MacMillan and Bernier. Under its terms, LFD purchased all outstanding shares in Concorde and Concorde assigned to LFD all intellectual property that it held and used. The 1990 Share Purchase Agreement contained a so-called "entire agreement" clause which read as follows:

> 10.4 Whole Agreement. This Agreement contains the whole agreement between the Vendors and the Purchaser in respect of the purchase and sale contemplated hereby and there are no warranties, representations, terms, conditions or collateral agreements, express or implied, or otherwise other than expressly set forth in this Agreement.

6 The second agreement made was a consulting agreement (the "1990 Consulting Agreement") between Mr. MacMillan and Concorde, the execution of which was required under the 1990 Share Purchase Agreement. The 1990 Consulting Agreement was essentially an employment contract under which Mr. MacMillan would be an independent contractor. It provided that Mr. MacMillan would disclose to Concorde "all designs, rights to sell patents or patentable concepts", stipulated that the patents would be the property of Concorde and required that Mr. MacMillan not claim any interest in them. Like the 1990 Share Purchase Agreement, the 1990 Consulting Agreement contained an entire agreement clause.

7 The 1990 Consulting Agreement was for a four-year term commencing 15 June 1990. Mr. MacMillan alleges that around the time the 1990 Consulting Agreement terminated in 1994 certain events occurred that lie at the heart of the dispute between the parties in this appeal.

8 Mr. MacMillan contends that Messrs. Lee, Fung and Dick, acting on behalf of LFD and in their personal capacities, offered him an equity position in Concorde. According to Mr. MacMillan, the parties had discussed the prospect of him acquiring shares as early as 1990. Mr. MacMillan specifically alleges that later, in either November or December 1995, he and Mr. Lee "shook hands" in order to confirm an agreement whereby he would receive 10% of the shares in Concorde. Mr. MacMillan says that it was the promise of an equity interest that induced him to continue providing his services and to cooperate in the assignment of patents. He says that a memorandum Mr. Lee wrote to Mr. Fung in October 1995 confirms the knowledge of LFD's stakeholders in this regard. Part of that memorandum reads as follows:

> [Mr. MacMillan] is not on board. There is a real crisis here. We have increased our cash to him to $35,000 in order to renew the agreement with him for assignment of patents . . . [H]e has refused our offer. He knows well that our past agreement is no longer valid as we are in total default of our commitments.
>
> . . .
>
> The most important and the most urgent help that I need from you is in connection with the patents . . . . Unless I hear from you very soon, I shall use my judgement to pay for any price and use any other reasonable means to secure the assignment of the patents.

9 The respondents' position throughout this litigation has been that there was no firm agreement for Mr. MacMillan to receive any shares in Concorde and that the most that can be said is that an agreement was contingent upon a number of matters being addressed and "sorted out".

10 On this point, the trial judge found as follows, at para. 28 of her reasons:

> Memoranda between the principals of Concorde demonstrate that they knew MacMillan hoped to acquire equity in the company. From time to time, they discussed different mechanisms for MacMillan earning or being given an equity interest but no clear consensus emerged on the terms under which such equity would be acquired.

11 In any event, when the 1990 Consulting Agreement terminated in June 1994, Mr. MacMillan continued his employment with Concorde. Between May 1994 and February 1995, Mr. MacMillan applied for four patents for tools that he had invented or improved. At trial, he maintained that those patents were "outside the scope of his employment". His position was contentious, to say the least. The trial judge concluded that the 1990 Consulting Agreement precluded him from claiming entitlement for tools that he invented while employed as a consultant by Concorde.

12 In 1994, Mr. Dick reduced his shareholding in LFD to 5%. The remaining shares were held by Kaiser, ACDEG and Mr. Lee's brother-in-law, the respondent Alfred Po-Hong Ma.

13 In November 1995, Mr. MacMillan and Kaiser entered into an employment agreement (the "1995 Employment Agreement"), pursuant to which Mr. MacMillan agreed to serve as Concorde's vice-president of operations. Kaiser paid Mr. MacMillan $35,000 as consideration for his agreement that all past, present and future patents and patentable concepts, including those registered in his name, were and would be the exclusive property of Kaiser.

14 It should be noted that Mr. MacMillan received independent legal advice by counsel who certified that he voluntarily agreed to be bound by the entire contents of the 1995 Employment Agreement after having received legal advice with respect to those contents. It is also crucial to note that the 1995 Employment Agreement contained an entire agreement clause. That clause read as follows:

> This contract constitutes the entire agreement between the parties with respect to the employment and appointment of [Mr. MacMillan] and any and all previous agreements, written or oral, express or implied, between the parties or on their behalf relating to the employment and appointment of [Mr. MacMillan] by the Employer, are terminated and cancelled and each of the parties releases and forever discharges the other of and from all manner of actions, causes of action, claims and demands whatsoever, under or in respect of any agreement.

15 On 1 October 1996, Messrs. Lee and MacMillan signed a so-called draft agreement in principle (the "1996 Draft Agreement in Principle"). Clause 12 of the document provided that it was "meant to be additional or supplementary to" the 1995 Employment Agreement and subject to the latter's conditions. The document described its purpose in these terms:

> We both agree that the fundamental spirit of this agreement is to encourage and to ensure that Mark MacMillan will work closely and harmoniously together so that someday Mark MacMillan can proudly say and we gladly and indisputably agree that he is not given the very lucrative rewards by us, he is in fact through his own personal involvement and his own personal contribution earning his own lucrative rewards with the Company as the platform and that his personal involvement and contribution is making our dream possible.

16 Clause 9 of the 1996 Draft Agreement in Principle reads as follows:

> With a clear understanding that the recovery of [Concorde] shares from Mr. David Dick and Mr. David Fung will provide a real and substantial mutual benefits to both, Mark MacMillan agrees to do everything in his power, including the immediate submission of an affidavit and testimony to support recovery of these shares. In light of this support and to fulfill prior loose understandings, the following will take place:

> *Through, and with your help and co-operation, 50% of any [Concorde] shares we can recover from David Fung and David Dick will be allocated to you. Our objective is to recover the full outstanding 25% of [Concorde] shares. This will provide Mark with 12.5% of [Concorde] shares with a view to promote the recovery of shares. We will support Mark MacMillan in the two legal disputes between David Fung and Mark MacMillan . . . .*

[Underlining emphasis added; italics in original.]

17 It is apparent that the document was prepared without legal advice or assistance, particularly as Messrs. Lee and Fung held shares in LFD, not Concorde.

18 On 27 February 1997, Kaiser terminated Mr. MacMillan's employment, alleging cause. However, the letter of termination did not specify any particular cause. Mr. MacMillan's dismissal shortly followed Kaiser registering with the U.S. Patent Office assignments of patents by Mr. MacMillan and Concorde to it.

19 In May 1997, Mr. MacMillan commenced five actions against Mr. Lee, Kaiser and Concorde in Provincial Court, Small Claims division. In December 1997, he and Mr. Dick established a new company, Northstar Tool Corporation, which is in the business of developing and marketing drywall tools. In 1999, the respondent Axia Incorporated ("Axia") (of which the respondent Ames Taping Tools Systems Company is an unincorporated division) purchased patents held by Kaiser and Concorde.

20 In April 2000, Mr. MacMillan commenced this action, and on 30 April 2003, the court below made an order dismissing it. Mr. MacMillan seeks a new order remitting the matter for trial.

ANALYSIS

Whether the trial judge erred in proceeding under Rule 18A

21 Counsel for Mr. MacMillan argues that the trial judge erred in interpreting the 1995 Employment Agreement on a summary trial basis since a fair determination of the issue required her to determine the validity of promises of shares alleged to be collateral to the agreement, respecting which there were serious credibility issues. He argues that the judge could not fairly have interpreted the agreement in light of the fact that it was necessary to consider extrinsic evidence marred by questions of credibility.

22 The principles relating to the applicability of the summary trial procedure are not in dispute. It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

23 The leading case on the applicability of Rule 18A is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.). In that case, the chambers judge had dismissed the plaintiff's application for judgment under Rule 18A because she said that judgment ought not to be given under the rule "unless it is clear that a trial in the usual way could not possibly make any difference in the outcome". In allowing the appeal, McEachern C.J.B.C. set out the policy reasons for the rule at 211:

> [Rule 18A] was added to the Rules of Court in 1983 in an attempt to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any case where he can decide disputed questions of fact on affidavits or by any of the other proceedings authorized . . . unless it would be unjust to decide the issues in such a way.

24 He continued at 212 by quoting with approval this passage from *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (B.C. C.A.), at 386 [*Placer Development*]:

> The rule must, however, be applied only where it is possible to do justice between the parties in accordance with the requirements of the rule itself and in accordance with the general principles which govern judges in their daily task of ensuring that justice is done.

25 He then said this, at 214:

> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

26 Finally, in relation to evidentiary problems, he said this at 215-16:

> Lastly, I do not agree . . . that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed in [***Placer Development***, *supra*]. Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given . . . .

27 In *Orangeville Raceway Ltd. v. Wood Gundy Inc.* (1995), 6 B.C.L.R. (3d) 391 (B.C. C.A.), this Court affirmed the decision of a chambers judge who granted summary judgment where credibility was the decisive issue through reliance on undisputed documentary evidence.

28 There is no doubt that this case was complex from an evidentiary perspective. Mr. MacMillan's contention that the respondents promised him an equity position in Concorde was based on oral promises alleged to have been made by several of the respondents at various points in time.

29 The judge concluded, in spite of the evidentiary conflicts, that she was able to deal with the matter on a summary basis. At the outset of her reasons, at para. 2, she stated:

> . . . I propose to examine the "final" proposed amended statement of claim against the background of the documentary evidence. If the plaintiff's pleadings cannot withstand that scrutiny, then it is unnecessary to analyze the defendants' extensive attacks on the plaintiff's credibility.

30 She concluded on this point with the following words, at paras. 72-73:

> . . . While there are serious credibility issues in this case that, in my view, are not amenable to summary resolution, the defendants argue that the necessary facts can be determined on the basis of the extensive documentary evidence.
>
> I have concluded that the matter is suitable for disposition by summary judgment.

31 It is clear that the judge was alive to the conflicts in the evidence. She was able to resolve the conflicts by making reference to and relying on the extensive documentary evidence before her. I agree with her decision in that regard.

32 The decision to proceed in a summary manner was sound for two other reasons. First, a conventional trial in this case would necessarily have involved lengthy proceedings coming at prohibitive cost. From that perspective, it made good sense to proceed under Rule 18A. Second, the judge had examined the law and concluded (as do I, below) that the facts alleged by Mr. MacMillan, even taken at face value, gave rise to no claim in law. A conflict in the evidence cannot require a trial where the evidence in question is irrelevant to the legal issues at hand.

33 This is a case in which the chambers judge obviously weighed the arguments carefully and determined that she could fairly try the case under Rule 18A. I do not think that she exercised her discretion improperly. For these reasons, Mr. MacMillan's argument on this issue must fail.

Whether the trial judge erred in concluding that the entire agreement clause in the 1995 Employment Agreement was not rebutted or modified by a collateral promise of shares

34 In the court below, Mr. MacMillan alleged that he was induced to enter into the 1990 Share Purchase Agreement, 1990 Consulting Agreement and 1995 Employment Agreement by promises made by Messrs. Lee, Fung and Dick (acting both on behalf of LFD and personally) that he would receive a 10% stake in Concorde. Mr. MacMillan contended that he would not have signed any of the agreements if the respondents had not promised him shares. Though the alleged promises were not in writing, Mr. MacMillan said that it was the intention of all parties that he receive some type of ownership interest.

35 On this appeal, the narrow issue raised in this respect is whether the entire agreement clause in the 1995 Employment Agreement could be rebutted or modified by extrinsic evidence of a collateral promise of shares. The trial judge said that it could not. Counsel for Mr. MacMillan argues that she erred in that respect.

36 The starting point in any discussion on this issue is the general rule that a written contract in clear terms cannot be varied or qualified by extrinsic evidence: see *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 (S.C.C.) [*Hawrish*]. In that case, the guarantor of a line of credit was sued by the bank on his guarantee. The guarantor alleged in his defence that the manager of the bank had orally assured him that he would be released from his guarantee under certain conditions. The Supreme Court of Canada held that the oral assurance could provide no defence, because it would have contradicted the terms of the written guarantee bond. Judson J., writing for the unanimous court, reviewed the authorities supporting that result at 518-21:

> In the last half of the 19th century a group of English decisions, of which *Lindley v. Lacey* [(1864), 17 C.B.N.R. 578, 144 E.R. 232.], *Morgan v. Griffith* [(1871), L.R. 6 Exch. 70.] and *Erskine v. Adeane* [(1873), 8 Ch. App. 756.] are established that where there was parol evidence of a distinct collateral agreement which did not contradict nor was inconsistent with the written instrument, it was admissible. These were cases between landlord and tenant in which parol evidence of stipulations as to repairs and other incidental matters and as to keeping down game and dealing with game was held to be admissible although the written leases were silent on these points. These were held to be independent agreements which were not required to be in writing and which were not in any way inconsistent with or contradictory of the written agreement.
>
> . . .
>
> The appellant has relied upon *Byers v. McMillan* [(1887), 15 S.C.R. 194]. But upon my interpretation that the terms of the two contracts conflict, this case is really against him as it is there stated by Strong J. that a collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement. To the same effect is the unanimous judgment of the High Court of Australia in *Hoyt's Proprietary Ltd. v. Spencer* [(1919), 27 C.L.R. 133.], which rejected the argument that a collateral contract which contradicted the written agreement could stand with it.

37 In this case Mr. MacMillan's counsel relies on *Turner v. Visscher Holdings Inc.* (1996), 23 B.C.L.R. (3d) 303 (B.C. C.A.) [*Turner*], and *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55 (B.C. C.A.) [*Zippy Print*]. In *Turner*, *supra*, the parties had entered into a written contract pursuant to which the defendant would purchase the plaintiff's interest in a company. The contract contained an entire agreement clause. The plaintiff alleged that the parties had also entered into two oral contracts, so-called employment and bonus agreements, and sought to enforce the latter of them. In dismissing the defendant's appeal, the majority of this Court stated that the entire agreement clause in the written contract did not apply to preclude operation of the collateral bonus agreement, since the parties had conducted themselves in accordance with the collateral employment agreement and thus evidenced a clear intention not to have the

written contract encompass all their contractual relations, its entire agreement clause notwithstanding. Finch J.A. (as he then was) expressed the point in these terms:

> [7] The fact that both parties entered and acted upon an oral contract of employment is a clear indication that clause 22, the "entire agreement clause", was not intended to govern all contractual relations between "the parties".

38 Newbury J.A. delivered dissenting reasons in *Turner*, *supra*. They are relevant to this case insofar as they discuss the policy reasons for the general rule against giving effect to collateral agreements that contradict a written entire agreement clause. In commenting upon *Hawrish*, *supra*, Newbury J.A. stated:

> [23] . . . the passage is a reminder that there are good policy reasons for regarding claims based on collateral contract with suspicion, where the "sole effect [thereof] . . . is to vary or add to the terms of the principal contract".
>
> . . .
>
> [35] But where as here the parties are both commercial entities or where they have in fact negotiated the terms of their agreement with the benefit of legal advice, courts have enforced "entire agreement" and similar provisions on many occasions. In addition to *Carman Construction, supra*, I note the decision of the majority of the Ontario Court of Appeal in *Hayward v. Mellick*, [45 O.R. (2d) 110]. It involved a negligent misrepresentation made orally concerning the acreage of a farm, and a clause in a written agreement for the sale of the farm which stated that there were no "representations, warranties or conditions, expressed or implied, other than those herein contained . . . ". In response to the argument that the clause did not exclude negligent representations, the majority said it would be "too strained a construction of the disclaimer clause to say that it applies only to representations that are not negligent". Thus the buyer of the farm was precluded from relying on the misrepresentation and was bound by the written contract.
>
> [36] The Supreme Court of British Columbia has also given effect to "entire agreement" clauses in the context of negotiated agreements . . . . In so doing, courts have almost invariably equated such clauses with the parol evidence rule . . . .
>
> [37] Given the rule of construction that a court should strive to give effect to all the terms of an agreement, however, it is at least arguable that a provision such as [the entire agreement clause] must be intended to have a broader effect than the parol evidence rule would have by itself - otherwise, the clause would be redundant. Certainly the wording used here was not limited to "any agreement, representation or warranty that contradicts or varies" the terms of the written agreement - the clause stated that there were no collateral agreements between the parties, whether at variance with the written document or not. In practical terms, the obvious purpose of such a clause is to ensure that parties who have conducted oral negotiations, from which (as this case illustrates) misunderstandings might easily arise, will finally review and by execution confirm in writing the terms they have agreed upon. It is a normal and in my view legitimate expectation in the commercial world that, absent fraud or some other vitiating element, provisions such as [the entire agreement clause] will generally be given effect to, so that prior discussions concerning the contract may not prevail over what has been acknowledged in writing to constitute the parties' "entire agreement."
>
> [38] In any event, whether one applies the wording of [the entire agreement clause] itself - an acknowledgment that no collateral agreements exist - or whether one applies the parol evidence rule to it and therefore disallows proof of the collateral contract because such a result would contradict [the entire agreement clause], the conclusion seems inescapable that the collateral oral contract cannot prevail. To rule otherwise would in my view render entire agreement clauses meaningless and thereby remove an important safeguard used in countless agreements in this province and elsewhere.

[Emphasis added.]

39 In *Zippy Print, supra*, the defendants alleged that the plaintiff had made oral representations that induced them to enter into a franchise licence agreement. The trial judge found the plaintiff's representations to have been false and thus dismissed its claim under the agreement. The plaintiff appealed, contending that the trial judge had ignored an entire agreement clause in the licence agreement that would have precluded consideration of the representations. In dismissing the plaintiff's appeal, Lambert J.A. made the following comments at para. 36:

> The representations in this case were made on behalf of [the plaintiff] in order to induce [the defendants] to enter into the license agreement. To exclude evidence of the representations on the basis of the Parol Evidence Rule, which is no longer, in the context of trials conducted by judges without juries, a rule of evidence at all, would be absurd. The real question raised by the Parol Evidence Rule is whether the license agreement in its printed form was intended to constitute the entire agreement and to supersede and replace the representations that were designed to bring it about and to nullify any prior agreement or any prior terms that were discussed but never incorporated in the written agreement.

40 Counsel for Mr. MacMillan relies on *Zippy Print, supra*, to argue that the entire agreement clause does no more than strengthen the presumption that the 1995 Employment Agreement is the whole agreement between the parties - a presumption that he says may be rebutted by extrinsic evidence as to the parties' true intention.

41 The trial judge in this case made no findings of fact relating to the promises alleged by Mr. MacMillan, having concluded that the entire agreement clause in the 1995 Employment Agreement ruled out any argument by Mr. MacMillan with respect to a collateral promise of shares. In that regard, she relied on *Gutierrez v. Tropic International Ltd.* (2002), 162 O.A.C. 247 (Ont. C.A.) [*Gutierrez*], a case in which the Ontario Court of Appeal held that an action on a written agreement containing an entire agreement clause could not be defended on the basis of an alleged oral collateral agreement. *Gutierrez* in turn cites the decision of McLachlin C.J.S.C. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403 (B.C. C.A.) [*Power Consolidated*].

42 In *Power Consolidated, supra*, the plaintiffs, who had entered into an agreement to purchase a pulp mill, brought an action on the basis of an alleged oral contract collateral to the main contract, which included an entire agreement clause. The defendants applied for judgment under Rule 18A, contending that the plaintiff had no cause of action. McLachlin C.J.S.C. dealt with the application as follows:

> The alleged warranty is not contained in the contract documents. Therefore, if it exists, it must be a collateral contract.
>
> The doctrine of collateral contract is simple. Where one party makes a promise, in exchange for which the other party enters into a contract, the promise may be considered as a separate contract "collateral" to the main contract.
>
> . . . . .
>
> . . . the question is whether the intention of the parties in the case at bar was that the written contract together with the specified appendices would constitute the whole of the contract. That intention, as in all matters relating to contractual construction, must be determined objectively. Here the parties expressly agreed that the contract documents constituted the whole of their agreement. <u>While in most cases such an agreement is only a presumption based on the parol evidence rule, in this case it has been made an express term of the contract. A presumption can be rebutted; an express term of the contract, barring mistake or fraud, cannot. I have no alternative but to conclude that the parties intended the contract documents to be the whole of their agreement and the plaintiffs cannot rely on collateral contract against Westar</u>.
>
> [Emphasis added.]

43 In this case, counsel for Mr. MacMillan argues that the intention of all parties was that Mr. MacMillan receive an equity position in Concorde. He says that evidence relating to the respondents' collateral promises must be considered in order to determine whether the entire agreement clause in the 1995 Employment Agreement was truly intended to exclude those promises.

44 In my view, this argument overlooks the fact that the courts have adopted an objective standard in determining the intention of contracting parties. In *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) by Professor G.H.L. Fridman, the learned author has fairly set out the law at 17:

> . . . The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. The common law embraced this attitude of objectivity in the determination of contractual relations . . . .

45 In this case it is apparent that Mr. MacMillan failed to establish that the alleged collateral agreement for or promises of shares survived the entire agreement clause in the written agreement. It is important to note that the 1995 Employment Agreement was negotiated between knowledgeable, sophisticated businesspersons. Mr. MacMillan was represented by independent counsel who presumably gave him legal advice relating to his rights and obligations. Clearly, from a policy perspective, an agreement that is negotiated between sophisticated businesspersons ought to be enforced in accordance with the terms they select in all but the most exceptional circumstances. There is no suggestion that the parties to the agreement in this case were unequal in any sense. Moreover, there is no evidence of mistake or fraud.

46 In my view both *Turner*, *supra*, and *Zippy Print, supra*, are distinguishable on their facts. In *Turner*, the parties acted on a collateral agreement, and by doing so, gave every indication that the written agreement containing the entire agreement clause did not actually constitute the entire agreement. Similarly, in *Zippy Print*, it was clear that the oral representations were made in order to induce the defendants to enter into the written contract and that the defendants relied on those representations.

47 At trial, counsel for Mr. MacMillan also argued that the entire agreement clause in the 1995 Employment Agreement was at best limited to the "employment and appointment" of Mr. MacMillan and thus would not extend to matters such as the assignment of patents or a promise of shares. The trial judge dealt with that argument as follows at paras. 108-09:

> In my opinion, the "employment" of MacMillan included all of the terms of the 1995 Employment Agreement that defined his employment. Those terms required the plaintiff to assign both the Early and New Patents to [Kaiser], prevented him from acquiring patentable rights to work done "outside his employment", and set out the terms of his remuneration. It is significant that MacMillan, after receiving the benefit of legal advice, signed the 1995 Employment Agreement which provided for a monthly salary of $5,540 as consideration for his continued employment and $35,000 as consideration for vesting all of the patents in [Kaiser].
>
> Accordingly, I conclude that the express terms of the 1995 Employment Agreement constitute the entire agreement between the parties as to all of the terms of MacMillan's employment. Clause 23 precludes him from claiming that he was induced to continue his employment and assign the patents by the representations of Lee and Young that he would receive 10% of the shares of Concorde.

48 I can see no error in the judge's reasoning in this regard. Any promise of shares to Mr. MacMillan would have represented compensation for his employment with Concorde. Surely a contract relating to such compensation would be a contract relating to "employment" and thus within the scope of the entire agreement clause.

49 For these reasons Mr. MacMillan's argument on this issue must fail.

Whether the trial judge erred in finding that the 1996 Draft Agreement in Principle was not enforceable

50 Counsel for Mr. MacMillan argues, finally, that the trial judge erred in concluding that the 1996 Draft Agreement in Principle was not enforceable. He says the document finally put the respondents' promise of Concorde shares in writing, and raises a genuine issue for trial, namely the extent of Mr. MacMillan's right to shares under its terms.

51 In discussing the 1996 Draft Agreement in Principle, the trial judge correctly expressed concern as to what value Concorde's shares would have had at the time the 1996 Draft Agreement in Principle was produced, since Kaiser held all relevant patents. She also noted the erroneous reference in the document to the recovery of Concorde shares from Messrs. Dick and Fung, before concluding in this way, at para. 50:

> . . . In my view, the reference in Clause 9 to "prior loose understandings" is significant. It negates any suggestion that there had [ever] been a firm agreement in place between the parties.

52 There is no doubt that in assessing Mr. MacMillan's claim the judge found as a fact that there was no firm agreement between the parties relating to the transfer of shares to Mr. MacMillan. In assessing the uncertain nature of Mr. MacMillan's claim, she stated as follows at paras. 28-29:

> Memoranda between the principals of Concorde demonstrate that they knew MacMillan hoped to acquire equity in the company. From time to time, they discussed different mechanisms for MacMillan earning or being given an equity interest but no clear consensus emerged on the terms under which such equity would be acquired . . . .
>
> However, nothing was finalized between the shareholders and no written proposals or agreements were conveyed to MacMillan.

53 I cannot conclude that the trial judge erred in law in coming to her conclusion, or that she made a palpable and overriding error with respect to evidentiary matters. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), the court held that the standard of review for inferences of fact is not verification that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard.

54 The trial judge made no such error in this case.

CONCLUSION

55 In summary, I do not believe that the trial judge, Allan J., erred in concluding that she could try this case on a summary basis by relying on the plaintiff's pleadings and accepting at face value the allegations contained in them. The decision to proceed under Rule 18A did not result in any prejudice or injustice to Mr. MacMillan since she accepted as factual his allegations contained in his pleadings. Moreover, I cannot conclude that the trial judge erred in refusing to consider the collateral promises alleged by Mr. MacMillan in light of the entire agreement clause in the 1995 Employment Agreement. Finally, I agree with the finding of the trial judge that the 1996 Draft Agreement in Principle is not an enforceable agreement.

56 For these reasons I would dismiss the appeal.

***Donald J.A.*:**

I Agree:

***Sauders J.A.*:**

I Agree:

Appeal dismissed.

End of Document

17

1989 CarswellBC 37
Supreme Court of Canada

Syncrude Canada Ltd. v. Hunter Engineering Co.

1989 CarswellBC 37, 1989 CarswellBC 703, [1989] 1 S.C.R. 426, [1989] 3 W.W.R. 385, [1989] B.C.W.L.D. 1283, [1989] C.L.D. 691, [1989] S.C.J. No. 23, 14 A.C.W.S. (3d) 277, 35 B.C.L.R. (2d) 145, 57 D.L.R. (4th) 321, 92 N.R. 1, J.E. 89-571, EYB 1989-66979

HUNTER ENGINEERING COMPANY INC. (HUNTER MACHINERY CANADA LTD.), INTEGRATED METAL SYSTEMS CANADA LTD. and ALLIS-CHALMERS CANADA LTD. v. SYNCRUDE CANADA LTD. et al.

Dickson C.J.C., Estey [*], McIntyre, Wilson, Le Dain [**], La Forest and L'Heureux-Dubé JJ.

Heard: February 25 and 26, 1988
Judgment: March 23, 1989
Docket: No. 19773, 19950

Counsel: *J. Giles, Q.C.*, and *R. McDonell*, for appellants Hunter Engineering Inc. et al.
D.M.M. Goldie, Q.C., and *P.G. Plant*, for appellant Allis-Chalmers Canada Ltd.
D.B. Kirkham, Q.C., and *G.S. McAlister*, for respondents Syncrude Canada Ltd. et al.

Subject: Contracts; Restitution; Property

Headnote

Contracts --- Performance or breach — Breach — Fundamental breach — General

Restitution --- Bars to recovery — No benefit conferred

Sale of Goods --- Statutory contract — Condition — Express condition — Effect

Contracts — Discharge — Breach — Fundamental breach — Exclusion clauses — Plaintiff entering into contract with second defendant for supply of conveyor systems including mining gearboxes — Contract excluding statutory warranties and defects appearing after expiry of term of contractual warranty — Gearboxes defective but repairable — Breach not amounting to fundamental breach — In any event, exclusion clause excluding fundamental breach.

Sale of goods — Contract of sale — Implied conditions and warranties — Quality and fitness — Plaintiff entering into contract with defendants for supply of conveyor systems including mining gearboxes — Gearboxes defective due to design errors within contractual responsibility of defendants — Although defects appearing after expiry of term of contractual warranty, contract with first defendant not excluding warranty of fitness under Sale of Goods Act — Contract with second defendant excluding statutory warranties and fundamental breach not applying.

Trusts — Constructive trusts — Third party fraudulently misrepresenting to plaintiff that it was Canadian subsidiary of defendant — Plaintiff contracting with third party for purchase of certain machinery — Defendant commencing passing off action — Plaintiff establishing trust with moneys intended to pay for machinery — Defendant successful in passing off action but unwilling to assume warranties as required by trust — Defendant not being entitled to moneys under unjust enrichment or under terms of trust.

Contracts — Discharge — Breach — Defective performance — Plaintiff entering into contract with first defendant for supply of mining gearboxes — Gearboxes defective due to design errors within contractual responsibility of defendant — Although defects appearing after expiry of term of contractual warranty, contract not excluding warranty of fitness under Sale of Goods Act — Defendant liable for breach of statutory warranty of fitness.

Sale of goods — Contract of sale — Discharge — Breach — Fundamental breach — Exclusion clauses — Plaintiff entering into contract with second defendant for supply of conveyor systems including mining gearboxes — Contract excluding statutory warranties and defects appearing after expiry of term of contractual warranty — Gearboxes defective but repairable — Breach not being fundamental breach — In any event, exclusion clause excluding fundamental breach.

The plaintiff S. operated a synthetic oil plant. It entered into three contracts to obtain mining gearboxes for use at the plant. The first contract was with the defendant H.(U.S.) for the supply of 32 gearboxes at a total price of $464,000. Under the contract H.(U.S.) was to "furnish all labour and material for the design, fabrication and delivery ..." of the gearboxes, and while S. supplied specifications as to what the gearboxes were required to do, H.(U.S.) bore sole responsibility for their correct and adequate design. The gearboxes were manufactured by a subcontractor. The second contract, with the defendant A.-C., was for the supply of 14 conveyor systems, at a price in excess of $4,000,000, four of which included gearboxes. These gearboxes were also made by the same subcontractor and according to the same design.

Both contracts contained provisions that the contract and the rights of the parties were to be governed by the laws of Ontario, and both contained warranties which expired on the earlier of 24 months after delivery or 12 months after the gearboxes entered service. However, the contract with A.-C. also included a clause that those provisions represented the only warranty, and that "no other warranty or conditions, statutory or otherwise shall be implied".

The third contract was with H.(Can.) for an additional 11 gearboxes. S. had been approached by employees of H.(U.S.), who said they now represented a Canadian subsidiary of H.(U.S.). However, these representations were fraudulent, and H.(Can.) was in fact an independent company with no connection with H.(U.S.). The warranty provision of this contract was unlimited in time. These gearboxes were of the same design as the original gearboxes and H.(Can.) also contracted with the same subcontractor as H.(U.S.). After work had commenced but before S. made any payments to H.(Can.), H.(U.S.) discovered the deception, alerted S. and commenced a passing off action against H.(Can.) and its owners. S., which had an urgent need for the gearboxes, secured a waiver from H.(Can.) of any interest arising under contract subject to the creation of an acceptable trust agreement.

S. then entered into an agreement directly with the subcontractor under which the latter would manufacture the gearboxes for S. at the price it would have received from H.(Can.), and established a trust fund into which were paid the moneys that would have been payable to H.(Can.). The subcontractor was to be paid its contract price out of the fund, with an amount representing the profit H.(Can.) would have made to be payable to the successful party in the litigation between H.(Can.) and H.(U.S.), provided that that party agreed to assume the warranty and service obligations of H.(Can.). The trust further provided that if the holder of the interest in the trust fund and S. were unable to agree with respect to the warranty and service of work, the balance of the trust moneys were to be paid to S. Both H.(U.S.) and H.(Can.) had knowledge of the agreements with the subcontractor and the trust agreement but they were not parties to either agreement. H.(U.S.) succeeded in its action against H.(Can.), but it refused to assume the warranty provisions of H.(Can.)'s contract.

Between one and two years after they were put in service, problems were discovered in the gearboxes. Although the gearboxes should have lasted ten years, the thickness of steel plates and the way in which the housing was welded together was inadequate and they were too weak for service. Both H.(Can.) and A.-C. refused warranty coverage,

and S. repaired the gearboxes at a cost of some $700,000 with respect to those obtained from H.(U.S.), $400,000 with respect to those obtained from A.-C., and $200,000 with respect to those which had been the subject of the contract with H.(Can.). S. commenced an action against H.(U.S.) and A.-C., and by third party notice A.-C. claimed contribution or indemnity from H.(U.S.). H.(U.S.) claimed entitlement to the moneys in the trust.

The trial judge held that the failure of the gearboxes was due to design fault and that this was H.(U.S.)'s responsibility. He held that the time limit in the contractual warranties excused H.(U.S.) and A.-C. from liability under those provisions, but that the warranty of fitness in s. 15(1) of the Ontario Sale of Goods Act applied to the contract between S. and H.(U.S.) and that H.(U.S.) had breached that warranty. Accordingly, the trial judge awarded judgment against H.(U.S.). However, the trial judge held that the statutory warranty was excluded in the contract between S. and A.-C., and he rejected S.'s claim that A.-C. had committed a fundamental breach so as to negate the exclusion clause. Accordingly, the trial judge dismissed the action against A.-C. and its third party notice. Finally, the trial judge held that H.(U.S.) was entitled to the principal in the trust fund, but only if it met the conditions of the H.(Can.) contract, and he allowed time for H.(U.S.) to assume the warranty and service obligations. The Court of Appeal dismissed H.(U.S.)'s appeal on the question of liability, allowed the plaintiffs' appeal against the dismissal of the action as against A.-C., and allowed H.(U.S.)'s appeal on the ownership of the trust fund. H.(U.S.) and A.-C. appealed the finding of liability and the plaintiffs cross-appealed with respect to the ownership of the trust fund.

Held:

H.(U.S.)'s appeal dismissed; A.-C.'s appeal allowed; plaintiffs' cross-appeal allowed.

I Liability of H.(U.S.)

Per WILSON J. (L'HEUREUX-DUBÉ and MCINTYRE JJ. concurring): It was apparent that under its contract H.(U.S.) was responsible for deciding specific design details, and that S.'s specifications were only specifications as to what the gearboxes were required to do, not of how they were actually to be built. Accordingly, H.(U.S.) was responsible for the design flaw that caused the gearboxes to fail.

Although the contract warranty period had expired, the statutory warranty of fitness in s. 15(1) of the Ontario Sale of Goods Act applied. Considering that an exclusion clause should be strictly construed against the party seeking to invoke it, and that clear and unambiguous language is required to oust an implied statutory warranty, the statutory warranty was not excluded by the contract. Moreover, it was abundantly clear that S. informed H.(U.S.) of the purpose for which the gearboxes were required and relied on its expertise, that the gearboxes were goods which were in the course of H.(U.S.)'s business to supply, and that they were not reasonably fit for their purpose. Accordingly, H.(U.S.) was liable for the cost of repairing the gearboxes it supplied.

Per DICKSON C.J.C. (LA FOREST J. concurring): Upon its true construction the contract between S. and H.(U.S.) placed the responsibility for the design of the gearboxes solely on H.(U.S.). The words of the contract clearly indicated a creative role for H.(U.S.), and the specifications S. supplied were specifications as to what the gearboxes were required to do, not how they were to be built. Moreover, H.(U.S.) failed to discharge its responsibility with respect to the adequacy of their design.

The contractual warranty had expired, and S. was not entitled to rely on that warranty. However, the statutory warranty in s. 15(1) of the Ontario Sale of Goods Act applied. While s. 53 provides for contracting out of the provisions of the Act, this must be done by clear and direct language and the mere presence of an express warranty does not mean that the express and statutory warranties are inconsistent so as to exclude the statutory warranties. Finally, the three prerequisites for the application of s. 15(1) were satisfied and H.(U.S.) was liable under that section.

II Liability of A.-C.

Per WILSON J. (L'HEUREUX-DUBÉ J. concurring): The provision in the A.-C. agreement explicitly and unambiguously ousted the statutory warranty and it was effective to prevent the application of s. 15(1) of the Sale of Goods Act.

A fundamental breach occurs where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties he should obtain. Fundamental breach gives the innocent party the election to put an end to all the remaining contractual obligations, and this is an exceptional remedy which should be available only where the foundation of the contract has been undermined and the very thing bargained for has not been provided. Here the breach of the A.-C. contract with respect to the gearboxes was not a fundamental breach. Although the gearboxes were an important part of the conveyor systems, the cost of their repair was only a small part of the total cost and their inferior performance did not deprive S. of substantially the whole benefit of the contract. Moreover, as the gearboxes did work for a period of time and were repairable, the breach did not go to the very root of the contract and was not fundamental to it.

In any event, even if the breach were fundamental, it was excluded by the terms of the contractual warranty. While no rule of law invalidates or extinguishes exclusion clauses in the event of fundamental breach, and exclusion clauses should be given their natural and true construction so that the parties' agreement is given effect, the court must still determine whether in the context of the particular breach which has occurred it is fair and reasonable to enforce the clause in favour of the party who committed that breach. Although the courts are unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them, and a requirement that an exclusion clause should be fair and reasonable per se should be rejected, it is a different matter for the courts to determine after a particular breach has occurred whether an exclusion clause should be enforced. In the absence of specific legislation, the courts must continue to develop a balance through the common law between the desirability of allowing the parties to make their own bargains and having them enforced by the courts and the undesirability of having the courts used to enforce a bargain in favour of a party which is itself totally repudiating that bargain. Whether this is addressed narrowly in terms of fairness between the parties, or on a broader, and preferably, policy basis of the need to balance conflicting values inherent in the contract law, the question is essentially the same: in the circumstances that have happened, should the court lend its aid in enforcing the clause?

There are other means available to render exclusion clauses unenforceable even in the absence of a finding of fundamental breach, including statutory provisions dealing with consumer sales and unconscionability stemming from inequality of bargaining power. However, where, as here, there is no inequality of bargaining power, the courts should, as a general rule, give effect to the bargain. Nonetheless, there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances. To abandon the doctrine of fundamental breach and rely solely on unconscionability would require an extension of the principle of unconscionability beyond inequality of bargaining power, and arguably it would be even less certain than the doctrine of fundamental breach.

Here, even if the breach were fundamental, there would be nothing unfair or unreasonable, or unconscionable, in giving effect to the exclusion clause: the parties were of roughly equal bargaining power, familiar with this type of contract, and there was no evidence A.-C. was guilty of sharp or unfair dealing.

Per DICKSON C.J.C. (LA FOREST J. concurring): The warranty clauses in the A.-C. contract effectively excluded liability for defective gearboxes after the warranty period ended.

In the context of deciding whether to enforce exclusion clauses the doctrine of fundamental breach should be replaced with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable. Accordingly, if on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will be saved from liability unless the contract is unconscionable. While the motivation underlying the continuing use of fundamental breach as a rule of law to relieve parties from the effects of unfair bargains may be laudatory, the doctrine has spawned a host of difficulties, the most obvious of which is in determining whether a particular breach is fundamental. As well, not all exclusion clauses are unreasonable, and they are not the only contractual provisions which may lead to unfairness. Accordingly, there is no sound reason for applying special rules in the case of exclusion clauses than in the case of other clauses producing harsh results.

Here the warranty clause excluded liability for the defects that materialized and, as unconscionability was not an issue, the parties should be held to the terms of their bargain.

Per MCINTYRE J.: Any breach of the contract by A.-C. was not fundamental, and in any event its liability would be excluded by the terms of the contractual warranty even if the breach were fundamental. Accordingly, it was unnecessary to deal further with the concept of fundamental breach in this case.

III Entitlement to the trust fund

Per DICKSON C.J.C (LA FOREST and MCINTYRE JJ. concurring): There was no basis in law or in equity for awarding the trust moneys to H.(U.S.). As H.(U.S.) maintained that it was not bound by the terms of the trust agreement and not obliged to honour any warranty or service obligations as a condition of payment to it of the trust moneys, it was not entitled to those moneys under the trust agreement. Nor had it satisfied any of the criteria necessary to establish a claim for unjust enrichment. As between H.(U.S.) and H.(Can.), H.(U.S.) had the better claim to the money accruing to H.(Can.) under S.'s contract with H.(Can.), and would be entitled to claim any profits made by H.(Can.) under both the traditional doctrine of constructive trust and unjust enrichment. However, as between S. and H.(Can.), S. had a stronger claim to the money: the relationship between S. and H.(Can.) was regulated by a contract which S. entered into on the basis of H.(Can.)'s fraudulent misrepresentation and which was therefore voidable at the instance of S. As the only connection between H.(U.S.) and S. was H.(Can.), H.(U.S.) had no higher claim against S. than did H.(Can.). Accordingly, the result of S.'s decision to terminate H.(Can.)'s contract and H.(Can.)'s acceptance of that termination was that H.(Can.) was no longer entitled to any payment under the contract and this precluded any claim by H.(U.S.).

The creation of the trust by S. was not an admission that either H.(U.S.) or H.(Can.) was entitled to the profit under the H.(Can.) contract. Upon suspecting fraud, S. was entitled to rescind the contract. Accordingly, it did not need to obtain the acceptance of H.(Can.) and create the trust fund, and it should not be worse off than it would have been had it simply rescinded the contract. At most, the establishment of the trust fund indicated S. was willing to pay the contract price if it received its negotiated warranties; it was not an admission that the trust moneys belonged to either H.(U.S.) or H.(Can.). Finally, the trial judge erred in declaring H.(U.S.) entitled to the trust moneys by assuming the warranty obligations after judgment without incurring liability for warranty claims prior to its assumption of the warranties.

Per WILSON J. (dissenting) L'HEUREUX-DUBÉ J. concurring): H.(U.S.) was entitled to the balance of the trust moneys. As the trust terms were not agreed to by the parties but were unilaterally established by S., the trial judge erred in holding that the fund should only be disposed of in accordance with the terms of the trust agreement. When the trust was established S. was perfectly prepared to acknowledge that the profit margin was payable to one of H.(U.S.) or H.(Can.), and in the circumstances the entitlement to the trust fund should be decided on the equitable principles governing unjust enrichment. S. would be enriched if allowed to retain the fund, as it would

receive interest income on money it initially intended to pay to H.(Can.). Moreover, if S. were permitted to keep the entire fund, H.(U.S.) would be correspondingly deprived of the interest income it would have earned on the contract for the supply of the additional gearboxes. There need not be a contractual link for the causal connection between contribution and enrichment to be proved, and on the facts of this case there was a sufficient causal connection. Finally, there was no juristic reason for the enrichment. Accordingly, provided it accepted the warranty terms of the H.(Can.) contract and paid for the costs of repairing the gearboxes, the trust fund minus administration expenses belonged in equity to H.(U.S.).

Table of Authorities

Cases considered:

Considered by Dickson C.J.C.

B.G. Linton Const. Ltd. v. C.N.R., [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, 49 D.L.R. (3d) 548, 3 N.R. 151 [Alta.] — *considered*

Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co., [1980] 2 S.C.R. 718, 15 R.P.R. 62, 116 D.L.R. (3d) 193, (sub nom. *Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.)* 33 N.R. 460 [Ont.] — *considered*

Beldessi v. Island Equip. Ltd. (1973), 41 D.L.R. (3d) 147 (B.C.C.A.) — *referred to*

Cain v. Bird Chevrolet-Oldsmobile Ltd. (1976), 12 O.R. (2d) 532, 69 D.L.R. (3d) 484, affirmed 20 O.R. (2d) 569, 88 D.L.R. (3d) 607 (C.A.) — *considered*

Chabot v. Ford Motor Co. of Can. (1982), 39 O.R. (2d) 162, 19 B.L.R. 147, 22 C.C.L.T. 185, 138 D.L.R. (3d) 417 (H.C.) — *referred to*

Gafco Ent. Ltd. v. Schofield, [1983] 4 W.W.R. 135, 25 Alta. L.R. (2d) 238, 23 B.L.R. 9, 43 A.R. 262 (C.A.) — *referred to*

George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd., [1983] 2 A.C. 803, [1983] 3 W.L.R. 163, [1983] 2 All E.R. 737 (H.L.) — *referred to*

Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co., [1970] 1 Q.B. 447, [1970] 2 W.L.R. 198, [1970] 1 All E.R. 225 (C.A.) — *referred to*

Karsales (Harrow) Ltd. v. Wallis, [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866 (C.A.) — *not followed*

Pettkus v. Becker, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 [Ont.] — *distinguished*

Photo Production Ltd. v. Securicor Tpt. Ltd., [1980] A.C. 827, [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556 (H.L.) — *applied*

Sperry Rand Can. Ltd. v. Thomas Equip. Ltd. (1982), 135 D.L.R. (3d) 197, 40 N.B.R. (2d) 271, 105 A.P.R. 271 (C.A.) — *referred to*

Suisse Atl. Soc. d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 W.L.R. 944, [1966] 2 All E.R. 61 (H.L.) — *applied*

Considered by Wilson J. (dissenting in cross-appeal)

Ailsa Craig Fishing Co. v. Malvern Fishing Co., [1983] 1 W.L.R. 964, [1983] 1 All E.R. 101 (H.L.) — *considered*

Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co., [1980] 2 S.C.R. 718, 15 R.P.R. 62, 116 D.L.R. (3d) 193, (sub nom. *Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.)* 33 N.R. 460 [Ont.] — *applied*

Beldessi v. Island Equip. Ltd. (1973), 41 D.L.R. (3d) 147 (B.C.C.A.) — *distinguished*

Canso Chem. Ltd. v. Can. Westinghouse Co. (1974), 54 D.L.R. (3d) 517, 10 N.S.R. (2d) 306 (C.A.) — *referred to*

Chabot v. Ford Motor Co. of Can. (1982), 39 O.R. (2d) 162, 19 B.L.R. 147, 22 C.C.L.T. 185, 138 D.L.R. (3d) 417 (H.C.) — *applied*

Cork v. Greavette Boats Ltd., [1940] O.R. 352, [1940] 4 D.L.R. 202 (C.A.) — *referred to*

Davidson v. Three Spruces Realty Ltd.; Farr v. Three Spruces Realty Ltd.; Elsdon v. Three Spruces Realty Ltd., [1977] 6 W.W.R. 460, 79 D.L.R. (3d) 481 (S.C.) — *considered*

Deglman v. Guar. Trust Co., [1954] S.C.R. 725, [1954] 3 D.L.R. 785 [Ont.] — *referred to*

Gafco Ent. Ltd. v. Schofield, [1983] 4 W.W.R. 135, 25 Alta. L.R. (2d) 238, 23 B.L.R. 9, 43 A.R. 262 (C.A.) — *applied*

Gillespie Bros. & Co. v. Roy Bowles Tpt. Ltd., [1973] Q.B. 400, [1972] 3 W.L.R. 1003, [1973] 1 All E.R. 193 (C.A.) — *considered*

Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co., [1970] 1 Q.B. 447, [1970] 2 W.L.R. 198, [1970] 1 All E.R. 225 (C.A.) — *referred to*

Harry v. Kreutziger (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.) — *referred to*

Hayward v. Mellick (1984), 45 O.R. (2d) 110, 26 B.L.R. 156, 5 D.L.R. (4th) 740, 2 O.A.C. 161 (C.A.) — *considered*

Karsales (Harrow) Ltd. v. Wallis, [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866 (C.A.) — *referred to*

Keefe v. Fort (1978), 89 D.L.R. (3d) 275, 27 N.S.R. (2d) 353 (C.A.) — *applied*

Morrison v. Coast Fin. Ltd. (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.) — *referred to*

Peters v. Parkway Mercury Sales Ltd. (1975), 58 D.L.R. (3d) 128, 10 N.B.R. (2d) 703 (C.A.) — *applied*

Pettkus v. Becker, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 [Ont.] — *applied*

Photo Production Ltd. v. Securicor Tpt. Ltd., [1980] A.C. 827, [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556 (H.L.) — *considered*

R.G. McLean Ltd. v. Can. Vickers Ltd., [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.) — *distinguished*

R.W. Heron Paving Ltd. v. Dilworth Equip. Ltd., [1963] 1 O.R. 201, 36 D.L.R. (2d) 462 (H.C.) — *referred to*

Sorochan v. Sorochan, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 2 R.F.L. (3d) 225, 23 E.T.R. 143, 29 D.L.R. (4th) 1, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67, 69 N.R. 81 — *referred to*

Suisse Atl. Soc. d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C. 361, [1966] 2 W.L.R. 944, [1966] 2 All E.R. 61 (H.L.) — *referred to*

Taylor v. Armstrong (1979), 24 O.R. (2d) 614, 99 D.L.R. (3d) 547 (H.C.) — *referred to*

Traders Fin. Corp. v. Halverson (1968), 2 D.L.R. (3d) 666 (B.C.C.A.) — *referred to*

Wallis, Son & Wells v. Pratt & Haynes, [1911] A.C. 394 (H.L.) — *referred to*

Waters v. Donnelly (1884), 9 O.R. 391 — *referred to*

Statutes considered:

Business Practices Act, R.S.O. 1980, c. 55

s. 2(b)(vi)

Business Practices Act, S.P.E.I. 1977, c. 31

s. 3(b)(vi)

Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1

ss. 24-26

Consumer Products Warranties Act, R.S.S. 1978, c. C-30

s. 8

s. 11 [am. 1979-80, c. 17, s. 5]

Consumer Protection Act, R.S.M. 1970, c. C200 (also C.C.S.M., c. C200)

s. 58(1)

Consumer Protection Act, R.S.N.S. 1967, c. 53

s. 20C [en. 1975, c. 19, s. 1]

Consumer Protection Act, R.S.O. 1980, c. 87

s. 34(1)

Sale of Goods Act, R.S.B.C. 1979, c. 370

s. 20

Sale of Goods Act, R.S.O. 1970, c. 421

s. 15(1), (4)

s. 53

Trade Practice Act, R.S.B.C. 1979, c. 406

s. 4(e)

Trade Practices Act, S.N. 1978, c. 10

s. 6(d)

Trade Practices Inquiry Act, R.S.M. 1987, c. T110 (also C.C.S.M., c. T110)

s. 2

Unfair Contract Terms Act, 1977 (U.K.), c. 50

Unfair Trade Practices Act, R.S.A. 1980, c. U-3

s. 4(b), (d)

Authorities considered:

Atiyah, Sale of Goods, 6th ed. (1980), p. 157

Fridman, Law of Contract in Canada, 2nd ed. (1986), pp. 531, 558.

Fridman, Sale of Goods in Canada, 2nd ed. (1979), pp. 203-204, 282, 531.

Ogilvie, "The Reception of *Photo Production Ltd. v. Securicor Transport Ltd.* in Canada: *Nec Tamen Consumebatur*" (1982), 27 McGill L.J. 424, p. 441.

Waddams, note (1981), 15 Univ. of B.C. L. Rev. 189.

Waddams, The Law of Contracts, 2nd ed. (1984), pp. 308, 249, 352-53.

Waddams, "Unconscionability in Contracts" (1976), 39 Modern L. Rev. 369.

Waters, The Law of Trusts in Canada, 2nd ed. (1984), pp. 378-82.

Ziegel, Comment (1979), 57 Can. Bar Rev. 105,, p. 113.

Appeal by defendants from judgment of British Columbia Court of Appeal, 68 B.C.L.R. 367, dismissing first defendant's appeal from judgment, 27 B.L.R. 59, finding it liable for breach of contract and allowing plaintiff's appeal from judgment

dismissing action against second defendant; Cross-Appeal by plaintiff as to portion of judgment allowing first defendant's appeal with respect to ownership of trust fund.

***Dickson C.J.C. (La Forest J.* concurring):**

1 Three main issues are raised in this appeal: (i) was Hunter Engineering Company Inc. ("Hunter U.S.") responsible for design faults which resulted in cracks in the bull gears of gearboxes used to drive conveyor belts at the oil sands operation of Syncrude Canada Ltd. ("Syncrude"); if so, is Hunter U.S. liable to Syncrude for breach of the implied warranty of fitness contained in s. 15(1) of the Ontario Sale of Goods Act, R.S.O. 1970, c. 421; (ii) is the "doctrine" of fundamental breach a part of Canadian contract law and what is its effect, if any, on the liability of Allis-Chalmers Canada Limited ("Allis-Chalmers") to Syncrude; (iii) can the law of constructive trust be extended to reach, for the benefit of Hunter U.S., moneys held under a trust agreement, to which Hunter U.S. was not a party, entered into by Syncrude in the unusual circumstances which will be described?

I Facts

2 Syncrude operates a multi-billion dollar synthetic oil plant at Fort McMurray, Alberta, where oil extracted from tar sands is processed. Large bucket wheels scoop sand from its natural state and load it onto conveyor belts, which in turn carry the sand a substantial distance to an extraction plant. Motive force from 1250 horsepower motors is transmitted to the conveyor belts through a series of gearboxes. The trial judge, Gibbs J. [27 B.L.R. 59], described a "gearbox" as a unit which comprises a collection of gears, shafts and bearings contained within a steel box or casing. Power generated by a motor is transmitted through a drive shaft into the gearbox, then through a series of intermediate gears to a very large (the larger type being 6 1/2 feet in diameter and the smaller 5 1/2 feet in diameter) "bull gear" which revolves, turning a large shaft set in the centre of the bull gear and extending outside the gearbox casing, to which shaft is attached a pulley which moves the conveyor belt.

3 In January 1975 Canadian Bechtel Ltd. ("Bechtel"), as agent for Syncrude, contracted with Hunter U.S. for the supply of 32 mining gearboxes for use at Syncrude's oil sands project. In July of the same year, Syncrude contracted with Allis-Chalmers for the purchase of 14 conveyor systems, including 4 extraction gearboxes. Both the Hunter and the Allis-Chalmers gearboxes were designed by Hunter U.S. in accordance with Bechtel specifications and fabricated by a subcontractor for Hunter U.S.

4 The gearboxes acquired from Hunter U.S. were put into service in July 1978. In September 1979, more than a year later, a gearbox failure occurred. The Allis-Chalmers extraction boxes went into operation in November 1977. In September 1979, nearly two years later, one of the extraction boxes failed and cracks were discovered in two of the other three.

5 The trial judge described the cause of the failure in these terms [pp. 62-63]:

> The outer rim of the bull gear is attached to the central shaft by steel plates, one on each side of the rim, called "web plates". Inside the outer rim a thicker portion of the rim provides a shoulder on each side. The intention was that the web plates be fitted snugly to the shoulder and welded in place. Halfway between the rim and the shaft eight 8-1/2 inch diameter holes were cut at regular intervals in line through each plate. Steel pipe was welded into each set of holes to provide rigid connections between the plates. At the outer edge of the web plates, where they met the inside of the rim, eight 3 inch radius "half moon" pieces were cut out at regular intervals. The result was that there was not a continuous weld attaching the web plates to the inside of the rim. The connection was broken in eight evenly spaced places by the 3 inch radius half moon cutouts.
>
> The bull gears failed because the weld between the web plates and the outer rim failed. The diagnosis was that the weld failed because of flexing of the web plates and that the web plates flexed because there was insufficient strength to withstand the torque applied by the pinion gear to the bull gear. The evidence supporting the flexing diagnosis was uneven wear and pitting of the teeth on the bull and pinion gears. The continuous flexing of the web plates

> weakened and cracked the weld between the web plate and the rim. In time, if remedial action had not been taken the web plates would have broken away entirely.

6 Syncrude was forced to undertake its own repairs to the gearboxes when Hunter U.S. and Allis-Chalmers refused warranty coverage. Syncrude and the other plaintiffs claimed damages from Hunter U.S. and from Allis-Chalmers for the cost of repairing and rebuilding the gearboxes, contending that the gearboxes were inherently defective, unsafe and unfit for the purposes for which they were intended and were not of merchantable quality. The defendants conceded that the gearboxes failed because they were too weak for the service, but they denied liability. By third party notice, Allis-Chalmers claimed contribution or indemnity from Hunter U.S. on the ground that if Allis-Chalmers were found liable, the liability would be due to faulty design or negligence by Hunter U.S.

7 Both the Hunter U.S. and the Allis-Chalmers contracts included a warranty limiting their liability to 24 months from the date of shipment or to 12 months from the date of start-up, whichever occurred first. In ad dition, the Allis-Chalmers warranty included a clause stating that the "Provisions of this paragraph represent the only warranty ... and no other warranty or conditions, statutory or otherwise shall be implied". Both the Hunter U.S. and Allis-Chalmers contracts provided that the laws of Ontario were to apply.

8 The trial judge noted that Hunter U.S. had designed the gearboxes and had drawn the plans and specifications for the internal working parts. He held that unless the Bechtel specifications provided to Hunter U.S. were inadequate, Hunter U.S. must take responsibility for the failures.

9 Hunter U.S. contended that there was no evidence led by Syncrude to show that the specifications were not met, to which the judge responded at p. 64:

> However, although the Canadian Bechtel specifications give detailed operating criteria for the gearboxes they do not extend to design details. Indeed, they expressly provide that: "Correct and adequate design is the seller's [sole] responsibility."
>
> In my opinion Hunter U.S. did not discharge the responsibility cast upon it when it accepted the Canadian Bechtel specifications. The torque applied by the pinion gear to the bull gear is directly related to the conveyor belt load which is translated into bull gear inertia which must be overcome by pinion gear force. The strength required in the moving parts within the gearbox to move the loaded conveyor belt is a design function and that design function was entirely the responsibility of Hunter U.S. The evidence was that the design load on the conveyor belt was never exceeded. The irresistible conclusion is that it was a design fault that prevented the gearboxes from performing the service. I so find.

10 The judgment of the Court of Appeal for British Columbia (reported 68 B.C.L.R. 367), affirmed the trial judge's finding that the cracks in the bull gears in the gearboxes were due to a breach of the design obligations of Hunter U.S. under its contract. The court awarded the sum of $1,000,000 against Hunter U.S., being the agreed cost, plus interest, of the repair of cracks in gears of the 32 mining gearboxes designed and supplied directly by Hunter U.S. to Syncrude.

11 The courts at trial and on appeal held that Hunter U.S. was not liable for the repair of the mining gearboxes under an express warranty because that warranty had expired. However, both courts also held that the cracks were in breach of the statutory warranty of reasonable fitness found in the Sale of Goods Act of Ontario.

12 Gibbs J. accepted Syncrude's argument that the Sale of Goods Act applied to the contract, barring express provisions to the contrary, and therefore held the implied warranty of fitness for purposes stipulated in s. 15(1) of that Act governed. Applying the three tests proposed by Professor Fridman in Sale of Goods in Canada, 2nd ed. (1979), at pp. 203-204, (i) that the contract be in the course of the seller's business; (ii) that the seller have knowledge of the purpose of the goods; (iii) and that the buyer rely on the seller's skill or judgment, the trial judge found Hunter U.S. liable to Syncrude for breach of s. 15(1).

13 In this court, Hunter U.S. submitted that its design responsibility was limited to providing the strength required by Bechtel's specifications, and that it was Bechtel's responsibility, as author of the specifications, to design to the strength required to move the loaded conveyor belt for the length of time Syncrude wanted the boxes to work without repair.

14 Paragraphs 21 and 22 of the Hunter U.S. factum read:

> 21. It must be emphasized that there is *no* evidence that Hunter's design did not provide a strength required by the specifications, and there is *no* evidence excluding an insufficiency in the strength required by the specifications as an alternative probable cause of the cracks when they eventually appeared.
>
> 22. In the result, the issue is one of proper interpretation of the contract: is Hunter's design obligation limited to designing in accordance with the strength required by the specifications? Or does it extend to and include the responsibility for designing to the strength required to move the loaded conveyor belt (without replacing a single gear) for more than twenty months of continuous service? If the former, the appeal succeeds entirely.

15 Counsel for Hunter U.S. quoted the design requirements set out in the specifications:

> **1.11 Requirements**
>
> The specifications, requirement drawings and date sheets included herewith represent minimum requirements.
>
> This Specification covers all engineering services required to complete the design *in accordance with the specifications*. Correct and adequate design is the Seller's sole responsibility. [emphasis by counsel]

and referred to cl. 10.2.4 of the specifications, headed "Service Factors":

> Gear reducers shall conform to AGMA standards for 1.5 mechanical service factor and 1:1 thermal service factor based on rated motor horsepower with motor service factor of 1.0. The mechanical rating shall permit loads of 275% of motor rated horsepower for starting and for momentary peak loads up to six occurrences per hour, and shall permit single starts at loads of 300 percent of motor rated horsepower (200 percent of reducer rating).

16 Syncrude took a somewhat different view of the matter, contending that the specifications were in fact drafted by Hunter U.S. and incorporated into the contract on the recommendation of Hunter U.S. Counsel submitted that it was necessary to review the history under which the contract specifications came into being. I will summarize that submission in the paragraphs immediately following.

17 The first oil sands plant built in the area of Fort McMurray, Alberta, was built by Great Canadian Oil Sands ("G.C.O.S.") in the early 1970's. In about 1972 Hunter U.S. designed and supplied the gearboxes and the conveyor system of G.C.O.S. The gearboxes supplied to G.C.O.S. were virtually identical in design to the gearboxes subsequently supplied to Syncrude. In 1974 Syncrude was in the planning stages for the construction of its plant. Hunter approached Syncrude and held itself out as being an expert in the design of gearboxes for the specific operation which Syncrude intended. Hunter U.S. supplied complete specifications for its gearboxes to Syncrude and represented that the specifications would be suitable for the particular purpose Syncrude intended.

18 The specifications gave various details regarding performance requirements of the gearboxes. However, they did not give any details of the dimensions of the components within the gearboxes. The service factors to which counsel for Hunter U.S. referred were taken directly from the original proposal of Hunter U.S. The mechanical service factor of 1.5 × horsepower, the thermal service factor of 1:1 and the mechanical rating of 275 per cent of motor rated horsepower for up to six starts per hour are all found in proposed specifications. There was nothing in the specifications which related to the part of the low speed gear which eventually failed.

19 Syncrude accepted the representations of Hunter U.S. as to its ability to produce suitable gearboxes for Syncrude's purpose and issued a purchase order to Hunter U.S. into which the specifications suggested by Hunter U.S., including the precise service factors, were incorporated.

20 Counsel for Syncrude also made the following additional points:

21 (i) the contract expressly provided, "Correct and adequate design is the Seller's sole responsibility";

22 (ii) Mr. Rao Duvurri, the design engineer employed by Hunter U.S., who designed the gearboxes for both G.C.O.S. and Syncrude and prepared detailed design drawings of all the components of the gearboxes for the purposes of manufacture, never discussed any of the matters relating to the design of the bull gear with Syncrude or Bechtel at any time;

23 (iii) the gearboxes should last 20 years; bull gears would normally be expected to last "10 years or beyond", yet Hunter U.S. conceded at para. 27 of its statement of facts that "There is no dispute that the strength of the moving parts within the gear boxes was inadequate to carry the conveyor belt for longer than two years without at least one failure";

24 (iv) Hunter U.S. called no expert witness, nor any evidence at all, except for certain extracts from the examination for discovery.

25 The following passage from the reasons of the trial judge at pp. 70-71, is apposite:

> ... on February 20, 1974 Hunter U.S., in the course of soliciting orders, sent Canadian Bechtel a technical description of their gearboxes, described as "shaft mounted conveyor drives". In the covering letter they said:
>
> > Furthering our telephone conversation of last week, I am attaching two (2) copies of Specifications for the 1250 HP, 60 RPM output gear reducers.
> >
> > Three Specifications are drawn up for installations in locations such as the Fort McMurray, Alberta Oil Sands Operation, and have been found quite suitable in other installations in that area.
> >
> > We have included the Ringfedar ring shaft mounting as you indicated, also.
> >
> > Please keep us informed on this project, and when you are in a position to accept prices for these units, we will be happy to respond with a minimum of delay.
>
> And in a summary sheet:
>
> > This specification is for a geared drive assembly designed to power a belt conveyor.
> >
> > This drive group has been designed for installation and operation in the remote areas and hostile environment normal to the mining industry. The units are designed for a high degree of reliability based on design arts developed in similar installations. Special design consideration has been made for field servicings in the event it is necessary.
>
> And on the introduction page of the descriptive document, described as "technical specifications":
>
> "This specification has been prepared to qualify HUNTER ENGINEERING COMPANY INC., as a competent and experienced manufacturer of specialized gear driving equipment.
>
> Hunter drives are designed for specific applications, incorporating those features required to minimize operational and environmental hazards having an adverse effect on the performance of the unit. Our market effort is directed towards those unique applications which challenge our designer's ingenuity. Hunter has the engineering,

> manufacturing and financial resources to supply the complete drive package designed to reliably power any defined processing function.

26 I am strongly of the opinion that upon its true construction the contract dated 29th January 1975, between Syncrude and Hunter U.S., places responsibility for the design of the gearboxes solely upon Hunter U.S., and that Hunter U.S. failed to discharge that responsibility. I would affirm the conclusions of the British Columbia courts on this point. I would reject the argument that Hunter U.S. had merely designed the gears according to specifications provided by Syncrude's agent and, therefore, if the specifications were inadequate, Syncrude was to blame. The words used in the contract clearly indicate a creative role for Hunter U.S. The specifications provided by Syncrude in the contract were specifications about what gearboxes were required to do, not how they were to be built. Specific design details were Hunter U.S.'s responsibility. There is no evidence that the specifications themselves were faulty; the evidence shows that the design was inadequate and design was solely Hunter U.S.'s responsibility.

27 Hunter U.S. knew the gearboxes were required to move a conveyor belt. Its tender to Syncrude of 20th February 1974 read in part:

> This specification is for a geared drive assembly designed to power a belt conveyor.

As Anderson J.A. observed in the Court of Appeal at p. 376:

> Hunter was well aware from the outset that the specifications were not to be construed in a vacuum but with regard to the system as a whole.

II The Contractual Warranty

28 In light of the design obligations of Hunter U.S., Syncrude attempts to rely on the contractual warranty provisions in both the Hunter U.S. and Allis-Chalmers contracts. Although the general clause is the same in both contracts, the warranty was modified differently in each document. Because the difference between these modifications is important for the statutory warranty argument, I include the entire text of the main provisions and the modifications. The general provision common to both contracts provided:

> 8. Warranties — Guarantees: Seller warrants that the goods shall be free from defects in design, material, workmanship, and title, and shall conform in all respects to the terms of this purchase order, and shall be of the best quality, if no quality is specified. If it appears within one year from the date of placing the equipment in service for the purpose for which it was purchased, that the equipment, or any part thereof, does not conform to these warranties and Buyer so notifies Seller within a reasonable time after its discovery, Seller shall thereupon promptly correct such nonconformity at its sole expense ... Except as otherwise provided in this purchase order, Seller's liability hereunder shall extend to all damages proximately caused by the breach of any of the foregoing warranties or guarantees, but such liability shall in no event include loss of profit or loss of use.

The clause was modified in the Hunter U.S. contract to read:

> Warranty: Twenty four (24) months from date of shipment to twelve (12) months from date of start-up whichever occurs first.

The Allis-Chalmers contract was modified to read:

> Warranty: 24 months from date of shipment or 12 months from date of start-up, whichever occurs first.
>
> Notes: Buyer's General Conditions supersede the Seller's Terms and Conditions of Sale and shall apply to this Purchase Order except as amended herein:
>
> **A. Paragraph 8 — "Warranties and Guarantees"**

> The final sentence of paragraph 8 is hereby deleted. In its place shall be, "The provisions of this paragraph represent the only warranty of the Seller and no other warranty or conditions, statutory or otherwise shall be implied." The warranty period shall be twelve (12) months from the date of operation or 24 months from the date of shipment, whichever occurs first ...

29 Two crucial factors emerge from these provisions. First, the relevant time period during which the warranties apply is 12 months from the date of putting the equipment into operation or 24 months from the date of shipment, whichever occurs first. Second, the Hunter U.S. provision does not exempt Hunter U.S. from warranties that arise from statutes.

30 The trial judge found the date of start-up to have been 4th July 1978. This was more than one year before the weakness in the gearboxes was first detected in September 1979. On this basis the trial judge rightly held that Syncrude was out of time and could not rely on the contractual warranty provisions.

31 Syncrude advances two arguments to suggest that it is entitled to rely on the contractual warranty. Both arguments are unconvincing and can be dismissed with little discussion. First, Syncrude alleges that the warranty clauses were not limited in time. It bases this claim on reading s. 8 as containing four distinct provisions. The first provision, contained in the first sentence, makes no mention of time and is therefore not limited in duration. This seems an incredible interpretation of a warranty provision. As a matter of contractual interpretation it makes sense to read the provision as a whole and not as four disjunctive parts.

32 The second argument is Syncrude's allegation that the defect "appeared" in the sense that the word is used in the warranty clause within the relevant time period. This claim rests on the allegations that the design defect "appeared" in the original drawings submitted by Hunter U.S. and that Hunter U.S. had knowledge of the defect before the gearboxes were operational. In response to this argument, the trial judge stated that Syncrude was proposing an extraordinary meaning of "appears", i.e., knowledge or deemed knowledge of Hunter U.S. The judge held that the word "appears" should be given its ordinary meaning, which is to become visible to Syncrude. This interpretation must be correct; any other interpretation would be stretching the meaning of the word beyond recognition.

The Implied Statutory Warranty

33 Since neither Hunter U.S. nor Allis-Chalmers could be held liable for breach of contractual warranty, the remaining option is to found liability on the basis of statutory warranty. The parties, an Alberta-based and an American-based company, had provided in the contract that the laws of Ontario were to apply. Syncrude contends that both Hunter U.S. and Allis-Chalmers breached s. 15(1) of the Ontario Sale of Goods Act, which reads:

> 15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. *Where the buyer*, expressly or by implication, *makes known to the seller the particular purpose for which the goods are required* so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), *there is an implied condition that the goods will be reasonably fit for such purpose*, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose. [emphasis added]

34 Section 53 of the Sale of Goods Act expressly provides for contracting out of the provisions of the Act. This may be accomplished by express agreement. Clearly the provision in the Allis-Chalmers contract reproduced above is sufficient to exclude the operation of the implied warranty.

35 The trial judge had no difficulty in concluding that, as against Hunter U.S., all three prerequisites for the application of s. 15(1) had been met. Hunter U.S. presents three arguments challenging this result. First, it submits that Syncrude

did not rely on Hunter's expertise as it was Syncrude which supplied the specifications. In light of the earlier finding concerning the nature of Hunter's design obligation, this argument cannot prevail. As the trial judge pointed out, Hunter U.S. could only succeed if there were evidence that Syncrude or Bechtel possessed and exercised skill and judgment in the design and manufacture of gearboxes. No such evidence was introduced.

36 Second, Hunter U.S. argues that because the gearboxes worked for more than one year, they *were* reasonably fit for their purpose. This seems difficult to accept when, as Syncrude contends, a gearbox is expected to operate without problem for more than ten years. I fail to understand how anything as seriously flawed as the gearboxes in the case at bar could be said to be reasonably fit.

37 Finally, Hunter U.S. argues that Syncrude cannot rely on the statutory warranty because it is inconsistent with the warranty embodied in the contract. According to s. 15(4) of the Sale of Goods Act, an implied condition can be negatived by an express warranty if the two are inconsistent. As mentioned earlier, s. 53 also allows parties to contract out of the provisions of the Act. Hunter U.S.'s argument is that the very presence of the express warranty renders the statutory warranty inapplicable. Again, this cannot be the correct position. The mere presence of an express warranty in the contract does not mean that the statutory warranties are inconsistent. If one wishes to contract out of statutory protections, this must be done by clear and direct language, particularly where the parties are two large, commercially sophisticated companies. This seems to be well-established in the case law, as Eberle J. makes clear in *Chabot v. Ford Motor Co. of Can.* (1982), 39 O.R. (2d) 162, 19 B.L.R. 147, 22 C.C.L.T. 185, 138 D.L.R. (3d) 417 (H.C.).

38 I would adopt the following passage from the reasons of Gibbs J. at trial at p. 73:

> Hunter U.S. cannot avoid liability under s. 15 §1 of the Ontario Sale of Goods Act. The design and manufacture of the gearboxes was in the course of Hunter U.S. business activities. Hunter U.S. knew the purpose of the gearboxes. Syncrude, through its agent, relied upon the skill and judgment of Hunter U.S. The gearboxes were not reasonably fit for the purpose for which they were required. Hunter U.S. is in breach of the implied condition in s. 15 §1.

IV Fundamental Breach

39 It will now be convenient to consider the liability to Syncrude of Allis-Chalmers and in turn of Hunter U.S. on the third party claim of Allis-Chalmers. The facts can be briefly stated. The purchase agreement contained in para. 8 a warranty modified, as stated earlier, to exclude statutory warranties or conditions. Paragraph 14 of the agreement read:

> **C. Paragraph 14 — Limitation of Liability**
>
> Notwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise or from any tortious acts or omissions of their respective employees or agents and in no event shall the liability of the Seller exceed the unit price of the defective product or of the product subject to late delivery.

40 The price of the 14 conveyor systems and accessories purchased from Allis-Chalmers was $4,166.464. The agreed cost of the repairs was $400,000; including prejudgment interest, $535,000. In the face of the contractual provisions, Allis-Chalmers can only be found liable under the doctrine of fundamental breach.

41 The Court of Appeal differed with the trial judge on the question of fundamental breach. At trial Gibbs J., at pp. 74-76, quoted with approval from the judgment of Stratton J.A. (as he then was) in *Sperry Rand Can. Ltd. v. Thomas Equip. Ltd.* (1982), 135 D.L.R. (3d) 197, 40 N.B.R. (2d) 271, 105 A.P.R. 271 at 205-206 (C.A.), and the judgment of Harradence J.A. in *Gafco Ent. Ltd. v. Schofield*, [1983] 4 W.W.R. 135 at 139-41, 25 Alta. L.R. (2d) 238, 23 B.L.R. 9, 43 A.R. 262 (C.A.).

42 Applying the principle of these cases to the purchase order and the nature of the defect in the bull gears, Gibbs J. concluded that the case for fundamental breach had not been made out. He said at pp. 77-78:

> As to the nature of the defect, in my opinion it was not so fundamental that it went to the root of the contract. The contract between the parties was still a contract for gearboxes. Gearboxes were supplied. They were capable of performing their function and did perform it for in excess of a year which, given the agreed time limitations, as the "cost free to Syncrude" period contemplated by the parties. It was conceded that the gearboxes were not fit for the service. However, the unfitness, or defect, was repairable and was repaired at a cost significantly less than the original purchase price. No doubt the bull gear is an important component of the gearbox but no more important than the engine in an automobile and in the *Gafco Ent.* case the failure of the engine was not a sufficiently fundamental breach to lead the Court to set aside the contract of sale. On my appreciation of the evidence Syncrude got what it bargained for ... It has not convinced me that there was fundamental breach.

43 On appeal, Anderson J.A. reviewed a number of authorities including the judgment of Seaton J.A. in *Beldessi v. Island Equip. Ltd.* (1973), 41 D.L.R. (3d) 147 (B.C.C.A.), and held that Allis-Chalmers was in fundamental breach because Syncrude was deprived of substantially the whole benefit of the contract.

44 In reaching that conclusion, he said at p. 393:

> It follows that the cost of repair was not significantly less than the original purchase price but, on the contrary, the cost of repair constituted 86 per cent of the purchase price. Moreover, the expected life of a gearbox is 20 years. The expected life of a bull gear is at least 10 years. The bull gear failed within less than two years after Syncrude's operations commenced.

He rejected as without merit the argument of counsel for Allis-Chalmers that Syncrude's contract with Allis-Chalmers was not just a "contract for gearboxes" but was rather a contract for the purchase of a package of 14 conveyor systems for a price of over $4,000,000, and viewed in relation to the total purchase price actually paid by Syncrude, the cost of repair of one component, whether it is considered to be the bull gear or the gearbox, was indeed "significantly less than the original purchase price".

45 Hunter U.S., ultimately liable on account of the third party claim against it, submits that the British Columbia Court of Appeal was wrong on this branch of the case because the effect of its decision is to re-establish the doctrine of fundamental breach as a rule of law invalidating a clause limiting liability.

46 Counsel submits that in England, since *Suisse Atl. Soc. d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361, [1966] 2 W.L.R. 944, [1966] 2 All E.R. 61 (H.L.), the doctrine of fundamental breach has been rejected as a rule of law invalidating exemption clauses. At p. 405, Lord Reid said: "In my view no such rule of law ought to be adopted". In commenting upon that decision, Professor P.S. Atiyah in his text, The Sale of Goods, 6th ed. (1980), at p. 157, says "This was not in all respects an easy decision to understand ..." With that statement I am in full agreement. Professor Atiyah continues:

> ... but the principal point to emerge from the *Suisse Atlantique* case was the firm and unanimous holding that the "doctrine" of fundamental breach is not a rule of law but merely a rule of construction. Parties are free to make whatever provision they desire in their contracts, but it is a rule of construction that an exemption clause does not protect a party from liability for fundamental breach. It follows that if the contract by express provision does protect a party from such a result and the court thinks that the provision was intended to operate in the circumstances which have occurred, the provision must be given full effect.

47 It was contended by Hunter U.S. that, at bar, the Court of Appeal approached the matter by asking whether the warranty in the contract excluded liability for fundamental breach. Upon finding it did not, the Court of Appeal then

found as a fact, contrary to the finding of fact made by the trial judge, that the breach was fundamental, and awarded the buyer the full amount of its claim.

48 It was submitted that by doing this, the Court of Appeal erroneously adopted the approach (as it did in *Beldessi v. Island Equip. Ltd.*, supra, upon which it relied so heavily in this case) that to be effective a limitation of liability clause must expressly exclude liability for fundamental breach. It was submitted this approach involves returning to the notion of treating fundamental breach as something which, as a rule of law, will displace the terms of the contract; to paraphrase Lord Bridge's decision in *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*, [1983] 2 A.C. 803, [1983] 3 W.L.R. 163, [1983] 2 All E.R. 737 at 741 (H.L.): it reintroduces by the back door a doctrine which the *Suisse Atl.* case, and cases following, had evicted by the front.

49 Allis-Chalmers adopted in its entirety the argument of Hunter U.S. with respect to the fundamental breach issue. The argument in the factum of Allis-Chalmers was directed to the further question whether the Court of Appeal erred in failing to construe properly the warranty clause in ascertaining whether it applied to the instant breach.

50 Allis-Chalmers argued that the words of cl. 8 are clear and fairly susceptible of only one meaning, and the Court of Appeal erred in failing to give effect to them; instead of giving effect to the language of the contract, the Court of Appeal imported its own implied warranty and erroneously embarked on a consideration of whether cl. 8 was effective to eliminate the "essential undertaking of Allis-Chalmers to provide gearboxes capable of meeting the requirements of the extraction process". In proceeding in this fashion, the Court of Appeal in effect resurrected a term analogous to the implied statutory warranty of fitness for the purpose required, which the parties had expressly excluded. By importing this additional term into the contract, the court rewrote the bargain which the parties had made for themselves.

51 Syncrude argues in response that the seller's fundamental obligation does not derive from, and is not dependent upon, the existence of express or implied warranties or conditions. It is inherent in the contract of sale.

52 Syncrude relied upon the pronouncement of the doctrine of fundamental obligation of the seller enunciated by Weatherston J. in *Cain v. Bird Chevrolet-Oldsmobile Ltd.* (1976), 12 O.R. (2d) 532, 69 D.L.R. (3d) 484, affirmed 20 O.R. (2d) 569, 88 D.L.R.(3d) 607 (C.A.). The court stated at pp. 534-35:

> The first and most important thing in any case is to determine what are the terms of the contract, so as to decide what performance was required by the defaulting party ...
>
> Where a machine has been delivered which has such a defect, or "such a congeries of defects" as to destroy the workable character of the machine, there is said to be a fundamental breach of contract by the seller. This is so because the purported performance of the contract is quite different than that which the contract contemplated ... There has been no failure of consideration, no failure to deliver the thing contracted for, but it is implicit in the transaction, as a fundamental term, that the thing contracted for is what it seems to be.

53 The House of Lords cases decided that liability for breach of a fundamental term may be excluded by a suitably worded exclusion clause. However, counsel contended that there is a rule of construction that exemption clauses must be very clearly worded if they are to be sufficient to exclude liability for fundamental breach. It was said that this approach to the construction of a contract was confirmed in this court in *Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co.*, [1980] 2 S.C.R. 718, 15 R.P.R. 62, 116 D.L.R. (3d) 193, *(*sub nom. *Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.)* 33 N.R. 460 [Ont.].

54 On the application of the principles to the present case, Syncrude asked the question whether Allis-Chalmers and Syncrude intended that Allis-Chalmers could supply gearboxes which were so fundamentally defective as to require complete replacement, or in this case, complete reconstruction, after 15 months' service, at Syncrude's sole cost. Syncrude would give a negative response to this question.

55 I have had the advantage of reading the reasons for judgment prepared by my colleague, Justice Wilson, in this appeal and I agree with her disposition of the liability of Allis-Chalmers. In my view, the warranty clauses in the Allis-Chalmers contract effectively excluded liability for defective gearboxes after the warranty period expired. With respect, I disagree, however, with Wilson J.'s approach to the doctrine of fundamental breach. I am inclined to adopt the course charted by the House of Lords in *Photo Production Ltd. v. Securicor Tpt. Ltd.*, [1980] A.C. 827, [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556, and to treat fundamental breach as a matter of contract construction. I do not favour, as suggested by Wilson J., requiring the court to assess the reasonableness of enforcing the contract terms after the court has already determined the meaning of the contract based on ordinary principles of contract interpretation. In my view, the courts should not disturb the bargain the parties have struck, and I am inclined to replace the doctrine of fundamental breach with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable.

56 The doctrine of fundamental breach in the context of clauses excluding a party from contractual liability has been confusing at the best of times. Simply put, the doctrine has served to relieve parties from the effects of contractual terms, excluding liability for deficient performance where the effects of these terms have seemed particularly harsh. Lord Wilberforce acknowledged this in *Photo Production*, supra, at p. 843:

> 1. The doctrine of "fundamental breach" in spite of its imperfections and doubtful parentage has served a useful purpose. There was a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate.

In cases where extreme unfairness would result from the operation of an exclusion clause, a fundamental breach of contract was said to have occurred. The consequence of fundamental breach was that the party in breach was not entitled to rely on the contractual exclusion of liability but was required to pay damages for contract breach. In the doctrine's most common formulation, by Lord Denning in *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866 (C.A.), fundamental breach was said to be a rule of law that operated regardless of the intentions of the contracting parties. Thus, even if the parties excluded liability by clear and express language, they could still be liable for fundamental breach of contract. This rule of law was rapidly embraced by both English and Canadian courts.

57 A decade later in the *Suisse Atl.* case, the House of Lords rejected the rule of law concept in favour of an approach based on the true construction of the contract. The Law Lords expressed the view that a court considering the concept of fundamental breach must determine whether the contract, properly interpreted, excluded liability for the fundamental breach. If the parties clearly intended an exclusion clause to apply in the event of fundamental breach, the party in breach would be exempted from liability. In *B.G. Linton Const. Ltd. v. C.N.R.*, [1975] 2 S.C.R. 678, [1975] 3 W.W.R. 97, 49 D.L.R. (3d) 548, 3 N.R. 151 [Alta.], this court approved of the *Suisse Atl.* formulation. The renunciation of the rule of law approach by the House of Lords and by this court, however, had little effect on the practice of lower courts in England or in Canada. Lord Denning quickly resuscitated the rule of law doctrine in *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co.*, [1970] 1 Q.B. 447, [1970] 2 W.L.R. 198, [1970] 1 All E.R. 225 (C.A.).

58 Finally, in 1980, the House of Lords definitively rejected the rule of law approach to fundamental breach in *Photo Production*, supra. In that case, the plaintiff Photo Production had contracted with Securicor, a company in the business of supplying security services, to provide four nightly patrols of its factory. At issue was whether Securicor was liable for a fire deliberately set by one of its employees in the course of his duties at the Photo Production factory. The contract between the two parties contained the following limitation clause (at p. 840):

> Under no circumstances shall the company (Securicor) be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for (a) any loss suffered by the customer through burglary, theft, fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment ...

The limitation clause clearly excluded liability for fire with the exception of fires started by negligent acts. Securicor argued it could not be liable under the contract for the fire that occurred. Photo Production contended that Securicor was liable for the damage done to the factory under the doctrine of fundamental breach.

59 Lord Wilberforce rejected Photo Production's argument. He began by reviewing the fractured history of the doctrine of fundamental breach and then forcefully repudiated the rule of law concept. Lord Wilberforce reiterated the thoughts articulated in *Suisse Atl.*, stating at pp. 842-43, he had no doubt as to:

> ... the main proposition that the question whether and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract.

The policy behind this approach is stated by Lord Wilberforce at p. 843 as follows:

> At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be ...
>
> At the judicial stage there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals.

Lord Wilberforce proceeded to examine the contract between Securicor and Photo Production to determine exactly what the parties had provided, at p. 846:

> As a preliminary, the nature of the contract has to be understood. Securicor undertook to provide a service of periodical visits for a very modest charge ... It would have no knowledge of the value of the plaintiffs' factory: that, and the efficacy of their fire precautions, would be known to the respondents. In these circumstances nobody could consider it unreasonable, that as between these two equal parties the risk assumed by Securicor should be a modest one, and that the respondents should carry the substantial risk of damage or destruction.
>
> The duty of Securicor was, as stated, to provide a service. There must be implied an obligation to use due care in selecting their patrolmen, to take care of the keys and, I would think, to operate the service with due and proper regard to the safety and security of the premises. The breach of duty committed by Securicor lay in a failure to discharge this latter obligation. Alternatively it could be put upon a vicarious responsibility for the wrongful act ... This being the breach, does condition 1 apply? It is drafted in strong terms, "Under no circumstances" ... "any injurious act or default by any employee." *These words have to be approached with the aid of the cardinal rules of construction that they must be read contra proferentem and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary. I think that these words are clear*. The respondents in facts [sic] relied upon them for an argument that since they exempted from negligence they must be taken as not exempting from the consequence of deliberate acts. But this is a perversion of the rule that if a clause can cover something other than negligence, it will not be applied to negligence. *Whether, in addition to negligence, it covers other, e.g., deliberate, acts, remains a matter of construction requiring, of course, clear words. I am of opinion that it does, and being free to construe and apply the clause, I must hold that liability is excluded.* [emphasis added]

60 Lord Diplock alluded to the importance of negotiated risk allocation at p. 851:

> My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what to-day would be called consumer contracts and contracts of adhesion ... In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by

> insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.

61 In *Beaufort Realties (1964) Inc.*, supra, Ritchie J., delivering the judgment of this court, stated at p. 723:

> Stated bluntly, the difference of opinion as to the true intent and meaning of their Lordships' judgment in the *Suisse Atlantique* case centered around the question of whether a rule of law exists to the effect that a fundamental breach going to the root of a contract eliminates once and for all the effect of all clauses exempting or excluding the party in breach from rights which it would otherwise have been entitled to exercise, or whether the true construction of the contract is the governing consideration in determining whether or not an exclusionary clause remains unaffected and enforceable notwithstanding the fundamental breach. The former view was espoused by Lord Denning and is illustrated by his judgment which he delivered on behalf of the Court of Appeal in the *Photo Production* case (*supra*) ...

and at p. 725:

> It has been concurrently found by the learned trial judge and the Court of Appeal that article 6 of this contract constituted an exclusionary or exception clause and Madame Justice Wilson adopted the same considerations as those which governed the House of Lords in the *Photo* case in holding that the question of whether such a clause was applicable where there was a fundamental breach was to be determined according to the true construction of the contract. I concur in this approach to the case.

62 As Wilson J. notes in her reasons, Canadian courts have tended to pay lip service to contract construction but to apply the doctrine of fundamental breach as if it were a rule of law. While the motivation underlying the continuing use of fundamental breach as a rule of law may be laudatory, as a tool for relieving parties from the effects of unfair bargains, the doctrine of fundamental breach has spawned a host of difficulties; the most obvious is how to determine whether a particular breach is fundamental. From this very first step the doctrine of fundamental breach invites the parties to engage in games of characterization, each party emphasizing different aspects of the contract to show either that the breach that occurred went to the very root of the contract or that it did not. The difficulty of characterizing a breach as fundamental for the purposes of exclusion clauses is vividly illustrated by the differing views of the trial judge and the Court of Appeal in the present case.

63 The many shortcomings of the doctrine as a means of circumventing the effects of unfair contracts are succinctly explained by Professor Waddams (The Law of Contracts, 2nd ed. (1984), at pp. 352-53):

> The doctrine of fundamental breach has, however, many serious deficiencies as a technique of controlling unfair agreements. The doctrine requires the court to identify the offending provision as an "exemption clause", then to consider the agreement apart from the exemption clause, to ask itself whether there would have been a breach of that part of the agreement and then to consider whether that breach was "fundamental". These inquiries are artificial and irrelevant to the real questions at issue. An exemption clause is not always unfair and there are many unfair provisions that are not exemption clauses. It is quite unsatisfactory to look at the agreement apart from the exemption clause, because the exemption clause is itself part of the agreement, and if fair and reasonable a perfectly legitimate part. Nor is there any reason to associate unfairness with breach or with fundamental breach ...
>
> More serious is the danger that suppression of the true criterion leads, as elsewhere, to the striking down of agreements that are perfectly fair and reasonable.

Professor Waddams makes two crucially important points. One is that not all exclusion clauses are unreasonable. This fact is ignored by the rule of law approach to fundamental breach. In the commercial context, clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance. In the usual situation, exclusion clauses will be reflected in the

contract price. Professor Waddams' second point is that exclusion clauses are not the only contractual provisions which may lead to unfairness. There appears to be no sound reason for applying special rules in the case of clauses excluding liability than for other clauses producing harsh results.

64 In light of the unnecessary complexities the doctrine of fundamental breach has created, the resulting uncertainty in the law, and the unrefined nature of the doctrine as a tool of averting unfairness, I am much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate, to deal explicitly with unconscionability. In my view, there is much to be gained by addressing directly the protection of the weak from overreaching by the strong, rather than relying on the artificial legal doctrine of "fundamental breach". There is little value in cloaking the inquiry behind a construct that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness. This is precisely what has happened with the doctrine of fundamental breach. It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. The courts do not blindly enforce harsh or unconscionable bargains and, as Professor Waddams has argued, the doctrine of "fundamental breach" may best be understood as but one manifestation of a general underlying principle which explains judicial intervention in a variety of contractual settings. Explicitly addressing concerns of unconscionability and inequality of bargaining power allows the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties.

65 I wish to add that, in my view, directly considering the issues of contract construction and unconscionability will often lead to the same result as would have been reached using the doctrine of fundamental breach, but with the advantage of clearly addressing the real issues at stake.

66 In rejecting the doctrine of fundamental breach and adopting an approach that binds the parties to the bargains they make, subject to unconscionability, I do not wish to be taken as expressing an opinion on the substantial failure of contract performance, sometimes described as fundamental breach, that will relieve a party from future obligations under the contract. The concept of fundamental breach in the context of refusal to enforce exclusion clauses and of substantial failure of performance have often been confused, even though the two are quite distinct. In *Suisse Atl.*, Lord Wilberforce noted the importance of distinguishing the two uses of the term fundamental breach, at p. 431:

> Next for consideration is the argument based on "fundamental breach" or, which is presumably the same thing, a breach going "to the root of the contract." These expressions are used in the cases to denote two quite different things, namely (i) a performance totally different from that which the contract contemplates, (ii) a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse performance or further performance under the contract.
>
> Both of these situations have long been familiar in the English law of contract ... What is certain is that to use the expression without distinguishing to which of these, or to what other, situations it refers is to invite confusion.
>
> The importance of the difference between these meanings lies in this, that they relate to two separate questions which may arise in relation to any contract.

I wish to be clear that my comments are restricted to the use of fundamental breach in the context of enforcing contractual exclusion clauses.

67 Turning to the case at bar, I am of the view that Allis-Chalmers is not liable for the defective gearboxes. The warranty provision of the contract between Allis-Chalmers and Syncrude clearly limited the liability of Allis-Chalmers to defects appearing within one year from the date of placing the equipment into service. The trial judge found that the defects in the gearboxes did not become apparent until after the warranty of Allis-Chalmers had expired. It is clear, therefore, that the warranty clause excluded liability for the defects that materialized, and subject to the existence of any

unconscionability between the two parties there can be no liability on the part of Allis-Chalmers. I have no doubt that unconscionability is not an issue in this case. Both Allis-Chalmers and Syncrude are large and commercially sophisticated companies. Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. There is no suggestion that Syncrude was pressured in any way to agree to terms to which it did not wish to assent. I am therefore of the view that the parties should be held to the terms of their bargain and that the warranty clause freed Allis-Chalmers from any liability for the defective gearboxes.

V The Trust Agreement

68 In 1977, almost three years after it originally contracted with Hunter U.S. for gearboxes, Syncrude determined it required an additional 11 gearboxes. It was approached by individuals with whom it had previously dealt at Hunter U.S., who said they now represented the Canadian subsidiary of Hunter U.S., Hunter Machinery (Canada) Limited ("Hunter Canada"). In fact, Hunter Canada was incorporated independently by employees of Hunter U.S. and the president of Aco Sales and Engineering ("Aco"), a subcontractor used by Hunter U.S. It had no connection with Hunter U.S. All representations that Hunter Canada was in any way affiliated with Hunter U.S. amounted to fraudulent misrepresentations.

69 Unaware of the fraud being perpetrated by Hunter Canada, Syncrude contracted with Hunter Canada for the purchase of the 11 gearboxes in the fall of 1977. The gearboxes were to be of the same design as the original 32 mining gearboxes. The only noteworthy feature of the contract was the warranty provision which was significantly broader than that normally negotiated by Hunter U.S. Unlike the Hunter U.S. warranty which was limited in time, the Hunter Canada warranty was unlimited in time.

70 Hunter Canada subcontracted with Aco for the manufacture of the gearboxes. After Aco had commenced work on the gearboxes but before Syncrude had made any payments to Hunter Canada under the contract, Hunter U.S. discovered Hunter Canada's deception. Hunter U.S. immediately alerted Syncrude and, on 13th January 1978, commenced a "passing off" action against Hunter Canada and the individuals who owned Hunter Canada. Syncrude, in the meantime, had an urgent need for the additional gearboxes. The gearboxes were essential for its operation and Syncrude was very concerned that receipt of the gearboxes would be held up until judgment in the passing off action. In January 1978 Syncrude secured a waiver from Hunter Canada of any right, title or interest arising from the contract, subject to the creation of a trust agreement acceptable to Hunter Canada.

71 On 1st March 1978, in an attempt to ensure prompt delivery of the gearboxes, Syncrude entered into two agreements. In the first agreement, Aco agreed to manufacture gearboxes for Syncrude at the price it would have received from Hunter Canada. Aco, it should be said, had already begun production of gearboxes under the Hunter Canada subcontract. The second agreement between Syncrude and one Donald E. Mann and Aco, appended as a schedule to the first, established a trust fund. All moneys that would have been payable by Syncrude to Hunter Canada were to be paid into the trust fund and administered by Mann as trustee. Aco was to be paid the contract price out of the fund. The balance was to be dealt with as follows:

> 7. Following the payments made pursuant to clauses 5 and 9, the trustee shall hold the remainder of the trust funds and trust income for payment pending determination by agreement between Hunter Canada and Hunter Engineering, or by a decision of a Court of competent jurisdiction in Canada as to the identity of the holder of a valid and lawful interest in the remainder of trust funds as between Hunter Engineering and Hunter Canada, or upon determination of certain issues in Canada, currently the subject of legal proceedings between Hunter Engineering and Hunter Canada by settlement agreement or by a decision of a Court of competent jurisdiction in Canada.
>
> 8. The trustee shall pay from the remainder of the trust fund at such time as the holder of a valid interest in the trust fund is determined pursuant to Clause 7, above, an amount or portion of the remainder of the trust fund which represents the value of such valid interest to the holder as identified, being an amount no more than the value of the interest Hunter Canada would have had under the purchase orders identified in Schedule "A" of the said Agreement

> less any payments made pursuant to Clauses 5 and 9 hereof; provided, however, the trustee shall refrain from making any such payment of the said remainder of the trust fund and trust income until the holder of the valid and lawful interest in the trust fund has undertaken, by agreement with Syncrude, to assume warranty and service obligations with respect to the Work under the said Agreement, as provided expressly or impliedly by the provisions of the purchase orders identified in Schedule "A" thereto, and until the trustee is notified by Syncrude of such agreement.
>
> 9. Reasonable legal expenses incurred by the trustee in the performance of his duties herein and remuneration to the trustee in accordance with the provisions of The Trustee Act shall be paid from the remainder of the trust funds following payments made pursuant to Clause 5.
>
> 10. In the event that Syncrude and the holder of the valid and lawful interest in the trust fund are unable to agree with respect to the warranty and service of Work in Schedule "A" of the said Agreement, the trustee shall pay the remainder of the trust fund, as determined by Clause 7 and Clause 8 of this Agreement, to Syncrude.
>
> 11. Upon satisfaction of the payments provided in Clauses 5, 7, 8 and 9 hereto, the trustee shall pay the balance of the remainder of the trust fund, if any, and trust income to Syncrude.

72 It will be noted that an amount representing the profit Hunter Canada would have made, less the administration costs of the trust fund, was to be payable from the trust fund to the successful party in the litigation between Hunter U.S. and Hunter Canada, provided that party agreed to assume the Hunter Canada warranty and service obligations. By the express terms of the trust agreement, Syncrude was entitled to the interest (the trust income) on the principal of the trust. Both Hunter U.S. and Hunter Canada had knowledge of the two agreements mentioned. Neither was a party to the Aco agreement or to the trust agreement.

73 The full scope of the discussions between Hunter U.S. and Syncrude during this period is unclear. The trial judge found that Hunter U.S. was prepared to assume warranty and service obligations if Syncrude repudiated its obligations under the Hunter Canada contract and contracted directly with it. Syncrude disputes this finding and claims that the discussions were limited to the creation of the trust fund. In my view, whether or not Hunter U.S. offered to assume the Hunter Canada contract is immaterial to the outcome of this appeal because it is clear that by the time the two agreements were entered into, Hunter U.S. was no longer willing to assume the Hunter Canada warranty provisions. Hunter U.S. continued to maintain the position, in the present proceedings, that it was not bound by the terms of the trust agreement and not obliged to honour any warranty or service obligations as a condition of payment to it of the trust moneys. Paragraph 25C(i) of the further amended statement of defence and counterclaim of Hunter U.S. reads:

> Further and in any event this Defendant says the Plaintiff is a constructive trustee of the monies in the Trust Fund for this Defendant and this Defendant is not bound by the terms of the Trust Agreement and is not obliged to honour any warranty or service obligations as a condition of payment to it of the trust monies in view of all the circumstances of this case being those recited herein together with the fact the Plaintiff accepted certain warranty and service obligations from Aco and Hunter Canada in respect of the gearboxes and enforced or attempted to enforce the same against Aco and Hunter Canada.

74 The trust fund now contains the profit Hunter Canada would have made, plus interest on the amount of this principal. Hunter U.S. claims it is entitled to all moneys in the trust fund under the doctrine of constructive trust. This amount is significantly greater than the amount Hunter U.S. could have claimed under the express terms of the trust fund had Hunter U.S. complied with its terms.

75 Judgment was given in favour of Hunter U.S. in the passing off action in December 1978. Meredith J. held that as between Hunter U.S. and Hunter Canada, Hunter U.S. was entitled to the trust fund. Syncrude was not, however, a party to that action. Also, it is important to note that the judgment provided that Hunter U.S.'s entitlement was conditional upon Hunter U.S. assuming warranty and service obligations, which it declined to assume.

76 The balance in the trust fund, when the trial began, was approximately $420,000. The gearboxes which were the subject of the Hunter Canada purchase orders underwent repair and rebuilding at a cost to Syncrude of $200,000, inclusive of prejudgment interest. That cost would have been covered by the warranty in the Hunter Canada purchase orders.

77 At trial, Gibbs J. rejected the claim of Hunter U.S. under the head of constructive trust. He said at pp. 81-82:

> In my opinion, the entitlement to the trust moneys is to be determined solely in accordance with the terms of the trust agreement. Hunter U.S. claimed entitlement under the doctrines of constructive trust and unjust enrichment, sometimes called restitutionary proprietary claims, but it cannot succeed on those grounds. The indicia are not present. Prior to the creation of the trust, there was not that nexus between the parties that is found in the reported cases on restitutionary proprietary claims. There was no fiduciary relationship between Syncrude and Hunter U.S.; there had not been a payment of money or delivery of property by Hunter U.S. to Syncrude under circumstances where it would be against conscience for Syncrude to retain it; Hunter U.S. was not a party with Syncrude to any agreement which gave Hunter U.S. a claim on Syncrude's funds. Hunter U.S. had, and established, a claim against Hunter Canada. If Syncrude had paid the purchase price to Hunter Canada, on the authorities, Hunter U.S. could have recovered the profit element from Hunter Canada because of the fiduciary duty owed to Hunter U.S. by those of its employees who were the owners of Hunter Canada. In my opinion however, in the absence of the trust agreement, Hunter U.S. would have no claim against Syncrude. It had not contracted with Syncrude, nor had it provided any of those things for which profit stands as compensation, such as risk capital, skilled and knowledgeable staff, supervision, overhead, and like matters. None of its plant or personnel had been used. I am satisfied that if Hunter U.S. has an entitlement, it must be found within the four corners of the trust agreement.

78 It will be observed from the foregoing passage that the trial judge was of the opinion that entitlement to the trust moneys had to be determined solely in accordance with the terms of the trust agreement. In his view, none of the indicia of restitutionary proprietary claims was present. He awarded Syncrude the trust income and awarded the principal of the trust to Hunter U.S. on the condition that it assume the warranty obligations of Hunter Canada before 1st October 1984. That date, by order of Gibbs J., dated 17th September 1984, was later extended to the date which is two months after final judgment in appeal had been handed down.

79 The Court of Appeal reversed the decision of the trial judge. The court held that the issue fell to be determined by reference to the judgment of this court in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 [Ont.]. Anderson J.A. was of the opinion that the criteria necessary to establish a successful claim for unjust enrichment, namely, (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment, were satisfied.

80 The Court of Appeal held that if Syncrude were to keep the trust income, Syncrude would be enriched. This enrichment would come at the expense of Hunter U.S., which would have earned the profit on the construction of the 11 gearboxes but for the fraud of Hunter Canada. Syncrude's actions in establishing the trust fund were interpreted by the appeal court as evidence of an acknowledgement by Syncrude that Hunter U.S. was entitled to the fund. The court was of the view that there was a sufficient causal nexus between the enrichment and the deprivation in the fact that Hunter Canada had performed all its contractual obligations with the exception of its service and warranty obligations. By offering to assume the warranty obligations of the Hunter Canada contract, Hunter U.S. satisfied the necessary causal connection. Finally, the Court of Appeal could find no juristic reason to justify Syncrude's enrichment. In the result, the court allowed the appeal of Hunter U.S. and held that Hunter U.S. was entitled to the whole of the trust fund and the income therefrom, except that Syncrude was entitled to deduct the sum of $200,000, being the agreed repair costs for which Hunter U.S. was responsible. It was held also that Syncrude be entitled to the income on the sum of $200,000 from the date of trial.

81 With respect, I am unable to agree with the view of the Court of Appeal and the view of my colleague, Wilson J., that the moneys in the trust fund established by Syncrude should be awarded to Hunter U.S. I can conceive of no basis in law or in equity for awarding the trust fund to Hunter U.S. Hunter U.S. is not entitled to those moneys under the terms of the trust agreement. Hunter U.S. has not satisfied any of the three criteria mentioned in *Pettkus v. Becker*, supra. In my view, there was no unjust enrichment and therefore no possibility of a constructive trust arising in this case. I would therefore allow the cross-appeal and declare that Syncrude is entitled to the principal of the trust fund and the interest accrued thereon.

82 If a restitutionary remedy is not available, Hunter U.S. is left trying to make a claim under a document the express terms of which deny recovery by Hunter U.S. Hunter U.S. provided nothing whatsoever to Syncrude in connection with the 11 gearboxes. Nor did Hunter Canada. All the work was done by Aco. The drawings were supplied by Syncrude. Counsel for Hunter U.S. lays emphasis on the fact that Hunter U.S. provided the design drawings to Aco under a pledge of confidentiality. That may be true but it overlooks the provision in the original contract between Syncrude and Hunter U.S. which required Hunter U.S. to provide Syncrude with such drawings, free of any such pledge. No restriction was placed on the use of these drawings by Syncrude. The design drawings were already in Syncrude's possession in 1977 and were provided to Aco by Syncrude. Hunter U.S. does not allege any breach of copyright on the part of anyone. Anderson J.A. refers to drawings "stolen from Hunter". No drawings were stolen by Syncrude.

83 The constructive trust has existed for over 200 years as an equitable remedy for certain forms of unjust enrichment. In its earliest form, the constructive trust was used to provide a remedy to claimants alleging that others had made profits at their expense. Where the claimant could show the existence of a fiduciary relationship between the claimant and the person taking advantage of the claimant, the courts were receptive: see Waters, The Law of Trusts in Canada, 2nd ed. (1984), at pp. 378-82. Equity would not countenance the abuse of the trust and confidence inherent in a fiduciary relationship and imposed trust obligations on those who profited from abusing their position of loyalty. The doctrine was gradually extended to apply to situations where other persons who were not in a fiduciary relationship with the claimant acted in concert with the fiduciary or knew of the fiduciary obligations. Until the decision of this court in *Pettkus v. Becker*, the constructive trust was viewed largely in terms of the law of trusts, hence the need for the existence of a fiduciary relationship. In *Pettkus v. Becker*, the court moved to an approach more in line with restitutionary principles by explicitly recognizing constructive trust as one of the remedies for unjust enrichment. In finding unjust enrichment the court, as I have said, invoked three criteria, namely, (1) an enrichment, (2) a corresponding deprivation, and (3) absence of any juristic reason for the enrichment. The court then found that in the circumstances of the case a constructive trust was the appropriate remedy to redress the unjust enrichment.

84 In determining whether a restitutionary remedy may be available in this case, an understanding of the legal positions of the three parties, Hunter U.S., Hunter Canada and Syncrude is of paramount importance. In my view, an analysis of the facts and of legal positions of all three parties reveals why a restitutionary remedy is not available to Hunter U.S.

85 I note that this appeal presents an unusually complex fact situation. Three parties are involved, rather than the two one usually finds when a constructive trust is advanced. Of the three parties, there is only one wrongdoer. Two of the parties, Syncrude and Hunter U.S., are completely innocent actors. As between the two innocent parties, only one will be entitled to the money in dispute. In my view, the complexities can best be minimized by examining separately the legal relationship between the wrongdoer and each of the innocent parties. Once the legal positions of Hunter U.S. and Syncrude are determined vis-à-vis Hunter Canada, the relationship between Hunter U.S. and Syncrude can be meaningfully examined.

86 There is no doubt that as between Hunter U.S., a company defrauded by disloyal employees, and Hunter Canada, Hunter U.S. would have been able to claim any profits made by Hunter Canada under the traditional doctrine of constructive trust. Hunter Canada was founded by trusted employees of Hunter U.S., persons who clearly stood in a fiduciary relationship to Hunter U.S. Equity will not permit a fiduciary to profit at the expense of its principal. The *Pettkus v. Becker* test for unjust enrichment would also be satisfied. Hunter Canada would be enriched to the amount of

the profit it would have received under its contract with Syncrude. The enrichment would be at the expense of Hunter U.S. There would be no juristic reason to justify the enrichment. As between Hunter U.S. and Hunter Canada, Hunter U.S. clearly has the better claim to money accruing to Hunter Canada.

87 An entirely different situation exists between Hunter Canada and Syncrude. The relations between Hunter Canada and Syncrude are regulated by contract. Syncrude can only be said to owe money to Hunter Canada on the basis of the agreement for gearboxes negotiated in 1977. Syncrude was induced to enter into that contract on the strength of Hunter Canada's fraudulent misrepresentations. It is a basic principle of contract law that where a party had entered into a contract, having been misled by a fraudulent misrepresentation, the contract is voidable at the instance of the innocent party: see Waddams, The Law of Contracts, at p. 308. Once Syncrude discovered Hunter Canada's deception, it was entitled to elect to continue with the contract or to treat the contract as at an end. Syncrude could not be compelled to continue with a contract it had been led to assume on fraudulent premises. As between Syncrude and Hunter Canada, Syncrude has a stronger claim to the money payable under the contract by virtue of its ability to elect to end the contract and retain the money it would have expended.

88 What, then, is the situation between Hunter U.S. and Syncrude? In my view, Syncrude is entitled to retain the money it would have paid under the Hunter Canada contract. The only connection between Hunter U.S. and Syncrude is Hunter Canada. Hunter U.S.'s claim to the entire trust fund arises only as a result of Hunter Canada's actions. As against Syncrude, Hunter U.S. has no higher claim than does Hunter Canada. While the actions of Hunter Canada are, on the one hand, essential to found Hunter U.S.'s claim of unjust enrichment, the need to rely on the conduct of Hunter Canada is fatal to this claim.

89 Hunter Canada's entitlement vis-à-vis Syncrude arose purely as a result of contractual obligation. Under ordinary principles of contract law, Syncrude could not be compelled to remain a party to the Hunter Canada contract. Even before the fraud of Hunter Canada was brought to light, it was open to Syncrude to breach the contract with Hunter Canada and to face an action for damages. In light of Hunter Canada's fraudulent misrepresentation to Syncrude, Syncrude was entitled to rescind the contract on the basis of fraud. Syncrude's actions in January through March 1978 essentially amounted to exercising its option to rescind. Rather than involve itself in the competing claims of Hunter Canada and Hunter U.S., Syncrude chose to extricate itself from the Hunter Canada contract as it was properly entitled to do. Syncrude's primary concern was the timely production of gearboxes. Syncrude sought to terminate its contract with Hunter Canada and requested Hunter Canada's approval of this course of action. Hunter Canada agreed to renounce its rights under the contract subject to the creation of a trust fund. Long before the legal resolution of the dispute between Hunter U.S. and Hunter Canada, the contract between Hunter Canada and Syncrude had come to an end as had any entitlement of Hunter Canada under the contract.

90 The result of Syncrude's decision to terminate the Hunter Canada contract and Hunter Canada's acceptance of the termination is that Hunter Canada is no longer entitled to any payment under the contract. In my view, this precludes any claim by Hunter U.S. as I have indicated. The claim of Hunter U.S. is predicated upon Hunter Canada's contractual entitlement. If Hunter Canada has no entitlement, Hunter U.S. has no entitlement. Hunter U.S. can be in no better position vis-à-vis Syncrude than that Hunter Canada occupies vis-à-vis Syncrude. Finding unjust enrichment in favour of Hunter U.S. on moneys held by Syncrude would be to found an entitlement deriving from a contractual entitlement of Hunter Canada that is no longer in existence.

91 Clause 8 of the trust agreement expressly provided that the trustee should refrain from making any payment out of the said trust fund and trust income "until the holder of the valid and lawful interest in the trust fund had undertaken, by agreement with Syncrude, to assume warranty and service obligations with respect to the work under the said Agreement, as provided expressly or impliedly by the provisions of the purchase orders identified in Schedule 'A' thereto, and until the trustee is notified by Syncrude of such agreement".

92 Hunter U.S. at no time gave any such undertaking. Hunter U.S. refused to become a party to the trust agreement. In its pleading in the present proceedings it claimed all the moneys in the trust fund but denied any obligation to honour

any warranty or service obligations as a condition of payment. In the Court of Appeal judgment the following passage appears at p. 385:

> I agree with counsel for Syncrude that Hunter would not be entitled to any profit if Hunter had refused to assume the obligations of Hunter Canada under the 1977 agreement. A court of equity would not assist Hunter in such a case. Moreover, there would not be a true "corresponding deprivation" or "causal connection".
>
> In the circumstances, it is not, however, open to Syncrude to contend that Hunter did not assume the service and warranty obligations contained in the 1977 agreement. Hunter offered to ratify or adopt the 1977 agreement made between Hunter Canada and Syncrude. Hunter offered to contract directly with Syncrude and to assume the service and warranty obligations contained in the 1977 agreement. Syncrude, prior to the discovery of the fraud, believed that Hunter Canada was the subsidiary of Hunter and, therefore, the offer made by Hunter to deal with Syncrude directly was exactly the contract Syncrude wanted in the first place. Syncrude, however, for reasons of its own and solely for its own benefit, refused to enter into any agreement with Hunter. Instead, it contracted with Aco, using Hunter's designs, and unilaterally attempted to impose onerous and additional obligations on Hunter.

93 Counsel for Syncrude strongly contests the finding that Hunter U.S. offered to assume the obligations of Hunter Canada. The evidence on this point is far from satisfactory. Hunter U.S. advanced no evidence on the point at trial other than a brief passage from an examination for discovery, which reads:

> Q. And there is this allegation: "At the time the plaintiff entered into the 1978 agreement, this defendant offered to assume all warranty and service obligations provided the plaintiff" that's Syncrude, "entered into contracts directly with this defendant", that's Hunter Engineering, and that is true as well, isn't it?
>
> A. Yes.

94 This is the best evidence Hunter U.S. can produce. There is no letter or other document evidencing such offer. No one testified, on behalf of Hunter U.S., in affirmation of the offer. Be that as it may, Hunter U.S. declined to be a party to the trust agreement or to the 1978 agreement and has since consistently denied any warranty obligations. Equally, if such an offer was made, I cannot understand why, in light of the circumstances prevailing at the time, Syncrude was under any obligation to accept such an offer.

95 At the time Syncrude rescinded the Hunter Canada contract, Syncrude was free to procure the gearboxes any way it pleased. If a company unrelated to either Hunter Canada or Hunter U.S. offered to supply the gearboxes on more advantageous terms, Hunter U.S. could not have prevented Syncrude from contracting with that other company. Viewing Hunter U.S.'s offer as a sufficient connection between Syncrude and Hunter U.S. to found a restitutionary remedy in Hunter U.S.'s favour is tantamount to compelling it to contract with Hunter U.S.

96 It is no answer to say that at some time in the negotiations Hunter U.S. agreed to assume the service and warranty obligations contained in the 1977 agreement. Opinions and attitudes frequently change in negotiations and it is clear that Hunter U.S. changed. It refused to sign the 1977 agreement or the trust agreement when the time came. Even after the trial judge awarded Hunter U.S. the trust fund under the terms of the trust agreement on the condition that Hunter U.S. accept the warranty provision within a certain period of time, Hunter U.S. did not assume the Hunter Canada warranty. The moneys paid into the trust fund can only be viewed as having been originally owed to Hunter Canada to pay for services that Syncrude had purchased from it. If Hunter U.S. is to receive those moneys, then it should also be found that it would have been liable insofar as any of those services were not provided. Yet it is difficult to see what Hunter U.S. might be liable for. An important "service" which Syncrude purchased from Hunter Canada was the extended warranty which Hunter Canada offered. Hunter U.S. did not take up their warranty and, therefore, could not have been held liable under it. Thus, it would be unfair to award it moneys intended to compensate the party which had agreed to assume the risks inherent in the warranty. In my view, it is no longer open to Hunter U.S. to claim under the express trust agreement.

97 In imposing a constructive trust in the circumstances of this case, the Court of Appeal carried the decision in the *Pettkus* case beyond the breaking point. Apart perhaps from an element of sympathy which one might have because of the attempt by its dishonest employees to cheat Hunter U.S., I can find nothing which would entitle Hunter U.S. to the funds set aside by Syncrude pursuant to an agreement with Hunter Canada in an attempt to extricate itself from an extremely difficult and potentially costly situation created by Hunter's employees or former employees. In my view, if Hunter U.S.'s claim prevailed, (i) Hunter U.S. would be enriched, (ii) with a corresponding deprivation of Syncrude, (iii) and for no juristic reason that I am able to detect.

98 The impact of a finding of constructive trust, as per the Court of Appeal, as compared with a finding of entitlement under the terms of the express trust is not minimal. Clause 9 of the trust agreement provides that reasonable legal expenses incurred by the trustee in the performance of his duties and remuneration to the trustee are to be paid from the trust funds. If all of the trust funds are payable to Hunter U.S. under a constructive trust, to whom does the trustee look for payment of his remuneration and the legal expenses he has incurred?

99 I disagree with the interpretation the Court of Appeal and Wilson J. have placed on Syncrude's decision to establish the trust fund. I do not see the creation of the trust as an admission on the part of Syncrude that either Hunter U.S. or Hunter Canada was entitled to the profit under the Hunter Canada contract. Upon suspecting fraud, Syncrude was entitled to rescind the Hunter Canada contract. Until Syncrude was completely convinced that Hunter Canada was fraudulent, rescission entailed a certain amount of risk. Had the litigation between Hunter U.S. and Hunter Can ada been resolved in Hunter Canada's favour, Syncrude would have been vulnerable to an action for breach of contract by Hunter Canada. It could protect itself against a lawsuit by requesting Hunter Canada's approval of its decision to consider the contract at an end. In my view, it was not strictly necessary for Syncrude to secure Hunter Canada's acceptance of its termination of the contract. Nor was it necessary for Syncrude to establish a trust fund. Syncrude's decision to create a trust fund, motivated no doubt by an abundance of caution, should not make it worse off than it would have been had it simply rescinded the contract. There was no onus on Syncrude to secure the approval of Hunter U.S. who was not even a party to the contract, to the terms of the trust fund.

100 The Court of Appeal said at p. 384:

> The trust balance represents the profit Hunter would have earned by designing the 11 gearboxes but for the fraud of Hunter Canada. The judgment of Meredith J. establishes that these funds are rightfully the property of Hunter. So much is acknowledged by Syncrude in the trust agreement. It follows that the trust income is also the property of Hunter.

101 I do not understand how it can be said that the trust balance represented the profit Hunter U.S. would have earned by designing the 11 gearboxes. Hunter U.S. earned its profit on the gearbox design when Syncrude paid Hunter U.S. for 32 mining gearboxes and for the design under the 1975 contract. The judgment of Meredith J. said nothing with respect to Syncrude's entitlement to the funds held in trust as Syncrude was not a party to that action.

102 Wilson J. makes the point that Syncrude was ready to pay the principal contractor's portion to Hunter U.S. and that Syncrude cannot now argue that it had no need of Hunter U.S. Reliance is placed on cl. 7 of the trust agreement. At the time of the agreement Syncrude appears to have been prepared to pay the principal contractor's portion to Hunter U.S., but upon terms to which Hunter U.S. did not agree. Syncrude had no need of Hunter U.S. The facts bear that out. Syncrude's act of establishing a trust fund was not an admission that the trust moneys belonged to either Hunter U.S. or Hunter Canada, but, at most, an indication that it was willing to pay the contract price if it received its negotiated warranties. Even if Hunter U.S. did make an offer to assume the warranties prior to the litigation between Hunter U.S. and Hunter Canada, Syncrude was not then, as I have indicated, in a position to have accepted.

103 I am therefore of the view that Hunter U.S.'s claim to the moneys in the trust fund under constructive trust fails. I am also of the view that Hunter U.S. is not entitled to claim under the express terms of the trust agreement. To qualify

under the trust agreement, Hunter U.S. would have had to agree to the terms of the trust agreement. It did not do so. The most important of these terms was the agreement to assume the Hunter Canada warranty provisions.

104 Clause 10 of the trust agreement made provision for the precise situation which developed. It provides:

> In the event that Syncrude and the holder of the valid and lawful interest in the trust fund are unable to agree with respect to the warranty and service of Work in Schedule "A" of the said Agreement, *the trustee shall pay the remainder of the trust fund*, as determined by Clause 7 and Clause 8 of this Agreement, *to Syncrude*. [emphasis added]

105 The trial judge, at p. 82, gave Hunter U.S. until October 1984, later extended, to assume the warranty and service obligations:

> That valid and lawful interest [the interest of Hunter U.S. in the trust fund] does not crystallize into an entitlement or right to be paid until the condition precedent of assumption of the Hunter Canada warranty and service obligations by agreement with Syncrude has been met. The trust income accruing prior to the date upon which the condition precedent is met belongs to Syncrude under cl. 11 of the trust agreement.

106 In my view, with respect, the judge erred in allowing Hunter U.S. to become entitled to the trust moneys by assuming the warranty obligation after judgment without incurring liability for warranty claims prior to its assumption of the warranties. The purpose of the trust fund was to ensure someone would promptly assume the warranties. Once Hunter U.S. elected not to do this, giving it another chance potentially requires the trustee to hold the fund in perpetuity. The trial judge erred by arbitrarily imposing a later date than that which would have entitled Hunter U.S. to the trust fund.

107 I am of the view that the judgment of the Court of Appeal of British Columbia be set aside. The cross-appeal of Syncrude should be allowed with costs here and below. The appeal of Hunter U.S. should fail and must be dismissed with costs. The appeal from that part of the judgment of the Court of Appeal which imposed liability on Allis-Chalmers Canada Limited should be allowed with costs here and below, payable by Syncrude.

***McIntyre J.*:**

108 I agree with Wilson J. that the appeal of "Hunter U.S." against the finding of liability for a design fault should be dismissed and I agree, as well, that the appeal of "Allis-Chalmers" should succeed. I agree with Wilson J. that any breach of the contract by Allis-Chalmers was not fundamental and, in any event, even if the breach were properly characterized as fundamental, the liability of Allis-Chalmers would be excluded by the terms of the contractual warranty. In my view, it is therefore unnecessary to deal further with the concept of fundamental breach in this case.

109 As to the issue concerning the trust fund, I agree with the Chief Justice that the cross-appeal, claiming ownership of the trust fund, by "Syncrude", should be allowed with costs here and below, and I agree with his reasons for reaching this conclusion. In the result, then, I would dispose of the appeal as would the Chief Justice.

***Wilson J.* (dissenting in cross-appeal) (*L'Heureux-Dubé J.* concurring):**

110 This appeal and cross-appeal raise a variety of issues relating to the interpretation of engineering contracts. They also require the court to consider the effect of exclusionary clauses in the context of implied statutory warranties and in the context of fundamental breach. The viability of the doctrine of fundamental breach is itself in issue as is also the applicability of the law of constructive trust to the facts of this case.

1. The Facts

111 The disputes between these parties arise out of three contracts for the supply of gearboxes for the Alberta tar sands industry. In the first contract, made on 29th January 1975, Syncrude Canada Ltd. ("Syncrude"), through its agent Canadian Bechtel, ordered 32 "mining gearboxes" from the Hunter Engineering Company Inc. ("Hunter U.S."). These

gearboxes were intended to drive conveyor belts which move sand to Syncrude's extraction plant at Fort McMurray where the oil is separated out. The responsibility of each of the contracting parties for the various design features of the gearboxes is one of the matters in dispute before the court and I will deal below with these aspects of the contract. The 32 mining gearboxes were manufactured by a subcontractor (ACO Sales and Engineering), delivered to Syncrude between January 1977 and February 1978, and entered service on 4th July 1978.

112 The second contract was made on 29th July 1975 between Syncrude and Stephens-Adamson Ltd., a division of Allis-Chalmers Canada Ltd. ("Allis-Chalmers"). It was for the supply of a $4.1 million extraction conveyor system which included four "extraction gearboxes" to drive the machinery which separates the oil from the sand. Although supplied un der the contract with Allis-Chalmers, they were built according to the same design as the mining gearboxes supplied by Hunter U.S. and like them were fabricated by the subcontractor ACO. The extraction gearboxes entered service on 24th November 1977.

113 The third contract was made between Syncrude and ACO on 1st March 1978. It arose out of some unusual circumstances. Between August and December 1977 Syncrude issued purchase orders to Hunter Machinery Canada Ltd. ("Hunter Canada") for an additional 11 mining gearboxes built to the same design as the 32 purchased from Hunter U.S. Hunter Canada was a Canadian-incorporated company established by employees of Hunter U.S. without the latter's knowledge. It held itself out to Syncrude as the Canadian arm of Hunter U.S. and not until January 1978 did Hunter U.S. discover the deception. It initiated a "passing-off" action against Hunter Canada in the British Columbia courts, notified Syncrude and offered to assume the Hunter Canada contract. Syncrude, however, opted not to prejudge the result of the litigation by agreeing to let Hunter U.S. step into the contractual shoes of Hunter Canada and, instead of accepting this offer, it contracted directly with the subcontractor ACO for supply of the 11 gearboxes which were the subject of the Hunter Canada contract at an identical price to that which ACO would have received from Hunter Canada. These 11 gearboxes were delivered and progressively put into service between May and December 1978.

114 Then, in March 1978 Syncrude unilaterally established a trust fund into which it paid the money due under the Hunter Canada contracts. Hunter Canada waived all rights under these contracts but Hunter U.S. refused to become a party to Syncrude's trust agreement. That agreement provided, inter alia, that the trustee would pay to ACO its price for the gearboxes when they were completed. The rest of the money in the fund was to be dealt with as follows:

> 7. The trustee shall hold the remainder of the trust funds and trust income for payment pending determination by agreement between Hunter Canada and Hunter Engineering, or by a decision of a Court of competent jurisdiction in Canada as to the identity of the holder of a valid and lawful interest in the remainder of trust funds as between Hunter Engineering and Hunter Canada, or upon determination of certain issues in Canada, currently the subject of legal proceedings between Hunter Engineering and Hunter Canada by settlement agreement or by a decision of a Court of competent jurisdiction in Canada.

Clause 8 of the fund made any such payment contingent upon an assumption by Hunter U.S. or Hunter Canada of the warranty and service obligations contained in Syncrude's 1977 agreements with the latter. Clause 9 provided for the payment of the trustee's expenses out of the fund. Clause 10 stated that if the winner of the Hunter U.S.-Hunter Canada litigation did not assume the service and warranty obligations mentioned in cl. 8, the money would go to Syncrude. Clause 11 specified that any money remaining after payment to ACO and satisfaction of the requirements of cls. 7-9, including any trust income, would be paid to Syncrude.

115 In December 1978 Meredith J. of the British Columbia Supreme Court gave judgment to Hunter U.S. (*Hunter Engr. Co. v. Hunter Machinery Can.*, Vancouver No. C780211, 28th December 1978 (unreported)). The judgment included a declaration that as between Hunter U.S. and Hunter Canada the former was entitled to the money referred to in cl. 7 of the trust agreement. The trust fund remained in place, however, because the parties could not agree on warranty and service terms. Hunter U.S. wanted the same terms as in its other contract with Syncrude. The latter insisted on the more extensive guarantees contained in its contract with Hunter Canada and specifically mentioned in the trust agreement. I pause here to note that this dispute arose before the defects in the gearboxes discussed below were discovered.

116 In September 1979 defects were discovered in the extraction gearboxes. These gearboxes were made up of gears, shafts and bearings housed within a steel casing. Each box contained a number of smaller gears and one large one, the bull gear, some 6 1/2 feet in diameter. The bull gear attaches to the drive shaft by two steel plates, one on each side of the rim. It was found that the welds joining these side plates and the rim had cracked under the strain because the welding was not continuous all the way around the rim. The extraction gearboxes were progressively taken out of service and repaired, primarily by putting in a continuous weld. This apparently solved the problem. On examination in October 1979 the same problem was discovered with the smaller (5 1/2 feet in diameter) bull gears in the mining gearboxes. All 47 gearboxes were progressively taken out of service and repaired. Total repair expenses, not including interest, amounted to $750,000 for the mining gearboxes and $400,000 for the extraction gearboxes. Neither Hunter U.S. nor Allis-Chalmers considered themselves responsible for these repair expenses on the grounds that their contractual warranties had expired. Syncrude commenced proceedings in the British Columbia courts.

2. The Judgments Below

(a) British Columbia Supreme Court

117 In a judgment delivered in July 1984 and reported at 27 B.L.R. 59, the trial judge, Gibbs J., dealt first with the question of design responsibility. This was a threshold issue since Hunter U.S. had argued before him that Canadian Bechtel, Syncrude's agent, provided the design on the basis of which Hunter U.S. built the gearboxes. The trial judge found, however, that while Bechtel had provided specifications which gave "detailed operating criteria", these specifications did "not extend to design details". Design was Hunter U.S.'s responsibility and the trial judge's review of the evidence convinced him that the failure of the gearboxes was due to design default.

118 Having established the prima facie responsibility of both Hunter U.S. and Allis-Chalmers, Gibbs J. considered the effect of the warranty clauses in the sales agreements. Both contained the following clause:

> 8. WARRANTIES — GUARANTEES: Seller warrants that the goods shall be free from defects in design, material, workmanship, and title, and shall conform in all respects to the terms of this purchase order, and shall be of the best quality, if no quality is specified. If it appears within one year from the date of placing the equipment into service for the purpose for which it was purchased, that the equipment, or any part thereof, does not conform to these warranties and Buyer so notifies Seller within a reasonable time after its discovery, Seller shall thereupon promptly correct such nonconformity at its sole expense. The conditions of any subsequent tests shall be mutually agreed upon and Seller shall be notified of and may be represented at all tests that may be made. Except as otherwise provided in this purchase order, Seller's liability hereunder shall extend to all damages proximately caused by the breach of any of the foregoing warranties or guarantees, but such liability shall in no event include loss of profit or loss of use.

Both warranties were modified by the purchase orders so that they expired either 24 months after delivery or 12 months after the gearboxes entered service, whichever occurred first. Gibbs J. found that the time limit in the warranties excused both companies from liability under them.

119 This did not, however, dispose of the issue of liability because the general conditions of each agreement also provided that:

> 13. APPLICABLE LAW — DEFINITIONS: The definition of terms used, interpretation of this agreement and the rights of all parties hereunder shall be construed under and governed by the Laws of the Province of Ontario.

The Ontario Sale of Goods Act, R.S.O. 1970, c. 421, s. 15, provides a statutory warranty of fitness:

> 15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

120 Gibbs J. found that this statutory warranty was not excluded by the contractual warranty. It was therefore applicable to the Hunter U.S. contracts. In deciding whether Hunter U.S. had breached the statutory warranty, he applied the following test from Fridman, Sale of Goods in Canada, 2nd ed. (1979), at pp. 203-204:

> The implied condition set out in section 15(1) applies, except where the proviso to that subsection operates, "where the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not)" and "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment." Three factors are therefore relevant: (1) the course of the seller's business: (ii) knowledge on the part of the seller of the purpose of the goods: (iii) reliance on the seller's skill or judgment. Only if a contract of sale satisfies these requirements will it be possible to imply into the condition of fitness of the goods that is contained in this subsection.

Gibbs J. found that all three aspects of the test were met. The gearboxes "were goods which it was in the course of the business of Hunter U.S. to supply" and Hunter U.S. "knew the purpose for which the gearboxes were required". The third aspect of the test [p. 72]:

> ... is satisfied by the express provision in the Canadian Bechtel specifications, incorporated by reference into the Hunter U.S. purchase order that: "Correct and adequate design is the Seller's sole responsibility". I understand those words to convey, in plain and simple language, that Syncrude, through Canadian Bechtel, was relying upon the skill and judgment of Hunter U.S. in matters of gearbox design. It is evident from the [evidence] that they held themselves out as being possessed of the requisite skill and judgment.

121 This finding applied only to the contracts between Syncrude and Hunter U.S. The Allis-Chalmers purchase order, in addition to modifying the sales agreement in the same way as that of Hunter U.S., also contained this more extensive change:

> The final sentence of Paragraph 8 is hereby deleted. In its place shall be, "The Provisions of this paragraph represent the only warranty of the Seller and no other warranty or conditions, statutory or otherwise shall be implied."

Gibbs J. considered this sufficient to exclude the statutory warranty in the Allis-Chalmers contract.

122 The trial judge then turned his attention to Syncrude's claim that Allis-Chalmers had nevertheless committed a fundamental breach of contract so as to negate the exclusion clause. He rejected the argument for two reasons. First, he held at p. 77 that Syncrude had fully and freely accepted the exclusion clause:

> With respect to the clause excluding statutory or other warranties or conditions, it is significant to me that liability was not completely excluded. Liability still existed under warranty cl. 8 of the general conditions, limited only in time to the twelve or twenty-four month period. Warranty cl. 8 was put forward by Syncrude. Presumably it provided the protection Syncrude wanted ... Syncrude freely accepted the time limitations; there is no evidence that they were under any disadvantage or disability in the negotiating of them. There is no reason why they should not be held to their bargain, including that part which effectively excludes the implied condition of s. 15(1) of the Ontario Sale of Goods Act.

Second, he did not consider that the problems with the gearboxes amounted to a fundamental breach (pp. 77-78):

> As to the nature of the defect, in my opinion it was not so fundamental that it went to the root of the contract. The contract between the parties was still a contract for gearboxes. Gearboxes were supplied. They were capable of performing their function and did perform it for in excess of a year which, given the agreed time limitations, was the "cost free to Syncrude" period contemplated by the parties. It was conceded that the gearboxes were not fit for the service. However, the unfitness, or defect, was repairable and was repaired at a cost significantly less than the original purchase price ... On my appreciation of the evidence Syncrude got what it bargained for from Stephens-Adamson. It has not convinced me that there was fundamental breach.

123 The final issue dealt with at trial concerned the trust fund unilaterally set up by Syncrude pending the outcome of the Hunter U.S./Hunter Canada litigation. When Hunter U.S. initiated its passing-off action it offered to assume the entire Hunter Canada contract with Syncrude, including this warranty:

> SELLER expressly warrants that the goods covered by this order are of merchantable quality, and satisfactory and safe for the use of the PURCHASER. Acceptance of the order shall constitute an agreement upon SELLER'S part to indemnify and hold the PURCHASER harmless from liability, loss, damage and expense, incurred or sustained by PURCHASER by reason of the failure of the goods to conform to such warranties.

As noted above, Syncrude opted instead to set up the trust fund, including the provision that acceptance of the Hunter Canada warranty was a precondition to receiving payment from it. After Hunter U.S. was successful in its action against Hunter Canada it was no longer prepared to assume the full warranty, preferring to substitute the same guarantees as were contained in its other contract with Syncrude, and claimed ownership of the fund on that basis.

124 By the time this matter came to trial the trust fund held $420,000. The cost of repairs to the 11 mining gearboxes, for which Hunter U.S. had been found liable, was $200,000 inclusive of prejudgment interest. Gibbs J. held that Syncrude should receive the income from the original fund and that Hunter U.S. was entitled to the principal of $242,229 but only if it met the conditions, particularly the warranty obligation, of the Hunter Canada contract. Hunter U.S. was given approximately two months to do so, failing which Syncrude would be entitled to keep all the money. Gibbs J. rejected an argument by Hunter U.S. that it was entitled to the entire fund "under the doctrines of constructive trust and unjust enrichment". He said at p. 81:

> In my opinion, the entitlement to the trust moneys is to be determined solely in accordance with the terms of the trust agreement ... There was no fiduciary relationship between Syncrude and Hunter U.S.; there had not been a payment of money or delivery of property by Hunter U.S. to Syncrude under circumstances where it would be against conscience for Syncrude to retain it; Hunter U.S. was not a party with Syncrude to any agreement which gave Hunter U.S. a claim on Syncrude's funds. Hunter U.S. had, and established, a claim against Hunter Canada. If Syncrude had paid the purchase price to Hunter Canada, on the authorities, Hunter U.S. could have recovered the profit element from Hunter Canada because of the fiduciary duty owed to Hunter U.S. by those of its employees who were the owners of Hunter Canada. In my opinion however, in the absence of the trust agreement, Hunter U.S. would have no claim against Syncrude. It had not contracted with Syncrude, nor had it provided any of those things for which profit stands as compensation, such as risk capital, skilled and knowledgeable staff, supervision, overhead, and like matters. None of its plant or personnel had been used.

The final judgment in favour of Syncrude was for $750,000 plus prejudgment interest plus whatever sum it eventually kept from the trust fund.

(b) British Columbia Court of Appeal

125 Syncrude appealed the finding of no fundamental breach by Allis-Chalmers and Hunter U.S. cross-appealed the other findings by Gibbs J. The Court of Appeal (Carrothers, Aikins and Anderson JJ.A.), in a judgment reported

at 68 B.C.L.R. 367, rejected Hunter U.S.'s appeal on its liability under the statutory warranty primarily by adopting the reasoning of the trial judge. Anderson J.A., for the court, in dealing with Hunter U.S.'s argument that it was not responsible for the design faults, added this comment at p. 377:

> ... the reasons for judgment of the learned trial judge were based on a comprehensive consideration of the evidence. He heard all the witnesses and examined all of the documentary evidence and it is difficult, if not impossible, for this court to substitute its judgment for that of the trial judge by fragmentary reference to the evidence and the contract documents, as counsel for Hunter would have us do. Palpable and overriding error cannot be demonstrated in that way.

126 The Court of Appeal did, however, allow Hunter U.S.'s appeal on the ownership of the income from the trust fund. Anderson J.A. said at p. 382:

> In my opinion, this issue falls to be determined by reference to the judgment of the Supreme Court of Canada in *Pettkus v. Becker* ... In that case, Dickson J. (as he then was), speaking for the majority, set forth the criteria necessary to establish a successful claim for unjust enrichment as being:
>
> (1) An enrichment of the defendant;
>
> (2) A corresponding deprivation of the plaintiff;
>
> (3) The absence of a juristic reason for the enrichment.

He then held that, were Syncrude to retain the trust income, it would be unjustly enriched and Hunter U.S. correspondingly deprived of income from profit rightfully theirs but for the fraud of Hunter Canada. No juristic reasons justified the enrichment of Syncrude. Provided Hunter U.S. adopted the warranty obligations in the Hunter Canada contract, it was entitled to the fund after trustee's expenses minus the sum required to repair the 11 gearboxes, i.e., $200,000.

127 The Court of Appeal also allowed Syncrude's appeal against Allis-Chalmers on the question of fundamental breach. Anderson J.A. found that the warranty exclusion clause, although broad, was not broad enough " 'to destroy the foundation of the contract and its business efficacy by eliminating the ... essential undertaking' of Allis-Chalmers to provide gearboxes capable of meeting the requirements of the extraction process" (p. 392). He then went on to note:

> There is, however, another compelling reason for holding that the warranty clause was not intended to exclude claims for "fundamental breach". The contract between Syncrude and Allis-Chalmers included a "Limitation of Liability" clause, reading as follows:
>
> > Paragraph 14 — Limitation of Liability
> >
> > Notwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, *fundamental* or otherwise or from any tortious act or omissions of their respective amployees [sic] or agents and in no event shall the liability of the Seller exceed the unit price of the defective product or of the product subject to late delivery.
>
> [The italics are mine.]
>
> It will be seen that this clause clearly stipulates that Allis-Chalmers shall not be liable "for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, *fundamental* or otherwise". It follows that if claims for "fundamental breach" were excluded by the terms of the warranty clause, it would not have been necessary to make specific provision for the exclusion of liability in cases where the

"fundamental" breach resulted in a "loss of use" claim. In other words, when the parties intended to exclude liability for "fundamental breach", they said so in clear and express terms.

128 Having found that liability for fundamental breach was not excluded, Anderson J.A. held Allis-Chalmers liable on that ground. The cost of repairs was 86 per cent of the purchase price and the bull gear failed after less than two years' service when it should have lasted for ten. Accordingly, "Allis-Chalmers was in 'fundamental' breach because Syncrude was deprived of substantially the whole benefit of the contract" [p. 393].

129 The Court of Appeal's judgment thus gave Syncrude the $750,000 it had won at trial plus $400,000 for repairs to the extraction gearboxes. Interest on both these sums brought the total to $1.535 million.

3. The Issues Before This Court

130 Both Hunter U.S. and Allis-Chalmers appealed to this court and there is also a cross-appeal by Syncrude concerning the Court of Appeal's award of the trust fund to Hunter U.S. Four separate grounds of appeal were argued. I will deal with them in the following order:

131 (i) the liability of Hunter U.S. for the design faults which caused the gearboxes to fail;

132 (ii) the liability of Hunter U.S. under the statutory warranty in the Sale of Goods Act;

133 (iii) the liability of Allis-Chalmers under the doctrine of fundamental breach;

134 (iv) the ownership of the trust fund.

(i) Responsibility for design faults

135 In argument before this court Mr. Giles, counsel for Hunter U.S., devoted much of his time to this aspect of the appeal. He sought to persuade us that Hunter U.S. had merely designed the gears according to the specifications laid down by Canadian Bechtel, Syncrude's agent. Accordingly, if the specifications were inadequate for the task to be performed, the fault was that of Syncrude and not Hunter U.S. Hunter U.S. could only be to blame if its design failed to meet those specifications. Since Syncrude led no evidence to show that Hunter U.S.'s design failed to comply with Bechtel's specifications, the verdict of the trial judge was unreasonable.

136 As noted in my review of the judgments below, this argument was considered and rejected both by the trial judge and the British Columbia Court of Appeal. I do not believe that Mr. Giles' position finds any support in the terms of the contract between the parties. I would accordingly adopt the findings of the courts below on this issue. I will, however, add some observations of my own. In the purchase order of 29th January 1975 Hunter U.S.'s task is stated to be to "furnish all labour and material for the design, fabrication and delivery of the following equipment in accordance with specification 9776-3T-14 in your possession". The use of the word "design" in addition to "fabrication" indicates a creative role for Hunter U.S. going well beyond the mere construction of a gearbox from specifications prepared for Syncrude by Canadian Bechtel. The willingness of Hunter U.S. to take on such a role is further evidenced by its tender to Syncrude of 20th February 1974 which contains inter alia the following statements:

> This specification is for a geared drive assembly designed to power a belt conveyor.
>
> This drive group *has been designed for installation and operation in the remote areas and hostile environment normal to the mining industry*. The units are designed for a high degree of reliability based on design arts developed in similar installations ...
>
> This specification has been prepared to qualify HUNTER ENGINEERING COMPANY, INC., as a competent and experienced manufacturer of specialized gear drive equipment.

> Hunter drives are designed for specific applications, incorporating those features required to minimize operational and environmental hazards having an adverse effect on the performance of the unit. *Our market effort is directed towards those unique applications which challenge our designers' ingenuity. Hunter has the engineering, manufacturing and financial resources to supply the complete drive package designed to reliably power any defined processing function.* [emphasis added]

137 Perhaps more significantly, the specifications referred to in the purchase order are, in layman's language, specifications about what the gearboxes were required to do, not specifications of how they were to be built. Section 1.11 of those specifications states that "correct and adequate design is the seller's sole responsibility". Sections 4 and 5 provide information about site elevation, climatic conditions and expected hours of operation of the gears. Section 7 warns the seller of the need for materials able to withstand the extreme climate of the tar sands region. Other sections, particularly s. 10, lay out further details of what the gearboxes were required to do and make reference to how to achieve this. Some of these references are very general, for example, s. 10.1.1:

> 10.1.1 All components shall be of heavy duty design as required for the specified operating conditions.

Some of the references are more specific. For example, in 10.2.6, dealing with "Housings", it states:

> Housings shall be made from steel, stress relieved after welding in accordance with 8.2.2...
>
> Generous inspection openings with bolted and gasketed doors complete with lifting handles shall be provided in the housing cover, to allow for inspection of high speed, intermediate and low speed gearing without removal of major housing sections. In addition, the upper half of the housing shall be removable to allow for removal and replacement of gearing ...
>
> Housings shall be provided with oil level indicators at each point in the housing where oil level is critical to successful reducer performance.

138 I include these extracts merely to illustrate the kinds of general requirements — operating conditions, operating load and hours, desired features — that are put forward in the specifications. Nowhere is there any instruction to Hunter U.S. about what thickness of steel should be used for the gear housings or about how the assembly was to be put together. There may be aspects of this contract where the dividing line between the responsibilities of the parties is unclear but I do not think that this is one of them. I do not believe there is any need to delve further into the details of the contract and Syncrude's specifications. The extracts that I have summarized and quoted demonstrate the different roles played by the parties. Syncrude's specifications are a recitation of what the gearboxes should be able to achieve and general guidelines as to how this should be done. Hunter U.S. took on the task of deciding specific design details. The thickness of the steel plates and the way in which the gear housing was to be welded together were both within Hunter U.S.'s purview. It was these design decisions that proved to be wrong. Hunter U.S.'s appeal on this issue must accordingly fail.

(ii) The statutory warranty

139 Although Hunter U.S. was liable for the design fault that caused the gearboxes to fail, the failure was discovered after the contractual warranty period had expired. For Syncrude to succeed, therefore, it must find an alternative route to establishing Hunter U.S.'s liability. Two issues are of concern here. The first is whether either or both of the exclusionary clauses in the Hunter U.S. and Allis-Chalmers contracts are sufficient to preclude the application of the statutory warranty. If not, then a second issue arises as to whether the gearboxes were "reasonably fit" for their purpose.

140 I would answer these questions in the same way as Gibbs J. and the British Columbia Court of Appeal. Section 15(4) of the Sale of Goods Act provides that an express warranty "does not negative a warranty or condition implied by this Act unless inconsistent therewith". Hunter U.S. argues that it may invoke s. 15(4) because the specific limitation period in its express warranty serves to exclude any other warranty which would extend beyond that period. This argument

runs counter to two long-established and related principles in the law of contract, (1) that an exclusion clause should be strictly construed against the party seeking to invoke it, and (2) that clear and unambiguous language is required to oust an implied statutory warranty: see *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A.C. 394 (H.L.); *R.W. Heron Paving Ltd. v. Dilworth Equip. Ltd.*, [1963] 1 O.R. 201, 36 D.L.R. (2d) 462 (H.C.); *Cork v. Greavette Boats Ltd.*, [1940] O.R. 352, [1940] 4 D.L.R. 202 (C.A.); Fridman, Sale of Goods in Canada, 3rd ed. (1986), p. 282. I would adopt the following statement of the law by Eberle J. of the Ontario Supreme Court in *Chabot v. Ford Motor Co. of Can.* (1982), 39 O.R. (2d) 162, 19 B.L.R. 147, 22 C.C.L.T. 185, 138 D.L.R. (3d) 417 at 430:

> ... although a vendor may exclude conditions implied by the *Sale of Goods Act*, he must use explicit language, in the absence of which the court will not be prepared to find that the conditions have been excluded.

141 In the present case there is clearly no explicit exclusion of the implied warranty contained in the Hunter U.S. contract. I find it equally clear that the revision to the Allis-Chalmers agreement did explicitly and unambiguously oust the statutory warranty by stating: "The Provisions of this paragraph represent the only warranty of the seller and *no other warranty* or conditions, *statutory or otherwise* shall be implied" (my emphasis). The explicit reference to the statutory warranty is crucial here and in my view serves to prevent the application of s. 15(1) of the Sale of Goods Act to the Allis-Chalmers contract.

142 This finding on the Hunter U.S. warranty requires a consideration of whether the gearboxes were, in the words of s. 15(1) of the Act, "reasonably fit" for the purpose for which they were supplied. I think this issue can be disposed of very shortly. It is abundantly clear that Syncrude informed Hunter U.S. of the purpose for which the gearboxes were required, that Syncrude relied on Hunter U.S.'s expertise, and that the gears were "goods ... which it is in the course of the seller's business to supply". It is equally clear that the gears were not reasonably fit for their purpose. The trial judge found as facts that:

143 (a) the gears would normally be expected to work for ten years before needing extensive overhauling;

144 (b) the gears needed to be replaced after only 15 months or so, despite never being put to more than 60 per cent of their intended workload;

145 (c) the cost of repairing the extraction gearboxes was $400,000 compared to the original price of $464,300;

146 Gibbs J.'s conclusion was that in such circumstances the gears could not be considered reasonably fit for their purpose. The Court of Appeal endorsed that finding and I would unequivocally affirm it also. The defects in design were crucial. The cracking was not something that would be expected to happen in the normal lifetime of the gearboxes. I would conclude therefore that Hunter U.S. is liable for the cost of repairs to the mining gearboxes.

(iii) Fundamental breach

147 Fundamental breach has been the subject of many judicial definitions. It has been described as "a breach going to the root of the contract" (*Suisse Atl. Soc. d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361, [1966] 2 W.L.R. 944, [1966] 2 All E.R. 61 (H.L.), per Lord Reid at p. 399), and as one which results "in performance totally different from what the parties had in contemplation" (*R.G. McLean Ltd. v. Can. Vickers Ltd.*, [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.), per Arnup J.A. at p. 20). In *Canso Chem. Ltd. v. Can. Westinghouse Co.* (1974), 54 D.L.R. (3d) 517, 10 N.S.R. (2d) 306 (C.A.), MacKeigan C.J.N.S. gave nine different definitions from leading Canadian and United Kingdom cases. The definitional uncertainty that has pervaded this area of the law is further illustrated by Fridman, Law of Contract in Canada, 2nd ed. (1986), at p. 531, and the cases cited therein.

148 The formulation that I prefer is that given by Lord Diplock in *Photo Production Ltd. v. Securicor Tpt. Ltd.*, [1980] A.C. 827, [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556 (H.L.). A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of *substantially the whole benefit* which it was the intention of the parties that he should obtain from the contract" (p. 849)

(emphasis added). This is a restrictive definition and rightly so, I believe. As Lord Diplock points out, the usual remedy for breach of a "primary" contractual obligation (the thing bargained for) is a concomitant "secondary" obligation to pay damages. The other primary obligations of both parties yet unperformed remain in place. Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to "put an end to all primary obligations of both parties remaining unperformed" (p. 849). It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

149 I do not think the present case involves a fundamental breach. The trial judge had this to say on the question at pp. 77-78:

> As to the nature of the defect, in my opinion it was not so fundamental that it went to the root of the contract. The contract between the parties was still a contract for gearboxes. Gearboxes were supplied. They were capable of performing their function and did perform it for in excess of a year which, given the agreed time limitations, was the "cost free to Syncrude" period contemplated by the parties. It was conceded that the gearboxes were not fit for the service. However, the unfitness, or defect, was repairable and was repaired at a cost significantly less than the original purchase price. No doubt the bull gear is an important component of the gearbox but no more important than the engine in an automobile and in the *Gafco Ent.* case the failure of the engine was not a sufficiently fundamental breach to lead the Court to set aside the contract of sale. On my appreciation of the evidence Syncrude got what it bargained for from Stephens-Adamson. It has not convinced me that there was fundamental breach.

The Court of Appeal, in overturning this finding, seems to have been influenced by two factors: that the repair cost was 85 per cent of the original contract price and that the gear which should have lasted ten years failed after less than two. I will deal with each of these factors in turn.

150 There is an obvious conflict between the judgments below over the relationship between the size of the contract and the cost of repairs. The Court of Appeal treated the contract for the gearboxes as a discrete transaction in coming to its conclusion. The trial judge, however, was influenced by the fact that the overall contract with Allis-Chalmers was for 14 conveyor systems, only 4 of which contained extraction gearboxes. The total cost of these systems was in excess of $4 million. It seems to me that the trial judge was right to take this into account. If he was, then Allis-Chalmers breached only one aspect of its contract with Syncrude, one "primary obligation". Although the gears were obviously an important component of the conveyor system, their inferior performance did not have the effect of depriving Syncrude of "substantially the whole benefit of the contract" to use Lord Diplock's phrase. The cost of repair was only a small part of the total cost.

151 Syncrude bargained for and received bull gears. Clearly, they were not very good gears. They were not reasonably fit for the purposes they were intended to serve. But they did work for a period of time and were repairable. There are numerous cases in which serious but repairable defects in machinery of various kinds have been found not to amount to fundamental breach. In *Gafco Ent. Ltd. v. Schofield*, [1983] 4 W.W.R. 135, 25 Alta. L.R. (2d) 238, 23 B.L.R. 9, 43 A.R. 262 (C.A.), a case relied on by Gibbs J. in this case, the purchaser bought a second-hand car for $12,000 which immediately required some $4,000 worth of engine repairs. Harradence J.A. held that the defects "do not amount to a breach going to the root of the contract. They are repairable, albeit at some expense" (p. 267). Similarly, in *Peters v. Parkway Mercury Sales Ltd.* (1975), 58 D.L.R. (3d) 128, 10 N.B.R. (2d) 703 (C.A.), a transmission failure shortly after the expiration of a 30-day warranty on a used car was found not to be a fundamental breach. Hughes C.J.N.B. said at p. 711:

> In my view the car which the defendant sold the plaintiff was not essentially different in character from what the parties should have had in contemplation. Although the car was in poorer condition than either party probably knew, I do not think the defects amounted to "such a congeries of defects as to destroy the workable character of the machine" and consequently the plaintiff's claim for a declaration that there has been a fundamental breach entitling him to rescission if [sic] the contract fails.

In *Keefe v. Fort* (1978), 89 D.L.R. (3d) 275, 27 N.S.R. (2d) 353 (C.A.), another case involving a faulty but repairable car, Pace J.A. said at p. 279 that "the doctrine of fundamental breach was never intended to be applied to situations where the parties have received substantially what they had bargained for".

152 In the present case the Court of Appeal relied on its own prior judgment in *Beldessi v. Island Equip. Ltd.* (1973), 41 D.L.R. (3d) 147 (B.C.C.A.), which it said was "very similar" to this one (p. 390). *Beldessi*, however, involved a log skidding machine which, despite numerous repairs, never worked properly. It was therefore similar to *R.G. McLean Ltd. v. Can. Vickers Ltd.*, supra, in which a printing press could not be made to function adequately. It seems to me that the present case is more akin to those cited above where the purchaser got a poor, but nonetheless repairable, version of what it contracted for. I do not think that in these circumstances it can be said that the breach undermined the entire contractual setting or that it went to the very root of the contract. It was not, in other words, fundamental. I would therefore allow the appeal by Allis-Chalmers on this issue.

153 However, if I am wrong in this and the breach by Allis-Chalmers is properly characterized as fundamental, the liability of Allis-Chalmers would, in my view, be excluded by the terms of the contractual warranty.

154 Prior to 1980, in both the United Kingdom and in Canada, there were two competing views of the consequences of fundamental breach. One held that there was a rule of law that a fundamental breach brought a contract to an end, thereby preventing the contract breaker from relying on any clause exempting liability. This view was most closely identified with Lord Denning in the English Court of Appeal: see *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866; *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co.*, [1970] 1 Q.B. 447, [1970] 2 W.L.R. 198, [1970] 1 All E.R. 225. The other view was that exemption clauses should be construed by the same rules of contract interpretation whether a fundamental breach had occurred or not. Whether or not liability was excluded was to be decided simply on the construction of the contract: see *Suisse Atl.*, supra, *Traders Fin. Corp. v. Halverson* (1968), 2 D.L.R. (3d) 666 (B.C.C.A.); *R.G. McLean Ltd. v. Can. Vickers Ltd.*, supra.

155 In England the issue was unequivocally resolved by the House of Lords in favour of the construction approach in the *Photo Production* case. The defendants Securicor had contracted to provide security services for the plaintiff's factory. One of the security guards deliberately set a fire which destroyed the building. When sued, Securicor pleaded the following exemption clause:

> 1. Under no circumstances shall the company [Securicor] be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any event, shall the company be held responsible for (a) Any loss suffered by the customer through burglary, theft, fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment ...

Lord Wilberforce, on behalf of all the other Law Lords, stated succinctly at pp. 842-43:

> ... the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract.

Lord Wilberforce gave three reasons in support of this conclusion. Firstly, the rule of law approach was based on faulty reasoning. He said at p. 844:

> I have, indeed, been unable to understand how the doctrine can be reconciled with the well accepted principle of law, stated by the highest modern authority, that when in the context of a breach of contract one speaks of "termination," what is meant is no more than that the innocent party or, in some cases, both parties, are excused from further performance. Damages, in such cases, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract itself says about damages — whether it "liquidates" them, or limits them, or excludes them?

Secondly, the courts should allow the parties to make their own bargain. The courts' role should be limited to upholding that bargain (p. 843):

> At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be. What, for example, would have been the position of the respondents' factory if instead of being destroyed it had been damaged, slightly or moderately severely? At what point does the doctrine (with what logical justification I have not understood) decide, ex post facto, that the breach was (factually) fundamental before going on to ask whether legally it is to be regarded as fundamental? How is the date of "termination" to be fixed? Is it the date of the incident causing the damage, or the date of the innocent party's election, or some other date? All these difficulties arise from the doctrine and are left unsolved by it.
>
> At the judicial stage there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals.

Lord Diplock in his concurring reasons stressed that parties of equal bargaining power should be allowed to make their own bargains. He said at p. 851:

> In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only ...

Thirdly, Lord Wilberforce, while recognizing that fundamental breach "has served a useful purpose" in the area of consumer and standard form contracts, found that legislation in the form of the Unfair Contract Terms Act, 1977 (U.K.), c. 50, had taken the place of judicial intervention in that area. He noted at p. 843 that the Act "applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable". For the future, the courts did not need to lay down rules to cover such situations and should refrain from doing so in other circumstances (p. 843):

> It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.

Lord Wilberforce concluded that the exemption clause in the case, even interpreted contra proferentem, was sufficiently clear to exclude liability.

156 The construction approach to exclusionary clauses in the face of a fundamental breach affirmed in *Photo Production* was adopted by this court as the law in Canada in *Beaufort Realties (1964) Inc. v. Chomedey Aluminum Co.*, [1980] 2 S.C.R. 718, 15 R.P.R. 62, 116 D.L.R. (3d) 193, *(*sub nom. *Beaufort Realties (1964) Inc. v. Belcourt Const. (Ottawa) Ltd.)* 33 N.R. 460 [Ont.]. The court did not, however, reject the concept of fundamental breach. The respondent entered into a construction contract with Beaufort in which it agreed to waive all liens for work and materials provided in the event of a failure to make payments. Such a failure took place and Justice Ritchie had no difficulty in concluding that the failure constituted a fundamental breach. He adopted Lord Wilberforce's construction approach to the exclusion clause and stated at p. 725 "that the question of whether such a clause was applicable where there was a fundamental breach was to be determined according to the true construction of the contract".

157 As Professor Waddams noted (see (1981), 15 Univ. of B.C. L. Rev. 189) shortly after this court's decision in *Beaufort Realties*:

> ... the Supreme Court of Canada followed the House of Lords in holding that there is no rule of law preventing the operation of exclusionary clauses in cases of fundamental breach of contract. The effect of such clauses is now said to depend in each case on the true construction of the contract.

158 Thus, the law in Canada on this point appears to be settled. Some uncertainty, however, does remain primarily with regard to the application of the construction approach. Some decisions of our courts clearly follow the construction approach in both theory and practice. In *Hayward v. Mellick* (1984), 45 O.R. (2d) 110, 26 B.L.R. 156, 5 D.L.R. (4th) 740, 2 O.A.C. 161 (C.A.), for example, Weatherston J.A. noted that as "the courts of this province adopted the doctrine from the English courts, I think we should now follow their lead in rejecting it as a rule of law" (p. 168). Even when the exclusion clause in issue was "strictly construed" Weatherston J.A. recognized at p. 168 that "it would be too strained a construction of the disclaimer clause to say that it applies only to representations that are not negligent. I think that effect must be given to it". He went on to hold that the exclusion clause in that case was sufficient to cover any breach of contract.

159 Commentators seem to be in agreement, however, that the courts, while paying lip service to the construction approach, have continued to apply a modified "rule of law" doctrine in some cases. Professor Fridman in Law of Contract in Canada has suggested at p. 558 that:

> Under the guise of "construction", some courts appear to be utilizing something very much akin to the "rule of law" doctrine. What Canadian courts may be doing is to apply a concept of "fair and reasonable" construction in relation to the survival of the exclusion clause after a fundamental breach, and the application of such a clause where the breach in question involves not just a negligent performance of the contract, but the complete failure of the party obliged to fulfil the contract in any way whatsoever.

Professor Ogilvie, in a review of Canadian cases decided shortly after *Photo Production*, including *Beaufort Realties* itself, argues that the rule of law approach "has been replaced by a substantive test of reasonableness which bestows on the courts at least as much judicial discretion to intervene in contractual relationships as fundamental breach ever did": see Ogilvie, "The Reception of *Photo Production Ltd. v. Securicor Transport Ltd.* in Canada: *Nec Tamen Consumebatur*" (1982), 27 McGill L.J. 424, at p. 441.

160 Little is to be gained from a review of the recent cases which have inspired these comments. Suffice it to say that the law in this area seems to be in need of clarification. The uncertainty might be resolved in either of two ways. The first way would be to adopt *Photo Production* in its entirety. This would include discarding the concept of fundamental breach. The courts would give effect to exclusion clauses on their true construction regardless of the nature of the breach. Even the party who had committed a breach such that the foundation of the contract was undermined and the very thing bargained for not provided could rely on provisions in the contract limiting or excluding his or her liability. The only relevant question for the court would be: on a true and natural construction of the provisions of the contract, did the parties, *at the time the contract was made*, succeed in excluding liability? This approach would have the merit of importing greater simplicity into the law and consequently greater certainty into commercial dealings, although the results of enforcing such exclusion clauses could be harsh if the parties had not adequately anticipated or considered the possibility of the contract's disintegration through fundamental breach.

161 The other way would be to import some "reasonableness" requirement into the law so that courts could refuse to enforce exclusion clauses in strict accordance with their terms if to do so would be unfair and unreasonable. One far-reaching "reasonableness" requirement which I would reject (and which I believe was rejected in *Beaufort Realties* both by this court and the Ontario Court of Appeal) would be to require that the exclusion clause be per se a fair and reasonable contractual term in the contractual setting or bargain made by the parties. I would reject this approach

because the courts, in my view, are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them. Too many elements are involved in such an assessment, some of them quite subjective. It was partly for this reason that this court in *Beaufort Realties* and the House of Lords in *Photo Productions* clearly stated that exclusion clauses, like all contractual provisions, should be given their natural and true construction. Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them ex post facto to have been an unfair and unreasonable clause.

162 I would accordingly reject the concept that an exclusion clause in order to be enforceable must be per se a fair and reasonable provision at the time it was negotiated. The exclusion clause cannot be considered in isolation from the other provisions of the contract and the circumstances in which it was entered into. The purchaser may have been prepared to assume some risk if he could get the article at a modest price or if he was very anxious to get it. Conversely, if he was having to pay a high price for the article and had to be talked into the purchase, he may have been concerned to impose the broadest possible liability on his vendor. A contractual provision that seems unfair to a third party may have been the product of hard bargaining between the parties and, in my view, deserves to be enforced by the courts in accordance with its terms.

163 It is, however, in my view an entirely different matter for the courts to determine *after a particular breach has occurred* whether an exclusion clause should be enforced or not. This, I believe, was the issue addressed by this court in *Beaufort Realties*. In *Beaufort* this court accepted the proposition enunciated in *Photo Production* that no rule of law invalidated or extinguished exclusion clauses in the event of fundamental breach but rather that they should be given their natural and true construction so that the parties' agreement would be given effect. Nevertheless the court, in approving the approach taken by the Ontario Court of Appeal in *Beaufort*, recognized at the same time the need for courts to determine whether *in the context of the particular breach which had occurred* it was fair and reasonable to enforce the clause in favour of the party who had committed that breach even if the exclusion clause was clear and unambiguous. The relevant question for the court in *Beaufort* was: is it fair and reasonable in the context of this fundamental breach that the exclusion clause continue to operate for the benefit of the party responsible for the fundamental breach? In other words, should a party be able to commit a fundamental breach secure in the knowledge that no liability can attend it? Or should there be room for the courts to say: this party is now trying to have his cake and eat it too. He is seeking to escape almost entirely the burdens of the transaction but enlist the support of the courts to enforce its benefits.

164 It seems to me that the House of Lords was able to come to a decision in *Photo Production* untrammelled by the need to reconcile the competing values sought to be advanced in a system of contract law such as ours. We do not have in this country legislation comparable to the United Kingdom's Unfair Contract Terms Act, 1977. I believe that in the absence of such legislation Canadian courts must continue to develop through the common law a balance between the obvious desirability of allowing the parties to make their own bargains and have them enforced through the courts and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves. I fully agree with the commentators that the balance which the courts reach will be made much clearer if we do not clothe our reasoning "in the guise of interpretation". Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts. Whether the courts address this narrowly in terms of fairness as between the parties (and I believe this has been a source of confusion, the parties being, in the absence of inequality of bargaining power, the best judges of what is fair as between themselves) or on the broader policy basis of the need for the courts (apart from the interests of the parties) to balance conflicting values inherent in our contract law (the approach which I prefer), I believe the result will be the same since the question essentially is: in the circumstances that have happened, should the court lend its aid to A to hold B to this clause?

165 In affirming the legitimate role of our courts at common law to decide whether or not to enforce an exclusion clause in the event of a fundamental breach, I am not unmindful of the fact that means are available to render exclusion clauses unenforceable even in the absence of a finding of fundamental breach. While we do not have legislation comparable to the United Kingdom's Unfair Contract Terms Act, 1977, we do have some legislative protection in this area. Six provinces prevent sellers from excluding their obligations under Sale of Goods Acts where consumer sales are concerned: see Consumer Protection Act, R.S.O. 1980, c. 87, s. 34(1); Consumer Protection Act, R.S.N.S. 1967, c. 53, s. 20C, as amended by S.N.S. 1975, c. 19; Consumer Protection Act, R.S.M. 1970, c. C200, s. 58(1); Sale of Goods Act, R.S.B.C. 1979, c. 370, s. 20; Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, ss. 24-26 (except insofar as an exclusion is fair and reasonable); Consumer Products Warranties Act, R.S.S. 1978, c. C-30, ss. 8 and 11. In addition, some provinces have legislation dealing with unfair business practices which affects the application of some exclusion clauses: see Business Practices Act, R.S.O. 1980, c. 55, s. 2(*b*)(vi); Trade Practice Act, R.S.B.C. 1979, c. 406, s. 4(*e*); Unfair Trade Practices Act, R.S.A. 1980, c. U-3, s. 4(*b*), (*d*); Trade Practices Inquiry Act, R.S.M. 1987, c. T110, s. 2; Trade Practices Act, S.N. 1978, c. 10, s. 6(*d*); Business Practices Act, S.P.E.I. 1977, c. 31, s. 3(*b*)(vi). Such legislation, in effect, imposes limits on freedom of contract for policy reasons.

166 There are, moreover, other avenues in our law through which the courts (as opposed to the legislatures) can control the impact of exclusion clauses in appropriate circumstances. Fundamental breach has its origins in that aspect of the doctrine of unconscionability which deals with inequality of bargaining power: see Waddams, "Unconscionability in Contracts" (1976), 39 Modern L. Rev. 369. As Professor Ziegel notes in Comment (1979), 57 Can. Bar Rev. 105, at p. 113:

> The initial impulse that prompted the development of the doctrine of fundamental breach was very sound insofar as it was designed to prevent overreaching of a weaker party by a stronger party. The impulse became distorted when subsequent courts confused cause and effect and treated the doctrine, albeit covertly, as expressing a conclusive rule of public policy regardless of the circumstances of the particular case. *What is needed therefore is a return to a regime of natural construction coupled with an explicit test of unfairness tailored to meet the facts of particular cases*. [emphasis added]

167 The availability of a plea of unconscionability in circumstances where the contractual term is per se unreasonable *and* the unreasonableness stems from inequality of bargaining power was confirmed in Canada over a century ago in *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch.). It has been used on many subsequent occasions: see *Morrison v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.); *Taylor v. Armstrong* (1979), 24 O.R. (2d) 614, 99 D.L.R. (3d) 547 (H.C.).

168 While this is perhaps not the place for a detailed examination of the doctrine of unconscionability as it relates to exclusion clauses, I believe that the equitable principles on which the doctrine is based are broad enough to cover many of the factual situations which have perhaps deservedly attracted the application of the "fair and reasonable" approach in cases of fundamental breach. In particular, the circumstances surrounding the making of a consumer standard form contract could permit the purchaser to argue that it would be unconscionable to enforce an exclusion clause. *Davidson v. Three Spruces Realty Ltd.; Farr v. Three Spruces Realty Ltd.; Elsdon v. Three Spruces Realty Ltd.*, [1977] 6 W.W.R. 460, 79 D.L.R. (3d) 481 (B.C.S.C.), is a case in point. The plaintiff and others deposited valuables with the defendants. When they were stolen as a result of the latter's negligence, a broad exclusion clause was pleaded. Anderson J. found the defendant liable for fundamental breach and for misrepresentation but he also expressed the view that the exclusion clause should not be applied because of unconscionability. He said at pp. 492-93:

> Counsel for the bailee submits that the Courts should not interfere with freedom of contract. He submits that if the parties to contracts are not held to the terms of their bargain, however harsh or one-sided, the element of certainty so important in the commercial world will be eliminated. He submits that the plaintiffs agreed in writing, in clear terms, that the bailee would not be responsible for any negligence on its part ...

> I agree that as a general rule, apart from fraud, it would be a dangerous thing to hold that contracts freely entered into should not be fully enforced. It is not correct, however, to suppose that there are no limitations on freedom of contract. The point has been reached in the development of the common law where, in my opinion, the Courts may say, in certain circumstances, that the terms of a contract, although perfectly clear, will not be enforced because they are entirely unreasonable ...
>
> I take the view that the Courts are not bound to accept all contracts at face value and enforce those contracts without some regard to the surrounding circumstances. I do not think that standard form contracts should be construed in a vacuum. I do not think that mere formal consensus is enough. *I am of the opinion that the terms of a contract may be declared to be void as being unreasonable where it can be said that in all the circumstances it is unreasonable and unconscionable to bind the parties to their formal bargain*. [emphasis added]

He concluded at p. 494:

> (c) Even if the limitation clause was such as to protect the bailee against conduct amounting to a fundamental breach, the clause is, in all the circumstances, so offensive to all right-thinking persons that the Courts will hold that to allow the bailee to rely on the limitation clause would be unconscionable and an abuse of freedom of contract.

Anderson J. suggested the following criteria, at p. 493, to ascertain whether " 'freedom of contract has been abused' so as to make it unconscionable for the bailee to exempt itself from liability":

> (1) Was the contract a standard form contract drawn up by the bailee?
>
> (2) Were there any negotiations as to the terms of the contract or was it a commercial form which may be described as a "sign here" contract?
>
> (3) Was the attention of the plaintiffs drawn to the limitation clause?
>
> (4) Was the exemption clause unusual in character?
>
> (5) Were representations made which would lead an ordinary person to believe that the limitation clause did not apply?
>
> (6) Was the language of the contract when read in conjunction with the limitation clause such as to render the implied covenant made by the bailee to use reasonable care to protect the plaintiffs' property meaningless?
>
> (7) Having regard to all the facts including the representations made by the bailee and the circumstances leading up to the execution of the contract, would not the enforcement of the limitation clause be a tacit approval by the Courts of unacceptable commercial practices?

Anderson J.'s judgment in *Davidson* drew on *Gillespie Bros. & Co. v. Roy Bowles Tpt. Ltd.*, [1973] Q.B. 400, [1972] 3 W.L.R. 1003, [1973] 1 All E.R. 193 (C.A.), in which Lord Denning said at pp. 415-16:

> The time may come when this process of "construing" the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago: "*there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused*": *John Lee & Son (Grantham) Ltd. v. Railway Executive*, [1949] 2 All E.R. 581, 584. It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so. [emphasis added]

169 As I have noted, this is not the place for an exposition of the doctrine of unconscionability as it relates to inequality of bargaining power and I do not necessarily endorse the approaches taken in the cases to which I have just referred. I use them merely to illustrate the broader point that in situations involving contractual terms which result from inequality of bargaining power the judicial armory has weapons apart from strained and artificial constructions of exclusion clauses. Where, however, there is no such inequality of bargaining power (as in the present case) the courts should, as a general rule, give effect to the bargain freely negotiated by the parties. The question is whether this is an absolute rule or whether as a policy matter the courts should have the power to refuse to enforce a clear and unambiguous exclusion clause freely negotiated by parties of equal bargaining power and, if so, in what circumstances? In the present state of the law in Canada the doctrine of fundamental breach provides one answer.

170 To dispense with the doctrine of fundamental breach and rely solely on the principle of unconscionability, as has been suggested by some commentators, would, in my view, require an extension of the principle of unconscionability beyond its traditional bounds of inequality of bargaining power. The court, in effect, would be in the position of saying that terms freely negotiated by parties of equal bargaining power were unconscionable. Yet it was the inequality of bargaining power which traditionally was the source of the unconscionability. What was unconscionable was to permit the strong to take advantage of the weak in the making of the contract. Remove the inequality and we must ask, wherein lies the unconscionability? It seems to me that it must have its roots in subsequent events, given that the parties themselves are the best judges of what is fair at the time they make their bargain. The policy of the common law is, I believe, that having regard to the conduct (pursuant to the contract) of the party seeking the indulgence of the court to enforce the clause, the court refuses. This conduct is described for convenience as "fundamental breach". It marks off the boundaries of tolerable conduct. But the boundaries are admittedly uncertain. Will replacing it with a general concept of unconscionability reduce the uncertainty?

171 When and in what circumstances will an exclusion clause in a contract freely negotiated by parties of equal bargaining power be unconscionable? If both fundamental breach and unconscionability are properly viewed as legal tools designed to relieve parties in light of subsequent events from the harsh consequences of an automatic enforcement of an exclusion clause in accordance with its terms, is there anything to choose between them as far as certainty in the law is concerned? Arguably, unconscionability is even less certain than fundamental breach. Indeed, it may be described as "the length of the Chancellor's foot". Lord Wilberforce may be right that parties of equal bargaining power should be left to live with their bargains regardless of subsequent events. I believe, however, that there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances.

172 Turning to the case at bar, it seems to me that, even if the breach of contract was a fundamental one, there would be nothing unfair or unreasonable (and even less so unconscionable, if this is a stricter test) in giving effect to the exclusion clause. The contract was made between two companies in the commercial market-place who are of roughly equal bargaining power. Both are familiar and experienced with this type of contract. As the trial judge noted (27 B.L.R. 59 at 77):

> Warranty cl. 8 was put forward by Syncrude. Presumably it provided the protection Syncrude wanted. Indeed, the first sentence thereof is sufficiently all-embracing that it is difficult to conceive of a defect which would not be caught by it. Syncrude freely accepted the time limitations; there is no evidence that they were under any disadvantage or disability in the negotiating of them. There is no reason why they should not be held to their bargain, including that part of which effectively excludes the implied condition of s. 15(1) of the Ontario Sale of Goods Act.

There is no evidence to suggest that Allis-Chalmers, who seeks to rely on the exclusion clause, was guilty of any sharp or unfair dealing. It supplied what was bargained for (even although it had defects) and its contractual relationship with Syncrude, which included not only the gears but the entire conveyor system, continued on after the supply of the gears. It cannot be said, in Lord Diplock's words, that Syncrude was "deprived of substantially the whole benefit" of the contract. This is not a case in which the vendor or supplier was seeking to repudiate almost entirely the burdens of the transaction and invoking the assistance of the courts to enforce its benefits. There is no abuse of freedom of contract here.

173 In deciding to enforce the exclusion clause, the trial judge relied in part on the fact that the exclusion clause limited but did not completely exclude the liability of Allis-Chalmers (p. 77). In relying on this fact, the trial judge was supported by some dicta of Lord Wilberforce in the House of Lords in *Ailsa Craig Fishing Co. v. Malvern Fishing Co.*, [1983] 1 W.L.R. 964, [1983] 1 All E.R. 101 at 102-103 (H.L.). It seems to me, however, that any categorical distinction between clauses limiting and clauses excluding liability is inherently unreliable in that, depending on the circumstances, "exclusions can be perfectly fair and limitations very unfair": Waddams, The Law of Contracts, 2nd ed. (1984), at p. 349. It is preferable, I believe, to determine whether or not the impugned clause should be enforced in all the circumstances of the case and avoid reliance on awkward and artificial labels. When this is done, it becomes clear that there is no reason in this case not to enforce the clause excluding the statutory warranty.

(iv) The trust fund

174 This issue arises from a cross-appeal by Syncrude against the Court of Appeal's decision to award the fund to Hunter U.S., minus administration expenses and the cost — $200,000 plus interest — of repairing the gearboxes built under the ACO contract. Hunter U.S. does not contest this latter aspect of the Court of Appeal's decision. ACO has been paid and the balance of $0.5 million left in the fund after the payment of ACO represents Hunter Canada's profit margin on its contract with Syncrude plus the income earned on that profit margin. In my view it was not correct to hold, as the trial judge did, that the fund should only be disposed of according to the terms of the trust agreement. The trust terms were not agreed upon by these parties. The trust was unilaterally established by Syncrude on a kind of interpleader basis, the object of creating the trust being to avoid prejudging the outcome of the litigation bet ween Hunter Canada and Hunter U.S. Syncrude was perfectly prepared to acknowledge in 1978 that the profit margin was payable to one of these two parties. The only question was which one. It is no longer prepared to acknowledge this. In such circumstances I agree with the Court of Appeal that the entitlement to the trust fund should be decided on the equitable principles governing unjust enrichment.

175 In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 [Ont.], Dickson J. (as he then was) said at pp. 847-48:

> "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* put the matter in these words: "... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money". It would be undesirable and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise ... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice ...
>
> ... there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries ...

These principles were unanimously affirmed by this court in *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 2 R.F.L. (3d) 225, 23 E.T.R. 143, 29 D.L.R. (4th) 1, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67, 69 N.R. 81. Although both *Pettkus v. Becker* and *Sorochan v. Sorochan* were "family" cases, unjust enrichment giving rise to a constructive trust is by no means confined to such cases: see *Deglman v. Guar. Trust Co.*, [1954] S.C.R. 725, [1954] 3 D.L.R. 785 [Ont.]. Indeed, to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles.

176 It is necessary to ask first whether Syncrude will be enriched if allowed to retain the trust fund. Clearly it will because it will receive interest income on money that it intended initially to pay to Hunter Canada. One need only look to the terms of the fund itself to appreciate this. I reproduce cl. 7, which states:

> 7. Following the payments made pursuant to clauses 5 and 9, the trustee shall hold *the remainder of the trust funds and trust income for payment* pending determination by agreement *between Hunter Canada and Hunter Engineering*, or by a decision of a Court of competent jurisdiction in Canada as to the identity of the holder of a valid and lawful interest in the remainder of trust funds as between Hunter Engineering and Hunter Canada, or upon determination of certain issues in Canada, currently the subject of legal proceedings between Hunter Engineering and Hunter Canada by settlement agreement or by a decision of a Court of competent jurisdiction in Canada. [emphasis added]

As already mentioned, Syncrude in 1978 considered itself bound to pay the Hunter Canada profit to either Hunter Canada or Hunter U.S. Syncrude's entitlement is limited to working gearboxes at the price agreed upon and, provided repair costs are paid out of the fund, it will get precisely that. Any additional money arising out of the circumstances surrounding the contract with ACO will constitute an enrichment.

177 I am likewise of the opinion that, if Syncrude is permitted to keep the entire fund, Hunter U.S. will be correspondingly deprived of the interest income it would have earned on the contract for the supply of the additional 11 mining gearboxes. I agree with the Court of Appeal that there need not be a contractual link for the causal connection between contribution and enrichment to be proved. This is a question to be decided on the facts of each case since the remedy of constructive trust is a discretionary one imposed as and when equity requires it. In this case there is sufficient causal connection in the fact that Hunter U.S. first offered to assume the whole Hunter Canada contract and later, after it won its case, was prepared to offer Syncrude the warranty terms under which the original 32 gearboxes were supplied. Its latter offer was not unreasonable in the circumstances, even though I believe that it should be held in equity to the warranty clause in the Hunter Canada contract. In any event, the arguments over warranties are now irrelevant, given that Hunter U.S. would be liable under both the Hunter Canada warranty and the implied statutory warranty.

178 In his presentation before this court, Mr. Kirkham, counsel for Syncrude, contended that Hunter U.S. had not suffered a deprivation because it did nothing to facilitate the supply of the gearboxes. ACO fabricated them from the designs in Syncrude's possession, the designs having been obtained from Hunter U.S. at the time of the first contract. Syncrude, because it supplied the designs, had to accept a very limited warranty from ACO, one that did not extend to any aspect of the design or specifications. Unfortunately, there is no finding of fact below as to the ownership of these designs and the evidence on the matter is contradictory. I believe, however, that Mr. Kirkham's arguments can be refuted without deciding that issue. The main difficulty with his argument is that they are based on an ex post facto view of the various circumstances. Whether or not Syncrude "owned" the designs when it contracted with Hunter Canada, the fact is that Syncrude willingly entered into that contract *at the time*. It was also prepared to pay a profit margin to Hunter U.S. after the passing-off litigation had been resolved. It may be the case, as counsel for Syncrude submitted, that Hunter U.S. made no contribution to the ACO contract. But Syncrude was ready in 1978 to pay the principal contractor's portion to Hunter U.S. and cannot now argue that it had no need of Hunter U.S.

179 Except for the point about ownership of the drawings, counsel for Syncrude suggested no juristic reason for the enrichment and I can think of none. I would therefore agree with the Court of Appeal that, provided Hunter U.S. accepts the warranty terms of the Hunter Canada contract and pays for the cost of repairing the 11 gearboxes, the trust fund minus administration expenses belongs in equity to Hunter U.S.

4. Disposition

180 I would dispose of the appeal and cross-appeal as follows:

181 (i) The appeal of Hunter U.S. against the finding of liability for design default is dismissed. Hunter U.S. breached its statutory warranty under s. 15(1) of the Sale of Goods Act in respect of the design default in the 32 mining gearboxes and must pay to Syncrude the sum of $750,000 in respect thereof plus prejudgment interest in the amount of $250,000.

182 (ii) The appeal of Allis-Chalmers against the finding of fundamental breach is allowed. The breach was not fundamental but, even if it were, Allis-Chalmers was insulated from liability for it by the exclusion clause. Since Allis-

Chalmers incurs no liability to Syncrude in respect of the design default in the four extraction gearboxes, it has no claim over against Hunter U.S. in respect thereof and its third party claim is accordingly dismissed.

183 (iii) The cross-appeal by Syncrude claiming ownership of the trust fund is dismissed. Hunter U.S. is entitled to the balance in the trust fund after administration costs and the cost of repairs to the 32 mining gearboxes have been satisfied out of it.

5. Costs

184 Allis-Chalmers should have its costs against Syncrude both here and in the Court of Appeal. As between Hunter U.S. and Syncrude success in this court was divided. Hunter U.S. lost on the main issue of its liability for design default in respect of the 32 mining gearboxes but shared success with Allis-Chalmers on the issue of fundamental breach and the effect of the exclusion clause in the Allis-Chalmers contract. It was also successful in its claim to the balance in the trust fund. I would make no order as to costs as between Hunter U.S. and Syncrude.

First defendant's appeal dismissed; second defendant's appeal allowed; plaintiffs' cross-appeal allowed.

Footnotes

* Estey and Le Dain JJ. took no part in the judgment.

** Estey and Le Dain JJ. took no part in the judgment.

18

2016 ABCA 103
Alberta Court of Appeal

Shefsky v. California Gold Mining Inc.

2016 CarswellAlta 649, 2016 ABCA 103, [2016] 7 W.W.R. 423, [2016] A.W.L.D. 1920, [2016] A.W.L.D. 1921, 264 A.C.W.S. (3d) 935, 31 Alta. L.R. (6th) 1, 399 D.L.R. (4th) 290

Martin Shefsky and 2350183 Ontario Inc., Appellants (Applicants) and California Gold Mining Inc., Michael Churchill, Kevin Cinq-Mars, Patrick Cronin, R.W. Tomlinson Limited, John Doe #1-50, and ABC Corporation #1-50, Respondents (Respondents)

Peter Costigan, Frans Slatter, Frederica Schutz JJ.A.

Heard: February 5, 2016
Judgment: April 14, 2016
Docket: Edmonton Appeal 1503-0001-AC

Proceedings: reversing *Shefsky v. California Gold Mining Inc.* (2014), 2014 CarswellAlta 2173, 2014 ABQB 730, D.R.G. Thomas J. (Alta. Q.B.); additional reasons to *Shefsky v. California Gold Mining Inc.* (2015), 2015 CarswellAlta 1857, 2015 ABQB 525, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: A.G. Formosa, for Appellants
S.M. Robinson, M.J. Diskin, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

APPEAL by appellants MS and holding company from decision reported at *Shefsky v. California Gold Mining Inc.* (2014), 2014 ABQB 730, 2014 CarswellAlta 2173 (Alta. Q.B.), which dismissed oppression motion.

***Peter Costigan, Frederica Schutz JJ.A.*:**

Overview

1 This is an appeal from the dismissal of the appellants' oppression application. This appeal engages the analytical framework applied to oppression claims and remedies stipulated by the Supreme Court of Canada in *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.).

2 Not all unfair conduct rises to the level of oppression for which a court may grant a remedy; what may be oppressive in one factual context may not be oppressive in a slightly different factual context. Fact findings are the crucial foundation for the legal analysis that must follow, because within such fact findings the hearing court identifies the interests that merit relief, and within such fact findings the court assesses the nature of the impugned conduct and its effect. "The evidence is also critical to the court's determination of the appropriate remedy in the event that oppression is found": David S. Morritt, Sonia L. Bjorkquist & Allan D. Coleman, *The Oppression Remedy* [Toronto: Canada Law Book, 2015] at 1-10-1-11.

3 Although this reviewing Court may have assessed the evidence differently, we have identified no juridically permissible basis upon which to interfere with the chambers judge's decision. Fact findings are entitled to a high degree of deference. The parties were well aware of the limitations of the summary procedure they chose and we are satisfied

from our review of the entire record that the chambers judge was entitled to find the facts and apply the law as he did; accordingly, the appeal is dismissed, for the reasons that follow.

Background

4 Detailed background information can be found in the decision of the special chambers judge: *Shefsky v. California Gold Mining Inc.*, 2014 ABQB 730 (Alta. Q.B.) [*Decision*].

5 In brief, this was a fight for control of the Board of Directors of California Gold Mining Inc (CGMI), a public corporation involved in mineral exploration. The appellants Martin Shefsky and his solely owned holding company, 2350183 Ontario Inc, alleged that the respondents breached Mr. Shefsky's reasonable expectations that he would control the corporation if he raised at least $5,000,000 in investments for CGMI. In particular, he would be entitled to name three of five directors on the board and would retain control through the shares owned by him and the investors he introduced to CGMI. The appellants assert that the respondents engaged in oppressive conduct, including a secret placement of shares that diluted Mr. Shefsky's voting power and refusing to allow Mr. Shefsky to appoint a third member to the board when his initial nominee, Mr. Cohen, refused to accept the position.

Decision Below

6 The chambers judge set out the uncontested facts, the facts that he found could be inferred from the affidavit evidence and documents, and the contested facts, before defining the issues, undertaking a legal analysis and setting out his conclusions. During the two-day special chambers hearing — which hearing was preceded by important interlocutory motions — the sole issues before the chambers judge were:

> (i) whether the newly-elected Board of Directors of CGMI ought to be replaced by a Board selected by Mr. Shefsky;
>
> (ii) whether shares ought to be offered to Mr. Shefsky and his designees on the same terms as what the appellants refer to as the "Secret Private Placement" (which also is the terminology used by the chambers judge in his Decision and which phrase we will continue to use as an aid to comprehension); and,
>
> (iii) whether the Court should give control of CGMI to Mr. Shefsky?

7 The chambers judge reviewed a substantial volume of affidavits, documents and transcripts from cross-examinations on numerous affidavits.

8 The chambers judge specifically noted the admonition about conflicting evidence in *Charles v. Young*, 2014 ABCA 200 (Alta. C.A.) at paras 4-5, (2014), 577 A.R. 54 (Alta. C.A.) and the cases cited therein, and to that end reviewed "the extensive materials to ensure that I make findings based on uncontested facts or, where there are contested facts, on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties": *Decision* at para 6. The chambers judge identified facts, and drawn inferences, and noted many of the instances where the evidence conflicted.

9 After citing the culture shift embedded in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 2, [2014] 1 S.C.R. 87 (S.C.C.), and this Court's endorsement of same in *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para 15, (2014), 572 A.R. 317 (Alta. C.A.), the chambers judge noted that the parties chose a chambers procedure knowing the limitations of affidavit evidence, and were aware of the implications of such a decision. Further, the chambers judge noted that the parties expressed a desire to avoid the expense and complication of trial if possible because most, if not all, of the witnesses were in Ontario, some of the lawyers are from Ontario, and because matters in issue were relatively time-sensitive.

10 The chambers judge identified the alleged reasonable expectations that Mr. Shefsky contended merited oppression relief:

- the Term Sheet be honoured;
- Mr. Shefsky be permitted to appoint a director to replace Mr. Cohen; and
- Mr. Shefsky retain control of CGMI.

11 As to the first expectation, the chambers judge determined that even though Mr. Shefsky did not raise $5,000,000 by the deadline specified in the Term Sheet, and despite the dispute about whether to count certain investors, Mr. Shefsky had a reasonable expectation that the Term Sheet would be extended and honoured: *Decision* at paras 81-103.

12 As to the second expectation, the chambers judge concluded that Mr. Shefsky had a reasonable expectation that he would be permitted to appoint a director other than Mr. Cohen when the latter refused to take the position: *Decision* at paras 104-108. However, he declined to find that Mr. Shefsky had an ongoing right to name a new director after the April 2013 shareholders' meeting because Mr. Shefsky had never taken steps to appoint a new director (which finding of fact is strenuously disputed by the appellants). Since Mr. Shefsky had not taken steps to appoint a new director, the chambers judge decided that Mr. Shefsky was asserting a "purely hypothetical breach of expectations" and concluded that "[w]hile the actions of the Board suggest that its members agreed that Shefsky could nominate a third person to the Board, thus giving rise to both a subjective and objective expectation, Shefsky never tried to act on that expectation and therefore it was never breached": *Decision* at paras 109-121.

13 As to the expectation of control of CGMI, the chambers judge found as a fact that Mr. Shefsky did not have a reasonable expectation that he had sufficient shareholders' support to control CGMI, at any time: *Decision* at paras 122-126.

14 In the result, the chambers judge dismissed the appellants' motion for oppression.

Applicable Legislation

15 The oppression remedy is located in the Alberta *Business Corporations Act*, RSA 2000, c B-9, in particular sections 239 and 242:

> **239** In this Part,
>
> (a) "action" means an action under this Act or any other law;
>
> (b) "complainant" means
>
> (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (iii) a creditor
>
> (A) in respect of an application under section 240, or
>
> (B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv), or
>
> (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

16 A complainant within the categories mentioned may apply to the court for an oppression remedy:

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

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

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

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

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting permission to the applicant to

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

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

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

RSA 2000 cB-9 s242; 2014 c13 s49

Grounds of Appeal

17 Although the appellants list numerous grounds of appeal in their factum, the only issues on which they provided written and oral argument can be summarized as follows:

(a) the chambers judge erred by mischaracterizing the appellants' argument about the Secret Private Placement as being loss of control rather than loss of the opportunity to gain control;

(b) the chambers judge erred by limiting their complaint about the Secret Private Placement to being an issue about control and failing to consider that regardless of control, the appellants had a reasonable expectation that the Secret Private Placement would not proceed in the circumstances; and

(c) the chambers judge erred by concluding that the issue of Mr. Shefsky's reasonable expectation that he would be permitted to appoint a third director to the Board was moot because Mr. Shefsky did not propose a replacement nominee for Mr. Cohen.

Standard of Review

18 Issues of jurisdiction and the test for oppression are questions of law, and should be reviewed on a standard of correctness: *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 (Alta. C.A.) at para 33, (2015), 382 D.L.R. (4th) 150 (Alta. C.A.); *McRoberts v. Whissell*, 2006 ABCA 388 (Alta. C.A.) at para 4, 2006 CarswellAlta 1689 (Alta. C.A.).

19 The application of a legal test to a set of facts is a question of mixed fact and law. Whether conduct amounts to oppression is a question of mixed fact and law and is therefore reviewable for palpable and overriding error. The same standard is applicable to whether a party possessed reasonable expectations, which is a question of fact: *1216808 Alberta Ltd. v. Crown Capital Corp.*, 2014 ABCA 386 (Alta. C.A.) at para 24, (2014), 35 B.L.R. (5th) 1 (Alta. C.A.).

20 Normally, when reviewing a decision that omits an issue, an appeal court is left with two options: (1) direct a new trial on the issue; or (2) review the record and attempt to arrive at a conclusion with respect to the missed issue: *Adeco Exploration Co. v. Hunt Oil Co. of Canada Inc.*, 2008 ABCA 214 (Alta. C.A.) at para 49, (2008), 437 A.R. 33 (Alta. C.A.).

21 The imposition of a remedy for oppression is discretionary, and deference should be accorded to it unless an error in principle has been made or the decision is otherwise unjust: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.) at 487, (1995), 23 B.L.R. (2d) 286 (Ont. C.A.).

Analysis

***The Supreme Court of Canada's Analytical Framework in* BCE**

22 A court's broad equitable jurisdiction under the oppression remedy is subject to three governing principles.

- First: not every expectation, even if reasonably held, will give rise to a remedy because there must be some wrongful conduct, causation and compensable injury in the claim for oppression: *BCE* at paras 68, 89-94.

- Second: not every interest is protected by the statutory oppression remedy. Although other personal interests may be connected to a particular transaction, the oppression remedy cannot be used to protect or advance, directly or indirectly, these other personal interests. "[I]t is only their interests as shareholder, officer or director as such which are protected": *Naneff v. Con-Crete Holdings Ltd.* at para 27. Furthermore, "the oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation": *Stahlke v. Stanfield*, 2010 BCSC 142 (B.C. S.C.) at para 23, aff'd 2010 BCCA 603 (B.C. C.A.) at para 38, (2010), 305 B.C.A.C. 18 (B.C. C.A.).

- Third: courts must not second-guess the business judgment of directors of corporations. Rather, the court must decide whether the directors made decisions which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions. Provided the directors acted honestly and reasonably, and made a decision in a range of reasonableness, the court must not substitute its own opinion for that of the Board. If the directors have chosen from one of several reasonable alternatives, deference is accorded to the Board's decisions: *Stahlke* at para 22; *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.) at para 36, (1998), 44 B.L.R. (2d) 115 (Ont. C.A.); *BCE* at para 40.

23 In *BCE* the Supreme Court underlines that the stakeholder's actual expectations are not conclusive; rather, reasonableness implies that the analysis is objective and contextual. "In the context of whether it would be 'just and equitable' to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": *BCE* at para 62.

24 *BCE* at para 68 stipulates a two-step inquiry in an oppression claim:

1. Does the evidence support the reasonable expectation asserted by the claimant?

2. Does the evidence establish that the reasonable expectation was

   (a) violated by conduct, and

   (b) falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

25 It is essential that the complainant establish wrongful conduct, causation and compensable injury: *BCE* at para 90.

26 *BCE* at paras 72-83 sets out some useful factors the court may consider in determining whether a reasonable expectation exists, including:

- general commercial practice
- the nature of the corporation
- the relationship between the parties
- past practice
- steps the claimant could have taken to protect himself
- any representations and agreements, and
- the fair resolution of conflicts between corporate stakeholders

27 As the chambers judge states in para 75 of his decision:

> Once it is determined what an applicants' reasonable expectations were, and that those expectations were not met, the Court must go on to determine whether the failure to meet the expectation was unfair. Not all failures to meet a reasonable expectation "will give rise to the equitable considerations that ground actions for oppression." The conduct must be oppressive or demonstrate unfair prejudice, or unfair disregard of the claimants' interests (at para 89). Often the proof required to establish reasonable expectation will also be relevant to the proof of oppression, unfair prejudice or unfair disregard of interests (para 90).

28 The chambers judge goes on to state that oppression has been described as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" related to the conduct of the corporations' affairs. That is, "a wrong of the most serious sort": *Decision* at para 76.

29 Unfair prejudice is described in *BCE* at para 93 as conduct that is less serious than oppression and includes such things as:

> ... squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm ...

30 Unfair disregard is described as the least serious of the three, and it includes favoring a director by failing to properly prosecute claims, improperly reducing dividends, or failing to deliver a claimant's property: *BCE* at para 94.

31 With all this in mind, each specific ground of appeal is discussed below.

Did the chambers judge err by mischaracterizing the appellants' argument about the Secret Private Placement as being loss of control rather than loss of the opportunity to gain control?

32 The chambers judge found that there is no evidence the appellants ever had control of CGMI. This finding is supported by the evidentiary record and is fatal to the suggestion that Mr. Shefsky had a reasonable expectation that he could control CGMI, or that this alleged expectation was defeated by the Secret Private Placement.

33 The appellants now assert that the special chambers judge did not properly characterize their submissions regarding the Secret Private Placement. They say their argument was not that the Secret Private Placement was oppressive because it resulted in Mr. Shefsky losing control of CGMI, but rather because it resulted in him losing the *opportunity to gain control* of the company. The appellants acknowledge that it was not a certainty that Mr. Shefsky would win control. However, they argue that the issuance of the Secret Private Placement diluted his shares and ensured that he could not

win a shareholder vote. The appellants essentially argue that the Secret Private Placement resulted in the loss of a chance for control of CGMI.

34 However, the appellants' argument about their expectation as summarized above was not clearly articulated before the chambers judge. The transcript of the hearing below shows that the appellants' arguments focused on Mr. Shefsky's expectation that he would control CGMI once he raised the funds specified in the Term Sheet, and the issue of control underlies the appellants' entire case including their requested remedies; the chambers judge cannot be faulted for characterizing the appellants' expectation in the manner he did. In addition to establishing that their expectations were reasonable, the onus is on the claimants to identify the particular expectations that they allege have been violated: *BCE* at para 70.

35 The respondents rely on *Cusson v. Quan*, 2009 SCC 62 (S.C.C.) at paras 36-37, [2009] 3 S.C.R. 712 (S.C.C.) to urge us not to entertain a new issue raised for the first time on appeal because they say the interests of justice do not require it and there is not a sufficient evidentiary record.

36 We do not agree the appellants are raising a new issue for the first time on this appeal. Despite the fact that their position was not clearly articulated before the chambers judge, the record shows that the appellants did make submissions effectively stating that insofar as Mr. Shefsky was concerned, the true intention of the Secret Private Placement was to dilute his shares and prevent him from winning a proxy war that, absent the Secret Private Placement, would have been a possibility. This issue was sufficiently canvassed on the record such that this Court can address it on appeal.

37 The essential difficulty with Mr. Shefsky's position is that a finding of oppression requires objective evidence that there has been oppression. A mere speculation or hope or, as the respondents put it, an "aspirational belief" is insufficient to form the foundational evidence for this type of extraordinary action and remedy. The ability of the disappointed or aggrieved to avail themselves of the oppression action and its remedies must be carefully circumscribed so as not to expand the legal right to mere aspirations or disappointments. This is why wrongful conduct, causation, and compensable injury must all be established by the claimant in an oppression claim: *BCE* at para 90. An expectation based on a loss of an opportunity, without proof that such opportunity was more than merely speculative, is insufficient to ground an oppression claim because causation and compensable injury have not been established.

38 In our view, the chambers judge did not err in failing to find that the loss of an opportunity to gain control of CGMI was a reasonable expectation violated by the Secret Private Placement.

Did the chambers judge err by limiting the appellants' complaint about the Secret Private Placement to being an issue about control and failing to consider that regardless of control, the appellants had a reasonable expectation that the Secret Private Placement would not proceed in the circumstances?

39 Aside from the issue of control, the appellants argue that the Secret Private Placement was also oppressive because of the circumstances in which it occurred; they allege it involved the issuance of shares to a select group of investors that did not include Mr. Shefsky, at a price below market value, without Mr. Shefsky's knowledge but after he had advised the other Board members that he intended to call a shareholders' meeting for the purpose of electing a new slate of directors, and in the context of what the appellants allege was a significantly better offer from Mr. Caland.

40 The difficulty with this argument is that the appellants have failed to identify any specific expectation, apart from the expectation of control, which was violated by these actions. The appellants submit that a shareholder does not need to prove control in order to establish that the act of issuing shares to a select group of investors well below market value is oppressive, and that every shareholder, including Mr. Shefsky, has a reasonable expectation that directors will not do this. However, the oppression remedy is a personal claim and requires the complainant to identify a personal interest that is alleged to have been violated. It is not sufficient to allege that shareholders generally have an expectation that directors generally will not act oppressively. Such assertions are contrary to the analytical framework set out in *BCE*.

41 In *Rea v. Wildeboer*, 2015 ONCA 373 (Ont. C.A.) at paras 34-35, the distinction between a generalized expectation and a personal claim that potentially attracts the oppression remedy is clearly set out:

> The oppression remedy is not available — as the appellants contend — simply because a complainant asserts a "reasonable expectation" (for example, that directors will conduct themselves with honesty and probity and in the best interests of the corporation) and the evidence supports that the reasonable expectation has been violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard". The impugned conduct must be "oppressive" of or "unfairly prejudicial" to, or "unfairly disregard" *the interests of the complainant*: OBCA, s. 248(2). No such conduct is pled here.
>
> That the harm must impact the interest of the complainant personally — giving rise to a personal action — and not simply the complainant's interests as a part of the collectivity of stakeholders as a whole — is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*. The legislative response was to create *two* remedies, with two different rationales and two separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy.

42 We agree that the cases cited in support of Mr. Shefsky's claim that he had some other reasonable expectation that was violated are distinguishable. In contradistinction to *Legion Oils Ltd. v. Barron* (1956), 2 D.L.R. (2d) 505, 17 W.W.R. 209 (Alta. T.D.), *Keho Holdings Ltd. v. Noble*, 1987 ABCA 84, 38 D.L.R. (4th) 368 (Alta. C.A.) and *Smith v. Hanson Tire & Supply Co.*, [1927] 3 D.L.R. 786, 21 Sask. L.R. 621 (Sask. C.A.), in the case at bar Mr. Shefsky did not have an articulated reasonable expectation that was violated by the Secret Private Placement. Moreover, oppression cases are highly fact-specific and what may be oppressive or improper in the case of a closely-held private corporation is not necessarily oppressive in the context of a publicly-held corporation: *BCE* at para 59.

43 In any event, the chambers judge did not find that the Secret Private Placement was below market value, nor was there any evidentiary foundation for that assertion. Indeed, the determination of market value for a junior mining company in the context of a private placement (as opposed to a sale of a small block on the stock market) would require expert evidence. The pricing of shares issued through the Secret Private Placement was made in accordance with the rules established by the TSX Venture Exchange. On August 12, 2013 CGMI's lawyers filed for a price reservation at a price of $0.05, which was approved by the TSX Venture Exchange as an acceptable price in light of prevailing market prices.

44 In connection with the requirement to raise additional funds, there was evidence accepted by the chambers judge that in the aftermath of the COO's termination, it was necessary for CGMI to raise additional funds in order to redo the geological reports and other work that the directors determined had been done improperly. As is a common occurrence in junior mining companies, as admitted by Mr. Shefsky, the Board of CGMI decided to turn to existing shareholders to try to raise these funds. There is no reason that Mr. Shefsky was entitled to prevent the corporation from offering additional shares to investors. The directors were entitled to make decisions in the best interests of the corporation, including raising additional capital, which may adversely affect the interests of particular stakeholders.

45 Absent any evidence to the contrary, the timing, source and pricing of this financing was solely a matter of business judgment. We agree that a board of directors is entitled to substantial deference and we are loath to step into the discretionary purview of the Board absent any evidence which would lead us to a contrary view. We agree that based upon the unassailable findings of the chambers judge and our review of the record, the decision of the CGMI Board to engage in the Secret Private Placement was reasonable and entitled to judicial deference.

46 Even if Mr. Shefsky and other shareholders had a claim for loss of value of their shares due to the Secret Private Placement, that claim belonged to the corporation. In *Alvi v. Misir* (2004), 73 O.R. (3d) 566, 50 B.L.R. (3d) 175 (Ont. S.C.J. [Commercial List]), Cameron J. determined that a claim brought by shareholders for loss of value of their shares was a claim that belonged to the corporation. He stated at para 57 that directors cannot owe statutory fiduciary duties and duties of care to shareholders if they are already owed to the corporation without placing the directors in an intolerable

conflict of interest and explained that "[s]uch parallel duties would create untenable and unreasonable conflicts" that would render impossible the jobs of directors and officers.

47 The Supreme Court of Canada has adopted a similar analysis in *BCE* at para 66:

> The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

48 Put simply, Mr. Shefsky's interests in not having his shares diluted by the Secret Private Placement were not interests that the directors of the corporation were obliged to consider. In fact, Mr. Shefsky's sole interests were diametrically opposed to the interests of the corporation and its directors' attempts to raise additional funding for this junior mining company so that exploration could continue after Mr. Moeller's departure. Mr. Shefsky's only reasonable expectation in these circumstances was that the directors would act in the best interests of the corporation, and there is no evidence to suggest that they did not do so.

49 Moreover, it was entirely reasonable and open to the Board of CGMI to reject the deal offered by Mr. Caland for reasons that were before the chambers judge as reflected in the minutes of the director's meeting of September 10, 2013. Notwithstanding the rejection of Mr. Caland's offer, there is further evidence upon which the chambers judge did decide that the CGMI Board was open to the possibility of both doing the Secret Private Placement and Mr. Caland's deal, but Mr. Shefsky indicated that the deals were mutually exclusive and that to accept Mr. Caland's offer would require rejection of the other financing.

50 The chambers judge was not persuaded that the Board's purpose in approving the Secret Private Placement was to dilute Mr. Shefsky's ownership; rather, the chambers judge found that the Secret Private Placement was intended to raise money to replace the money that had been wasted on the improper exploration work done by the COO. Even if the effect was dilutive, Mr. Shefsky's only reasonable expectation was that the directors act in the best interests of *the corporation*, despite that so acting may not have coincided with Mr. Shefsky's personal interests. As *BCE* makes clear, the directors owe fiduciary obligations to the corporation only, and when particular shareholder interests do not coincide with the best interests of the corporation, the directors are nonetheless duty bound to protect the interests of the corporation above all else.

51 Assuming that there was some evidence to support Mr. Shefsky's theory that the CGMI Board was acting to buttress the existing management slate of directors through the Secret Private Placement, contrary to Mr. Shefsky's personal interests, that is insufficient. Mr. Shefsky is required to prove that the Board's actions were contrary to the best interests of the *corporation*. Directors are entitled to consider who is seeking control and why. If the Board believes there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper: *Teck Corp. v. Millar* (1972), 33 D.L.R. (3d) 288 (B.C. S.C.) at para 99, [1973] 2 W.W.R. 385 (B.C. S.C.); *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228 (B.C. C.A.) at para 83, (2011), 333 D.L.R. (4th) 257 (B.C. C.A.).

52 Accordingly, we see no reviewable error in the chambers judge's articulation and application of the binding law, or in his findings of fact or inferences drawn based upon the evidentiary record that was before him. This ground of appeal is dismissed.

Did the chambers judge err by concluding that the issue of Mr. Shefsky's reasonable expectation that he would be permitted to appoint a third director to the Board was moot because Mr. Shefsky did not propose a replacement nominee for Mr. Cohen?

53 The chambers judge did not find it necessary to decide whether Mr. Shefsky had a continuing right after the April 2013 annual meeting to appoint a third member to the Board of CGMI because Mr. Shefsky did not attempt to exercise this asserted right, and therefore any reasonable expectation he may have had in this regard was never breached.

54 The appellants argue that it was an error for the chambers judge to rely on this narrow technicality, rather than considering all the circumstances of the alleged oppression. Moreover, the appellants contend that Mr. Shefsky did in fact nominate a third director to the Board, in a letter from his lawyer dated October 2, 2013. Implicit in their argument is the assumption that Mr. Shefsky had a continuing right to appoint a third member to the Board up until the January 2014 annual shareholders' meeting, when a different management slate of board members was elected.

55 The respondents suggest that there are three fatal problems with the appellants' position:

(i) It mischaracterizes the reasonable expectation that was actually found by the chambers judge in this case;

(ii) Mr. Shefsky's expectations did not arise in his capacity as a shareholder, director, or officer of CGMI and therefore are not protected by the oppression remedy; and

(iii) Mr. Shefsky's expectation, if it did exist, was not disregarded in an oppressive manner.

56 Each of these contentions is addressed separately below.

(i) Mischaracterization of the reasonable expectation that was actually found by the chambers judge in this case

57 The chambers judge found that Mr. Shefsky had not attempted to exercise his right to appoint a third member of the Board of CGMI. In April 2013, the slate of directors was duly elected by the shareholders, so the relevant period of time for complaint by Mr. Shefsky was between April 2013 and the January 2014 annual shareholders' meeting.

58 Contrary to the appellants' suggestion, the chambers judge did not make a finding that Mr. Shefsky had a continuing right to appoint a third member to the Board up until the January 2014 annual shareholders' meeting. As noted above, the chambers judge found it unnecessary to decide this point, and the evidence does not support the appellants' position. Rather, the record shows that any reasonable expectation Mr. Shefsky may have had to appoint a third member to the Board was extinguished by the April 2013 annual meeting, because any expectation to control the composition of the Board past this date is inconsistent with the corporation's public statements, its statutory disclosure obligations, and the basic rights of its shareholders as a whole to choose the board of directors of their publicly-traded company.

59 Prior to the April 2013 annual meeting, Mr. Shefsky had an opportunity to comment on the draft circular but did not propose any changes to the slate which listed Messrs. Shefsky, Brandolini, Churchill, Cronin and Cinq-Mars as the management slate of directors. Indeed, at the April 2013 meeting Mr. Shefsky voted for the slate nominated and set out in the circular.

60 As the respondents point out, if there had in fact been an arrangement whereby Mr. Shefsky retained a unilateral power after the April 2013 shareholders' vote to compel one of the elected directors to resign in favor of an unidentified nominee of his choice, that would have been contrary to the voting shareholders' wishes and would be material information requiring disclosure in the circular. Failure to disclose would constitute an offence under s 122(1)

(b) of the Ontario *Securities Act*, RSO 1990, c S-5, the commission of which would clearly not be in the corporation's best interests.

61 Moreover, the Board has a fiduciary interest to act in the best interests of the corporation, which includes an obligation not to fetter its discretion absent a unanimous shareholders' agreement: *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) at paras 102-10, aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) at 123. The expectation alleged by Mr. Shefsky is inconsistent with his own obligations as a director, and is not reasonable.

(ii) Mr. Shefsky's expectations did not arise in his capacity as shareholder, director, or officer of CGMI and therefore are not protected by the oppression remedy

62 The respondents suggest that there is doubt about the correctness of the chambers judge's analysis of Mr. Shefsky's alleged expectations arising from the Term Sheet.

63 In particular, they submit that the chambers judge erred in principle in finding that the oppression remedy protects Mr. Shefsky's expectation to appoint Mr. Cohen (or his replacement), when that expectation arose in Mr. Shefsky's capacity as a financier or underwriter of CGMI, and not as a shareholder, officer or director.

64 In this branch of their argument, the respondents note that the oppression remedy protects the interests of a "complainant" within the meaning of s 239(b) of the Alberta *Business Corporations Act*, which includes security holders, creditors, officers and directors. The statute does not protect the interests of those acting as financiers, underwriters or investment dealers for or on behalf of a corporation.

65 Simply put, where harm is alleged to have been done to a complainant's interests in a capacity outside of the scope of s 239(b), the oppression remedy is not engaged so as to protect these interests outside the scope of the legislation: Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 265-267.

66 In particular, *Rogers Communications Inc. v. MacLean Hunter Ltd.* (1994), 2 C.C.L.S. 233 (Ont. Gen. Div. [Commercial List]) makes clear that in a position *qua* bidder, relief cannot be obtained under the applicable legislation; rather, it is only in the position *qua* shareholder that there can be a claim of oppression. Looking at matters as a whole in that case, the court concluded that Rogers' complaint arose in its position as a bidder and not as a shareholder: *Rogers* at para 9.

67 The same point is made by the British Columbia Supreme Court in *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2010 BCSC 1547 (B.C. C.A.) at paras 179-83, (2010), 15 B.C.L.R (5th) 132 (B.C. S.C.), aff'd 2011 BCCA 228, 333 D.L.R. (4th) 257 (B.C. C.A.), and in *Stahlke* at para 23 where it stated: "The oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation."

68 We agree that Mr. Shefsky's reasonable expectation to appoint a third director found in the Term Sheet, or grounded in the various representations that were made by Mr. Churchill to Mr. Tomlinson, were not made by, or to, Mr. Shefsky in his capacity as a shareholder, director or officer of CGMI. We note that the initial version of the Term Sheet was signed on or about October 19, 2012, well before Mr. Shefsky became an officer (in December of 2012), a shareholder (in February of 2013) or a director (in April of 2013).

69 We also agree with the respondents' contention that the October 19, 2012 Term Sheet — replaced by the December 12, 2012 Term Sheet but with no change to material terms — is simply a *sui generis* contract made between CGMI and Mr. Shefsky in his capacity as a potential financier, promoter or underwriter in relation to the $5,000,000-8,000,000 private placement to be arranged for CGMI.

70 The respondents further argue that prospective shareholders do not have standing under the oppression remedy. The requirement that a complainant actually be a shareholder at the time of the oppression complained of is logical, since the

question whether a complainant shareholder has sustainable grounds of oppression that brings the shareholder within the ambit of the oppression remedy "requires a time-related factual nexus between the complainant and the oppression complained of": *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2004), 41 B.L.R. (3d) 74 (Ont. S.C.J. [Commercial List]) at para 246, [2004] O.T.C. 53 (Ont. S.C.J. [Commercial List]), rev'd (but not on this point) (2006), 263 D.L.R. (4th) 450 (Ont. C.A.), leave to appeal to SCC refused (2006), 267 D.L.R. (4th) ix (S.C.C.).

71 Although this is a legally correct proposition, we find that in October of 2012 Mr. Shefsky possessed a legal entitlement to acquire shares. He had acquired an option, a right of first refusal, to shares and his subscription (and that of other accredited investors) was to be reflected in a formal subscription agreement to be entered into prior to December of 2012. In other words, Mr. Shefsky's acceptance of the Term Sheet conferred upon him the right to perform confirmatory due diligence and exercise his option in respect of the "Issue", defined in the Term Sheet as "[p]rivate placement of units (each unit consisting of one common share ... in the Capital of the Company and three-quarters one Common Share purchase warrant, each whole warrant ... being exercisable for one Common Share) of the Corporation (the "Units") (together, the "Offering")" at a price of $0.10 per Unit.

72 What the Term Sheet did not do, however, was confer upon Mr. Shefsky a right to enjoin any further share placements. Quite simply, an existing shareholder cannot complain about subsequent share offerings even if it has the effect of diluting that complaining shareholder's shares, provided the share offering is done in the best interests of the corporation. And, no shareholder has the right to acquire additional shares and no corporation is obliged to offer additional shares to existing shareholders. When a corporation offers its shares for sale, an individual can decide whether to accept the offer. But, it is not the case that a shareholder or putative shareholder can demand that shares be sold to him personally. There are good corporate business judgment reasons why a corporation may not, in fact, wish to sell shares to a certain individual or entity, either because of regulatory issues or because the directors do not believe that the putative purchaser's participation in the corporation would serve the best interests of the corporation. In this corporate exercise of business judgment, this Court will not and should not lightly interfere.

73 We reject the respondents' assertion that because the Subscription Agreement contains an "entire agreement" clause that governs the relationship of Mr. Shefsky *qua* shareholder, the effect of the entire agreement clause is that it supersedes any prior understanding between Mr. Shefsky *qua* shareholder and CGMI. Since the Subscription Agreement does not contain any reference to the management provisions in the revised Term Sheet upon which Mr. Shefsky bases his claim, the respondents submit that is the end of the matter. We disagree. Similarly, we disagree that Mr. Shefsky's role as CEO, as governed by the terms of the Consulting Agreement between CGMI and 2350183 Ontario Inc, is a complete answer to Mr. Shefsky's oppression claim, despite that the Consulting Agreement also contains an "entire agreement" clause. Put another way, the fact that neither the Subscription Agreement nor Consulting Agreement contain a reference to any expectation or right on behalf of Mr. Shefsky to control the composition of CGMI's Board is not determinative. Rather, we must consider the entire context, not merely the discrete contracts made between the appellants and some of the respondents.

74 The essential difficulty with Mr. Shefsky's invocation of the oppression remedy in respect of the Term Sheet, however, is that he attempts to gain access to the court's equitable oppression remedy jurisdiction for a *personal* claim that arises pursuant to the provisions of the Term Sheet: his *personal* claim for breach of contract. At its core, the Term Sheet is a commercial agreement negotiated at arm's-length by sophisticated parties. That commercial agreement must not be rewritten by a court importing notions of "just and equitable". It would be dangerous territory, indeed, and an improper conflation of contract law and equitable oppression principles to suggest that the latter can come to the aid of a claim for breach of any contractual promises made to Mr. Shefsky in his personal capacity. See, for example, *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183 (Ont. C.A.) at para 60, (2008), 234 O.A.C. 59 (Ont. C.A.).

75 The legal and jurisdictional boundaries which circumscribe, and delineate, resort to an oppression remedy must be firmly set. A party aggrieved, whether by having made an imprudent, or incomplete, or improvident personal

bargain, cannot be permitted to seize an oppression remedy and, thus, gain an equitable remedy that was never in the contemplation of the contracting parties.

76 In summary, Mr. Shefsky and 2350183 Ontario Inc's claims derivative of the provisions of the Term Sheet are contractual in nature. These claims fall outside the legal and jurisdictional boundaries of an oppression remedy.

(iii) Mr. Shefsky's reasonable expectation, if it did exist, was not disregarded in an oppressive manner

77 Assuming the appellants had proven that their reasonable expectations were unmet, they must go farther to prove that those reasonable but unmet expectations were violated by conduct that falls within the terms 'oppression', 'unfair prejudice' or 'unfair disregard' of a relevant interest. This proposition is made abundantly clear in *BCE* at para 68. See also *Rea v. Wildeboer* at paras 34-35.

78 On appeal, the parties conceded that the chambers judge had articulated correctly the principles of law and, in particular, that he was required to consider the meaning of "oppression" and "unfair prejudice" and "unfair disregard".

79 In his decision at paras 76-77 the chambers judge correctly notes:

> [76] Oppression has been described as conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" related to the conduct of the corporations affairs: "a wrong of the most serious sort" (at para 92). Unfair prejudice is conduct that is less serious than oppression, and includes such things as:
>
> > ... squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm ... (at para 93)
>
> [77] The Supreme Court went on to describe unfair disregard as the least serious of the three, and noted that it included favouring a director by failing to properly prosecute claims, improperly reducing dividends, or failing to deliver a claimant's property.

80 The chambers judge found that the appellants had not met their persuasive burden of showing that they had suffered oppression, unfair prejudice or unfair disregard because Mr. Shefsky did not name a replacement, seek to call, or actually call a shareholders' meeting himself, or propose a different slate of directors. The appellants challenge the trial judge's finding in this regard on the basis of an October 2, 2013 letter from the appellants' lawyer to the respondents.

81 A demand letter emanating from counsel's office does not amount to Mr. Shefsky naming a replacement, seeking to call, or actually calling a shareholders' meeting himself, nor does it equate to Mr. Shefsky proposing a different slate of directors. The October 2, 2013 letter from WeirFoulds says as follows:

> Mr. Shefsky demands:
>
> > (a) that one of Michael Churchill, Kevin Cinq-Mars or Patrick Cronin immediately resigns from the board so that his place can be taken by Charlie Cohen who is prepared to accept the nomination; and
> >
> > (b) that the September Placement be immediately unwound.

82 After making the demands cited, the letter abruptly concludes: "If we have not received a positive response by October 11, 2013 our client intends to commence immediate legal proceedings against you, and to seek any appropriate injunction or mandatory order."

83 The reader of the demand letter would appreciate that the demand to replace one of the duly elected directors within 9 days, without any notice or regard to the shareholders of the corporation, would expose the corporation to significant jeopardy. The law requires that all shareholders be notified of material information. Mr. Shefsky's assertion of a right to appoint a third director was certainly material information. The demand letter from the lawyer was not copied to all other shareholders; thus, it cannot in any sense amount to notification that would have satisfied the reasonable expectations of the other shareholders, which may not have comported with Mr. Shefsky's personal interests, or with the best interests of the corporation.

84 We find that the demand letter does not meet the requisite degree of proof required of Mr. Shefsky to meet his burden of controverting evidence on the record that he did not — within the corporate governance structure — name a replacement, seek to call, or actually call a shareholders' meeting, or propose a different slate of directors. Compliance with that which was demanded, within a 9-day period, would not have been in the best interests of CGMI.

85 We conclude that the October 2, 2013 letter is not an exercise of Mr. Shefsky's right to appoint a third member of the Board of Directors, nor is it sufficient evidence to controvert the chambers judge's finding that Mr. Shefsky took no steps to appoint a third director. Further, there is no evidence that Mr. Shefsky's expectation that he could appoint a third director to the Board was violated in a manner that was oppressive, unfairly prejudicial, or that unfairly disregarded his protected interests.

Conclusion

86 In conclusion, and for the foregoing reasons, the appeal is dismissed.

Frans Slatter J.A. **(dissenting):**

87 The issue on this appeal is whether the appellants Shefsky and 2350183 Ontario Inc. are entitled to a remedy for oppressive conduct arising from the way the business of California Gold Mining Inc. was conducted.

Facts

88 California Gold Mining is a junior mining company listed on the TSX-Venture Exchange. In 2012 it was managed and controlled by its president and CEO, Michael Churchill; its chairman Patrick Cronin; a director, Kevin Cinq-Mars; a major shareholder, R.W. Tomlinson; and other associates of theirs. This original group can conveniently be described as the "Incumbent Group".

89 California Gold Mining had unsuccessfully attempted to raise money to purchase a gold mining property in Mariposa County, California. The company's financial advisor, Haywood Securities, introduced Shefsky as a person who might be able to assist in raising the necessary funds.

90 In October 2012, California Gold Mining and Shefsky signed a Term Sheet respecting the raising of funds to purchase the Mariposa property. The essential terms were that Shefsky would attempt to raise between $5 million and $8 million via a private placement of shares by November 30, 2012. If he was successful, certain changes would be made to the management structure of the company:

- two existing board members would resign in favour of Shefsky and his nominee, Charlie Cohen;
- Nuno Bandolini, another ally of the appellants, would be appointed to the board, provided he invested at least $100,000;
- Churchill would resign as CEO, but remain as president, and Shefsky would be appointed as CEO;
- the Chief Operating Officer would resign in favour of Eric Moeller.

The expectation was that Shefsky would nominate three members of a five-person board, and Shefsky and Moeller would essentially control the day-to-day operations: reasons, para. 105.

91 Shefsky was unable to raise the funds by the original deadline of November 30, 2012, and the deadline was extended to December 31. All of the money was actually raised by February, 2013, when the private placement closed. The chambers judge found that nobody involved considered time to be "of the essence", and all were content that the funds were actually raised. There was ample evidence about the words and conduct of the parties to support the inference that Shefsky had complied with the fundraising pre-conditions of the Term Sheet.

92 At some point a dispute arose as to whether Shefsky was entitled to credit for all of the $5 million raised. It was suggested that Shefsky was not entitled to credit for subscriptions from incumbent shareholders, or subscriptions that had been solicited by other members of the Board, or for units given to Haywood Securities for services rendered. Shefsky took the position that he had raised $5 million, or alternatively that the Term Sheet merely required that $5 million be raised for the private placement, regardless of the exact motivation for any specific investment. It is unclear whether this issue was only raised later, after the eventual falling out of the various groups. The chambers judge found (reasons, paras. 60, 102-3) "... it was objectively reasonable for Shefsky to conclude that his obligations under the Term Sheet had been met ...".

93 However, once Shefsky had raised the necessary funds, there was some resistance among the Incumbent Group to the agreed changes to the Board. None of the incumbents were keen to resign, and the suggestion was made that the deal had "morphed significantly" from what was originally contemplated. Further, Cohen was unexpectedly unable to serve on the Board, and Shefsky could not immediately find a replacement. There were various discussions about the final makeup of the Board, with Shefsky continuing to assert his right to nominate three members of a five-person board.

94 In March 2013, when the time came to send out the management information circular for the April Annual General Meeting, Shefsky had still not identified a replacement for Cohen. As a result, the slate of directors proposed by management was Churchill, Shefsky, Bandolini, Cronin and Cinq-Mars. The appellants voted in favour of that slate. As a result, the appellants cannot complain that the election of these directors was in any way oppressive. On the other hand the record does not support an inference that Shefsky had abandoned his long-term right to appoint three members of a five-member board. The chambers judge declined to make a finding of fact about whether there were conversations about one board member resigning when a replacement for Cohen was identified: reasons, para. 36.

95 Problems in the relationship started to appear. None of the incumbent directors was eager or willing to resign in favour of Shefsky's nominee. Moeller was terminated in July, allegedly for shortcomings in the performance of his work. Shefsky had some concerns about his own employment contract. There was evidence on the record that Shefsky continued to raise the topic of calling another shareholders meeting to restructure the composition of the Board.

96 Matters came to a head in August of 2013. California Gold Mining's lawyers were instructed to file a price reservation with the TSX-V for a private placement with a share price of $0.05. This was below both the recent trading range and the book value of the company. At the Board meeting on August 21, 2013, Churchill made a general statement about seeking financing in the short term. Shefsky again expressed a desire to call a shareholders meeting to reconstitute the Board. Churchill approached the Incumbent Group and its supporters to subscribe to a proposed new private placement. The appellants were neither informed of the impending private placement, nor were they invited to participate. On September 9, 2013, a notice was sent to the Board members indicating that a vote would be held the next day to authorize the private placement, which by this point had been fully subscribed. This was the first time that Shefsky and Bandolini became aware of what they accurately describe as the Secret Private Placement.

97 The Secret Private Placement contemplated the issuance of 15,860,000 units at $0.05 a unit, for gross proceeds to California Gold Mining of $793,000. Shefsky immediately contacted Pierre Caland, an investor, and persuaded him to finance a competing private placement. Within 48 hours, Shefsky was able to present to the Board a "Bought Deal"

which contemplated the issuance of about 14,286,000 units at $0.07 a unit, for gross proceeds to California Gold Mining of approximately $1 million. In other words, the Bought Deal generated more capital for the company, through less dilution of the shareholdings.

98 The Board raised a number of technical objections to the Bought Deal. It refused even a 48-hour adjournment of the meeting to allow Shefsky to address some of their concerns. The Secret Private Placement was approved, thereby diluting the shareholdings of the appellants and their supporters. The next week, Cinq-Mars proposed an equivalent private placement for the appellants' supporters in the sum of $793,000. Churchill, however, would not permit a further private placement for any more than $304,454. That obviously would not neutralize the dilution resulting from the Secret Private Placement. That, combined with the apparent repudiation of the overall arrangement in the Term Sheet by the Incumbent Group, caused Shefsky to decline the offer. Given all that had happened, it was now abundantly clear that the Incumbent Group was not going to implement the provisions of the Term Sheet which would have given Shefsky control of the Board.

99 The appellants then commenced this litigation, alleging that the affairs of California Gold Mining had been conducted in an oppressive manner that unfairly disregarded their interests.

The Reasons of the Chambers Judge

100 After reviewing the evidence and the facts, and stating the law with respect to oppression, the chambers judge identified the following issues:

1. What reasonable expectations are alleged by Shefsky? The chambers judge concluded at para. 79 that the applicants had asserted three:

    a. The Term Sheet would be honoured;

    b. Shefsky would be permitted to appoint a director to replace Cohen; and

    c. Shefsky would have control of California Gold Mining.

2. Were these expectations reasonable?

    a. The Term Sheet

        (i) Did Shefsky meet the deadline? If not, was there conduct that could have led Shefsky to a reasonable expectation that the deadline in the Term Sheet was extended?

        (ii) Did Shefsky reach the goal of $5 million in subscriptions?

    b. Appointment of a director to replace Cohen

        (i) Did Shefsky have a reasonable expectation that he could nominate a third director when Cohen refused the nomination?

        (ii) Were Shefsky's reasonable expectations regarding Board nominations breached?

    c. The expectation of control.

3. If any reasonable expectations were breached, did any actions of the respondents constitute oppressive conduct?

4. If oppressive conduct was found, what is the appropriate remedy?

In summary, the chambers judge found (reasons at para. 127) that the applicants had established the first two reasonable expectations: that the Term Sheet would be honoured, and that Shefsky would be allowed to appoint a third member to the Board. The chambers judge concluded, however, that those two expectations were not violated. He found that the third expectation, that of "retaining control", was not reasonable, because Shefsky never had control.

101 The chambers judge found that the first expectation, respecting the honouring of the Term Sheet, was established on the record. Even considering the dispute about who brought in some of the subscribers, Shefsky could reasonably expect that he had met his obligation of raising $5 million: reasons at para. 103. The record showed that the parties did not regard time as being "of the essence", and the fact that a small amount of the money was raised after December 31 was not significant.

102 With respect to the second expectation, the chambers judge found that Shefsky had a reasonable expectation that he could appoint a third member to the Board. He was not limited to appointing only Cohen, and Shefsky was entitled to find a replacement when Cohen was unable to accept the appointment: reasons at para. 108. However, this expectation was not breached. Shefsky voted for the slate in the 2013 management circular, and never thereafter named a replacement director: reasons at para. 114. Whether one of the existing directors would have resigned in favour of this nominee was therefore moot. Further, Shefsky did not prove that if he had nominated a replacement, a majority of the shareholders would have elected that nominee.

103 The chambers judge found that the third expectation, that Shefsky would retain control of the Board, was not reasonable since he never had control to start with. Shefsky had not brought forward affidavits from a majority of the shareholders indicating that they would vote for him, an absence of evidence that the chambers judge found to be fatal: reasons at paras. 119, 123, 126. Thus, any expectation that Shefsky had about control was unreasonable.

104 Given these conclusions, it was not necessary for the chambers judge to decide the third issue (whether any of the conduct was oppressive) nor the fourth issue (the appropriate remedy): reasons at para. 127.

Issues and Standards of Review

105 The formulation of the core standards of review is set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.):

> (a) conclusions on issues of law are reviewed for correctness: *Housen* para. 8,
>
> (b) findings of fact, including inferences drawn from the facts are reviewed for palpable and overriding error: *Housen* paras. 10, 23; *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 SCR 401, and
>
> (c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": *Housen* para. 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: *Housen* paras. 33, 36.

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

106 The appellants allege a number of errors. Firstly they argue that the chambers judge mischaracterized the third complaint as being limited to "a reasonable expectation of control". They argue that in the whole context, they had a reasonable expectation that the Incumbent Group would not proceed with the Secret Private Placement, which itself was an oppressive act that unfairly disregarded their interests. This issue engages a mixed question of fact and law. The facts surrounding the Secret Private Placement are not materially in dispute; the remaining issue is whether they can reasonably amount in law to oppressive conduct.

107 Secondly, error is alleged in the finding that any question about the reasonable expectation of nominating three directors out of five was moot. This is essentially a finding of fact.

108 Thirdly, it is alleged that the chambers judge erred in requiring that the appellants bring forth direct evidence from shareholders that they would support Shefsky by voting their shares as he recommended. This is primarily a question of the weight of the evidence, which is only reviewable for palpable and overriding error.

The State of the Record

109 The chambers judge unfortunately declined to make key findings of fact on some issues. He concluded that the law prevents a chambers judge from making findings on disputed evidence. He thus decided at para. 6 to resolve contested factual issues only "on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties." The reluctance of the chambers judge to draw inferences from the evidence before him leaves gaps in the record that require the necessary inferences to be drawn on appeal.

110 There are admittedly cases that point out the dangers of attempting to resolve disputed issues, especially those that rely on findings of credibility, based on conflicting affidavits and documents that would support either party's position. An example is *Charles v. Young*, 2014 ABCA 200 (Alta. C.A.) at para. 4, in which the chambers judge attempted to decide whether the respondent was the adult interdependent partner of the deceased. But the record before the court will never be perfect or complete, even after a trial. Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the disputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability).

111 *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), a summary judgment case, pointed out the need to make greater use of summary procedures for deciding disputes. Rules that saw the trial as a default method of proving disputed facts should be moderated:

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

The mere fact that there might be some conflicting evidence on the record did not mean that a "fair and just adjudication" was not possible.

112 The cases where it was impossible to resolve disputed factual issues in chambers tend to be more extreme. One category is cases that depend almost entirely on credibility, without any collateral documentation to support either side: *Nieuwesteeg v. Barron*, 2009 ABCA 235 (Alta. C.A.) at paras. 9-10, (2009), 460 A.R. 329 (Alta. C.A.); *Haluschak v. Stokowski* (1990), 104 A.R. 10 (Alta. Master) at paras. 23-25, (1990), 39 C.P.C. (2d) 8 (Alta. Master). In these cases, sometimes there has not even been cross-examination on the affidavits: *Montgomery v. Riviere*, [1989] A.J. No. 958 (Alta. C.A.); *Guimond v. Sornberger* (1980), 25 A.R. 18 (Alta. C.A.) at para. 20, (1980), 13 Alta. L.R. (2d) 228 (Alta. C.A.); *Burton v. Burton* (1987), 84 A.R. 338 (Alta. C.A.) at para. 15, (1987), 12 R.F.L. (3d) 113 (Alta. C.A.). As another example, in *Schmidt v. Wood*, 2013 ABCA 138 (Alta. C.A.), which involved an application for contempt, it could not be seen from the record with clarity what the underlying order actually required, never mind whether the respondent had complied. Some issues are particularly unsuited to resolution on a paper record: *Achtem v. McConnell*, [1986] A.J. No. 207 (Alta. C.A.) (the *bona fides* of a party); *Barter v. Barter* (1996), 42 Alta. L.R. (3d) 221 (Alta. C.A.) at para. 8 (best interests of a child with special medical needs).

113 Not every piece of disputed evidence requires a trial. For example, a "bare denial" or bald allegation does not raise a triable issue: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 (S.C.C.) at para. 11, [2008] 1 S.C.R. 372 (S.C.C.); *Goldman v. Devine*, 2007 ONCA 301 (Ont. C.A.) at para. 23; *R. Floden Services Ltd. v. Solomon*, 2015 ABQB 450 (Alta. Q.B.) at para. 23, *R. Floden Services Ltd. v. Solomon* (2015), 24 Alta. L.R. (6th) 76 (Alta. Q.B.); *Confederation Trust Co. v. Alizadeh*, [1998] O.J. No. 408 (Ont. Gen. Div.) (QL). Nor does a self-serving affidavit unsupported by other evidence: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at pp. 436-37. Nor does evidence that flies in the face of the balance of the record: *Dagher v. Glenn*, 2016 ABCA 38 (Alta. C.A.) at paras. 30-2; *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298 (Alta. C.A.) at para. 25-6, (2003), 27 Alta. L.R. (4th) 62 (Alta. C.A.); *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Ont. Gen. Div.); *Klein v. Wolbeck*, 2016 ABQB 28 (Alta. Q.B.) at para. 26; *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. S.C.J.) at p. 253. Whether there is truly a "genuine issue requiring resolution at a trial" requires a nuanced balancing of the weight and perceived reliability of the evidence, the importance of the issue, the likelihood of there being a better record at trial, and any other relevant considerations.

114 Where the parties decide, for whatever reason, that they do not wish to suffer the expense or delay of a full trial, a chambers judge should still attempt to resolve the dispute, if possible. It is important to note that the *Business Corporations Act*, RSA 2000, c. B-9, contemplates that oppression disputes will be decided "on application". Section 242(3)(p) includes as a possible remedy "an order requiring the trial of any issue", which demonstrates that a trial is not the presumptive forum for oppression litigation. Rigid rules preventing the reconciliation of inconsistent evidence in a chambers setting are inconsistent with this approach.

115 As the chambers judge noted at para. 9:

> 9 In this case, the parties chose a chambers procedure, knowing the limitations of affidavit evidence and aware of the implications of such a decision. It is appropriate, then, to decide the issues that I can, based on the best available evidence before me.

This is the proper approach, but it should not be constrained by artificial or formalistic rules stating that any issue of fact disputed on the record cannot be resolved in chambers. As noted in *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para. 15, (2014), 94 Alta. L.R. (5th) 301 (Alta. C.A.): "Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication."

The Oppression Remedy

116 The *Business Corporations Act* provides a remedy to any "complainant" (defined to include any security holder, creditor, director, officer or "other proper person") who has been the subject of oppressive conduct with respect to the business of the corporation. The scope of the remedy is provided in s. 242(2):

> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

This statutory remedy has been described as extending beyond strict legal rights to encompass "not just what is legal but what is fair .... It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities": *BCE Inc., Re*, 2008 SCC 69 (S.C.C.) at para. 58, [2008] 3 S.C.R. 560 (S.C.C.). The three types of conduct mentioned in s. 242(2) are not mutually exclusive and should be read in combination: *BCE* at para. 89.

117 *BCE* at para. 68 outlines a two-step process for the analysis:

> (1) Does the evidence support the reasonable expectation asserted by the claimant? and
>
> (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

Once these two initial conditions are satisfied, the applicant must still go on to establish wrongful conduct, causation, and compensable injury: *BCE* at para. 90.

118 The first part of the analysis is factually and contextually driven:

> 59 Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another. ...
>
> 62 As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

Again, the assessment of the "reasonable expectations" is driven by the context and business realities, not merely by the strict legal rights and relationships existing between the parties.

119 There is no strict legal constraint on what can generate reasonable expectations. *BCE* listed some factors that might commonly be in play:

> 72 Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

Reasonable expectations may also arise from the dealings and relationships of the parties, and from the way the corporation was operated.

120 However, not every disappointed expectation will be oppressive:

> 89 Thus far we have discussed how a claimant establishes the first element of an action for oppression - a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather

> than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

It is thus necessary for the applicant to prove that the challenged conduct was oppressive, or unfairly prejudicial to it, or unfairly disregarded its interests.

121 It is not suggested on appeal that the chambers judge erred in his statement of the law of oppression. The alleged errors arise primarily from the way the law was applied to the facts.

Status of the Appellants

122 The respondents argue that the *Act* only gives rights to "complainants" and that the appellants' complaints arise in another context. Complainants are defined to include any security holder, creditor, director, officer or "other proper person". The appellants are clearly security holders, and Shefsky was a director and officer. It is sufficient that their status arose as a result of the Term Sheet; it matters not that Shefsky was not a director when the Term Sheet was signed, because the oppressive conduct occurred later. Given the conduct of the Incumbent Group in entering into the Term Sheet, it would be artificial to think that the appellants are not also "other proper persons" for the purposes of the oppression remedies.

123 The respondents argue, however, that the dispute does not arise out of Shefsky's status as a shareholder, director, or officer. Rather, they argue that the complaints of oppression arise in his capacity as a financier or underwriter, which does not entitle him to oppression remedies. In support of this argument, the respondents cite *Rogers Communications Inc. v. MacLean Hunter Ltd.* (1994), 2 C.C.L.S. 233 (Ont. Gen. Div. [Commercial List]) at para. 9; *Stahlke v. Stanfield*, 2010 BCSC 142 (B.C. S.C.) at para. 23; and *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2010 BCSC 1547 (B.C. S.C.) at paras. 182-3, (2010), 75 B.L.R. (4th) 212 (B.C. S.C.) affirmed other grounds 2011 BCCA 228 (B.C. C.A.) at para. 89. Those cases are, however, distinguishable; while the applicants were shareholders, the complaints they made did not arise out of their status as shareholders, but rather out of collateral contracts or relationships.

124 Allegations of oppression will generally arise against a background of other legal rights. There will frequently be contractual relationships between the various parties. Further, there are always corporate law rights in play, some of which are loosely analogous to contractual rights. It is generally not oppressive for a party to rely on clear contractual rights, unless they are asserted entirely out of proportion to the reasonable expectations of the parties. If the real complaint is a breach of contract, it should be pursued as such, and not under the guise of an oppression claim: *Stahlke* at para. 23. "Reasonable expectations", however, can arise from a background of contractual rights, and can also arise absent any specific contractual right. In this case the expectations of the appellants arose primarily as a result of the terms of the Term Sheet, combined with rights arising from the law of corporations. There were also contractual relationships between the parties, but they were primarily in place to implement the understandings set out in the Term Sheet.

125 It is difficult to regard the Term Sheet as being merely a contract. The only parties to it were California Gold Mining and Shefsky, yet the expectations it created required the cooperation of other parties. Many of the things outlined in the Term Sheet were beyond the practical power of the corporation, for example, the composition of its own board. As another example, it contemplated that one or more of the sitting directors would resign in favour of Shefsky's nominees. Given the reality of "shareholder democracy", the Term Sheet contemplated others (such as the Incumbent Group) voting their shares in ways that would make possible the realization of the reasonable expectations it created. Whatever its contractual content, the Term Sheet was equally important in creating reasonable expectations that could be relied on by the appellants once they became shareholders and Shefsky became a director and officer.

126 Further, describing Shefsky as merely an underwriter or financier does not accurately describe his role. It is true that he was to raise a certain amount of money for California Gold Mining, but that was only the precondition to him taking a larger role. In addition to becoming a shareholder, Shefsky was to become the Chief Executive Officer, a

board member, and was also to have a control of the appointment of the Board. The expectations thus created went well beyond what he might have had as a mere financier.

127 Given the factual context, and having regard to the particular allegations and complaints being made by the appellants, they are properly regarded as being complainants, and the allegations that they make are properly characterized as complaints about oppressive corporate conduct.

The Expectation of Control

128 The chambers judge found that Shefsky had met the requirement of raising $5 million in capital, which created a reasonable expectation that the provisions of the Term Sheet would be honoured. That in turn created an expectation that Shefsky could nominate three directors, but this issue was said to be moot because Shefsky never purported to name a third director. Finally, the chambers judge found that the Shefsky's expectation of "control" was unreasonable because the appellants never had control.

129 The appellants argue that the chambers judge defined the alleged scope of the oppressive conduct too narrowly. They argue that the expectation of control went well beyond demonstrating that they could prove a majority of the shareholders would vote as Shefsky recommended. Further, the chambers judge erred in concluding that Shefsky had never nominated a replacement director. The respondents argue that any expectation of control was unreasonable because, at the end of the day, the shareholders control who will be elected as a director.

130 On this issue it is important to highlight what is not in dispute. Neither side disputes the concept of "shareholder democracy". It is not disputed that only the shareholders can elect the directors. It is thus artificial to characterize Shefsky's asserted expectation of "control", as an expectation that he could override shareholder democracy. His expectations could, however, encompass:

> (a) an agreement by the Incumbent Group that they would vote their shares with the appellants in such a way that they could maximize their chances of obtaining control of the Board,
>
> (b) an understanding that Shefsky would never have to concern himself with "winning a proxy fight", because the Incumbent Group agreed that they would vote to elect his three nominees; there would never be a proxy fight, and
>
> (c) the business reality that if Shefsky had control of the Board he could effectively control the management nominees for directors.

The chambers judge's description of the appellants' expectation as centering around whether they could "maintain control" artificially characterizes what was alleged, and sets up an expectation that would be impossible to achieve. It focusses on "narrow legalities" rather than "business realities": *BCE* at para. 58.

131 Further, in the context of an oppression action, "shareholder democracy" is not an absolute. The *Business Corporations Act* allows the Court to order several remedies that are inconsistent with a strict view of shareholder democracy. Thus, the Court can amend the articles or bylaws, appoint additional or replacement directors, and make other corporate changes that usually require shareholder approval. The respondents' artificial reliance on the concept of "shareholder democracy" to justify their oppressive conduct is unsupported by the statute. The statute makes it clear that "shareholder democracy" is not a trump card that always overrides reasonable expectations.

132 The chambers judge also set an unreasonably high evidentiary standard. The appellant filed affidavits from a few key investors indicating that they had invested because of the appellant's involvement. The chambers judge would not, however, draw an inference that they would have voted as Shefsky recommended. The chambers judge would not accept that Shefsky could have ensured the election of his nominees because he had not brought forward affidavits from all of those who subscribed for units at his invitation indicating that they would support him. The suggestion that such

affidavits would be required from every shareholder sets an artificially high evidentiary standard that could never be met for a publicly traded company.

133 In any event, the only reasonable inference is that many, if not all who subscribed for units at Shefsky's invitation had a considerable measure of confidence in him, which they demonstrated by writing cheques for units. Absent some noticeable change of circumstances, it is unreasonable to infer that they would have abandoned support for him in favour of the Incumbent Group. Any findings and inferences to the contrary represent palpable and overriding errors.

134 Further, as noted the chambers judge ignored the business realities. Churchill acknowledged that the "shareholders had never voted against the slate of directors proposed by management": reasons, para. 15. If Shefsky had control of the Board, he controlled the management slate. Further, the Term Sheet implied that the Incumbent Group would vote their shares to support Shefsky's nominees, or at the very least they would not obstruct the process. The finding that the appellants had not proven an ability to control the Board is inconsistent with the finding that they had a legitimate expectation that the Term Sheet would be honoured. The chambers judge's refusal to draw the inference that the board of a company could be controlled notwithstanding the concept of "shareholder democracy" was unreasonable. The only reasonable inference is that if the appellants and the Incumbent Group had joined together to nominate and then vote for a particular slate, that slate would undoubtedly have been elected.

135 It is also unreasonable to interpret the Term Sheet as only creating reasonable expectations about control of the Board until the next shareholders meeting. Gold mining is not a short-term enterprise. There is nothing in the Term Sheet to suggest that Shefsky's control of the Board would end only a few months after he raised the $5 million. The Term Sheet in fact specifies that Shefsky's initial term as Chief Executive Officer would be for 36 months. The respondents argue that because of "shareholder democracy" no one could guarantee the composition of the Board beyond the next shareholders meeting. As previously discussed, that is an artificial argument and no answer to Shefsky's reasonable expectations that he would have control of the Board, with the support of the Incumbent Group at least in the medium term.

136 The appellants argue that their reasonable expectation that Shefsky could nominate a third member of the Board was well-established on this record, and that this issue was not moot.

137 The essence of the arrangement in the Term Sheet was that Shefsky would be able to nominate three members of a five-person board. The Term Sheet specifically provides that if the $5 million was raised "two of the existing members of the board of the Company shall resign in favour of Martin Shefsky and Charlie Cohen". The essential business arrangement was control of the Board, and it is unreasonable to interpret the Term Sheet as meaning that Shefsky could only nominate the two candidates specifically named. If (as it turned out) one of them could not act, or if one commenced to serve but had to resign, the only commercially reasonable interpretation is that Shefsky could nominate qualified replacements: reasons, paras. 107-8. Indeed, the record does not appear to disclose that the respondents ever asserted otherwise. Further, it must be implicit in this arrangement that incumbent directors would resign in order to make place for Shefsky's nominee; in any event the Term Sheet says so explicitly.

138 The chambers judge concluded at para. 114 that the refusal of any members of the Incumbent Group to resign was a "red herring and moot" because Shefsky "did not name a replacement, seek to call, or actually call a shareholders meeting himself". This fact finding and inference are surprising, as all the objective evidence on the record discloses that Shefsky was persistently asserting his right to nominate three members of a five-member board. On several occasions he proposed calling a shareholders meeting, but was rebuffed. On October 2, 2013 the appellants' counsel wrote a letter demanding that one of the Incumbent Group's directors "immediately resign from the board so that his place can be taken by Charlie Cohen who is prepared to accept the nomination". The chambers judge appears to have overlooked this evidence.

139 The appellants are justified in arguing that the findings on this point represent palpable and overriding error. Shefsky did nominate a third director, and none of the incumbent directors resigned as specifically required by the Term Sheet, which further defeated a reasonable expectation of the appellants.

140 In summary, the appellants have demonstrated palpable and overriding error with respect to the expectation of control. The conclusion that Shefsky could not prove potential control arose only because an impossible and unreasonable standard of proof was set. Further, the chambers judge's failure to draw the inference that Shefsky, once in control of the Board, could effectively control the election of directors, reflects palpable and overriding error. The finding that Shefsky never nominated a third director reflects a reviewable error of fact; the letter of October 2, 2013 proves that he did do so no later than then. The failure of one of the incumbent directors to resign to make room for Shefsky's nomination reflected a clear breach of the Term Sheet and the expectation that it would be honoured.

Was the Conduct Oppressive?

141 *BCE* confirms that it is not sufficient for a complainant to prove a breach of a reasonable expectation. The complainant must also show that the offending conduct falls within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest.

142 The Secret Private Placement unfairly disregarded the appellants' interests and was prejudicial to them, making it oppressive. The primary reason it unfairly disregarded the appellants' interests was that it was in direct breach of the Term Sheet. As the chambers judge found, once Shefsky had raised $5 million, he had a reasonable expectation that the Term Sheet would be honoured. Not only did the Secret Private Placement dilute the shareholdings of the company, it was part of an overall pattern of conduct by the Incumbent Group that demonstrated their repudiation of the Term Sheet.

143 No later than at the time of the Secret Private Placement, it became apparent that the Incumbent Group had no further intention of respecting the provisions of the Term Sheet. It may well be that the conditions of the financing had "morphed significantly", but that did not justify secret, unilateral steps by the Incumbent Group to change the agreement. At this point, Shefsky had completely performed his side of the deal; he had raised the $5 million that California Gold Mining needed to buy the Mariposa property. It was unfair and oppressive for the Incumbent Group to aspire to enjoy the benefits of Shefsky's performance of the Term Sheet, while not performing their reciprocal obligations under it.

144 The inference is clear that the Incumbent Group was not motivated to perform its obligations under the Term Sheet. It appears that in some quarters there was a lack of enthusiasm from the very beginning for the concept of giving Shefsky control of the company. There was also the view that the capital structure had "morphed" from what was originally envisioned. The Incumbent Group was not disposed to perform its obligations under the Term Sheet, and persistently resisted or deflected attempts by Shefsky to call a shareholders meeting or to appoint a third member to the Board. They seized on the idea, rejected by the chambers judge, that Shefsky had not performed his obligations under the Term Sheet.

145 There are further aspects of the Secret Private Placement which demonstrate that it unfairly disregarded the appellants' rights. Its very secrecy was objectionable, as was the appellants' exclusion from the opportunity to subscribe to shares. It was only offered to supporters of the Incumbent Group, not to the shareholders as a whole. It was done on very short notice, without opportunity for any amendment or mitigation. For the purposes of the oppression analysis, another important distinction between the Bought Deal and the Secret Private Placement is that the former was consistent with the Term Sheet, which stipulated that Shefsky would retain control, whereas the latter was inconsistent with that agreement.

146 Further, the Secret Private Placement was oppressive because it was not in the best interests of the corporation. The Secret Private Placement contemplated the issuance of 15,860,000 units at $0.05 a unit, for gross proceeds to the California Gold Mining of $793,000. At the time, the shares were trading at about $0.07 each, and the book value was higher than that. The Bought Deal contemplated the issuance of about 14,286,000 units at $0.07 a unit, for gross proceeds of approximately $1 million. In other words, the Bought Deal generated more capital for the company through less dilution of the shareholdings. While the directors of a company are entitled to act in what they consider to be in the best interests of the company, it is impossible to rationalize how the Secret Private Placement could possibly have been the better deal.

147 The respondents argue that it is neither unusual nor improper for a junior mining company to want to raise additional capital. That is not the issue. No one doubts that any junior mining company can benefit from more capital. That, however, does not justify oppressive methods of raising that capital.

148 It also unfairly disregards the interests of the shareholders if the Board acts in its own best interest, rather than in the interests of the corporation: *Legion Oils Ltd. v. Barron* (1956), 2 D.L.R. (2d) 505 (Alta. T.D.) at p. 516 [33], (1956), 17 W.W.R. 209 (Alta. T.D.); *Keho Holdings Ltd. v. Noble*, 1987 ABCA 84 (Alta. C.A.) at para. 38, (1987), 52 Alta. L.R. (2d) 195 (Alta. C.A.). While the courts defer to the reasonable business judgment of the directors, no reasonable justification for the Secret Private Placement has been advanced. The respondents cite *Teck Corp. v. Millar*, [1973] 2 W.W.R. 385 (B.C. S.C.) at p. 413 for the proposition that it may sometimes be acceptable for the directors to act to retain control of the corporation:

> My own view is that the directors ought to be allowed to consider who is seeking control and why. If they believe that there will be substantial damage to the company's interests if the company is taken over, then the exercise of their powers to defeat those seeking a majority will not necessarily be categorized as improper.

Having expressly agreed in the Term Sheet to voluntarily give control of the company to Shefsky, the Incumbent Group can hardly argue that there was anything contrary to the interests of the company in that change of control. The Secret Private Placement was undoubtedly better for the Incumbent Group, but it cannot reasonably be said to have been in the best interest of the company.

Justification for the Oppressive Conduct

149 While *BCE* makes it clear that corporate oppression is as much concerned with equitable expectations as it is with strict legal rights, the respondents' frequent response to the appellants' claims is that they are inconsistent with strict legal rules.

150 For example, the respondents argue that after the Term Sheet was signed, the appellants subscribed to shares using a standard form subscription agreement. That agreement had a "whole agreement" clause that disclaimed any prior representations or covenants. Thus, the respondents argue, the subscription agreement overtook the Term Sheet, and at that point any of Shefsky's expectations arising from it expired. This is a completely technical and artificial argument. It was obvious that the arrangements in the Term Sheet would not become operational until after the $5 million private placement had been successfully completed. If that was the true meaning of the whole agreement clause, Shefsky would never be entitled to become Chief Executive Officer, or to nominate three out of five directors; the entire Term Sheet would become meaningless. This proposition is simply unreasonable. The whole agreement clause in the subscription agreement must mean that there were no prior surviving representations representing the subscription itself, not representing other agreements relating to the operation of the company.

151 Another example of this technical response is the respondents' reliance on artificial and technical concepts of "shareholder democracy", as previously discussed.

152 The respondents justify the Board's refusal of the Bought Deal in favour of the Secret Private Placement on other technical grounds. For example:

> (a) the respondents reply that the Bought Deal, as proposed, was not compliant with the securities regulations because Caland was not licensed to engage in underwriting. That is undoubtedly so, but that does not mean that the Bought Deal could not have easily been made compliant, for example by enlisting Haywood Securities as the underwriter;
>
> (b) the respondents also allege that the Bought Deal required shareholder approval because it would result in Caland owning more than 20% of the shares. That presupposes that Caland was going to retain control of that entire block,

> whereas the concept of a "bought deal" is that the underwriter will sell the shares to numerous investors. Indeed, the minutes of the Directors' meeting of September 10, 2013 confirm that the "proposed financing would be distributed widely so as to avoid creation of a control person".

If some of the proposed steps and filings were inadvertently non-compliant with securities regulations, that does not necessarily mean that the appellants' expectations were unreasonable.

153 Neither side disputes that the securities industry is highly regulated. All concerned were sophisticated players, and they knew that whatever was to be done had to be done in compliance with the rules of the TSX-Venture Exchange and the directives of the Securities Commission. The Term Sheet contains numerous references to securities' regulatory requirements. Thus, when proposals were made to take certain steps with respect to California Gold Mining, it must have been the intention of all concerned that such steps were subject to, and would be undertaken in compliance with, the appropriate securities regulation. Securities regulation being extremely complex, it must have been anticipated that expert advice would have been sought on how exactly to implement any steps. It is thus no answer to the oppression claim, or to the appellants' expectations, to say that any particular proposed step required regulatory approval, as it must have been anticipated that such approval would be obtained. It is also no answer that any particular step, as proposed, would be offside the securities regulations, because it must have been intended that all steps would be structured to be compliant.

154 It should also be remembered that the Bought Deal was put together and presented to the Board with great haste because the Incumbent Group had essentially ambushed the appellants with the Secret Private Placement. It is hardly surprising that the appellants had not had time to explore all of the regulatory requirements that would have to be met, but it was not unreasonable for them to think that those details could be worked out if the Board accepted the Bought Deal in principle. The Board would not even consider a 48 hour adjournment of the meeting to allow the appellants to deal with these regulatory details.

155 The respondents argue that any agreements about the composition of the board, or about control of the company, should have been publicly disclosed in accordance with the securities regulations. If such an obligation rested on the company or the directors, they may well have been in breach of them. However, those breaches cannot fairly be used to defeat Shefsky's rights; any consequences of a breach of the Board's duties in that regard more fairly lie on the Incumbent Group. Any such duty of disclosure was equally knowable to all involved, including counsel for the company, and any deficiencies in disclosure should obviously have been promptly remedied as soon as they were identified. The failure to comply with those duties does not, in any event, justify oppressive conduct.

156 The respondents complain that the Bought Deal was presented on an "all or nothing" basis. Having unilaterally foisted the Secret Private Placement on the appellants, they can hardly complain about the Bought Deal on that basis. The appellants had made it clear that the Bought Deal was an "either/or" proposal, in that it could not proceed contemporaneously with the Secret Private Placement. But it would be unreasonable to permit the Incumbent Group to acquire units at $0.05 under the Secret Private Placement, and then expect those participating in the Bought Deal to acquire units at $0.07. Any of the subscribers to the Secret Private Placement would undoubtedly have been offered shares under the Bought Deal.

157 The respondents also argue that the appellants failed to mitigate the effect of the Secret Private Placement because they refused an offer to take up units on the same terms. A few days after the Secret Private Placement, Cinq-Mars proposed a further private placement for the appellant's supporters in the sum of $793,000. Churchill, however, would not permit a further private placement for any more than $304,454. That obviously would not neutralize the dilution resulting from the Secret Private Placement. Combined with the Incumbent Group's obvious repudiation of the overall arrangement in the Term Sheet, there was ample justification for the appellants to decline this offer.

158 In summary, the conduct of the respondents breached the expectations of the appellants in ways that were unfairly prejudicial, and unfairly disregarded their interests. The reasons disclose reviewable error to the extent that

they overlooked these breaches based on any of the technical defences raised. They overlook the point that oppression remedies are as much concerned with fairness as they are with strict legal rights, and they are based on unreasonable assumptions, or draw unreasonable inferences about the legitimate expectations of the parties.

The Appropriate Remedy

159 Given a finding of oppressive conduct, it would be necessary to consider the appropriate remedy. Both parties agree that, given the passage of time, it would be inappropriate to attempt to devise an appropriate remedy from this record. It would accordingly be appropriate to refer the issue of a remedy back to the chambers judge.

Conclusion

160 In conclusion, the appeal should be allowed. The appellants were able to demonstrate breaches of their reasonable expectations resulting from conduct of the respondents that was unfairly prejudicial and unfairly disregarded their interests. The question of remedy should be referred back to the chambers judge.

Appeal dismissed.

End of Document

19

2012 SCC 67
Supreme Court of Canada

AbitibiBowater Inc., Re

2012 CarswellQue 12490, 2012 CarswellQue 12491, 2012 SCC 67, [2012] 3 S.C.R. 443, [2012] A.C.S. No. 67, [2012] S.C.J. No. 67, 221 A.C.W.S. (3d) 264, 352 D.L.R. (4th) 399, 438 N.R. 134, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, J.E. 2012-2270

Her Majesty the Queen in Right of the Province of Newfoundland and Labrador, Appellant and AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders), Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty the Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada, Interveners

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: November 16, 2011
Judgment: December 7, 2012
Docket: 33797

Proceedings: affirmed *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965, Chamberland J.A. (C.A. Que.); refused leave to appealdemande d'autorisation d'en appeler refusée *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812, Clément Gascon J.C.S (C.S. Que.)

Counsel: David R. Wingfield, Paul D. Guy, Philip Osborne, for Appellant
Sean F. Dunphy, Nicholas McHaffie, Joseph Reynaud, Marc B. Barbeau, for Respondents
Christopher Rupar, Marianne Zoric, for Intervener, Attorney General of Canada
Josh Hunter, Robin K. Basu, Leonard Marsello, Mario Faieta, for Intervener, Attorney General of Ontario
R. Richard M. Butler, for Intervener, Attorney General of British Columbia
Roderick Wiltshire, for Intervener, Attorney General of Alberta
Elizabeth J. Rowbotham, for Intervener, Her Majesty The Queen in Right of British Columbia
Robert I. Thornton, John T. Porter, Rachelle F. Moncur, for Intervener, Ernst & Young Inc., as Monitor
William A. Amos, Anastasia M. Lintner, Hugh S. Wilkins, R. Graham Phoenix, for Intervener, Friends of the Earth Canada

Subject: Insolvency; Environmental

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — Contingent claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found

as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Crown claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Environmental law --- Liability for environmental harm — Nuisance — Liability in particular cases — Miscellaneous

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Faillite et insolvabilité --- Preuve de réclamation — Créances prouvables — Réclamations éventuelles

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et

de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Procédures assujetties à la suspension — Créances de l'État

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Droit de l'environnement --- Responsabilité pour dommages causés à l'environnement — Nuisance — Catégories particulières de responsabilité — Divers

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC),

et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

In 2008, A Inc. experienced financial difficulties and announced the closure of a mill in the province. One year later, A Inc. sought protection under the Companies' Creditors Arrangement Act (CCAA), and a claims procedure order was issued. Province's Minister of Environment and Conservation issued five orders under s. 99 of the Environmental Protection Act (the "EPA orders") requiring A Inc. to submit remediation action plans to the Minister and to complete them. The province then brought a motion for a declaration that the claims procedure order did not bar the province from enforcing the EPA orders.

The trial judge dismissed the province's motion. The trial judge found that the EPA orders remained truly financial and monetary in nature and, as such, were subject to the claims procedure order. The province brought a motion for leave to appeal.

The Court of Appeal held that the appeal had no reasonable chance of success because the trial judge had found as a fact that the orders were financial or monetary in nature, and it denied leave to appeal. The province appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Deschamps J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): The CCAA provides a single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. In light of wording of the CCAA, the legislative history and the purpose of the reorganization process, to exempt environmental orders would be inconsistent with the insolvency legislation. However, courts will not necessarily conclude that all orders will be subject to the CCAA process. Courts must determine whether the facts indicate that the conditions for inclusion in the claims process are met. There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process. First, there must be a creditor. Here, the province identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Here, the environmental damage occurred before the time of the CCAA proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. Here, the province had not yet formally exercised its power to

ask for the payment of money. Thus, the question was whether it was sufficiently certain that the EPA orders would eventually result in a monetary claim. The trial judge relied on a unique and inescapable set of facts — including the fact that the province actually intended to perform the remediation work itself and assert a claim against A Inc. — to conclude that it was. The majority held that the trial judge reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. Therefore, the majority confirmed the trial judge's finding that the province was a creditor with a monetary claim that should be subject to the CCAA process.

The majority noted that subjecting an order to the claims process merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. It does not extinguish the debtor's obligation to pay its debts, it does not exempt the debtor from complying with environmental regulations and it does not invite corporations to restructure in order to rid themselves of their environmental liabilities.

Per McLachlin C.J.C. (dissenting): The CCAA draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised. Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. In narrow circumstances, where a province has done the work or where it is "sufficiently certain" that it will do the work, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the CCAA proceedings. Here, the Minister had neither done the clean-up work nor was it sufficiently certain that he or she would do so. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

Per LeBel J. (dissenting): The only regulatory orders that can be subject to compromise are those which are monetary in nature. The trial judge's decision was not consistent with the principle that the CCAA does not apply to purely regulatory obligations. Based on the evidence before him, the trial judge could not conclude with "sufficient certainty" that the province would perform the remedial work itself. In fact, it appeared that the trial judge was more concerned with the fact that the arrangement would fail if A Inc. was not released from its regulatory obligations. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

En 2008, A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province. Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise. Le ministre provincial de l'Environnement et de la Conservation a prononcé, en vertu de l'art. 99 de l'Environmental Protection Act, cinq ordonnances (les « ordonnances EPA ») contraignant A Inc. à présenter au ministre des plans de restauration et à les réaliser. La province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter les ordonnances EPA.

Le juge de première instance a rejeté la requête de la province. Le juge de première instance a conclu que les ordonnances EPA demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations. La province a déposé une requête en permission d'appeler.

La Cour d'appel a estimé que l'appel n'avait aucune chance raisonnable de succès parce que le juge de première instance avait conclu, comme question de fait, que les ordonnances EPA étaient de nature financière ou pécuniaire, et elle a refusé d'autoriser l'appel. La province a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Deschamps, J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) : La LACC prévoit une procédure unique permettant de traiter la presque totalité des réclamations contre un débiteur devant un même tribunal. Considérant le libellé de la LACC, de l'historique des dispositions législatives

et des objectifs du processus de réorganisation, une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Toutefois, les tribunaux ne vont pas nécessairement conclure que toutes les ordonnances seront assujetties au processus régi par la LACC. Les tribunaux doivent déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit y avoir un créancier. En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite. En l'espèce, les dommages environnementaux sont survenus avant que les procédures en vertu de la LACC ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. En l'espèce, la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent. Ainsi, la question était de savoir s'il était suffisamment certain que les ordonnances EPA mèneraient éventuellement à la présentation d'une réclamation pécuniaire. En se fondant sur un contexte factuel unique et dont il ne pouvait pas faire abstraction, y compris le fait que la province avait de fait l'intention d'exécuter les travaux de décontamination elle-même pour ensuite présenter une réclamation contre A Inc., le juge de première instance a conclu que c'était le cas. Les juges majoritaires ont estimé que le juge de première instance a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait en l'espèce. Par conséquent, les juges majoritaires ont confirmé la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC.

Les juges majoritaires ont fait remarquer que le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Cela n'éteint pas l'obligation du débiteur de payer ses dettes, ni le dégage de son obligation de respecter la réglementation environnementale, ni n'incite les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

McLachlin, J.C.C. (dissidente) : La LACC établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction. Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. En certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la LACC, une réclamation pécuniaire couvrant le coût des travaux de décontamination. En l'espèce, le ministre n'a pas effectué les travaux de décontamination et il n'était pas suffisamment certain qu'il le ferait. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

LeBel, J. (dissident) : Les seules ordonnances réglementaires pouvant faire l'objet d'une transaction sont celles qui sont de nature pécuniaire. La décision du juge de première instance n'était pas conforme avec le principe selon lequel la LACC ne s'applique pas aux exigences purement réglementaires. En se fondant sur la preuve dont il disposait, le juge de première instance ne pouvait pas conclure avec « suffisamment de certitude » que la province exécuterait les travaux de décontamination elle-même. En fait, il semblait que le juge de première instance était davantage préoccupé par le fait que l'arrangement risquait d'échouer si A Inc. n'était pas libérée de ses exigences réglementaires. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

AbitibiBowater Inc., Re (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812 (C.S. Que.) — considered

Cie pétrolière Impériale c. Québec (Tribunal administratif) (2003), 5 Admin. L.R. (4th) 1, 310 N.R. 343, (sub nom. *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*) 231 D.L.R. (4th) 577, 2003 SCC 58, 2003 CarswellQue 2315, 2003 CarswellQue 2316, (sub nom. *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*) [2003] 2 S.C.R. 624, 5 C.E.L.R. (3d) 38 (S.C.C.) — referred to

Confederation Treasury Services Ltd., Re (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re*) 96 O.A.C. 75, 1997 CarswellOnt 31 (Ont. C.A.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — referred to

McLarty v. R. (2008), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue*) 374 N.R. 311, (sub nom. *Canada v. McLarty*) [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, (sub nom. *McLarty v. Canada*) 293 D.L.R. (4th) 659, 2008 CarswellNat 1380, 2008 CarswellNat 1381, 2008 SCC 26, (sub nom. *R. v. McLarty*) 2008 D.T.C. 6366 (Fr.), (sub nom. *R. v. McLarty*) 2008 D.T.C. 6354 (Eng.) (S.C.C.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 1991 CarswellAlta 315, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (Alta. C.A.) — distinguished

Cases considered by *McLachlin C.J.C.* (dissenting):

Air Canada, Re (2003), 2003 CarswellOnt 9109, 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]) — considered in a minority or dissenting opinion

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — considered in a minority or dissenting opinion

Confederation Treasury Services Ltd., Re (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re*) 96 O.A.C. 75, 1997 CarswellOnt 31 (Ont. C.A.) — referred to

General Chemical Canada Ltd., Re (2007), 228 O.A.C. 385, (sub nom. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*) 2007 C.E.B. & P.G.R. 8258, 35 C.B.R. (5th) 163, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 2007 ONCA 600, 2007 CarswellOnt 5497 (Ont. C.A.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — referred to

Knight v. Imperial Tobacco Canada Ltd. (2011), 2011 CarswellBC 1968, 2011 CarswellBC 1969, 2011 SCC 42, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, 86 C.C.L.T. (3d) 1, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, *(*sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — referred to

Lamford Forest Products Ltd., Re (1991), 10 C.B.R. (3d) 137, 8 C.E.L.R. (N.S.) 186, 63 B.C.L.R. (3d) 388, 86 D.L.R. (4th) 534, 1991 CarswellBC 443 (B.C. S.C.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 1991 CarswellAlta 315, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (Alta. C.A.) — considered in a minority or dissenting opinion

Shirley, Re (1995), 36 C.B.R. (3d) 101, 18 C.E.L.R. (N.S.) 43, 129 D.L.R. (4th) 105, 1995 CarswellOnt 936 (Ont. Bktcy.) — referred to

Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of) (2005), 47 Alta. L.R. (4th) 138, 12 M.P.L.R. (4th) 167, [2006] 3 W.W.R. 195, 386 A.R. 338, 2005 ABQB 559, 2005 CarswellAlta 1018, 13 C.B.R. (5th) 145, 256 D.L.R. (4th) 536 (Alta. Q.B.) — considered in a minority or dissenting opinion

Statutes considered by *Deschamps J.*:

Abitibi-Consolidated Rights and Assets Act, S.N. 2008, c. A-1.01
Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 "claim provable in bankruptcy" — considered

s. 14 [rep. & sub. 1992, c. 27, s. 9] — referred to

s. 121(1) — considered

s. 121(2) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

Code civil du Québec, L.Q. 1991, c. 64
art. 1497 — referred to

art. 1508 — referred to

art. 1513 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "claim" — considered

s. 11 — considered

s. 11.1 [en. 2007, c. 36, s. 65] — referred to

s. 11.1(3) [en. 2007, c. 36, s. 65] — considered

s. 11.8(8) [en. 1997, c. 12, s. 124] — considered

s. 11.8(9) [en. 1997, c. 12, s. 124] — considered

s. 12 — considered

s. 12(1) "claim" — considered

Environmental Protection Act, S.N. 2002, c. E-14.2
Generally — referred to

s. 99 — considered

Statutes considered by *McLachlin C.J.C.* (dissenting):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 — referred to

s. 14.06(8) [en. 1992, c. 27, s. 9(1)] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.1(3) [en. 2007, c. 36, s. 65] — referred to

s. 11.8(5) [en. 1997, c. 12, s. 124] — considered

s. 11.8(7) [en. 1997, c. 12, s. 124] — referred to

s. 11.8(9) [en. 1997, c. 12, s. 124] — considered

s. 12(1) "claim" — considered

Environmental Protection Act, S.N. 2002, c. E-14.2
Generally — referred to

s. 102(3) — referred to

Statutes considered by *LeBel J.* (dissenting):

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Treaties considered by *Deschamps J.*:

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

Treaties considered by *McLachlin C.J.C* (dissenting):

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

Authorities considered:

Baird, Douglas G., and Thomas H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199

Canada, House of Commons, *Evidence of the Standing Committee on Industry,* No. 16, 2nd Sess., 35th Parl., June 11, 1996

Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* new ed. (Burlington, Vt.: Ashgate, 2001)

MacCormick, D.N., "Rights in Legislation", in P.M.S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977)

Saxe, Dianne, "Trustees' and Receivers' Environmental Liability Update" (1997), 49 C.B.R. (3d) 138

APPEAL by province from decision reported at *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), denying leave to appeal decision dismissing its motion for declaration that claims procedure order issued under *Environmental Protection Act* (Nfld.) did not bar province from enforcing orders requiring debtor to perform remedial work.

POURVOI formé par la province à l'encontre d'une décision publiée à *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), ayant refusé d'accorder la permission d'interjeter appel à l'encontre d'une décision ayant rejeté sa requête visant à faire déclarer que l'ordonnance relative à la procédure de réclamations émise en vertu de l'*Environmental Protection Act* n'empêchait pas la province d'exécuter les ordonnances enjoignant la débitrice d'exécuter des travaux de décontamination.

***Deschamps J.*:**

1 The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

2 Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.

3 In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

4 The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the *EPA* Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.), at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

5 For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

6 Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

7 The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montreal. The *CCAA* stay was ordered on April 17, 2009.

8 In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

9 On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders ("*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

10 On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued — and still argues — that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks

the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

11 Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

12 Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

13 In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57 (C.A. Que.)). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

II. Positions of the Parties

14 The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the EPA Orders" (A.F., at para. 32).

15 Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

16 At the Province's request, the Chief Justice stated the following constitutional questions:

> 1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
>
> 2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?
>
> 3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

17 I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However,

the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) ("2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

18 Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

19 What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims under the CCAA

20 Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

21 One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

22 Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

> [Definition of "claim"]
>
> **12.** (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> [Determination of amount of claim]

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(*a*) the amount of an unsecured claim shall be the amount

. . .

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and ...

23 Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor.

24 This definition is completed by s. 121 of the *BIA*:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

25 *Sections* 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121. . . .

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135. . . .

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

26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

27 The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

28 The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

> **11.8**. . . .
>
> (9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

29 The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases, the damage continues to be sustained after the reorganization has been completed.

30 With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

31 However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update", 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

32 Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

33 If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

34 Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *McLarty v. R.*, 2008 SCC 26, [2008] 2 S.C.R. 79 (S.C.C.), at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

35 The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a

situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

36 The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative: *Confederation Treasury Services Ltd., Re* (1997), 96 O.A.C. 75 (Ont. C.A.). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

37 The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

38 Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

39 Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

40 These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.) (para. 24). This objection demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third party-pay" principle in place of the polluter-pay principle.

41 Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars,

"Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

42 Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities.

43 And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

44 The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (Alta. C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

45 The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

46 The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

47 The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's need for fairness against the debtor's need to make a fresh start.

48 Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

49 I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

50 The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

51 The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

52 That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Minister that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in time, there would not be a net payment to Abitibi" (para. 181).

53 The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

54 In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

55 Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible — in some cases, primarily responsible — for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on

the property, on which its source of power had been horse power, and subsequent activities by others who had used fuelpowered vehicles there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

56 These reasons — and others — led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

57 In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (at para. 175), and it was "the hat of a creditor that best [fit] the Province, not that of a disinterested regulator" (para. 176).

58 In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

VI. Conclusion

59 In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

60 With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 22). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

61 Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

62 Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

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

***McLachlin C.J.C.* (dissenting):**

1. Overview

64 The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*") by the Newfoundland and Labrador Minister of Environment and Conservation (the "Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

65 Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

66 In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador (the "Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

67 I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

2. The Proceedings Below

68 The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.)). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57 (C.A. Que.)).

69 The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

3. The Distinction Between Regulatory Obligations and Claims under the CCAA

70 Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the property has been cleaned up or the matter otherwise resolved.

71 It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

72 The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

73 This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (Alta. C.A.), the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety ... as a charge to the public" (para. 29). He answered the question in the negative:

> The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgement for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
>
> [Emphasis added, para. 33]

74 The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.); *Shirley, Re* (1995), 129 D.L.R. (4th) 105 (Ont. Bktcy.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada Re [Regulators' motions],* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J. [Commercial List]), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

75 Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

76 Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385 (Ont. C.A.), *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138 (Alta. Q.B.), *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

4. When Does a Regulatory Obligation Become a Claim Under the CCAA?

77 This brings us to the heart of the question before us: when does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

78 Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. "Creditor" is defined as "a person having a claim ..." (*BIA* s. 2). Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation ... that ... would be a debt provable in bankruptcy", which is accepted as confined to obligations of a financial or monetary nature.

79 The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

80 Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

81 The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

82 The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

83 A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

84 It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt) Re* (1997), 96 O.A.C. 75 (Ont. C.A.) (para. 4).

85 Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that "there appears to be *every likelihood to a certainty* that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley, Re*, Kennedy J. relied on the fact that the Ontario Minister of Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the MOE's intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

86 There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures" (at para. 81), and could indeed cost several times that. In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the Legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations — matters which are not normally subject to judicial consideration: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created by a corporation have insisted on proof of likelihood approaching certainty.

87 In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

5. The Result in this Case

88 Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

89 The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

90 The Minister quickly moved to address the immediate concern of the unsound dam and put out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

91 Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

92 Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi" (R.F. at para. 12). Apart from the fact that the Premier was not purporting to state government policy, the statement simply

does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

93 My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was "sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

94 The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of the United Mexican States and the Government of the United States of America*, Can.T.S. 1994 No. 2), excluding Canadian courts.) In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

95 My colleague concludes:

> [The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact would have been same. ... The *CCAA* judge's assessment of the facts ... leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.
>
> [Emphasis added, para. 58].

96 I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the site contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

97 I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

***LeBel J.* (dissenting):**

98 I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it

is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

99 At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 22). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

100 First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.)), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and Labrador (the "Province") would perform the remedial work itself.

101 In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an off-hand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

102 For these reasons, I would concur with the disposition proposed by the Chief Justice.

Appeal dismissed.

Pourvoi rejeté.

End of Document

20

1997 CarswellOnt 31
Ontario Court of Appeal

Confederation Treasury Services Ltd., Re

1997 CarswellOnt 31, 43 C.B.R. (3d) 4, 68 A.C.W.S. (3d) 396, 96 O.A.C. 75

In the matter of the Bankruptcy of Confederation Treasury Services Limited, a corporation incorporated under the laws of the Province of Ontario having its head office in the City of Toronto, in the Municipality of Metropolitan Toronto, Province of Ontario; in the matter of the Winding-Up Act; in the matter of the Liquidation of Confederation Life Insurance

Catzman, Carthy and Moldaver JJ.A.

Heard: December 19, 1996
Judgment: January 14, 1997
Docket: CA M19800, C24399

Counsel: *Peter H. Griffin* and *Risa Kirshblum*, for Ernst & Young.
A. Sternberg, for former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited.
William G. Horton, for rehabilitator of Confederation Life Insurance Company in the United States.
R.N. Robertson and *E. Lamek*, for trustee of estate of Confederation Treasury Services Limited, a bankrupt.

Subject: Insolvency; Insurance; Civil Practice and Procedure

Headnote

Bankruptcy --- Proving claim — Provable debts — Contingent claims

Bankruptcy — Proving claim — Provable debts — Contingent claims — Claim for contribution and indemnity regarding potential liability in foreign proceedings being valid contingent claim in circumstances — Claim being neither too remote nor too speculative — Appeal from disallowance of claim allowed.

Bankruptcy --- Proving claim — Practice and procedure — Disallowance of claims — Time of appeal from disallowance

Bankruptcy — Proving claim — Practice and procedure — Disallowance of claims — Time of appeal from disallowance — Extension of time to appeal — Order disallowing claim being one of several related motions heard on same day — Intention to appeal entire disposition disentitling claimant to seek contribution and indemnity shown — Extension of time to appeal granted.

An accounting firm had filed a proof of claim with the trustee of the bankrupt; the proof of claim was disallowed on a motion by the trustee. No appeal was brought in regard to that order. Several related motions were heard on the same day. The accounting firm then attempted to obtain an order entitling it to assert a claim against the trustee for relief arising out of its potential liability in an action pending in Michigan. Only creditors, however, were entitled to do so. Accordingly, the accounting firm needed to extend the time to appeal the order disallowing the proof of claim, so that it could appeal the order. The accounting firm argued that it had always intended to appeal the whole disposition, which had had the result of foreclosing its entitlement to assert a claim for contribution and

indemnity from the trustee. The accounting firm applied for leave to extend the time to appeal, and appealed the order disallowing the proof of claim.

Held:

Leave was granted, and the appeal was allowed; a declaration was to issue that the accounting firm's claim was provable, and the matter was to be remitted for valuation of the claim.

The claim of the accounting firm was a valid contingent claim within the meaning of s. 121 of the *Bankruptcy and Insolvency Act*. The claim for contribution and indemnity in regard to the relief sought against it in the Michigan proceedings was neither too remote nor too speculative. Because the accounting firm was subject to a claim for treble damages in the Michigan proceedings, its claim was not the same as the claim asserted against the trustee in Ontario by the rehabilitator. The claim exceeded the claim asserted against the trustee to the extent that damages could be awarded over and above the amount that could be awarded against the trustee.

Table of Authorities

Cases considered:

Claude Resources Inc. (Trustee of) v. Dutton (1993), 22 C.B.R. (3d) 56, (sub nom. *Re Claude Resources Inc. (Bankrupt)*) 115 Sask. R. 35 (Q.B.) — *considered*

Wiebe, Re (1995), 30 C.B.R. (3d) 109 (Ont. Bktcy.) — *considered*

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 2 "creditor"*referred to*

s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable"*referred to*

s. 69 [re-en. S.C. 1992, c. 27, s. 36(1)]*referred to*

s. 121 [am. S.C. 1992, c. 27, s. 49]*considered*

s. 121(2)*considered*

MOTION for leave to extend time to appeal disallowance of claim in bankruptcy; APPEAL from order disallowing claim.

Endorsement. *Per curiam*:

1 Ernst & Young ("E&Y") filed a proof of claim, dated February 21 st, 1996, with the trustee of the estate of Confederation Treasury Services Limited ("the trustee"). In one of several orders made on April 8th, 1996, Farley J. granted a motion by the trustee disallowing E&Y's proof of claim. No appeal was taken from this order until its significance became apparent during the argument of the appeal from another order made by Farley J. on the same day. In that appeal, E&Y and the former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited ("the directors and officers") sought an order that would entitle them to assert a claim against the trustee for relief arising out of their potential liability in an action now pending in Michigan. But only a creditor

may seek such leave: see ss. 69 *ff.* of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the *BIA*"). Section 2 of the *BIA* defines "creditor" to mean a person having a claim, preferred, secured or unsecured, provable as a claim under the *Act*, and defines "claim provable in bankruptcy", "provable claim" and "claim provable" to include any claim or liability provable in proceedings under the *Act* by a creditor. The trustee resisted the other appeal on a number of grounds, including the ground that, because E&Y's proof of claim had been disallowed, it was not a "creditor" entitled to the relief it sought.

2 E&Y immediately brought this motion for leave to extend the time to appeal from the order disallowing its proof of claim. The uncontradicted evidence of E&Y is that it always intended to appeal the whole of the disposition of Farley J. made on April 8th, 1996 which had the result of foreclosing its entitlement to assert a claim for contribution and indemnity from the trustee, and we are not satisfied that the trustee would suffer any prejudice from the granting of such leave. Leave to extend the time to appeal from the order disallowing the proof of claim is therefore granted.

3 We turn to the appeal itself. Section 121 of the *BIA* deems all debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E&Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rehabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.

4 In so far as the cases of *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.), and *Re Wiebe* (1995), 30 C.B.R. (3d) 109 (Ont. Bktcy.), relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the *BIA*.

5 Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the *BIA*, the matter is remitted to the Ontario Court (General Division) to value E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E&Y's claim shall be deemed a proved claim to the amount of its valuation.

6 It has been common ground throughout the argument of these appeals that the directors and officers, who have not yet filed a proof of claim with the trustee, fall into the same category as E&Y with respect to the relief sought against them in the Michigan proceedings. Such a proof of claim, as and when it is filed by the directors and officers, is to be treated in the same manner as we have directed in respect of E&Y's proof of claim.

7 Having regard to the circumstances out of which the appeal from the disallowance of E&Y's proof of claim arose, we order that there should be no costs of this appeal except the usual order for payment of the costs of the trustee out of the estate of Confederation Treasury Services Limited.

Order accordingly.

End of Document

21

1976 CarswellOnt 72
Ontario Supreme Court, In Bankruptcy

Carling Acceptance Ltd., Re

1976 CarswellOnt 72, 22 C.B.R. (N.S.) 258

Re Carling Acceptance Limited

Hughes J.

Judgment: July 27, 1976

Counsel: *W. Jennings* , for trustee.
R. Laishley, Q.C. , for claimants Macdonald, Murray, Butler and Ault.
H. Solway, Q.C. , for interveners McCormack and Urie.
R. Ritchie , for insolvent company.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Proving claim — Provable debts — Contingent claims

The Bankruptcy Act, R.S.C. 1970, c. B-3, s. 95(1).

Certain shareholders of the debtor company loaned certain moneys to the company upon condition that they would not require repayment until the company's surplus reached a certain figure. The shareholders attempted to prove their claims in the proposal of the debtor company.

Held , having represented to the public in a prospectus for which the shareholders were responsible that the loan was not repayable to them until a certain sum of money had been accumulated in the earned surplus account, the said shareholders should not be allowed to prove their claims in the same category as other creditors. Section 95(1) of the Bankruptcy Act excluded proof of a claim dependent upon the liability occurring under the provisions of the agreement between the company and the shareholders in this matter.

***Hughes J.* :**

1 Carling Acceptance Limited (hereinafter "the company") was, according to a prospectus dated 16th July 1965 drawn in connection with an offer of $1,000,000 unsecured debentures, incorporated by letters patent under the Dominion Companies Act, R.S.C. 1952, c. 53, on 10th July 1964 under the name of Carling Finance Limited as a private company. By supplementary letters patent dated 4th February 1965 its name was changed, and it was constituted a public company. Note 9 to the prospectus contains, inter alia, the following statement:

> Four of the Directors have each loaned the Company the sum of $25,000.00 and these have been secured by promissory notes bearing interest at the rate of 7% per annum which is repayable semi-annually. The Directors and the Company have entered into a subrogation agreement dated the 16th day of July, 1965 which provides that these loans shall not be repaid until the Company's earned surplus account shall have reached a minimum of $150,000.00.

2 This agreement, which was indisputably entered into to secure approval of the debenture issue by the Ontario Se curities Commission, was made between the company and one Brian H. Wilson of the first part, and Frank C. Patterson, George S. Murray, Lawrence W. Butler and George A. Ault as lenders of the second part, and Price Waterhouse & Co. of the third part. It recites the application to the Ontario Securities Commission by the company for the approval of the prospectus, the fact that the lenders have each loaned to the company the sum of $25,000, the loans being secured by promissory notes, and that these lenders, being also shareholders of the company and four of its five directors, have agreed as follows:

> 1) The trustees declare that they stand possessed of the said sum of One Hundred Thousand ($100,000.00) Dollars, the said sum to remain as a part of the working capital of the Company, for the benefit of creditors of the act of bankruptcy during the currency of these presents, to apply the said funds as they may legally be required so to do.
>
> 2) The lenders shall not present the individual promissory notes hereinbefore referred to to the Company nor demand payment of the said promissory notes in either case in whole or in part until the Company's earned surplus account shall have reached a minimum of One Hundred and Fifty Thousand ($150,000.00) Dollars and the auditor's certificate to that effect has been forwarded to the Company.
>
> 3) The Trustees covenant and agree to continue to stand possessed of the said sum until the Company's auditors have issued a certificate to it certifying that the Company's earned surplus account has reached a minimum of One Hundred and Fifty Thousand ($150,000.00) Dollars and upon receipt of such certificate these presents shall be of no further force or effect.

3 The operations of the company were not in the end profitable although interest was regularly paid upon the directors' loans, and new notes drawn in the same terms were provided to the lenders in 1971. It may be said here that the notes themselves were unconditional on their face and payable on demand. Then on 12th May 1975 the company made a proposal in bankruptcy approved by the court on 17th June, and Robert E. Lowe, C.A., of Toronto was appointed trustee. In the course of the subsequent proceedings required by statute the lending directors preferred their claims, and on 10th February 1976 the trustee, upon advice that they were not provable, moved before Henry J. sitting in bankruptcy to have the question determined. The learned judge referred the question to the judge sitting in weekly court in Ottawa "to determine whether the subordinated claims of Alastair Macdonald, Executor under the Last Will and Testament of Frank Charles Patterson, George S. Murray, Lawrence W. Butler and George A. Ault are provable claims, and if the claims are provable, to value the claims".

4 It is clear from the report of the trustee that the proposal was made under s. 32 of the Bankruptcy Act, R.S.C. 1970, c. B-3, by the company as an insolvent person and not as a bankrupt, and this distinction, although blurred in some of the authorities, may be of significance in this case. The motion is made pursuant to the provisions of s. 95, and I quote what appear to be the relevant provisions:

> 95.(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value such claim, and such claim shall after, but not before, such valuation be deemed a proved claim to the amount of its valuation.
>
> (3) A creditor may prove for a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

(4) Where a proposal is made before bankruptcy the claims provable shall be determined as of the date of the filing of the proposal.

(5) The claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, provable in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal.

5 Counsel for the trustee took the position that the claims of the directors were not provable since the occasion for presenting their notes had not arisen. Both Mr. Laishley and Mr. Solway relied on the doctrine of frustration, contending that under the circumstances the occasion for presentation and payment could never arise. As to valuation they said that the directors should rank with other creditors and that their claims should be valued at their face value plus interest accrued and unpaid. It was not suggested in argument that the claims might be valued as contingent claims, and indeed such a solution would be fraught with serious difficulty.

6 I think the question of frustration can be shortly dealt with. The doctrine arises from the decision of Blackburn J. applying by analogy the civil law in *Taylor v. Caldwell* (1863), 3 B. & S. 826, 122 E.R. 309 , where the defendant had agreed to give the plaintiff the use of a music hall. Before the stipulated day of performance it was destroyed by fire. Such a contract was described at pp. 834-35 as "subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor". Much attention has been given to such implied terms as a result of enemy action in two world wars, and the doctrine of frustration has been subsequently extended to embrace situations where performance of a contract becomes impossible because of a change in the circumstances which were contemplated by the parties as the basis of the contract. But the contract between these parties obviously contemplated bankruptcy on the part of the company, and it is clear from the authorities that, where the source of frustration is foreseeable, and a fortiori foreseen, relief from the obligations thereunder cannot be provided: see for example *Can. Govt. Merchant Marine Ltd. v. Can. Trading Co.*, [1922] 3 W.W.R. 197, 64 S.C.R. 106, 68 D.L.R. 544 .

7 If then, as I hold, the contract still subsists, can the directors prove contingent claims? With regard to the distinction maintained in the Bankruptcy Act between a proposal made before bankruptcy and one afterwards, I quote the words of Orde J. in *Re McKay; Ex parte McCall Co.* (1922), 2 C.B.R. 462 at 464 -65, 52 O.L.R. 466 . The learned judge was considering the case of a claim under a contract for the supply of goods over a period which had not yet expired. After holding that the contractor was entitled to file his claim under the whole contract "both in respect of moneys already payable thereunder and in respect of the liability incurred for the performance of the unexpired or uncompleted portion of the contract" he continued:

In cases such as this it is incumbent upon the debtor, the trustee and the compounding creditors to take contracts of this nature into consideration, and if it is necessary for the future conduct of the debtor's business to retain such contracts that matter should be made the subject of special provision as a term of the proposal.

It was argued by counsel for the trustee that there had been no breach of the contract by the debtor, but I do not think that the question of breach is involved at all. The right to prove against an insolvent estate is based upon the theory that the debtor's business has come to an end and that all obligations whether already incurred or merely contingent are to be disposed of and cleared off in the bankruptcy proceedings. There is manifestly some inconsistency in applying this theory to compositions and extension under sec. 13 [of the Bankruptcy Act, 1919 (Can.), c. 36] which have for their object the continuance of the debtor's business, but there is, even in such cases, the fundamental object of enabling the debtor to continue business with a clean sheet. Whatever the inconsistencies may be, the scheme of sec. 13 seems to be that the rights and obligations of the debtor and his creditors are to be worked out in cases which come under that section in substantially the same manner as in cases of assignments and receiving orders.

8 But what is the situation where, as in the claims under consideration, a valuation depends upon such a contingency as is contemplated in the agreement here? The chance of the company's earned surplus account reaching a figure of $150,000 in the future, assuming it is able as a result of its proposal to continue in business, is not, in my view, measurable by any actuarial computation, and I cannot in conscience refer valuation of these claims to the registrar were I to find them provable. In England s. 30(6) of the Bankruptcy Act, 1914 (U.K.), c. 59, provides:

> (6) If, in the opinion of the court, the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

9 I have not discovered, nor have been advised of any similar provision in our Bankruptcy Act, but it may be argued that s. 95 contemplates proof of claims only in those cases where they can be valued by the court. In any event, the language of subs. (1), saying that "All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy", would exclude proof of a claim dependent upon the liability occurring under the provisions of the agreement between the company and the directors quoted above. No doubt the language of this subsection is applicable to the case of a proposal made before bankruptcy by virtue of the provisions of s. 46(1):

> 46.(1) All the provisions of this Act, in so far as they are applicable, apply *mutatis mutandis* to proposals.

10 There is also an equitable aspect to the situation in which the directors find themselves. They have indeed advanced the money to the company, and these advances, recorded in the company's accounts, exist independently of the notes by which they are secured. Yet, having regard to the purpose of the agreement entered into between them and the company, avowed in the affidavit of George A. Ault filed on the motion, can the directors, in the light of its provisions and of the unequivocal assurance given in the prospectus, be heard to say that they were providing for their own security as well as for that of other creditors of the company? It is contended that their contribution was always expressed to be a loan and not a subscription, and indeed they have been paid interest by the company on this assumption. But, having represented to the public in a prospectus for which they are responsible that the loan was not repayable until $150,000 accumulated in the earned surplus account, they should not, in my view, be now allowed to prove their claims in the same category as other creditors.

11 For these reasons, and only in connection with this proposal made before bankruptcy, I find that the directors' claims are not to be proved except as to interest on their notes due and unpaid before the date of the proposal. The trustee shall have his costs of the motion out of the company's estate.

1977 CarswellOnt 72
Ontario Court of Appeal

Carling Acceptance Ltd., Re

1977 CarswellOnt 72, [1977] 1 A.C.W.S. 604, 23 C.B.R. (N.S.) 245

Re Carling Acceptance Limited

Arnup, MacKinnon and Zuber JJ.A.

Judgment: April 13, 1977

Counsel: *H. Soloway, Q.C.*, and *R. D. McGregor*, for intervenors, applicants.
W. J. Jennings, for trustee.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Proving claim — Provable debts — Contingent claims

Proposals — Provable claims — Subordinated claims — The Bankruptcy Act, R.S.C. 1970, c. B-3, s. 95(1).

Held, the order of the trial judge should be affirmed for the reasons given by him.

Appeal from the judgment of Hughes J., 22 C.B.R. (N.S.) 258. Appeal dismissed.

The judgment of the court was delivered by *Arnup J.A.* (orally):

1 This is an appeal from the judgment of Hughes J., dated 27th July 1976 [22 C.B.R. (N.S.) 258]. By that judgment Hughes J. held that the holders of four promissory notes of Carling Acceptance Limited, each in the amount of $25,000, were not entitled to prove for those notes, except as to interest due and unpaid before the date of the proposal made and approved pursuant to the Bankruptcy Act, R.S.C. 1970, c. B-3.

2 The judgment of Hughes J. is primarily concerned with the argument addressed to him that the agreement between the note holders, the company, and others, dated 16th July 1965, had been frustrated. We agree with the reasons for judgment of Hughes J. on that issue.

3 In this court the first point made to us by the appellants is that the agreement terminated prior to any act of bankruptcy by the company. That termination, it is submitted, occurred either when the debentures originally issued were exchanged for new debentures by the vast majority of the debenture holders, or at the latest terminated on 1st July 1973, when the debentures issued originally became due and payable. We do not accept this argument. In our view, it involves reading into the agreement a termination date which is not found within it. The agreement, according to its terms, could not have terminated prior to the company's earned surplus account reaching the sum of $150,000. The note holders agreed that they would not demand payment of their notes prior to the occurrence of that event.

4 Needless to say, it did not occur, and accordingly the agreement, in our view, was in full force and effect on the date as of which claims of creditors are to be ascertained for the purposes of the proposal.

5 The appeal is accordingly dismissed with costs.

1977 CarswellOnt 72, [1977] 1 A.C.W.S. 604, 23 C.B.R. (N.S.) 245

End of Document

22

2004 CarswellOnt 3320
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 3320, [2004] O.J. No. 3353, [2004] O.T.C. 717, 132 A.C.W.S. (3d) 1050, 2 C.B.R. (5th) 23

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

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

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

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

Farley J.

Heard: August 9, 2004
Judgment: August 9, 2004
Docket: 03-CL-004932

Counsel: Sean Dunphy, Shana Ivall for Air Canada
Peter J. Osborne, Monique Jilesen for Monitor, Ernst & Young Inc.
Larry Steinberg for C.U.P.E.
Hugh O'Reilly for I.A.M.A.W.
Gregory Azeff for G.E.C.A.S.
Howard A. Gorman for Ad Hoc Unsecured Creditors Committee
Lyle Kanee for CAW

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Onus is on creditor to prove its claim — Contingent unliquidated claims are determined under Companies' Creditors Arrangement Act claims process even in most complicated of litigation and even though claim may not have been initiated in court or otherwise — If, instead of providing no evidence, creditor had provided acceptable expert report, even in simplified form, on job evaluation to support its pay equity claim, then insolvent company would have had to respond to that evidence — Claims process under Act does not require that such report be precise.

Table of Authorities

Cases considered by *Farley J.*:

Canadian Airlines Corp., Re (2001), 2001 ABQB 146, 2001 CarswellAlta 240, [2001] 7 W.W.R. 383, 14 B.L.R. (3d) 258, 92 Alta. L.R. (3d) 140, 294 A.R. 253 (Alta. Q.B.) — referred to

Olympia & York Developments Ltd., Re (March 14, 1994), Doc. B125/92 (Ont. Gen. Div. [Commercial List]) — referred to

Shelson, Re (2004), (sub nom. *Shelson (Bankrupt), Re)* 184 O.A.C. 161, 236 D.L.R. (4th) 591, 2004 CarswellOnt 902 (Ont. C.A.) — referred to

Statutes considered:

Canadian Human Rights Act, R.S.C. 1985, c. H-6
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPEAL by creditor from disallowance of contingent claim in proceedings under *Companies' Creditors Arrangement Act*.

***Farley J.*:**

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

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

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

He went on to observe at paragraph 39:

> (39) To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

Further at paragraph 40, the CO stated:

> (40) ... As noted by counsel to Air Canada, there are three pre-requisite elements of a human rights complaint, without which there is no claim: (i) difference in wages; (ii) within the same establishment; and (iii) the performance of work of equal value as between the groups in question. ... But, with respect to the third criterion, I agree with Air Canada that there is no evidence before me to indicate that the work performed by Flight Attendants is of equal value to the work performed by the Comparative Groups, which is the very basis of CUPE's claim. It is entirely unclear that there is any principled basis of comparison between Flight Attendants and the Comparative Groups and, in any event, no evidence before me that the outcome of such comparison establishes that there is work of equal value being performed.

3 CUPE submitted that notwithstanding my views in *Olympia & York Developments Ltd., Re*, [1994] O.J. No. 1335 (Ont. Gen. Div. [Commercial List]), that I should follow the Alberta practice as set out by Paperny, J. in *Canadian Airlines Corp., Re*, [2001] A.J. No. 226 (Alta. Q.B.) of hearing this matter on a *de novo* basis as opposed to a true appeal. Even if I were to agree with that notwithstanding the difference in practice related to Alberta Masters, I would observe that on the basis of the record before me, I would have come up with the same conclusions as the CO save and except as to what I might describe as wholehearted acceptance of his views at paragraph 46 when he describes "the intuitive appeal of Air Canada's argument with respect to the manner in which wages are determined". It is clear from his reference later in that paragraph to "yet another reason" that this argument of Air Canada was not a determinative feature. Indeed it may well be that the CO merely intended paragraph 46 to be simply a point which could be characterized as a buttressing observation on a check of reasonability, not that there is an obligation to do so to provide a foundation for a pay equity claim. Collective bargaining is a process of give and take. Secondly I would not be of the view that as per his observation in paragraph 47 that CUPE had an obligation to lead evidence as to:

> (b) more importantly, that the wage gap cannot be explained, in full or in part, by factors other than system gender discrimination (such as consideration of the factors set out in section 11(2) of the CHRA).

While it would seem to me that CUPE was not under any positive obligation to provide such evidence (that seemingly being Air Canada's role if it wished to do so), again that observation by the CO is not in my view determinative of the wage gap question.

4 See also my views in *Re Air Canada (Corporate Travel Management CTM Inc.)* and *Re Air Canada (Always Travel Inc.)* matters released August 3 and 5, 2004 respectively relying on the Court of Appeal decision in *Shelson, Re*, [2004] O.J. No. 850 (Ont. C.A.) released March 9, 2004 at paragraph 20 relating to deference notwithstanding that a matter may be decided originally on a paper record.

5 The onus is on a claimant to prove its claim. As discussed in paragraph 38 of his reasons, the CO required that "CUPE must demonstrate that its claim is not too speculative or remote, but it need not establish that success is probable". He went on to say at paragraph 39:

> (39) In the present case, I am satisfied for the reasons set out below that CUPE's claim has not been proven. The claim is remote and speculative as there is no evidence to substantiate that the claim has any merit. To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

It seems to me to be an unreasonable analysis of his reasoning that would allow CUPE to advance at paragraph 46 of its factum:

> (46) To require scientific certainty is to set up inappropriate roadblocks to the goal of the CHRA, namely to remedy discrimination...

The fact of the matter is that CUPE provided no evidence as to the particular case involving Air Canada (and the "merged Canadian Airlines" question) as to the third criterion.

6 It is indeed troubling that a *Canadian Human Rights Act* / pay equity case could rattle around the Commission, the Tribunal and the courts for 14 years and for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation. However, that process is not the one which is required to be followed in the determination of a claim under the CCAA. Contingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise. I do not wish or intend to minimize the hurdles and hoops which may be involved in the payment equity litigation in the established "ordinary course", but I would observe that if CUPE had provided an acceptable expert report on job evaluation, even if in "simplified form" (as opposed to no evidence), then Air Canada would have had to respond to that evidence. Would that report have had to be precise (apparently to the degree envisaged by parties in pay equity disputes)? The simple answer to that is that is not necessary in a CCAA claims process.

7 The appeal is dismissed. While that claim as agreed between Air Canada and CUPE only deals with the monetary aspect of the claim up to September 30, 2004, I would trust that with respect to the process otherwise continuing, that with respect to the determination of this as with any other human rights issue (which the Supreme Court of Canada has determined should be regarded as a quasi-constitutional right) such determination can be accomplished with cooperation in very significantly less time than a further decade. The resolution of such an important question demands nothing less.

Appeal dismissed.

End of Document

23

2008 BCSC 1
British Columbia Supreme Court [In Chambers]

Edgewater Casino Inc., Re

2008 CarswellBC 2, 2008 BCSC 1, [2008] B.C.W.L.D. 1738, [2008] B.C.W.L.D. 1739, 163 A.C.W.S. (3d) 570, 39 C.B.R. (5th) 208

In the Matter of the Companies' Creditors Arrangement Act, —R.S.C. 1985, c. C-36, as amended

And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57, as amended

In the Matter of Edgewater Casino Inc. and Edgewater Management Inc.

Burnyeat J.

Heard: August 28, 29, 2007; September 11, 2007
Judgment: January 3, 2008
Docket: Vancouver S062842

Counsel: B.J. Ingram, J.R. Sandrelli for Libin Holdings Inc., Gary Jackson Holdings Ltd. & Phoebe Holdings Inc.
J.A. Henshall for Canadian Metropolitan Properties Corp.

Subject: Insolvency; Corporate and Commercial; Property

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — Contingent claims

Creditor was owner of lands and premises — Creditor leased part of lands to debtor in connection with operation of casino operation — Creditor went into possession of leased premises in order to commence construction of leasehold improvements in order to operate casino — Debtor applied for and obtained order under Companies' Creditors Arrangement Act granting it protection from creditors and authorizing it to make plan for reorganization — As result of implementation of plan of reorganization, sufficient funds were paid into trust to pay all creditors whose claims were allowed and to secure all claims that were disputed — Creditor submitted proof of claim in amount of $1,087,337.49 — Claim was related to alleged development commitments to be imposed on premises by city — Creditor's claim was disallowed — Creditor brought application for payment of claim — Application dismissed — Creditor had not displaced onus of proving claim — City had raised possibility of imposing development or building commitments on creditor — But city had not taken further action in that regard for over 18 months and there was no indication it ever would — Future plans of creditor and new shareholder of debtor would make any developmental work redundant — Creditor and new shareholder planned extensive development of existing premises — Possibility of legitimate claim being raised in future remained if city followed through on developmental impositions — Debtor was to pay $500,000 into trust as contingency for such possibility.

Business associations --- Changes to corporate status — Winding-up — Under Dominion Act — Claims of creditors — Preferred claims — Claims for municipal taxes and public utility rates

Creditor was owner of lands and premises — Creditor leased part of lands to debtor in connection with operation of casino operation — Creditor went into possession of leased premises in order to commence construction of leasehold improvements in order to operate casino — Debtor applied for and obtained order under Companies' Creditors Arrangement Act granting it protection from creditors and authorizing it to make plan for reorganization — As result of implementation of plan of reorganization, sufficient funds were paid into trust to pay all creditors whose

claims were allowed and to secure all claims that were disputed — Creditor submitted proof of claim in amount of $1,087,337.49 — Claim was related to alleged development commitments to be imposed on premises by city — Creditor's claim was disallowed — Creditor brought application for payment of claim — Application dismissed — Creditor had not displaced onus of proving claim — City had raised possibility of imposing development or building commitments on creditor — But city had not taken further action in that regard for over 18 months and there was no indication it ever would — Future plans of creditor and new shareholder of debtor would make any developmental work redundant — Creditor and new shareholder planned extensive development of existing premises — Possibility of legitimate claim being raised in future remained if city followed through on developmental impositions — Debtor was to pay $500,000 into trust as contingency for such possibility.

Table of Authorities

Cases considered by *Burnyeat J.*:

Air Canada, Re (2004), 2 C.B.R. (5th) 23, 2004 CarswellOnt 3320 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 121 — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 12(1) "claim" — considered

APPLICATION by creditor for payment of claim.

***Burnyeat J.*:**

1 Canadian Metropolitan Properties Corp. ("CMPC") is the owner of lands and premises known as the Plaza of Nations site on the north side of the False Creek area of Vancouver. By a November 8, 2004 lease agreement ("Lease"), CMPC leased part of the site to Edgewater Casino Inc. ("Edgewater") in connection with the operation of a casino facility ("Facility"). Prior to the execution of the Lease, Edgewater went into possession of the leased premises in order to commence construction of leasehold improvements in order to operate a casino at that location ("Casino").

2 The original shareholders of Edgewater were Libin Holdings Inc., Gary Jackson Holdings Ltd. and Phoebe Holdings Inc. ("Old Shareholders"). Pursuant to a March 1, 2006, as amended July 27, 2006, Share Purchase Agreement, the Old Shareholders transferred their shares in Edgewater to Paragon Gaming Inc. and Paragon BCULC ("New Shareholder").

Proceedings of Edgewater Pursuant to the Companies' Creditors Arrangement Act

3 Applying pursuant to the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*C.C.A.A.*"), on May 2, 2006, Edgewater obtained an "Initial Order" granting it protection from creditors and authorizing it to make a Plan of Reorganization. On June 9, 2006, that Initial Order was confirmed by a "Confirmation Order". On August 11, 2006, Edgewater applied for and obtained a "Claims Process Order" that established a process for creditors of Edgewater to advance their claims against Edgewater and for Edgewater to review and pay or to disallow such claims.

4 On August 29, 2006, Edgewater applied for and obtained a "Closing Order" authorizing it to implement its Plan of Reorganization. As a result of the implementation of the Plan of Reorganization, sufficient funds were paid into trust to pay all creditors whose claims were allowed and to secure all claims that were disputed. A process was created whereby creditors could submit Proofs of Claim. Under the Claims Process Order, Proofs of Claim were to be submitted no later than August 28, 2006. Pursuant to the Share Purchase Agreement and to the August 29, 2006 Closing Order any funds not required to pay the claims of creditors allowed or ordered will be available to the Old Shareholders. In the circumstances, that is why counsel appears on behalf of the Old Shareholders rather than on behalf of Edgewater.

5 On August 26, 2006, CMPC through its legal counsel submitted a Proof of Claim to PriceWaterhouse Coopers Inc. ("PWC") as required by the Claims Process Order. The total amount claimed by CMPC pursuant to the Proof of Claim was $1,087,337.49.

6 In its Proof of Claim, CMPC claimed $500,000.00, pursuant to a "General Oral Agreement" between CMPC and Edgewater claiming that:

> (a) CMPC agreed to lease to Edgewater and Edgewater agreed to lease from CMPC, premises at the Plaza of Nations consisting of Building "C" [for use as a casino], the Plaza Stage Area, a portion of Building "B" [for use as administrative offices], and parking and other amenities "as is".
>
> (b) Edgewater agreed at its cost to apply for rezoning in order to use Building "C" as a casino.
>
> (c) Edgewater agreed at its cost to apply for a development permit in order to convert Building "C" into a casino and to improve a portion of Building "B" for use as administrative offices and to make other improvements to enhance casino use;
>
> (d) Edgewater agreed at its cost upon approval of its said application for rezoning and for a development permit by the City of Vancouver to perform all conditions imposed by the City for that rezoning and for the issuance of that development permit and to complete all improvements required by the City as a condition of that rezoning and that development permit.
>
> (e) Edgewater agreed at its cost to design and construct all improvements and upgrades required to convert Building "C" into and to operate it as a casino and to improve a portion of Building "B" for administrative offices and to indemnify CMPC against any liability or costs on that account.

7 Included within the Proof of Claim was a $500,000.00 claim relating to "City of Vancouver Development Commitments". Regarding this particular issue, the Proof of Claim relies upon s. 12(1) of the *C.C.A.A.*, which provides that any claim would include a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*B.I.A.*"), and that s. 121 of the *B.I.A.* provides that a debt provable includes: "all debts and liabilities, present or future, to which the bankrupt is subject on the day in which the bankrupt becomes bankrupt or which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt ....".

8 CMPC relies on the provisions of the Zoning and Development Bylaw of The Vancouver Charter in order to state that city officials "... have the ability to direct any person to take actions to comply with the terms of development permits. The Bylaw also provides city officials with the option of performing work required under a development permit and then adding the costs associated with such work to the property tax assessment of the owner of the subject property." CMPC points out that, while the City is not presently contemplating making expenditures, the City may well do so in the future.

9 On August 28, 2006, PWC delivered a Notice of Disallowance to CMPC relating to its Proof of Claim. After clarification regarding the Notice of Disallowance was received, a Revised Notice of Disallowance was delivered to CMPC. In the Revised Notice of Disallowance, it is noted:

> ... there is no indication in the letter [the June 23, 2006 letter from the City of Vancouver] that the City is contemplating making expenditures with respect to the landscaping requirements. Furthermore, the City and the aforementioned letter draws the Claimant's [CMPC's] attention to the provision of the bylaw that allows for an application to the City to make minor amendments to the terms of the Development Permit including, in this situation, an application to reduce the scope of the landscaping requirements.

10 It is further stated in the Revised Notice of Disallowance that CMPC has a duty to mitigate the amount of its claim and pursue a reduction of any obligations to the City in cooperation with the new shareholders of Edgewater and that CMPC has not taken steps in this regard. Edgewater submits that CMPC has not fulfilled the obligation to prove the amount of its contingent claim.

11 Pursuant to a procedure ordered to deal with the disputed Proof of Claim of CMPC, a Statement of Claim was issued by Edgewater on April 13, 2007, a Reply from CMPC dated April 27, 2007 was filed, Mr. Gary Jackson on behalf of Edgewater was cross-examined on an affidavit he had sworn, Mr. Daisen Gee-Wing on behalf of CMPC was cross-examined on an affidavit he had sworn, and there were examinations for discovery of Messrs. Jackson and Gee-Wing.

Pre-Lease Negotiations and Lease Provisions

12 In the correspondence in evidence, Edgewater made proposals to CMPC. It is the position of CMPC that an "Initial Agreement" was formed between the parties and CMPC now relies upon that Initial Agreement including the following which was set out in a letter between Edgewater and CMPC:

> All tenant improvements and mechanical upgrades to Building "C" as well as landscaping for the main entrance and port-cochere area to Building "C".
>
> 8. All costs related to the rezoning application for a Class II Casino Development Permit etc., shall be the responsibility of the Tenant.

13 In response to the submission that this constituted part of the pre-Lease agreement said to have been reached, Edgewater submits that this phrase only related to what might ultimately be incorporated within a lease and that the negotiations between the parties were restricted to what would ultimately be incorporated within a lease.

The November 8, 2004 Lease

14 The Lease includes the following provisions:

> 2.02 The Landlord hereby grants to the Tenant. ... an easement ... for the purposes of
>
> > (b) constructing, installing, maintaining, altering or removing a driveway, with appropriate curbing, for the passage of vehicular traffic, together with such sidewalks, walkways, landscaping (including a waterfall and one or more sculptures), canopies and awnings, all as the Tenant might reasonably require, provided that all such work is done at the expense of the Tenant and in accordance with the requirements of any governmental authority having jurisdiction (including the City of Vancouver)
>
> **6.02 Compliance with laws**
>
> Each of the Landlord and the Tenant will comply promptly with all lawful requirements of any governmental or administrative authority with which it must comply in order to observe or perform its obligations under this lease.
>
> **6.03 Compliance with City Agreements**
>
> Subject to Article 6.04, the Landlord will comply promptly with all of its obligations to the City of Vancouver relating to the Lands including, without limitation, all obligations set forth in the agreements registered against

title to the Lands, as shown on the certificates of title attached as Schedule C. The Tenant will permit public access across the walkway that will form part of the Easement Area, where reasonably required, in accordance with the requirements of the City of Vancouver for public access over the Lands, as more particularly described in the agreements registered against title to the Lands, as shown on the certificates of title attached as Schedule

6.04 Tenant's Performance of Landlord's obligations under the City Agreements

The Tenant covenants and agrees that, during the term of this Lease and any extensions or renewals thereof, the Tenant will observe and perform all of the Landlord's agreements and obligations under the City Agreements, EXCEPT in the following respects:

(a) the obligations of the Landlord in the City Services Agreement to obtain and maintain insurance coverage in respect of the "Owner's Works" as required by section 2.6(m)(iv) of that agreement;

(b) the agreements and obligations of the Landlord in the City Agreements in respect of periods outside the Term (including any extensions or renewals thereof), other than

(1) the obligations pertaining to the "City Works" (as defined in the City Services Agreement),

(2) the construction or installation of the alterations to the Walkway (as defined in the City Services Agreement) prior to the Term to meet the requirements of the City Services Agreement;

(3) all matters related to the Enterprise Area Beautification Works including the removal and storage of the Enterprise Area Beautification Works prior to the Term and their retrieval, refurbishment and reinstallation after the Term, but excluding any obligation for the continued maintenance of such works after their retrieval, refurbishment and reinstallation as provided in the City Services Agreement; and

(4) the obligation to indemnify after the Term with respect to events occurring or conditions arising during the Term;

(c) the Landlord's agreements and obligations to indemnify to the extent they apply to the results of the negligence of the Landlord, or wilful actions of the Landlord in breach of the City Agreements or of this Lease, in each case inclusive of those for whom the Landlord is legally responsible, or in respect of events occurring or conditions arising outside the Term except in respect of the matters referred to in Articles 6.04(b)(1) to 6.04(b)(3);

and the Landlord hereby grants to the Tenant the power and authority to observe and perform such agreements and obligations on behalf of the Landlord, to the extent set out in this Article and the Landlord hereby agrees to co-operate in good faith with the Tenant to the extent necessary to enable the Tenant to do so, including giving the Tenant access to portions of the Lands not in the Premises or the Easement Area and use of the Landlord's facilities where necessary.

7.02 The Landlord will promptly, at its own expense

(c) comply with all upgrading requests or orders of all government or administrative authorities, except where those requests or orders are due to the Tenant's particular use of the Premises, in which case the Landlord will only be required to comply if the Tenant bears the cost of doing so;

7.03 Improvements by Tenant

The Tenant may, at its cost, make or cause to be made leasehold improvements to the Premises. If such improvements will materially affect the structure of any building on the Premises, the Tenant will obtain the

Landlord's consent prior to making such improvements, which consent the Landlord covenants not to unreasonably withhold or delay.

15.01 Tenant's Indemnity

The Tenant will ... indemnify and hold harmless the Landlord from and against every demand, claim, proceeding, cause of action, judgment, expense, loss or damage which the Landlord may suffer or incur or be put to arising out of or in connection with any default by the Tenant in observing or performing its obligations under the lease or any breach by the Tenant of any warranty or representation under this lease, and in respect of any property damage or personal injury during the Term resulting from the presence of improvements installed by the Tenant on the Lands outside the Premises.

16.13 Entire Agreement Clause

Except as expressly set out herein, there are no representations, warranties, conditions or collateral agreements between the Landlord and the Tenant.

15 Under Clause 1.01(e) the term "City Agreements" means that:

(1) the On-site Parking Agreement between the Landlord and the City of Vancouver dated November 1, 2004;

(2) the Agreement for the Provision of Services Related to the Temporary Casino to be Operated at the Plaza of Nations 750-770 Pacific Boulevard between the Landlord and the City of Vancouver dated November 1, 2004 (the "City Services Agreement");

(3) the agreement between the City of Vancouver and the Landlord registered at the Vancouver/New Westminster Land Title Office under numbers BN313693 and BN313694, as subsequently modified by agreements between the City of Vancouver and the Landlord dated November 1, 2004 (the "Performance Space Agreement"); and

(4) the Off-site Parking Agreement between the Landlord and the City of Vancouver dated November 1, 2004.

Re-Zoning and Development Permit Applications

16 CMPC alleges that the parties began to implement what had been agreed prior to the execution of the Lease and that, in the Fall of 2003 and the Spring of 2004, Edgewater at its own expense but in the name of CMPC applied for rezoning of Building "C" to convert that building into the Casino, applied for a development permit for Building "C", a building permit for Building "C", and, in May and June of 2004, occupied the premises and began to improve the premises in anticipation of rezoning and anticipation of issuance of a development permit and building permit by the City of Vancouver ("City").

17 In May of 2004, Edgewater requested CMPC to provide the City with an owner's undertaking ("Undertaking"). CMPC submits that the provision of the Undertaking was a precondition for the issuance of a development permit and a building permit and that the Undertaking obliged CMPC to comply with the requirements of any permit issued by the City to a tenant and also obliged CMPC to use reasonable efforts to ensure that the tenant complied with all such requirements. It is the position of CMPC that the City would be in a position to call upon CMPC under this Undertaking in order that the works contemplated under any development permit and building permit issued were completed in accordance with those permits.

18 The Undertaking is headed as follows: "Owners' Undertaking" (Tenant Improvements). The Undertaking in evidence refers to a "building permit" but does not refer to a development permit. The Undertaking requires CMPC to confirm that it is the owner of the property and to covenant as follows:

> The Owner will use its reasonable efforts to require the Tenant to comply with, and cause those employed for this project to comply with all applicable by-laws of the City of Vancouver and other statutes and regulations in force in the City of Vancouver relating to the development, work, undertaking or permission in respect of which this application is made.
>
> The Owner understands and acknowledges that the issuance of any permit, including an Occupancy Permit, or the inspection or approval or passage of work by the City is not a representation or warranty that any by-law has been complied with the Owner remains responsible at all times to use its reasonable efforts to require compliance by the Tenant. The Owner has read and understands Articles 1A.1.1.2. and 1A.3.4.1. of the Vancouver Building By-law which are set out on the reverse side hereof.
>
> The Owner hereby agrees to use its reasonable efforts to require that the Tenant does indemnity and save harmless the City of Vancouver and its employees from all claims, liability, judgments, costs and expenses of every kind including negligence which may result from the failure to comply fully with all by-laws, statues and regulations relating to any work or undertaking in respect of which this application is made.
>
> Where used herein the words "work" or "undertaking" in respect of which this application is made, the Owner understands this to include all electrical, plumbing, mechanical, gas and other works necessary to complete the contemplated construction.

19 A development permit was issued on December 3, 2004 under No. DE408507 ("Development Permit") and governs the term of the use of the premises as a casino for: "... a limited period of time expiring December 3, 2008, unless extended in writing by the Director of Planning". The Development Permit states that it is for the "following only: To alter, add to and use the use of Building C of the Plaza of Nations, to permit a Casino ... for a limited period of time expiring December 3, 2008, unless extended in writing by the Director of Planning." The Development Permit is subject to a number of conditions including:

> All landscaping and treatment of the open portions of the site will be completed in accordance with the approved drawings within six months of the date of issuance of any required occupancy permit or any use or occupancy of the proposed development not requiring an occupancy permit and thereafter permanently maintained in good condition. In accordance with Private Property Tree By Law No. 7347 the removal and replacement of trees are permitted only as indicated on the approved Development Permit drawings.

20 In his October 19, 2006 Affidavit, Mr. Gee-Wing, General Manager of CMPC, states that a condition of issuing the Development Permit was that the City "... imposed an obligation on CMPC, which Edgewater agreed to perform, to complete certain works on and in the vicinity of the Plaza of Nations" and that Edgewater failed to complete such works.

21 A building permit was issued on December 3, 2004 under No. BU429878 ("Building Permit"). Attached to the Building Permit were detailed plans prepared by Patrick Cotter Architect Inc. relating to Building "C", Building "B", and the adjacent area within the Plaza of Nations site.

22 At the time of the issuance of the Building Permit and the Development Permit, Edgewater was well advanced in the construction of the improvements for the Casino. The improvements were substantially completed by February, 2005 and, at that time, Edgewater began to operate the Casino ("Commencement Date").

Matters Raised by the City of Vancouver and the Potential Cost of Correcting the "Deviations"

23 In a June 23, 2006 letter from the City, the following "Deviations" from the "Approved Plans of Development Permit No. DE408507" were noted:

> (a) The required seventy-six (76) new trees have not been provided.

(b) Restoration planting of the "Legacy Forest" (approximately 4,500 plants) have not been provided.

(c) The irrigation system has not been provided and as a result, a 16' Caliper Hemlock, located in the "Legacy Forest" has died.

(d) Landscape lighting, including lighting of the bicycle path, has not been provided.

(e) The "waterfall feature with rock scape" to be located along the north elevation of the casino building has not been provided, there are large pre-cast concrete blocks currently retaining the 10' 0" slope cut where the water feature should be located.

(f) Trees and planting intended to separate the bicycle path from the main vehicular driveway have not been provided.

Under this By-law, an application for a minor amendment may be requested. To make application for the required approval, you or your representative must attend this office, pay the prescribed fee, and submit three sets of revised plans indicating the landscaping to be provided, and a letter to the Director of Planning requesting a minor amendment to Development Permit No. DE408507.

24 At the time of the filing of its Proof of Claim, CMPC was of the view that $500,000.00 would be the potential cost of work in order to comply with the potential requirements of the City.

25 CMPC obtained an October 18, 2006 estimate from Scott Construction Group relating to the matters set out in the June 23, 2006 letter from the City. The "preliminary budget" was stated to be $453,000.00 made up as follows:

	Soft Landscaping		$114,000.00
	Irrigation		$ 10,000.00
	Landscape lighting	$122,000.00 cash allowance	
	Water feature	$ 95,000.00 cash allowance	
	Soft Landscaping	incl in items 1 & 2	
Total (items 1-6)			$341,000.00
GC's General Conditions			$ 34,000.00
GC's Mark up			$ 38,000.00
Contingency			$ 40,000.00
Total Budget			$453,000.00

26 At the February 14, 2007 Cross-Examination on his Affidavit, Mr. Gee-Wing confirmed that the $453,000.00 estimate received from Scott Construction Group included work relating to lands not leased or owned by CMPC but also stated that the Development Permit required them to "do something on someone else's property" so that the work was still required even though some of the work related to a property not owned by CMPC. Mr. Gee-Wing also confirmed that there was no further letter after the June 23, 2006 letter from the City and no phone calls or emails from the City regarding the "landscaping issue".

27 CMPC prepared a more recent estimate regarding the obligations to the City as a result of the issuance of the Development Permit and the conditions set out in the Development Permit. That estimate sets out that $279,600.00 (not including G.S.T.) may be sufficient to satisfy the requirements of the City. That amount is made up as follows:

The current amount of $114,000 should perhaps be brought to $90,000. I consider the 76 legacy trees in #1 to be the bulk of this particular expense.

> #4 — The landscape lighting @ $122,000 should be brought to $60,000. While there was some lighting placed, there is some lighting deficiency as pointed out by the building inspector on a recent visit.
>
> #5 — The water feature @ $95,000. You are correct that if it doesn't go in, then what will go in its place? I would be satisfied with $50,000 so that we can finish the area properly and to remove the existing concrete construction blocks.
>
> #3 — Irrigation @ $10,000 should remain the same.
>
> The above gives a new total of $210,000. Following the estimate rec'd, we then proceed as follows:

GC's General Conditions		$ 21,000
GC's Mark up		$ 23,100
Contingency		$ 25,500
Total Budget	$279,600 (GST not included)	

Position of the Parties

28 In addition to relying on a "general oral agreement" made in 2003 and the Spring of 2004, CMPC alleges a further oral agreement in May, 2004 whereby CMPC agreed to and did provide the Undertaking and, in consideration of receiving the Undertaking, Edgewater agreed as its own cost to comply with all applicable by-laws and requirements of the City relating to the rezoning and the issuance of the Development Permit *and* Building Permit and to indemnify CMPC against any liability to the City or otherwise. CMPC submits that the Lease incorporates some but not all of the terms of the agreements reached between the parties and that, while CMPC has made a demand on Edgewater to complete the work contemplated, Edgewater has not completed the work set out in the June 23, 2006 letter from the City.

29 CMPC requests an order that Edgewater complete the required work at their own cost and to the satisfaction of the City or, alternatively, for an order that Edgewater pay to CMPC a sum equivalent to the cost of completing the works so that the work can be undertaken by CMPC. In the further alternative, CMPC seeks an order that Edgewater will indemnify CMPC against any liability to the City or otherwise arising from the non-compliance of the work and for an order that the sum of $500,000.00 or such other sum as the Court deems appropriate be held as security for the payment of the works or the performance under such an indemnity.

30 In its Statement of Defence, Edgewater denies entering into the "general oral agreement" or the oral agreement alleged, that the landscaping requirements have been "reduced, varied or altered through negotiations with the City of Vancouver involving" ... [both the New Shareholder and CMPC], and all of the "Deviations" set out in the June 23, 2006 letter from the City relate to the Development Permit whereas the Undertaking refers to the Building Permit under which all of the work required has been completed.

Evidence of Gary Jackson

31 Mr. Jackson states that the Share Purchase Agreement between the Old Shareholders and the New Shareholder provides that the New Shareholder will be responsible for all of the landscaping work referred to in the Development Permit. At the February 14, 2007 Cross-Examination on his Affidavit, Gary Jackson did not take issue with the statement that Edgewater was responsible for the work items contained in the June 23, 2006 letter from the City but stated:

> The new owners of ECI [Edgewater] who purchased the shares of ECI have the responsibility to deal with that issue. .... They were made aware in terms of the due diligence process of the outstanding issues that were part of the development permit. They had disclosure. They were well aware of those issues. They had provided information to the Lottery Corporation and to the City of Vancouver during the course of the time we received the actual share purchase offer and the closing that they would take over those responsibilities as part of the repositioning of the casino. .... Included is their responsibility to deal with this issue.

32 At his June 14, 2007 Examination for Discovery, Gary Jackson again acknowledged that Edgewater had a liability to complete the landscaping work either as stipulated in the June 23, 2006 letter received from the City of Vancouver or as modified through negotiations with the City but asserted that the New Shareholder agreed to assume liability for any such deficiencies. In this regard, Gary Jackson was asked the following questions and gave the following answers:

> Q I understand, in order to obtain a building permit, one of the requirements is that the developer provide an owner's undertaking to the city. Does that accord with your recollection?
>
> A I think it's the owner of the property that does the undertaking. A developer could be somebody else.
>
> Q To get specific, in order for you or ECI to obtain a building permit, it had to deliver an owner's undertaking to the City of Vancouver:
>
> A Correct.
>
> Q And did you ask your son Chris to approach Mr. Gee-Wing or CMPC to obtain an owner's undertaking:
>
> A It would have either been myself or my son Chris would have dealt with these issues with Daisen.
>
> Q So once this was provided to you by CMPC or once Mr. Gee-Wing signed it, was it then delivered to the City of Vancouver as part of the building permit application?
>
> A It would have either gone directly to the city or back to the architect. I believe the architect is the one that has to do that.

33 In his March 5, 2007 Affidavit, Mr. Jackson states that, to the best of his knowledge, "... there is no outstanding landscape lighting work remaining to be done under the Development Permit ...". He also states that he is advised by Patrick Cotter that the New Shareholder submitted revised landscaping plans to the City and that the revised plans call for the elimination of the water feature referred to in the Development Permit drawings.

Activities of CMPC, the New Shareholder of Edgewater and the City

34 In evidence is an April 21, 2006 letter from the proposed new shareholders of Edgewater to the British Columbia Lottery Corporation. This letter was forwarded prior to the completion of the purchase of shares in Edgewater. The proposed new shareholders set out a "proposed repositioning plan" which included: "... the completion of City-permitted but unfinished improvements to both the Edgewater Casino and the surrounding site ...." and advise that they have formally requested the City to "... indicate the process by which Development Permit DE408507, which was issued December 3, 2004 and covers the term of the Casino use "for a limited period of time expiring December 3, 2008, unless extended in writing by the Director of Planning", can be amended to allow a seven year term of operation through December 3, 2013 so as to secure financing required to reposition the Edgewater Casino". The letter also set out that the proposed new shareholders have presented their "... proposed repositioning plan to representatives of the City, including: (a) the proposed schedule of improvements originally permitted by the City but never completed; and (b) the proposed new improvements to the Edgewater Casino and the Site which would require new Development Permits."

35 In evidence is a copy of the May 31, 2006 Development Permit Staff Committee Report for the Development Permit Board of the City of Vancouver regarding a possible extension of the time-limited approval of the use of Building "C" until July 31, 2013. The applicant is shown as Paragon Gaming Inc. (which is the New Shareholder) and the property owner is shown as CMPC. It was the recommendation of the Development Permit Staff Committee that the Development Permit Board approve the extension requested. In the "background" to the report, it is noted:

> The request from Paragon does not seek to alter any of the existing agreements or commitments negotiated previously between Edgewater and the City, nor does it involve any proposed changes to the building or operation. A

> subsequent development permit application proposing changes to the building, the vehicular and pedestrian access, and landscaping is expected in the near future. (emphasis added)

36 Pursuant to a Restrictive Covenant registered against the property, any request to extend the four year time limit required the consideration of the Council of the City. On May 30, 2006, City Council passed a resolution supporting the extension from the previous expiry date of December 3, 2008. At the Development Permit Board and Advisory Panel meeting held on June 5, 2006, the time limit placed on the use of the premises as a Casino was changed to expire on the earlier of July 31, 2013 or the "relocation of the casino operation to premises other than the Plaza of Nations".

37 Mr. Jackson understands that Edgewater through the New Shareholder has hired consultants and are working with the City on a number of matters that will likely result in an amended development permit being issued. In this regard, the New Shareholder has retained Patrick Cotter Architect Inc. (the ongoing architects for Edgewater) ("Cotter") and E. Lees & Associates Consulting Ltd., landscape architects and planners ("Lees"), to deal with the City of Vancouver.

38 In a July 26, 2006 letter to the City, Cotter states:

> As most of the deficiencies involved landscaping, Mr. Andrew Robertson of Eric Lees & Associates, landscape consultants, had addressed most of the items in his accompanying letter. As he has indicated, work on the detail dwgs is ongoing and the construction is due to be undertaken within the next three months. The implementation of these outstanding items has received top priority from the prospective owners of the casino, Paragon Gaming LLC, who perceive the installation of the landscape and screening as one of their 4 main pillars to revitalize the casino to the mutual benefit of the owners and city hall.
>
> At the time of the Development Permit application only an outline sketch of the water feature was available and design development was halted until Paragon Gaming recently gave the go-ahead to restart the process. Vincent Helton are currently engaged in developing the design of the fountain. We will require a structural, mechanical and electrical permit for this element and would like to discuss the possibility of gaining these permits through the field review process in order to speed up the installation of this key feature. However we are not sure whether we are to approach yourself or Mr Ron Dyck, the assigned building inspector, on this matter.
>
> As we are installing some retaining walls as part of the deficiencies list we will need to provide the City with structural dwgs signed & sealed by a recognized professional structural engineer. We would also like to have the structural permit application processed via a field review.
>
> The changes to the original Development Permit are relatively small, I showed our facilitator at City Hall, Allson Higginson, the proposed changes to the original DP and she determined it would require an application for a minor amendment to the original DP. We will print out 5 copies of the original and latest dwgs, bubble the changes and describe them in detail on an accompanying sheet. The dwgs will be delivered to Andy Chinfen at City Hall enquiry desk by Wednesday morning Aug 2nd for distribution before the design review meeting.

39 In a July 26, 2006 letter to the City, Lees states:

> Allow me to address each of the landscape deficiencies you raise in your letter and how the revised plan will address them (Refer to the accompanying letter from Patrick Cotter Architects regarding structural, mechanical, electrical and lighting issues):
>
> **1) The required seventy-six (76) trees have not been provided.**
>
> The revised 2006 plan calls for a total of seventy-one (71) trees. The 2006 tree count is lower than the 2004 tree count as the latter includes 16 *Quercus rubra* (Red Oak) on Concord Pacific lands to the North of the site. Paragon Gaming has been unable to secure approval from Concord Pacific to undertake this planting. As well, it is our professional opinion that the 2004 plan calling for the planting of 22 *Pseudotsuga menziesii* (Douglas Fir) in the

"Legacy Forest" is too optimistic considering the space available for new tree planting in this area. The 2006 plan calls for the planting of six *Pseudotsuga menziesii* along with 12 native understory Acer circinatum (Vine Maple). The long term health of this stand of trees, rather than maximizing new tree numbers, is our primary concern.

2) Restoration planting of the "Legacy Forest" (approximately 4,500 plants) have not been provided.

The 2004 plan called for the planting of a total of 572 plants in this area. 4,500 plants is approximately the number of plants proposed for the entire site (4,575). Of these, 3,500 are *Hedera helix* (English Ivy) — classed as a weed by the City of Vancouver. These plants were to be installed on Concord Pacific land, which, as noted above, is not a possibility.

The 2006 plan calls for the planting of a total of 626 plants in the "Legacy Forest," a higher plant count than the 2004 plan.

40 In a July 28, 2006 letter, Lees makes reference to the Development Permit and states: "We wish to apply for a minor amendment ...." There are no details in that letter as to the cost of what is referred to in this letter as the "2006 plan" but the letter provides in detail a comparison between the 2004 landscaping plans and the following proposed by Lees:

2. Screening (to North of site)

2004 plan: The plan proposes a berm with tree and groundcover planting to the North of the property boundary (in Concord Pacific lands).

2006 plan: The plan proposes no sitework on Concord Pacific lands. Instead it proposes the existing fence be repaired and decorated with coloured inset strips. Additional visual interest would be created with banners and planting at the NorthEast corner of the site.

Rationale for amendment: Our client, Paragon Gaming, has been unable to secure approval from Concord Pacific to undertake the proposed 2004 planting on heir lands. We are therefore seeking relief with regard to the installation of the berm and planting in question. The extremely narrow space between the entry road and the property boundary does not allow any planting along the Northern edge of the site. Therefore, a decorative fence that would enhance the casino \ visitor's arrival experience while screening the unattractive views to the North of the site is proposed.

3. North side of Building 'B'

2004 plan: The plan does not propose any enhancements to the side of the building.

2006 plan: The plan proposes (a) hedge planting and a decorative fence gate to screen an unsightly loading dock (b) cleaning and repainting a stucco wall section and two sets of stairs, and (c) the installation of decorative aluminum ribbons (refer to Drawing L106) on the side of the building.

Rationale for amendment: The proposal would improve the appearance of the building side and thereby enhance site visitors' experience.

4. Curved Raised Planters (Beds # 5 & 6)

2004 plan: The plan does not propose any beds in these areas.

2006 plan: The plan proposes two concrete raised planters along the roadside to be planted with shrubs and groundcover plants.

Rationale for amendment: The planters will screen the unsightly East side of Building 'B' as visitors in vehicles are entering and leaving the site.

5. East Side Planting

2004 plan: The plan proposes Red Oak (*Quercus rubra*) planting both in the median between the vehicle entry and along the East side of Building 'B' in planters.

2006 plan: The plan proposes fastigiate Hornbeam (*Carpinus betulus* 'Fastigiata') in both of the above noted areas. It also calls for more trees (14 compared to 8) along the East side of Building 'B.'

Rationale for amendment: The striking fastigate trees will create year-round drama while the Oaks are more of a seasonal interest tree. As well, Red Oaks are more problematic in terms of disease in Vancouver, compared to the Horn beam. The additional trees will better screen the East side of the building.

41 There is nothing in evidence to indicate whether the "minor amendment" to the Development Permit was approved by the City or the cost of creating what was set out in the "2006 Plan".

42 In a September 21, 2006 email transmission from Marc Lippok of Cotter to CMPC and to Mr. Chris Jackson of the Old Shareholders, Mr. Lippok states:

The contractor is due to start next week on the items that were shown on the 2004 DP dwgs but not completed, and the City is on course to issue us with a Minor Amendment to DP for the minor changes and additions to the 2004 dwgs on October 15 th .

However any changes we make now to the recent Minor Amendment to DP dwgs we issued to the City will inevitably result in postponement of the DP permit. We need to resolve these issues as soon as we can to minimize the delays in the permit and construction schedule.

43 In a May 11, 2007 letter to the solicitors for the Old Shareholders, Cotter states:

The following is in response to your request of April 30, 2007 for information pertaining to landscape lighting and the waterfall feature in the matter of Edgewater Casino and Edgewater management Inc. in the Supreme Court of British Columbia, Action No. S062842, Vancouver, Registry. These are the facts as we can best recall.

(a) Landscape Lighting

Please find attached copies of both Architectural and Landscape drawings which were part of the Development Permit Drawings approved in November 2004 (Appendix A), and a copy of the Staff Report accompanying the Development Permit DE # 408507 (Appendix C). These drawings do not indicate exterior landscape or site lighting.

Also attached are copies of the Building Permit drawings and Building Permit BU # 429878 (Appendix B) issued December 3, 2004 covering the exterior scope of work. These drawings and permit do not show any landscape lighting. The exterior site lighting was designed and documented by the Electrical Consultant, Harbourview Electric.

A Photometric Plan indicating light levels around the site, location and type of fixtures was prepared by Harbourview, and submitted to the City of Vancouver. Illumination to the access road and pedestrian walkways was supplied and installed according to the light levels requested by the City of Vancouver. For record of these drawings, submissions and permits and confirmation of what was installed on-site, please contact Harbourview Electric.

(b) Waterfall Feature

Architectural and Landscape drawings which were part of the Development Drawings approved on December 3, 2004 (Appendix A) are attached, which indicate the provision of a waterfall and rock-scape feature at the north end of Building C. No detailed drawings of this feature were included in the Development Permit and Building Permit.

(c) Status of Deficiencies

We have been advised by the City of Vancouver that Paragon Gaming, CMPC, VANOC, and the City of Vancouver have met recently to review the status and requirement for the completion of outstanding items.

Evidence of Mr. Gee-Wing

44 In a September 21, 2006 email transmission from Mr. Gee-Wing to one of the Old Shareholders, CMPC advised as follows:

I have been told that should we begin demolishing in early 2007, a substantial amount of the beautification from Pacific Blvd to the Casino would be rendered redundant.

We will not be permitting the removal of the parking toll both on Pacific Blvd. and we also oppose the gates and fencing to the loading bay area of Bldg B.

In addition, with our master plan to convert Bldg C into being self sufficient, the work proposed would limit the flexibility of such an expansion.

In short, I would recommend a meeting to be held with James Cheng [architect for CMPC] to go over the your design and to come to some sort of arrangement that works for both parties.

45 In his October 19, 2006 Affidavit, Mr. Gee-Wing states:

CMPC is presently in the process of applying for re-zoning and re-development of certain of the Plaza of Nations lands. It has a significant stake in ensuring that all commitments made under its name to the City of Vancouver are performed. The City of Vancouver may be reticent to accept new development commitments from CMPC as CMPC is in default of its old and existing development commitments. CMPC does not want to be placed in this position. Under the Lease, Edgewater agreed to perform the commitments that CMPC made to the City of Vancouver on its behalf to obtain a development permit. CMPC's broader interest will not be served by requiring the City of Vancouver to initiate enforcement proceedings against it in order to compel it to perform its obvious commitments to the City of Vancouver. As required under the Lease, CMPC demands that the Old Owners complete the work items contained in the [June 23, 2006] Demand Letter [from the City] or pay CMPC to complete those work items.

46 In his January 19, 2007 Affidavit, Mr. Gee-Wing states that his counsel inquired of counsel for the New Shareholder whether the New Shareholders were willing: "to assume liability to CMPC for completing the work described in the City Letter or any of the work items ..." and whether Edgewater was prepared to execute an indemnity agreement in favour of CMPC so that CMPC could reduce its claim against the former owners of Edgewater accordingly. The January 10, 2007 response from the solicitor for the New Shareholder did not deal with the question of whether Edgewater was prepared to assume liability to complete the work described. Rather, the response was:

Edgewater Casino ULC is not prepared to indemnify your client against liability to the City of Vancouver in connection with the demands of the City as described in its letter dated June 23, 2006 ...

47 At his March 9, 2007 Cross-Examination on his Affidavit, Mr. Gee-Wing could not point to any provision in the Lease that dealt with any commitment on the part of Edgewater to be responsible for matters that were required under the Development Permit.

48 During the hearing of this matter when it became apparent to CMPC and its counsel that the Undertaking referred only to the Building Permit and not to the Development Permit and despite what had been earlier stated by Mr. Gee-Wing in his January 19, 2007 Affidavit, Mr. Gee-Wing stated in his September 17, 2007 Affidavit that, when he signed

the Undertaking, as a condition of doing so: "... I obtained an assurance from Chris Jackson, the son of Gary Jackson, that the tenant would indemnify CMPC for any work it did or was required to do pursuant to the Building Permit".

49 In his September 17, 2007 Affidavit, Chris Jackson states: "... I deny giving any sort of assurance [as is set out in the September 17, 2007 Affidavit of Mr. Gee-Wing] to Mr. Gee-Wing as such would have clearly required my father's or Mr. Libin's approval given its legal nature. I was simply attempting to obtain Mr. Gee-Wing's signature as that is what the City required."

Case Authorities and Discussion

50 Dealing first with the Undertaking, I am satisfied that it has no application to this question. First, it refers only to the Building Permit and to "tenant's Improvements". As it is the tenant rather than the landlord who is responsible to complete what is set out under any building permit, it is logical for the City to require an undertaking from a landlord to complete that which is not completed by the tenant under a building permit. Second, the City By-laws relied upon by CMPC refer only to "development permits" and not to responsibilities under a building permit. Third, Cotter confirms in its May 11, 2007 letter that the "Architectural and Landscape Drawings" are attached to the Development Permit and that the Building Permit shows no "landscape lighting". It is unlikely that the architect throughout for Edgewater would not be aware that the matters on the "Deviations" letter of June 23, 2006 from the City do not relate to matters set out in the Building Permit. Fourth, there were no references to landscaping in the Building Permit Fifth, the "Deviations" letter from the City is addressed to CMPC not to Edgewater, it makes reference to the Development Permit, and it makes no reference to the Building Permit. Sixth, the Undertaking only requires the "best efforts" of CMPC — it is not an indemnification of the City if Edgewater did not undertake the work required of it. As well, I am satisfied that Mr. Jackson was mistaken when he acknowledged that it was the Building Permit which set out the responsibilities of Edgewater.

51 Accordingly, I find that CMPC is not in a position to rely on the Undertaking to raise the concern that the City may call upon it in due course to perform the matters which are set out in the Development Permit. The question which then arises is whether there was an agreement in place that Edgewater would undertake the work required by the City as set out in the Development Permit. The first argument raised by CMPC is that there was an oral agreement in place. I am satisfied that the correspondence between Mr. Gee-Wing and Mr. Jackson which pre-dated the Lease all relates to what would be included within the Lease and does not constitute either an "Initial Agreement" or a "General Oral Agreement" as is alleged by CMPC. At best, the correspondence reflects the proposals of Edgewater as to what would eventually be contained within the Lease. At his Examination for Discovery, Mr. Gee-Wing confirmed that, as late as June, 2004, he did not consider Edgewater as being contractually bound to CMPC with respect to the casino project.

52 However, I am satisfied that there was an agreement in place which would require Edgewater to be responsible for the undertakings required by the City. First, Mr. Jackson at his Examination for Discovery acknowledges that Edgewater was to undertake the work. Second, the Lease makes it clear that the work was to be undertaken by Edgewater. In this regard, under Clause 2.02(b) of the Lease an easement is granted by CMPC to Edgewater for "... constructing, installing ... landscaping (including a waterfall and one or more sculptures) ...." There would be no need for such an easement to be granted if Edgewater was not responsible for that landscaping. As well, Clause 2.02(b) provides further that: "... all such work is done at the expense of the Tenant and in accordance with the requirements of any governmental authority ... including the City of Vancouver ...."

53 Accordingly, the Lease clearly sets out that the landscaping and other exterior work to be done is to be done by Edgewater. While the reference to "City Agreements" in Clause 6.4 of the Lease does not include work set out under the Development Permit, the landscaping and other exterior work is nevertheless required to be done by Edgewater as it must be done in accordance with the requirements of the City. As well, Clause 6.02 requires Edgewater to comply promptly with all "lawful requirements" of the City in order to: "... observe or perform its obligations under [the Lease] ...." I am satisfied that included within the phrase "lawful requirements" are those works that are required under the Development Permit.

54 While I am satisfied that it is not an answer available to the Old Shareholders that the New Shareholder agreed to be bound by any outstanding requirements of the City, it is clear that the New Shareholder took on the obligations which are now in issue. First, that obligation is acknowledged by the proposed new shareholders to the British Columbia Lottery Corporation. Second, the dealings that Edgewater has had since the completion of the transaction set out in the Share Purchase Agreement indicate that they are satisfied that Edgewater is bound to complete whatever work is required by the City. That is clearly set out in the Development Permit Staff Committee Report for the Development Permit Board of the City. It is also clear from the subsequent dealings that Edgewater has had with the City and the correspondence on behalf of the New Shareholder by its agents Cotter and Lees.

55 However, it must be noted that CMPC is in no way bound by the Share Purchase Agreement. Accordingly, if any rights which had accrued to CMPC prior to the filing under the *C.C.A.A.* are lost as a result of the Proof of Claim of CMPC being disallowed, it may be that CMPC would not be in a position to pursue Edgewater for any future obligations which arise as a result of the Lease and obligations that Edgewater has to the City.

Has CMPC Proven Its Claim

56 The August 11, 2006 Claims Process Order provides in part: "Upon payment being made by or on behalf of the Petitioners to a creditor for the full amount of the proven Claim of such creditor including all contractual interest and all other contractual payments accruing due to the date of payment, all of the claims that could be made by that creditor as against the Petitioners are released and discharged." The term "Claim" is as set out in the *C.C.A.A.* Pursuant to s. 12(1) of the *C.C.A.A.*, a "Claim" means "... any indebtedness, liability or obligation or any kind that, if unsecured, would be a debt provable in bankruptcy...."within the meaning of the *B.I.A.*, s. 121 of which reads as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt became bankrupt shall be deemed to be claims provable in proceedings under this *Act*.

57 Under s. 135(1.1) of the *B.I.A.*, a bankruptcy 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 thereby deemed a proven claim to the amount of its valuation. In this case, the Court takes the place of a trustee in bankruptcy pursuant to the Claims Process Order.

58 The onus is on CMPC to prove its claim: *Air Canada, Re* (2004), 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial List]). In the endorsement relating to the decision, Farley J. stated that there were: "two fundamental aspects" to the determination of a contingent claim: "(i) an assessment of the happening of the contingency in question; and (ii) the quantification of the claim. If C.U.P.E. successfully discharged its onus of establishing that there is some basis to presuppose the happening of the contingency, a reasonable value must then be established for the claim (and it is common practice to discount the aggregate value of the claim in a "best case" scenario by some reasonable percentage that reflects the risk that a less optimistic scenario may in fact result)." (at p. 34).

59 Farley J. then went on to hold that the claimant had failed to prove any evidence to substantiate the happening of the contingency and that the quantification of the claim would in any event be negligible. Farley J. described the onus as follows: "C.U.P.E. must demonstrate that its claim is not too speculative or remote, but it need not establish that success is probable." (at p. 26).

60 To the question of whether the process which was established should be delayed until a final determination of the contingent claim could be made, Farley J. stated:

> It is indeed troubling ... for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation [***Canadian Human Rights Act***]. However, that process is not the one

> which is required to be followed in the determination of a claim under the *C.C.A.A.*. Contingent unliquidated claims are determined under the *C.C.A.A.* claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise. (at p. 26)

61 I find that CMPC has not proven either test as set out in *Air Canada* , *supra*. While the June 23, 2006 "Deviations" letter received from the City relating to the Development Permit shows that CMPC may well be called upon to complete the work that was to have been done by Edgewater under the Development Permit, the City has not taken further action in that regard for over 18 months and there is no indication that it ever will. As well, the activities of the New Shareholder and CMPC are likely to make the work "redundant" (in the words of Mr. Gee-Wing). Clearly, CMPC and the New Shareholder plan to redevelop the site thus making it highly unlikely that the work originally contemplated will ever be required. CMPC has applied for "minor amendments" to the Development Permit thus making some of the work previously required no longer required. It should also be noted that CMPC has not attempted to refute the statements that Cotter makes in its May 11, 2007 letter regarding what remains to be done. I have concluded that the possibility that CMPC will ever be called upon by the City to complete the work contemplated by either the Development Permit or the Building Permit is too speculative and remote.

62 At the same time, I cannot find that CMPC has met the onus of establishing the amount of the claim as at August 28, 2006, being the deadline for the filing of Proofs of Claim. In this regard, there are varying estimates of what work may be required. However, no architect, landscape architect, official of CMPC, Edgewater, or the City has stated that the work set out in the estimates is required and that the estimates accurately represent the cost of the work that is actually required. The evidence does not establish that any of this work will be required.

63 In the circumstances, I conclude that CMPC has not met the onus of establishing that there is some basis to pre-suppose the happening of the contingency that it will be called upon to perform the work that was contemplated under either the Building Permit or the Development Permit or that the quantum of its contingent claim is anything other than negligible.

64 While I am not called upon to do so and while I express no opinion regarding the same, it may well be that any future expense to undertake the work required by the City pursuant to the Development Permit may well be claimed by CMPC against Edgewater even though the shareholders of Edgewater have changed. In this regard, it was Edgewater who entered into an agreement with CMPC. Edgewater was the covenantor under the Lease. The Claims Process Order as drawn does not appear to eliminate the possibility that CMPC could advance a claim against Edgewater if, in the future, it was called upon by the City to perform the obligations set out under the Development Permit. The August 11, 2006 Claims Process Order only provides that any claim against Edgewater would be "released and discharged" upon payment being made to a creditor "... for the full amount of the proven Claim of such creditor". The Claims Process Order does not appear to provide that, if a Notice of Disallowance is upheld, the claim advanced is also released and discharged. The "Closing Order" only provides that claims are forever barred if a Proof of Claim is not filed by October 7, 2006.

Order Made

65 The sum of $500,000.00 plus a *pro rata* share of any interest which has accrued on that sum will be paid out of trust to the credit of the Old Shareholders. The parties will be at liberty to make application regarding the question of costs.

Application dismissed.

End of Document

24

2006 CarswellOnt 8175
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2006 CarswellOnt 8175, 28 C.B.R. (5th) 317

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 as amended

And In the Matter of a plan of compromise or arrangement
of Air Canada and those subsidiaries listed on schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Cumming J.

Heard: December 12, 2006
Judgment: December 20, 2006
Docket: 03-CL-4932

Counsel: Katherine Kay, Danielle Royal for Air Canada
Jacqueline Dais-Visca for Attorney General of Canada

Subject: Insolvency; Public

Table of Authorities

Cases considered by *Cumming J.*:

Air Canada, Re (July 21, 2003), Doc. 03-CL-4932 (Ont. S.C.) — considered

Buland Empire Development Inc. v. Quinto Shoes Imports Ltd. (1999), 11 C.B.R. (4th) 190, 1999 CarswellOnt 2312, 123 O.A.C. 288, 24 R.P.R. (3d) 169 (Ont. C.A.) — followed

C.U.P.E. v. Canadian Airlines International Ltd. (2006), 2006 C.L.L.C. 230-004, *(*sub nom. *Canadian Human Rights Commission v. Canadian Airlines International Ltd.)* 343 N.R. 308, 2006 SCC 1, 2006 CarswellNat 43, 2006 CarswellNat 44, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.)* 263 D.L.R. (4th) 1, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.)* [2006] 1 S.C.R. 3 (S.C.C.) — considered

Decision No. 534/90I (1990), 17 W.C.A.T.R. 187 (Ont. W.C.A.T.) — followed

Jerrard v. Peacock (1985), 1985 CarswellAlta 325, 61 A.R. 161, 57 C.B.R. (N.S.) 54, 37 Alta. L.R. (2d) 197 (Alta. Master) — considered

Milner Greenhouses Ltd. v. Saskatchewan (2004), 2004 CarswellSask 280, 2004 SKQB 160, 50 C.B.R. (4th) 214, [2004] 9 W.W.R. 310, 48 B.L.R. (3d) 276, *(*sub nom. *Milner Greenhouses Ltd., Re)* 252 Sask. R. 42 (Sask. Q.B.) — not followed

Ontario (Ombudsman) v. Ontario (Health Disciplines Board) (1979), 1979 CarswellOnt 901, 26 O.R. (2d) 105, 104 D.L.R. (3d) 597 (Ont. C.A.) — considered

R. v. Fitzgibbon (1990), [1990] 1 S.C.R. 1005, 107 N.R. 281, 40 O.A.C. 81, 78 C.B.R. (N.S.) 193, 55 C.C.C. (3d) 449, 76 C.R. (3d) 378, 1990 CarswellOnt 172, 1990 CarswellOnt 996 (S.C.C.) — referred to

R. v. Sault Ste. Marie (City) (1978), 1978 CarswellOnt 24, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, (sub nom. *Regina ex rel. caswell v. Sault Ste. Marie)* 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 1978 CarswellOnt 594 (S.C.C.) — referred to

R. v. Wholesale Travel Group Inc. (1991), 1991 CarswellOnt 117, 4 O.R. (3d) 799 (note), 1991 CarswellOnt 1029, 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (S.C.C.) — referred to

Simone v. Daley (1999), 1999 CarswellOnt 551, 170 D.L.R. (4th) 215, 8 C.B.R. (4th) 143, 118 O.A.C. 54, 24 R.P.R. (3d) 1, 43 O.R. (3d) 511 (Ont. C.A.) — followed

Transport North American Express Inc. v. New Solutions Financial Corp. (2001), 200 D.L.R. (4th) 560, 54 O.R. (3d) 144, 16 B.L.R. (3d) 148, 2001 CarswellOnt 1758 (Ont. S.C.J.) — considered

Transport North American Express Inc. v. New Solutions Financial Corp. (2002), 2002 CarswellOnt 1935, 6 R.P.R. (4th) 1, 214 D.L.R. (4th) 44, 27 B.L.R. (3d) 163, 160 O.A.C. 381, 60 O.R. (3d) 97 (Ont. C.A.) — distinguished

Transport North American Express Inc. v. New Solutions Financial Corp. (2004), 2004 SCC 7, 2004 CarswellOnt 512, 2004 CarswellOnt 513, 17 R.P.R. (4th) 1, 235 D.L.R. (4th) 385, 183 O.A.C. 342, [2004] 1 S.C.R. 249, 18 C.R. (6th) 1, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 18, 316 N.R. 84 (S.C.C.) — considered

Vancouver (City) v. Alliston (2003), 2003 CarswellBC 799, 2003 BCPC 105, 47 C.B.R. (4th) 142 (B.C. Prov. Ct.) — not followed

Statutes considered:

Aeronautics Act, R.S.C. 1985, c. A-2
Generally — referred to

ss. 7.3-7.5 [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — referred to

s. 7.6(2) [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — referred to

s. 7.7 [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — referred to

s. 7.9(2) [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — referred to

s. 8.2 [en. R.S.C. 1985, c. 33 (1st Supp.), s. 1] — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 2 "court" — referred to

s. 12(1) — referred to

s. 121(1) — referred to

s. 178 — considered

s. 178(1) — referred to

s. 178(1)(a) — considered

s. 178(2) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 24 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 12 — referred to

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Ombudsman Act, 1975, S.O. 1975, c. 42
s. 14(a) — referred to

Regulations considered:

Aeronautics Act, R.S.C. 1985, c. A-2
Canadian Aviation Regulations, SOR/96-433

Generally — referred to

s. 602.105(c) — referred to

MOTION by airline for declaration that monetary penalty assessed under *Aeronautics Act* was "claim" for purposes of claims procedure order and sanction order issued under *Companies' Creditors Arrangement Act*.

***Cumming J.*:**

The Motion

1 Air Canada moves for a declaration that a Monetary Penalty of $25,000.00 assessed by the Minister of Transport is a "claim" for the purposes of the Claims Procedure and Sanction Orders issued by this Court under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). This motion raises important issues of first instance as to the impact, if any, of orders made by this Court under the authority of the *CCAA* upon monetary penalties imposed by the Minister of Transport and as to the respective authority of this Court and the federal administrative tribunal regime relating to aviation regulations and noise abatement.

2 For the reasons that follow, the motion is allowed.

Background

3 On December 19, 2001, the Minister of Transport issued an Assessment of Monetary Penalty (the "Monetary Penalty") against Air Canada under s. 7.7 of the *Aeronautics Act*, R.S.C. 1985, c. A-2. The Minister alleged that on or about December 23, 2000, an Air Canada aircraft landed at Montreal International Airport (Dorval) at approximately 3:41 a.m. in contravention of the noise abatement procedures and noise control requirements in s. 602.105(c) of the *Canadian Aviation Regulations*, SOR/96-433 (the "noise abatement regulations"). A review hearing was commenced before the Transportation Appeal Tribunal of Canada ("TATC") on October 1, 2002 and concluded after four days of hearings on February 18, 2003.

4 On April 1, 2003 Air Canada applied in this Court for protection from its creditors under the *CCAA*, which resulted, *inter alia*, in an immediate stay of all proceedings.

5 This Court issued its Claims Procedure Order on September 18, 2003, which sets forth the process by which creditors' claims would be determined. Paragraph 8 of that Order provides that any creditor who does not file a proof of claim before the claims bar date is "...forever barred from making or enforcing any Claim against [Air Canada] and the Claim shall be forever extinguished."

6 The TATC proceeding remained stayed pending the currency of the stay. The Minister of Transport and Transport Canada did not make a claim in the *CCAA* proceedings even though they had timely notice of the Claims Procedure Order.

7 This Court issued a Sanction Order on August 23, 2004, which provided in paragraph 10 that a creditor who did not file a proof of claim in accordance with the claims procedure is "forever barred from making any Claim against [Air Canada]...and that such Claim is forever extinguished."

8 Air Canada emerged from *CCAA* protection on September 30, 2004. On December 10, 2004 the TATC sought written arguments in respect of the December 19, 2001 Monetary Penalty.

9 On June 2, 2005 Transport Canada and the Canadian Transportation Agency filed a motion in this Court for directions and a declaration regarding the issue of whether regulatory penalties were "claims" for the purpose of the Sanction Order. This motion has since been abandoned and on November 28, 2005 the Minister of Transport filed submissions with the TATC requesting that the TATC determine:

> What effect, if any, does the *CCAA* Sanction Order have on the jurisdiction of the TATC to issue a Review determination, including the jurisdiction to issue a Certificate pursuant to 8(b) of the *Aeronautics Act* if the fine is not paid?

10 The TATC rendered an interim decision on May 16, 2006 holding that the effect of any orders pursuant to the *CCAA* is not a question that needs to be answered. However, the decision by the TATC resulting from the merits review of the Monetary Penalty against Air Canada (the so-called "Merits Decision") was issued the same day. Tribunal member Mr. Michel Boulianne determined:

> I uphold the Minister's decision and the monetary penalty of $25,000 assessed for flight 630. The said monetary penalty is to be made payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within fifteen days of service of this determination.

11 Air Canada has a pending application for judicial review in the Federal Court in respect of both TATC decisions and has advised the Federal Court that in Air Canada's view the Ontario Superior Court of Justice is the proper forum

to determine the issue of whether a Monetary Penalty assessed for a regulatory violation is a "claim" which ought to have been dealt with in the *CCAA* Claims Procedure.

Preliminary Issue Relating to the Jurisdiction of this Court

12 After some considerable deliberation, the Attorney General of Canada concedes that this Court as a Superior Court can determine whether the Monetary Penalty assessed by the Minister of Transport is a "claim" for the purposes of the *CCAA* and the Claims Procedure and Sanction Orders. However, the Attorney General opposes this Court's jurisdiction to judicially review the May 16, 2006 decisions of the TATC.

13 I do not understand Air Canada's motion before this Court to be an application for judicial review of the TATC's decisions. Air Canada is seeking a declaration that the Monetary Penalty is a "claim" that is extinguished by the Sanction Order and that all proceedings related to the "claim" (ie. the Monetary Penalty) are permanently stayed. As such, the correctness of the TATC's decision as to the merits is not before me and I make no ruling regarding that decision, provided however, these Reasons for Decision will impact upon the claimed continuing existence and *enforceability* of the Monetary Penalty.

The First Issue — Is the Monetary Penalty a "Claim" for the Purposes of the CCAA?

14 The first issue raised by the motion is whether the Monetary Penalty assessed by the Minister of Transport in respect of Air Canada's alleged failure to abide by the noise abatement regulations is a "claim" for the purposes of the *CCAA* and the Claims Procedure and Sanction Orders.

The Law

15 Paragraph 2(h) of the Claims Procedure Order provides:

> "Claim" means any right of any Person against one or more of the Applicants in connection with any indebtedness, liability or obligation of any kind of one or more of the Applicants owed to such Person and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts existing prior to April 1, 2003, or a Restructuring Claim; provided however, that "Claim" shall not include an Excluded Claim; [Emphasis added]

16 The Sanction Order incorporates the definition of "Claim" set out in the Consolidated Plan of Reorganization, Compromise and Arrangement for Air Canada (the "Plan") developed in the *CCAA* proceeding. That definition is virtually the same as the broad definition in the Claims Procedure Order, with certain minor differences that are immaterial to this motion.

17 Section 12 of the *CCAA* provides that determinations as to whether any unsecured indebtedness, liability or obligation is a "claim" within the meaning of the *CCAA* are made by reference to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). Subsection 12(1) of the *BIA* provides:

> 12.(1) For the purposes of the Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act.

18 Subsection 121(1) of the *BIA* sets forth which claims are deemed provable in bankruptcy:

> 121.(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any

obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Analysis

A. The Attorney General's Submissions

19 The Attorney General makes four key submissions in support of his assertion that the Monetary Penalty is not a "claim". First, at paragraphs 10 and 11 of his supplementary factum, the Attorney General asserts that the Crown is not acting in a commercial capacity when it is enforcing sanctions against an "offender" like Air Canada. Therefore, since it is not "attempting to make money...the Crown can not be said to be acting as a 'creditor', or to have a 'claim' which would be subject to the CCAA." The Attorney General cautions this Court not to "strain" to find ways to permit an offender to escape the consequences of its regulatory misconduct. In support of this submission, the Attorney General cites the decisions of the Saskatchewan Court of Queen's Bench in *Milner Greenhouses Ltd. v. Saskatchewan*, [2004] S.J. No. 264 (Sask. Q.B.) at paras. 24-29 [*Milner*], and the Ontario Court of Appeal in *Transport North American Express Inc. v. New Solutions Financial Corp.* (2002), 60 O.R. (3d) 97 (Ont. C.A.) at para. 31 [*Transport*].

20 The Ontario Court of Appeal's decision in *Transport* dealt with a loan agreement that contravened the criminal interest rate provisions of the *Criminal Code*. The Court of Appeal overturned the trial judge's decision [2001 CarswellOnt 1758 (Ont. S.C.J.)] to "notionally sever" the offending provisions of the loan agreement to reduce the interest rate to a non-criminal rate. At para. 31, the Court of Appeal recited the principle that courts should not strain to avoid the application of the *Criminal Code* or assist those who strain to do so. The Supreme Court of Canada overturned this decision ([2004] S.C.J. No. 9 (S.C.C.)), however the majority did not explicitly dispute the aforementioned statement of principle.

21 The *Transport* decision is distinguishable. The motion before this Court does not involve the *Criminal Code*. Nor can the motion at hand be construed as an attempt to circumvent the provisions of the *Aeronautics Act* and its regulations (see my related comments below). Rather, this motion concerns the legitimate question as to whether the Monetary Penalty is a "claim" for the purposes of the *CCAA*.

22 The *Milner* case also does not assist the Attorney General. In that case it was found that a *CCAA* stay does not stay the *prosecution* of a quasi-criminal regulatory offence, but does stay the *enforcement* of any orders resulting from a successful prosecution. The Court held at para. 30 that if the Crown successfully prosecuted Milner Greenhouses and a fine was imposed, "the Crown would have to line up with Milner's other creditors [in the *CCAA* proceedings]." The Court in *Milner* therefore acknowledges that the Crown, when seeking to *enforce* a quasi-criminal fine, is a "creditor" for the purposes of the *CCAA*.

23 Even if it is assumed that the breach of the noise abatement regulations is a quasi-criminal offence (an assumption with which I ultimately disagree), the *Milner* decision supports Air Canada's submission that the Monetary Penalty that the Minister of Transport is seeking to *enforce* against Air Canada is a "claim" and that the Minister of Transport is a "creditor" within the meaning of the *CCAA*.

24 The Attorney General's second submission, at para. 12 of his supplementary factum, is that the Monetary Penalty is not a claim provable in bankruptcy because there is no "obligation" on Air Canada to pay the penalty until a tribunal or court makes a finding that Air Canada breached the noise abatement regulations and affirms the Monetary Penalty. I reject this submission.

25 The Attorney General did not provide, and I am not aware of, any authority to support the proposition that a debt or liability subject to review or appeal can *never* be a claim provable in bankruptcy. If the Attorney General's submission were correct, a judgment creditor, for example, would never have a provable claim where the judgment debtor appeals the judgment and thereafter files for bankruptcy. This cannot have been the intention of Parliament. In my view, the

Monetary Penalty can be a claim provable in bankruptcy notwithstanding the fact that it was subject to an unresolved review by the TATC when Air Canada applied for *CCAA* protection.

26 The Attorney General's third submission, at paras. 13 and 14 of his supplementary factum, is that the interpretation of the term "claim" in the *CCAA* must be informed by the scheme, object and intention of Parliament, and it cannot be Parliament's intention that companies can use the *CCAA* as a "free pass" or "pardon" for offences committed prior to electing *CCAA* protection.

27 With respect, this submission mischaracterizes the *CCAA* process. Interpreting the term "claim" as including penalties issued by the Crown (like the Monetary Penalty in this case) does not give companies subject to such penalties a "free pass". The Minister of Transport was entitled to file the Monetary Penalty with the Claims Officer as a "claim", and to have it validated. The Minister would also have been entitled to vote on any subsequent Plan and to receive a part of the distribution under that Plan. If the Plan was rejected, the *CCAA* stay would be lifted and the Minister would be free to bring proceedings against Air Canada to enforce the Monetary Penalty. While the Crown may not always be able to collect the entire penalty under the *CCAA* process, this hardly justifies labeling the process as a "pardon" system for companies.

28 The Attorney General's fourth submission, at paras. 15 and 16 of his supplementary factum, is that decisions of this Court and the Supreme Court of Canada state that the *CCAA* process does not affect a regulatory body's ability to pursue remedies after a company emerges from court protection.

29 First, the Attorney General submits that Farley J., in *Air Canda, Re* (July 21, 2003), Doc. 03-CL-4932 (Ont. S.C.) at paras. 18, 29, stated that the "temporal" *CCAA* stay did not prejudice federal regulators' ability to pursue remedies once Air Canada emerged from court protection. Second, the Attorney General submits that the Supreme Court of Canada, in *C.U.P.E. v. Canadian Airlines International Ltd.*, [2006] S.C.J. No. 1 (S.C.C.) at paras. 1, 45 [*Canadian Airlines*], held that *CCAA* restructuring does not "usurp the jurisdiction of a regulatory body to discharge its regulatory mandate to issue decisions, record offences, and ultimately enforce their decisions."

30 I do not agree with this submission. First, Farley J.'s statement in *Regulator's Order* was that after Air Canada emerged from Court protection it would have to deal with "each and every then *unresolved* Regulator matter" (emphasis added). This cannot be taken to mean that no Regulator matters were to be dealt with in the Claims Procedure. In fact, several regulators did file claims, and these claims were resolved prior to Air Canada's emergence from Court protection. Second, I do not agree that the *Canadian Airlines* case stands for the proposition put forward by the Attorney General. That case involved a judicial review of the Canadian Human Rights Tribunal's decision that female flight attendants were not subject to discrimination because they were paid less than the male mechanics and pilots. That decision was overturned by the Federal Court of Appeal and remitted back to the Tribunal. The Supreme Court of Canada upheld the Federal Court of Appeal's decision. The *Canadian Airlines* case does not in any way address the *CCAA* and its impact on federal regulators.

B. Air Canada's Submissions

31 Air Canada submits that the Monetary Penalty is a "claim". It points out that the definition of "claim" in the Claims Procedure Order is broad. It submits that the fact that a claim is contingent, unliquidated or disputed does not change the character of a claim as one provable under the *BIA* so long as the claim is not too remote or speculative. Air Canada submits that given the factual situation at hand, it is clear that a contingent obligation arose on the part of Air Canada prior to the *CCAA* filing and the date of the stay. It submits that liability for the alleged penalty arose on or about December 23, 2000 when the Air Canada plane landed at Montreal's Dorval airport allegedly in contravention of the noise abatement regulations. Finally, Air Canada says the fact that the TATC had not yet upheld the imposition of the Monetary Penalty as of the date of the *CCAA* stay does not change the character of the Monetary Penalty as a claim provable in bankruptcy.

Disposition in respect of the First Issue

32 I agree with and accept the submissions of Air Canada. I would only add that while it could be said that Air Canada's liability for the Monetary Penalty first arose on December 23, 2000, in my view that liability only became an "obligation" when the Minister of Transport issued the Monetary Penalty on December 19, 2001. Such a liability is not too remote or speculative and is therefore a provable claim under the *BIA*.

33 For the reasons outlined above, I conclude that the Monetary Penalty is a "claim" for purposes of the *CCAA* and the Claims Procedure and Sanction Orders. The Minister of Transport could and should have made a claim in accordance with the direction of the Claims Procedure Order.

The Second Issue — Is the Monetary Penalty an "Excepted Claim" under the BIA?

34 The second issue is whether the Monetary Penalty is an "excepted claim" under the *BIA*. The Attorney General submits that if this Court concludes that the Monetary Penalty is a "claim", it is an excepted claim by operation of ss. 178 (1) and (2) of the *BIA*.

35 I cannot accept this submission. In my view, s. 178 of the *BIA* does not apply. The *CCAA* refers to the *BIA* solely for the purpose of determining what is or is not a "claim". The *CCAA* does not require a Court to determine whether a "claim" is an "excepted claim" under s. 178 of the *BIA*. Nor does the *CCAA* itself contain a provision analogous to s. 178 of the *BIA*.

36 During oral submissions the Attorney General argued that both the *BIA* and *CCAA* must be read harmoniously together. The Attorney General suggested that Parliament could not have intended to provide for "excepted claims" under the *BIA* but not under the *CCAA* because this would allow companies to voluntarily proceed under the *CCAA* and compromise claims that would otherwise be exempted under the *BIA*. I disagree.

37 The processes established under the *BIA* and *CCAA* are distinct and separate. It is plain from the text of the *CCAA* that Parliament did not intend the *CCAA* to create an "excepted claims" process mirroring the one found in the *BIA*. If it had intended otherwise, Parliament would have included provisions analogous to s. 178 of the *BIA* in the *CCAA*, or would have expressly directed that s. 178 of the *BIA* should be considered, just as it expressly directed in s. 12 of the *CCAA* that reference should be made to the *BIA* to determine what is or is not a "claim".

38 Even if I were to conclude that s. 178 of the *BIA* does apply, I would find that the Monetary Penalty is not an excluded claim.

39 A central purpose of the *BIA* is to encourage the rehabilitation of an honest but unfortunate debtor and permit his or her reintegration into society by obtaining a discharge from the continued burden of financial obligations that cannot be met. Debts that survive a bankruptcy as a result of s. 178(1), therefore, are exceptions to the normative policy objective of rehabilitation.

40 The limited exceptions set out in s. 178(1) of the *BIA* were discussed in *Simone v. Daley*, [1999] O.J. No. 571 (Ont. C.A.) at paras 29-30. The Court of Appeal adopted the analysis of Master Funduk in *Jerrard v. Peacock* (1985), 57 C.B.R. (N.S.) 54 (Alta. Master) at 62 -3, who said that the excepted claims are "the kinds of claims which society (through the legislators) considers to be of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations."

41 The Attorney General specifically argues that the Monetary Penalty is an excepted claim under s. 178(1)(a) and is therefore not a provable claim in bankruptcy. The relevant provisions provide as follows:

Debts not released by order of discharge

178 (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;...

. . . . .

178(2) Claims released — Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

42 The jurisprudence and academic commentary have interpreted the meaning of "fine" or "penalty" in s. 178(1)(a) as fines or penalties imposed for offences against the state in either a criminal or quasi-criminal context. See Hon. L.W. Houlden, Hon. G.B. Morawetz and J. Sarra, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at 777; *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 (S.C.C.) at para. 28; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 11 C.B.R. (4th) 190 (Ont. C.A.) at para. 19 [*Buland*]; *Simone v. Daley*, *supra* at paras. 29-30.

43 In my view, a Monetary Penalty imposed by the Minister of Transport for a regulatory infraction does not constitute a criminal or quasi-criminal fine or penalty.

44 Regulatory infractions are different from criminal offences. Regulatory proceedings attempt to regulate behaviour in specific areas of activity, whereas criminal offences seek to punish "morally reprehensible" acts. *Canadian Aviation Regulation* s. 602.105(c) relates to noise operating criteria and is punishable by a monetary penalty designed to regulate behaviour. Violations of noise abatement regulations relating to air traffic do not involve the morally or socially reprehensible behaviour intrinsic to criminal offences. See *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.) at 1302-1303; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.) at para. 125. By contrast, there are hybrid offences set forth in ss. 7.3 through 7.5 of the *Aeronautics Act* that fall under the subtitle of "Prohibitions, Offences and Punishment". Subsection 7.6(2) of the *Aeronautics Act* provides that the summary conviction procedure is not applicable with respect to the contravention of a "designated provision" such as the noise abatement regulation.

45 The Attorney General referred to the decision in *Vancouver (City) v. Alliston*, [2003] B.C.J. No. 781 (B.C. Prov. Ct.). In that case, the British Columbia Provincial Court held at paras. 19-22 that a parking fine was an excepted claim under s. 178(1)(a) of the *BIA*, even though such a fine does not engage public morality like criminal and quasi-criminal fines. This decision does not reflect the law in Ontario as clearly set out by the Ontario Court of Appeal in *Buland* and *Simone v. Daley*, *supra*, and for this reason I do not follow it.

46 Even if I were to find that *Alliston* were applicable, that decision does not change the requirement under s. 178(1)(a) that a "court" must issue the fine or penalty. In my opinion the Minister of Transport is not a "court"; therefore, the Monetary Penalty is not a "fine or penalty...imposed by a court" under s. 178(1)(a).

47 Section 2 of the *BIA* defines the word "court", but that definition is not applicable to s. 178(1)(a). No authority for the precise meaning of the word "court" in s. 178(1)(a) was brought to my attention. However, guidance can be taken from the interpretation of "court" in other statutes.

48 In *Ontario (Ombudsman) v. Ontario (Health Disciplines Board)* (1979), 104 D.L.R. (3d) 597 (Ont. C.A.), the Court of Appeal had to determine whether the Health Disciplines Board was a "court" for the purposes of s. 14(a) of the *Ombudsman Act*, S.O. 1975, c. 42, which said, "This Act does not apply...to judges or to the functions of any court." The Court of Appeal concluded that the Board was not a "court". Justice Morden, at p. 612, said, "There is little doubt as to the normal scope of the word 'court' and I do not think that it embraces administrative tribunals, even those exercising powers with a substantial judicial component."

49 In *Decision No. 534/90I* (1990), 17 W.C.A.T.R. 187 (Ont. W.C.A.T.), the Workers' Compensation Appeals Tribunal was interpreting the word "court" in s. 24 of the *Canadian Charter of Rights and Freedoms*. At p. 211 of the decision, the Tribunal made the following general comments regarding the plain meaning of the word "court", which I would adopt:

> We would also note that as a matter of plain-meaning reading, the word "court" cannot be fairly taken to include "tribunal". Nowhere in other English-language legal contexts does one see administrative tribunals referred to as "courts". Indeed, it is a trite principle of Canadian administrative law that the most important distinguishing feature of the administrative tribunals is that they are not "courts".

50 Both of these decisions support the conclusion that the plain and ordinary meaning of the word "court" in s. 178(1)(a) of the *BIA* does not include an administrative tribunal such as the TATC and does not encompass the Minister of Transport who imposed the Monetary Penalty in the first instance. This interpretation is bolstered by the general recognition (with the sole exception of the *Alliston* decision) that fines and penalties imposed by an administrative body for regulatory infractions are different in kind from those imposed by a court for criminal or quasi-criminal offences.

51 This would be the end of the matter except for one further argument raised by the Attorney General during oral submissions. It was pointed out that on June 12, 2006 the TATC had issued a certificate, pursuant to s. 7.92 of the *Aeronautics Act*, in the amount of the Monetary Penalty after Air Canada refused to pay the penalty, and that this certificate was registered with the Quebec Superior Court on August 2, 2006. According to s. 8.2 of the *Aeronautics Act*, when such a certificate is so registered it "has the same force and effect, and proceedings may be taken in connection with it, as if it were a judgment in that court". The Attorney General submits that this makes the Monetary Penalty one "imposed by a court" for the purposes of s. 178(1)(a).

52 I reject this submission. I agree with Air Canada's assertion that a Court-registered certificate that is statutorily treated "*as if* it were a judgment in that court" is not equivalent to a fine or penalty actually *imposed* by a court. The Attorney General conceded at the hearing that the Superior Court does not scrutinize a certificate when it is registered. This is in stark contrast to the consideration given by a Court when it is deciding to exercise its power to impose a fine or penalty.

Disposition in respect of the Second Issue

53 I conclude that s. 178 of the *BIA* does not apply to proceedings under the *CCAA*. Even if s. 178 were applicable, taking into consideration the administrative nature of the offence in question (a noise infraction) and the fact that the body issuing the penalty (the Minister of Transport) is not a "court", in my view the Monetary Penalty is not an "excepted claim" under s. 178(1)(a) of the *BIA*.

Overall Disposition

54 I conclude that the Monetary Penalty is a "claim" for the purposes of the *CCAA* and the Claims Procedure and Sanction Orders.

55 Paragraphs 9 and 10 of the Sanction Order provide:

> 9. THIS COURT ORDERS that, upon the Implementation Date, each Affected Unsecured Claim shall be settled, compromised and released in accordance with the Plan, and the ability of an Unaffected Unsecured Creditor to proceed against [Air Canada] in respect of an Affected Unsecured Claim shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Unsecured Claims are hereby permanently stayed... (Emphasis added)
>
> 10. THIS COURT ORDERS that, without limiting the Claims Orders, a Creditor that did not...file a Proof of Claim in accordance with the provisions of the Claims Orders shall be and is hereby forever barred from making

any Claim against the Applicants and shall not be entitled to any distribution under the Plan, and that such Claim is forever extinguished.

56 Paragraph 1 of the Sanction Order incorporates the definitions listed in the Plan. The Plan defines "Creditor" as "any Person having a Claim". The Plan also defines "Affected Unsecured Creditor" as a "holder of an Affected Unsecured Claim", and defines "Affected Unsecured Claim" as "all Claims of any Person". Since the Minister of Transport is unquestionably the holder of a claim, paragraphs 9 and 10 of the Sanction Order apply to him.

57 By operation of these two paragraphs, I conclude that the Sanction Order forever extinguishes the Minister of Transport's right to enforce the Monetary Penalty against Air Canada, and that the Sanction Order permanently stays all proceedings "with respect to, in connection with or relating to" the Monetary Penalty.

58 The consequence of this conclusion is that the certificate issued by the TATC and registered with the Quebec Superior Court is a nullity.

59 An Order will issue in accordance with these Reasons for Decision.

60 For greater certainty, I state that the Sanction Order does not require the Minister of Transport to expunge the administrative record of Air Canada's violation of the noise abatement regulations on December 23, 2000. Thus, for example, this decision in no way prohibits the Minister of Transport from considering Air Canada's prior infraction of the noise abatement regulations when determining the quantum of penalty in the event of any future noise abatement regulation infraction by Air Canada.

Costs

61 I may be spoken to as to costs.

Motion granted.