Court File No. CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C., 1985,c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

\- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, POYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

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Dealer Settlement Approval Motion, Returnable May 11, 2015

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CRAIG PYKE, PATRICIA PYKE, GARY YOUNG, ERLYNE YOUNG, KENNETH GILES, SALLY GILES, BERNICE GARDNER, JEAN GARDNER, DONALD WALKER, LESLIE WALKER, MARGARET DAVIS, RONALD CHAPMAN, GORDON DONNISON, KAREN DONNISON, JOHN LENNOX, NADIA LENNOX, CHRIS DOWNES, CHRISTA DOWNES, 1094581 ONTARIO LIMITED (Plaintiffs / Respondents) and TRI GRO ENTERPRISES LTD. and G.M.F. PART 2 carrying on business as GREENWOOD MUSHROOM FARM, BRENT TAYLOR HOLDINGS LTD., RICK CAMPBELL HOLDINGS LTD., SNOBELEN MUSHROOMS LTD. carrying on business as G.M.F. PART 2, MAC SNOBELEN HOLDINGS LTD., MALCOLM (MAC) ALEXANDER SNOBELEN, DORIS GRACE SNOBELEN, DAVID RICHARD CAMPBELL, CLAYTON RUSSELL TAYLOR, DONALD LESLIE VAN DUSEN, NICHOLAS VAN HALTEREN, WILLIAM JOHN WALRAVEN, DAVID BRENT TAYLOR (Defendants / Appellants) and THE ONTARIO FEDERATION OF AGRICULTURE (Intervener)

Abella, Charron, Sharpe JJ.A.

Heard: March 21, 2001
Judgment: August 3, 2001 [*]
Docket: CA C32764

Proceedings: affirming 1999 CarswellOnt 2697 (Ont. S.C.J.); additional reasons at 2000 CarswellOnt 1300 (Ont. S.C.J.); and affirming 1999 CarswellOnt 4253 (Ont. S.C.J.); additional reasons at 2000 CarswellOnt 1300 (Ont. S.C.J.)

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APPEAL by mushroom farmers from judgment reported at 1999 CarswellOnt 2697 (Ont. S.C.J.) and 1999 CarswellOnt 4253 (Ont. S.C.J.), allowing neighbours' action against mushroom farmers for damages in nuisance due to noxious odours.

***Charron J.A.* (dissenting):**

I. Overview

1 The appellants are mushroom farmers who operate the Greenwood Mushroom Farm on Heron Road in the Town of Whitby, Ontario. [1] The respondents are property owners who reside in the vicinity of the appellants' mushroom farm. Ferguson J., by judgment dated August 23, 1999, found the appellants liable in nuisance to the respondents as a result of odours created by the operation of the mushroom farm. The sole issue on this appeal is whether the appellants' operation is exempt from liability in nuisance under the *Farm Practices Protection Act*, R.S.O. 1990, c. F.6 and the *Farming and Food Production Protection Act, 1998*. This issue turns on whether the odours that formed the subject-matter of the action resulted from an agricultural operation carried on as a "normal farm practice" within the meaning of both statutes.

2 The Greenwood Mushroom Farm ("GMF") purchased the present Heron Road farm site in 1993 for 1.1 million dollars. The property had formerly been the site of non-farming manufacturing businesses. Since the purchase, GMF has invested over four million dollars in capital improvements and equipment. GMF has become the sixth largest of about 25 mushroom farms in Ontario. The property is situated in an area that is zoned agricultural and the operation of a mushroom farm is permitted by the zoning.

3 The respondents are owners of properties on or near the farm operation. Their properties are also zoned agricultural. All but one of the respondents live on their properties, and most use their properties only for residential and recreational purposes although some lease parts to farmers. All but one of the respondents owned their properties before the arrival of the appellants' mushroom farm.

4 GMF operates mostly indoors. However, the process for growing mushrooms starts outdoors with the making of compost or substrate to feed the mushrooms. There is no issue between the parties that the formulation and production of composting material forms an integral part of growing mushrooms. Unfortunately, as the evidence at trial showed, the composting process, even when carried out according to the current state-of-the-art techniques, generates significant odours that can be extremely unpleasant.

5 The odours resulting from the composting process form the subject-matter of this litigation. In December 1995, the respondents commenced this action in negligence and nuisance seeking damages for mental distress, health problems, interference with the use and enjoyment of their properties, and decrease in the value of their properties. They also sought injunctive relief.

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6 The appellants denied that their conduct breached any standard of care and pleaded the protection of the *Farm Practices Protection Act*, S.O. 1988, c. 62 ("the 1988 Act"). The pleadings were amended at trial to include a reference to *the Farming and Food Production Protection Act, 1998*, S.O. 1998, c. 1 ("the 1998 Act"), enacted subsequent to the commencement of the action. Both statutes exempt farmers from liability in nuisance in respect of certain adverse effects, including odours, resulting from a "normal farming practice".

7 The trial judge found no negligence and, accordingly, dismissed that part of the claim. No appeal is taken from this finding. The trial judge held, however, that the odours constituted a nuisance. He held further that the appellants could not claim the statutory protection because their operation was commenced in an area where the nuisance it produced was completely out of character with the area and, as such, did not constitute a "normal farming practice" within the meaning of each statute. He therefore assessed damages for each individual respondent ranging from $7,500 to $35,000 for the unreasonable interference with the use and enjoyment of their property.

8 The appellants do not appeal from the finding that the odours constitute a nuisance at law. Nor do they dispute any of the findings of fact made by the trial judge. They contend, however, that the trial judge erred in his interpretation of the two statutes, holding in effect that the statutory protection was limited to agricultural practices that pre-dated adjacent residential development in a particular area, or to new practices that are consistent with the character of the area in which they commence operations. They submit that this restricted interpretation is contrary to the broad purposes of the legislation. They submit that, based on the findings of fact made by the trial judge, their operation clearly falls within the scope of statutory exemption.

9 The respondents disagree with the appellants' characterization of the trial judge's decision. They submit that the trial judge, in essence, found that the nuisance created by the appellants far exceeded the level of discomfort and inconvenience in respect of which the statutory protection can be claimed and that, consequently, he was correct in finding that the action was not barred by statute. They submit that the trial judge's decision was both reasonable and supported by the evidence, and that, consequently, the judgment should not be interfered with on appeal.

10 In order to resolve the question raised on this appeal, it is necessary to consider the relevant statutory provisions and the findings of the trial judge, and then determine whether the statutory protection extends to the facts as determined at trial. In addition, the Ontario Federation of Agriculture, as intervener, submits that questions of this nature should be determined by the administrative tribunal created by the legislature for this purpose rather than by the courts, and seeks direction from this court with respect to future cases.

II. Analysis

1. The Statutory Provisions

a) The 1988 Act

11 An issue arose at trial as to which statute should govern, the 1988 Act or the 1998 Act. The odours complained of in this case began in the fall of 1994 and continued to the time of trial in 1999. The trial judge held that the first statute applied to all claims based on facts occurring during the period when it was in force, and that the second statute applied to the facts occurring since its coming into force on May 11, 1998. The parties do not take issue with this finding.

12 The 1988 Act was passed to protect persons who carried on an agricultural operation from liability under the common law of nuisance for any odour, noise or dust resulting from normal farming practices. An "agricultural operation", as defined in the 1988 Act, specifically included "the production of mushrooms". A "normal farm practice" was defined in s. 1 of the 1988 Act:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices;

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13 In order to enjoy the protection from nuisance claims, farmers had to comply with any land use control law and other specified statutes:

> 2.(1) A person who carries on an agricultural operation and who, in respect of that agricultural operation, does not violate,
>
> (a) any land use control law;
>
> (b) the *Environmental Protection Act*;
>
> (c) the *Pesticides Act*;
>
> (d) the *Health Protection and Promotion Act, 1983*; or
>
> (e) the *Ontario Water Resources Act*,
>
> is not liable in nuisance to any person for any odour, noise or dust resulting from the agricultural operation as a result of a normal farm practice and shall not be prevented by injunction or other order of a court from carrying on the agricultural operation because it causes or creates an odour, a noise or dust.
>
> (2) Subsection (1) does not apply to an owner or operator of an agricultural operation that fails to obey an order of the Board made under clause 5 (3) (b).

14 A person aggrieved by any odour, noise or dust resulting from an agricultural operation could bring an application before the Farm Practices Protection Board, a tribunal appointed by the Minister of Agriculture, Food and Rural Affairs, for a determination as to whether the odour, noise or dust resulted from a normal farm practice. If, after a review, the Board determined that the complaint resulted from a normal farm practice, the application was dismissed. If the practice was not normal, the Board was empowered to order the farmer to cease the practice or to modify it so as to be consistent with normal farm practice. Any party to a hearing before the Board had a right to appeal an order of the Board on any question of fact or law or both to the Divisional Court.

15 The 1988 Act further provided that any injunction proceedings in relation to a farm practice which was the subject of an application to the Board were to be held in abeyance pending the resolution of the application by the Board: s.6(1). This latter provision did not apply, however, in respect to proceedings taken under the *Environmental Protection Act*, the *Pesticides Act* or the *Ontario Water Resources Act*.

b) the 1998 Act

16 The 1998 Act, which is currently in force, repealed the 1988 Act effective May 11, 1998. The 1998 Act increases the protection afforded to farmers in several respects. The definition of agricultural operation, which still includes the production of mushrooms, is expanded to include a wider variety of enterprises. The protection against nuisance claims is expanded to include complaints resulting not only from noise, odour and dust but also from light, vibration, smoke and flies arising from an agricultural operation carried on as a normal farm practice. Farmers who carry on a normal farm practice are also exempt from the application of municipal by-laws that restrict land use or vehicular transport. The Farm Practices Protection Board is continued under the name 'Normal Farm Practices Protection Board' and its jurisdiction is expanded to deal with the wider protection afforded under the 1998 Act. The following provisions of the 1998 Act are more particularly relevant to the question for consideration on this appeal.

17 The preamble to the 1998 Act provides much assistance in this case to determine the intent of the Legislature. It echoes many of the statements made during the debates preceding the enactment of the legislation:

> It is desirable to conserve, protect and encourage the development and improvement of agricultural lands for the production of food, fibre and other agricultural or horticultural products.

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> Agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands.
>
> Because of the pressures exerted on the agricultural community, it is increasingly difficult for agricultural owners and operators to effectively produce food, fibre and other agricultural or horticultural products.
>
> It is in the provincial interest that in agricultural areas, agricultural uses and normal farm practices be promoted and protected in a way that balances the needs of the agricultural community with provincial health, safety and environmental concerns.

18 The protection against nuisance claims is set out in s. 2:

> 2.(1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> (2) No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.

19 Compliance with other specified statutes is no longer a precondition to the application of the s. 2 protection against nuisance claims under the 1998 Act. However, s. 2(3) provides that the protection afforded to farmers by the 1998 Act does not preclude the making of orders or injunctions under the *Environmental Protection Act*, the *Pesticides Act*, the *Health Protection and Promotion Act*, or the *Ontario Water Resources Act*. The 1998 Act is also expressly subject to the *Environmental Protection Act*, the *Pesticides Act*, and the *Ontario Water Resources Act*: s. 2(5). Hence farmers are not exempt from compliance with those statutes.

20 A "disturbance" and a "normal farm practice" are defined under s. 1:

> "disturbance" means odour, dust, flies, light, smoke, noise and vibration;
>
> "normal farm practice" means a practice that,
>
>> (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>>
>> (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices;

21 The definition of "normal farm practice" reads substantially the same as it did under the earlier statute, except for the use of the word "<u>acceptable</u> customs and standards" as opposed to "<u>accepted</u> customs and standards" found in the 1988 Act, and the additional qualifier "proper" in the second part of the definition. The respondents submit that these amendments are significant. More will be said about this later.

22 Three kinds of applications can be made to the Board under the 1998 Act: under s. 5, by a person affected by a disturbance; under s. 6, by a municipality or interested person in relation to municipal by-laws that restrict land use; and under s. 7, by a municipality or interested person in relation to municipal by-laws that restrict vehicular transport to and from an agricultural operation.

23 Under s. 5, a person who is directly affected by a disturbance from an agricultural operation may apply to the Board for a determination as to whether the disturbance results from a normal farm practice. As in the earlier statute, if, after a review, the Board determines that the disturbance results from a normal farm practice, the application is dismissed. If the farm practice is not normal, the Board may order the farmer to cease the practice or to modify it so as to be consistent with normal farm practice.

24 The 1998 Act provides further protection to farmers in respect of municipal by-laws:

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6.(1) No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation.

25 Under s. 6(2), an application may be brought before the Board for a determination as to whether a practice is a normal farm practice for the purpose of the non-application of a municipal by-law. This application can be brought by a municipality or by the following persons:

6. (3) An application may be made by,

(a) farmers who are directly affected by a municipal by-law that may have the effect of restricting a normal farm practice in connection with an agricultural operation; and

(b) persons who want to engage in a normal farm practice as part of an agricultural operation on land in the municipality and have demonstrable plans for it.

26 The 1998 Act provides for certain factors to be taken into account in determining whether the practice is a normal farm practice for the purpose of a s. 6 application:

6. (15) In determining whether a practice is a normal farm practice, the Board shall consider the following factors:

1. The purpose of the by-law that has the effect of restricting the farm practice.

2. The effect of the farm practice on abutting lands and neighbours.

3. Whether the by-law reflects a provincial interest as established under any other piece of legislation or policy statement.

4. The specific circumstances pertaining to the site.

27 Section 7 provides that a municipal by-law that has the effect of restricting the times during which a vehicle may travel does not apply in certain specified circumstances related to agricultural operations. An application to the Board may be made under s. 7 by a municipality or interested person to determine whether the statutory conditions for the exemption have been met.

28 Finally, the 1998 Act gives any party to a hearing under the Act a right of appeal from an order or a decision of the Board on any question of fact, law or jurisdiction to the Divisional Court within thirty days of the making of the order or decision: s. 8(2).

2. The Decision at Trial

29 Extensive evidence was called at trial with respect to the appellants' agricultural operation and its effect on the respondents' use and enjoyment of their properties. During their final submissions at trial, the respondents took the position that the appellants had not proved that they were entitled to the statutory protection because they had not adduced sufficient evidence that their operation was conducted in a manner consistent to similar agricultural operations under "similar circumstances" within the meaning of the two Acts. The trial judge gave the appellants leave to call further evidence on this point. He ruled that such evidence could include evidence to show how the appellants' operation compared to other operations as to location, surrounding geographical features, proximity of neighbours and uses made of their lands, zoning, weather features of the area, and other factors that may bear on the potential effect, if any, of the operation on others. Further evidence was called accordingly.

30 As indicated earlier, the parties take no issue with any of the findings of fact made by the trial judge. The material findings of fact may be summarized as follows:

1. The area within which the appellants' mushroom farm and the respondents' properties are situated is zoned agricultural. The mushroom farm is permitted by the zoning.

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2. Phase one in the production of mushrooms involves the making of compost or substrate to feed the mushrooms. According to the existing technology, composting takes place outdoors.

3. The goal of the composting phase is to keep the process aerobic. If the process becomes anaerobic, it produces chemical compounds which are odorous. These odours can be most offensive. They have been described as rotten eggs, like a septic tank, like ammonia, like urine, putrid, nauseating, like decaying flesh, rancid, overpowering, like rotten fish, and worse than a hog farm. Even when the process is aerobic, it always has the potential of producing odours.

4. The problem of composting odours is becoming a significant issue world-wide and presents a problem for mushroom growers, especially those who compost in locations that are in proximity to areas zoned for residential purposes. There is no present solution to the problem.

5. The GMF started its operation in October 1994. Within a month, it was receiving complaints. As a result, the GMF took some action to remedy the problem and, since the spring of 1995, it has been using all the reasonable precautions possible in the current state of the art of mushroom composting to reduce the odours resulting from the process.

6. The composting operation of GMF, up until about the spring of 1995, was not carried out properly. Since the spring of 1995, the composting practices, equipment and facilities used by GMF were customary in the mushroom industry.

7. There is no material difference between the relationship of GMF to residential neighbours compared to other mushroom farms. There was no evidence that would enable the court to form any opinion as to whether the neighbours of other farms were more or less affected by offensive odours.

8. The GMF's composting process, with the resulting odours and haze it produces, has affected the physical well-being of the respondents to a significant degree and very substantially disrupted their use of their lands from the commencement of its operations. The interference caused by GMF is severe, unprecedented for the area, and intolerable to the respondents.

31 The trial judge first determined whether the odours constituted a nuisance at common law, and then whether the appellants were entitled to the statutory protection.

32 On the first question, the trial judge instructed himself on the law of nuisance as follows:

The material claim of the plaintiffs is about odours. There is no doubt that odours can be the subject of a claim in nuisance.

The fundamental issue in a nuisance claim is whether, taking into account all the circumstances, there has been an unreasonable interference with the use and enjoyment of the plaintiffs' land.

In this case the plaintiffs rely on the alleged injury to their health, comfort and convenience, and the alleged depreciation of the resale value of their lands.

To establish nuisance, the plaintiffs must show substantial interference which would not be tolerated by the ordinary occupier in their location. The test is objective. The interference must be repeated or continuous.

In considering the interference, the court must consider the type of interference, the severity, the duration, the character of the neighbourhood and the sensitivity of the plaintiffs' use of their lands. With respect to the severity of the interference, it is not actionable if it is a substantial interference only because of the plaintiff's special sensibilities. With respect to the character of the neighbourhood, the court should consider the zoning, whether the defendant's conduct changed the character of the neighbourhood and the reactions of other persons in the neighbourhood.

The court must balance these considerations against the value of the defendant's enterprise to the public and the defendant's attitude toward its neighbour. The court must consider whether the defendant is using the property reasonably having

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> regard to the fact that the defendant has neighbours. The court should consider whether the defendant took all reasonable precautions.

33 The trial judge had no hesitation in concluding that the composting of material used to grow the mushrooms constituted a nuisance at common law from the commencement of the GMF's operations. His summary of the findings upon which this conclusion is based shows the extent of the interference with the respondents' use and enjoyment of their properties. I find it useful to reproduce the trial judge's summary of findings in this respect in its entirety particularly since the respondents, on the subsequent question of the statutory protection, take the position that the statutes do not extend protection to nuisances that exceed a certain tolerance level:

> The operation of GMF has produced offensive odours and a haze and there is some evidence that it produces noise. While annoying, the haze is not sufficient to constitute a nuisance because it is infrequent. The evidence does not establish that the noise is a nuisance. However, the odours, some of which are associated with the haze, have affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted their use of their lands.

> The number of the plaintiffs, their testimony and their varied backgrounds satisfy me that the interference would not be tolerated in their location by the ordinary occupier whether that person be only a resident or also a farmer. Other than the defendants, every owner called as a witness has found the interference intolerable. The only witness from the area who was not a party was the golf director of the Thunderbird Golf Club who took the same view as the plaintiffs. The interference has been repeated frequently.

> The neighbourhood is rural. The zoning is agricultural but the majority of the owners to the southwest of GMF use their lands for primarily residential purposes. In the surrounding area there is also mixed farming, a hog farm, a dog kennel, a stable and a golf course. The severity of the interference is not the result of the plaintiffs' special sensibilities although one of the plaintiffs has special sensibilities which have magnified the impact on her. The operation of GMF has dramatically changed the nature of the neighbourhood. While the mushroom farm is classified by statute as an agricultural operation the odours and haze it produces are completely unheard of and intolerable to the owners in the area which was the subject of the evidence. The plaintiffs have resided in the area for up to 58 years and the interference caused by GMF is unprecedented. Three of the plaintiffs have resided on working farms in the area for decades. The reasonableness of the plaintiffs' complaints is enhanced by the fact that they have tolerated the usual farm odours from mixed farms and a hog farm.

> The defendants' operation produces a food product and an agricultural producer of food is a valued enterprise. However, it is not the growing of mushrooms which is the nuisance but only the composting of material used to grow the mushrooms. The defendants have made efforts at significant expense to reduce the nuisance caused by their operation but have deliberately tried to belittle the neighbours' complaints and have falsely denied under oath that their operation produces a nuisance. I accept the evidence of the defendants' experts that they now take all the reasonable precautions possible in the current state of the art of mushroom composting. However, the use of the defendants' land for composting is unreasonable having regard to the fact that they have neighbours.

> Considering all these factors, I find that the defendants' operation has caused an unreasonable interference with the use and enjoyment of the plaintiffs' lands by producing offensive odours. The odours constitute a nuisance at common law.

34 The trial judge then proceeded to determine whether the nuisance resulted from a normal farm practice. After reserving judgment but prior to determining this question, the trial judge asked counsel for submissions on whether, in the exercise of his discretion, he should decline to decide the issue and leave it for determination by the Normal Farm Practices Protection Board. After receiving submissions, the trial judge concluded that it would not be practical or appropriate at this late stage in the proceedings to follow such a course of action. Consequently, he proceeded to decide the issue.

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35 The trial judge reviewed the definition of "normal farm practice" contained in each statute and noted the differences between the wording of the two statutes that he considered to be material. For ease of reference, I reproduce again the two definitions and have underlined the differences that were noted by the trial judge in the later statute:

> Under the 1988 Act*:*
>
> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices;
>
> Under the 1998 Act:
>
> "normal farm practice" means a practice that,
>
>> (a) is conducted in a manner consistent with proper and <u>acceptable</u> customs and standards as established and followed by similar agricultural operations under similar circumstances, or
>>
>> (b) makes use of innovative technology in a manner consistent with <u>proper</u> advanced farm management practices;

36 The trial judge further considered the factors set out under s. 6(15) and concluded that:

> ... when the legislature changed the definition in the new statute by replacing "proper and accepted customs and standards" with "proper and <u>acceptable</u> customs and standards" it was the intention of the legislature to make clear that the Board and the court have the power to consider not just whether a practice was normal but also whether it was acceptable in a very broad context. The addition of the word "proper" seems to reflect the same intention. [Emphasis in original.]

37 The trial judge held that the proximity of neighbours and the effect of the operation upon them was a relevant consideration in determining whether the operation was a normal farm practice. He further held that the timing of the start-up of mushroom farms in relation to the commencement of adjacent residential development was a relevant consideration. In his view, the "inclusion of this factor" in determining what is normal farm practice would provide "a fair and reasonable way of balancing the interests of the public in agriculture and in providing housing" and "would be consistent with the intention of the legislature in enacting [the] legislation". After quoting from the legislative debates, he stated as follows:

> It is clear that the legislation was intended to protect farmers from unreasonable complaints of people who are intolerant of agricultural disturbances because they are used to city living and that it was also intended to protect *farmers who are already carrying on agricultural practices which produce disturbances which are normal in the area*. The defendants in this case do not fall into either category.
>
> I recognize that there is a broad spectrum of farm types and of agricultural practices and I am not suggesting that a farm will not be complying with normal farm practice if it commences operations in an area where that type of farm has not operated before. *The issue would be whether the intensity and frequency of any nuisance produced by that farm would be consistent with normal farm practice in that area*. In the case before me the evidence establishes that the GMF produces a nuisance which because of its intensity and frequency is completely out of character for this rural area.
>
> It is not unreasonable to expect city folk moving to residences in the country to make enquiries and to tolerate any normal farm practices *which already produce a nuisance in that area*. Similarly, it is not unreasonable to expect new types of farms which produce a nuisance which is fundamentally different in intensity or frequency or both from those *already existing* in a rural area to make enquiries and desist from conducting such operations in that new area. Nor is this a new concept. As mentioned earlier, Dr. Rinker in his publication written for the Ministry of Agriculture and Food recognized that composting odours were a world wide problem and said, " . . . anyone considering constructing or purchasing a mushroom farm must be especially cautious in choosing the site for composting preparation". He noted that some farms had to relocate

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> their composting operations up to 160 km. from the growing site. The evidence satisfies me that the defendants were well aware of the potential effect on neighbours and should not have started composting in that area. [Emphasis added.]

38 The trial judge concluded that the operation of GMF up until the spring of 1995 was not a "normal farm practice" because the composting was not carried out properly. With respect to the operation of GMF over the entire period of time, he further concluded as follows:

> From the commencement of its operations GMF was not operating in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and was not operating in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances *because GMF commenced its operations in an area where the nuisance it produced was completely out of character*. There is no evidence that such a fundamental change in an area's environment had ever been introduced anywhere else in similar circumstances. In any event I do not think it is acceptable. In my view the intensity and frequency of the odours produced by GMF fundamentally changed the rural environment the plaintiffs enjoyed before. Even those of the plaintiffs who had been farmers themselves found the GMF odours intolerable.
>
> Having considered the factors I discussed earlier as relating to what is a normal farm practice, I conclude that the GMF operation was never in the category of normal farm practice. [Emphasis added.]

3. Application of the statutes to the appellants' operation

39 There is no question that the appellants' mushroom farm is an agricultural operation within the meaning of both statutes. There is also no issue on this appeal that the odours resulting from the composting phase of the operation constitute a nuisance at common law. The narrow issue for determination is whether the trial judge, based on the facts as he found them, erred in not concluding that the composting phase of the appellants' operation was carried on as a "normal farm practice" within the meaning of both statutes.

40 The definition in each statute is comprised of two components. The first part of the definition necessitates that a comparative analysis be made between the practice in question and that followed by similar agricultural operations under similar circumstances. The second part of the definition concerns the use of innovative technology. Since proper subjects of comparison in cases where innovative technology is used may not be available, the question becomes, rather, one of measuring such use in a more general way against advanced management practices.

41 The different wording of the definition in each statute was noted by the trial judge as "material in this case". As noted earlier, it was his view that when the legislature changed the definition to read "acceptable" instead of "accepted" and added the word "proper" it intended "to make clear that the Board and the court have the power to consider not just whether a practice was normal but also whether it was acceptable in a very broad context".

42 I agree, and the parties do not dispute, that the determination of what constitutes a "normal farm practice" must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands. However, it is my view that this approach applies under either statute. Hence, nothing turns on the 1998 amendment to the definition of "normal farm practice" in this case and the differences between the two statutes are not "material" in any real sense.

43 In this case, there is no suggestion that GMF was making use of innovative technology and it is therefore the comparative component of the definition that is applicable. The kind of evidence that will be relevant to this inquiry will vary greatly depending on the practice and the operation in question. The following hypothetical published by the Ministry of Agriculture, Food and Rural Affairs [2] illustrates the highly fact-specific nature of the inquiry:

> Hypothetically, in a hearing before the [Board] by an applicant about noise-producing equipment frequently used to scare birds away from eating grapes in vineyards, the [Board] might decide that it was *normal* to use this equipment:

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• in a *location* where few, if any, neighbours lived nearby, but not normal if there were many residences nearby

• in a *vineyard* in the Region of Niagara, but not normal if used to scare coyotes from sheep pastures in Bruce County

• with a *method of* operation using automatic shutoff switches, but *not normal* using manual shutoff switches

• when bird pressure was greatest during the *timing* of early morning and late afternoon, but *not normal* during the middle of the day during hot weather when birds eat less frequently. [Emphasis in original.]

44 In my view, the trial judge properly identified the kind of evidence that could be relevant to the comparative analysis in this case in his ruling on the application to reopen the case. He repeated the relevant part of his reasons on the ruling in his final judgment:

> In this case the focus is on evidence relating to the odour of phase one composting operations carried on to produce substrate for mushroom farming. Without limiting the scope of what evidence may be relevant to show "similar circumstances" of the defendants' operation, I would say that in my view it would include evidence [to show how the defendant's operation compared to other operations] as to the location, the surrounding geographical features, the proximity of neighbours and the uses they make of their lands, the zoning of the farm land and of the neighbours' lands, weather features of the area and other factors which may bear on the potential effect, if any, of the operation on others.
>
> It would also include other factors which are already in evidence such as the size of the operation and the formula used.
>
> When I say these factors are relevant I am not saying that there must be evidence on each factor in every case. The sufficiency of the scope of the evidence and its weight are matters which must be considered in the circumstances of each case which include the extent to which the plaintiffs take issue with the evidence. The court must make a finding as to whether the defendant has established that its operation is carried on as a normal farm practice in the context of the particular case.

45 The appellants called this kind of evidence about the composting practices followed by similar agricultural operations under similar circumstances and the trial judge made the appropriate comparison. As noted earlier, he concluded that, since at least the spring of 1995, the composting practices, equipment and facilities used by GMF were customary in the mushroom industry and all reasonable precautions possible in the current state of mushroom composting to reduce the odours resulting from the process were being used. He further concluded that there was no material difference between the relationship of GMF and residential neighbours compared to other mushroom farms.

46 I agree with the appellants' position that, based on these findings with respect to the appellants' operation since the spring of 1995, the trial judge should have concluded that the appellants were entitled to the statutory protection against nuisance claims. Rather, he improperly concluded that the appellants were not entitled to the statutory protection because the nuisance was new and out of character to the area previously enjoyed by the respondents. It is my view that this approach introduces a notion of proximity in time that is inconsistent with the stated objectives of the legislation. It would prohibit intensive agricultural activities from being established in new areas, even where properly zoned agricultural, simply because there are existing residences nearby. This prohibition would be inconsistent with the stated objective in the preamble to the 1998 Act to, not only "conserve" and "protect" but also "encourage the development and improvement of agricultural lands for the production of food". This approach also ignores the fact that the legislature expressly recognized that "agricultural activities may include intensive operations that may cause discomfort and inconveniences to those on adjacent lands".

47 While the proximity of neighbours and the effect of the farm practice on the use of their lands are relevant considerations in the determination of whether the farm practice is "normal", the fact that the nuisance may be new to the area or to the complainants is irrelevant. It cannot change the character of a practice that is otherwise a "normal farm practice". Otherwise, the inclusion of the notion of "first in time, first in right" would effectively undermine one of the important objectives behind the legislation.

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48 Counsel for the respondents made no attempt to support the trial judge's inclusion of this additional factor in the interpretation of the legislation. Counsel argued, rather, that the trial judge's decision could be supported on the basis that the intensity and frequency of the odours produced by GMF exceeded any "acceptable" tolerance level and, hence, fell outside the scope of protection under the statutes. Counsel argued that it is implicit from the use of the words "discomfort and inconveniences" in the preamble and "proper and acceptable" in the definition of 'normal farm practice' under the 1998 Act that the protection does not extend to intolerable levels such as those experienced by the respondents in this case.

49 I see no merit to this argument. The protection afforded under both Acts is against "nuisance" which, by definition, must constitute a substantial interference that would not be tolerated by the ordinary occupier. The reference to "discomfort and inconveniences" in the preamble of the 1998 Act does not change the nature of the tort of nuisance. Further, I am unable to read any outer limit to the protection as contended by the respondents from the words "proper and acceptable" in the first part of the definition of "normal farm practice" in the 1998 Act. Quite clearly, these words qualify the nouns "customs and standards" as established and followed by similar agricultural operations under similar circumstances. While the effect of a particular practice on neighbouring properties can be a relevant consideration in determining what are the "proper and acceptable customs and standards" for an operation, it does not mean that the practice must be within the tolerance limits of, or acceptable to, the affected neighbour before the test can be met.

4. Conclusion

50 In my view, the findings of fact made by the trial judge support his conclusion that GMF's composting practice was not a "normal farm practice" up until the spring of 1995, but not thereafter. The trial judge's conclusion with respect to the period of time up to the spring of 1995 was based on his specific finding that the manner in which the composting was conducted during the initial months of the operation was not consistent with accepted customs and standards as established by similar mushroom farms under similar circumstances. As such, the appellants cannot claim the statutory protection for that period of time. On the other hand, the trial judge's conclusion with respect to the period thereafter cannot be supported by the material findings of fact made at trial. The trial judge's findings can only lead to the conclusion that the composting practice followed by GMF after the spring of 1995 was a normal farm practice within the meaning of the statutes. The conclusion to the contrary was based on the trial judge's erroneous interpretation of the legislation and cannot be supported.

51 In the result, I would allow the appeal, set aside the judgment and refer the matter to the trial judge for a reassessment of the damages and costs of the trial in accordance with this analysis.

III. Intervention by the Ontario Federation of Agriculture

52 Although the Ontario Federation of Agriculture ("the OFA") argued in its factum that the Superior Court of Justice did not have the jurisdiction to determine at first instance what constitutes a "normal farm practice" under the 1998 Act, this argument was not advanced in oral submissions. Counsel for the OFA conceded that, given the late stage in the proceedings when the question was raised, the trial judge did not err in deciding the issue himself rather than leaving the matter for determination by the Normal Farm Practices Protection Board.

53 Although counsel did not expressly acknowledge the point, I take it from this concession that the OFA is retracting the primary submission in its factum that the Superior Court of Justice only acquires jurisdiction to make an award in a nuisance case against an agricultural operation after the Board determines that the "disturbance" complained of is not the result of a "normal farm practice". In any event, it is my view that there is nothing in the 1998 Act, express or implied, that ousts the jurisdiction of the Superior Court of Justice to decide, in the context of an action in nuisance, whether the defendants are immune from liability because the subject matter of the claim is a "normal farm practice" within the meaning of the statute. The question is, rather, whether the court should, in its discretion, decline to determine the issue and stay the action in nuisance until the Board makes the determination whether the disturbance constitutes a normal farm practice. See s.106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for the general power to stay proceedings in appropriate circumstances. The intervener takes the position

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that courts, in all cases, should decline to exercise their jurisdiction and leave the determination of what constitutes a normal farm practice to the Board.

54 In the circumstances of this case, no one takes issue with the trial judge's decision to determine the matter himself. As he stated in his reasons, had the issue been raised at the commencement of the trial [3], he might well have left the matter for the Board to determine, but as matters stood, the parties had gone to enormous expense to present the case before the court and if the issue were referred to the Board, the evidence would have to be called again and significant delays would be occasioned. The trial judge also noted that the court was better equipped to determine the related questions of statutory interpretation than the Board. Finally, the trial judge remarked that, whether he declined to hear the matter or not, a multiplicity of proceedings appeared to be unavoidable:

> If the matter were referred to the Board and it found this was not a case of normal farm practice it could order the composting operation to stop but could not compensate the plaintiffs because this is not within their authority. The parties would have to return to the court once again. As I will discuss, if the plaintiffs succeed before me I can compensate them but cannot issue an injunction to terminate the nuisance. This is a very impractical and costly division of authority.

55 Although the court's power to issue an injunction prohibiting a farmer from carrying on an agricultural operation that is not a normal farm practice is not in issue on this appeal, I find it important to determine the matter in the context of the issue raised by the intervener. For reasons that I will set out below, it is my view that the court does retain this jurisdiction under the 1998 Act. Nonetheless, there remains a division of power between the Board and the court that lends much support to the intervener's position. In my view, absent special circumstances (this case is one example), the question, raised within a nuisance action, of whether a disturbance constitutes a "normal farm practice" should generally be left for the Board to determine and the action should be stayed pending such determination. I find the intervener's position persuasive for the following reasons.

56 First, the expertise of the Board is a very important factor. The Board is an administrative tribunal that has been constituted with the particular expertise to achieve the purposes of the legislation. It also has the power to appoint experts to assist it in performing any of its functions: s. 8(3).

57 Second, the Board's special procedure and non-judicial means available under the legislative scheme to implement its purposes can present litigants with significant advantages over the traditional court system. I note the following. The Board has the general power to inquire into and resolve a dispute respecting an agricultural operation and to determine what constitutes a normal farm practice: s. 4(2)(a). The material before the court demonstrates that the informal procedures that have been put in place have proven quite effective. One consultation paper on the role of the Farm Practices Protection Board dated February 1996 reveals that, on average, the Ontario Ministry of Agriculture, Food and Rural Affairs receives approximately 700 environmentally related complaints annually, yet the Board holds only two hearings per year. The great majority of complaints are otherwise resolved by ministry staff and/or other experts. This is further confirmed in the Ministry's "fact sheet" referred to earlier where it is estimated that only about 1% of the total complaints received by Ministry staff on nuisances covered by the Act actually end in a Board hearing. Even when the matter is not resolved informally and a hearing does take place, it is usually held in local municipalities, the procedure is less formal than court proceedings and, judging from the Board decisions that have been presented to this court, the entire process appears to be more accessible to the unrepresented litigant.

58 Third, the Board has extensive powers of relief that can, in many cases, be more suitable to the needs of the parties. If the practice is a normal farm practice, there is no difference between the powers of the Board and the court. The Board must dismiss the application and likewise, the court must dismiss the action in nuisance. It is in those cases where the disturbance is not a normal farm practice that the differing powers can become significant.

59 Of particular significance is the Board's power, where the disturbance is not a normal farm practice, to require that a farmer implement certain farming techniques and methods to ensure compliance with normal farm practice: s. 5(4)(c). The court does not have such power. Example of remedial orders made by the Board under the earlier statute can be found in the following decisions: *Re Youcke v. Hermann* (29 September, 1993) 93 - 01 (F.P.P.B.); and *Re Thuss v. Shirley* (27 December

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1990) 90 - 02 (F.P.P.B.). After making an order, the Board retains the power to make the necessary inquiries and orders to ensure compliance with its decisions: s. 4(2).

60 If the practice is not a normal farm practice, the Board, in addition to its power to make remedial orders, has the power to order the farmer to cease the practice: s. 5(4)(b). In my view, the court also has this power under the 1998 Act. I reproduce the relevant provisions here for ease of reference:

> 2.(1) A farmer is not liable in nuisance to any person for a disturbance resulting from an agricultural operation carried on as a normal farm practice.
>
> (2) No court shall issue an injunction or other order that prohibits a farmer from carrying on the agricultural operation because it causes or creates a disturbance.
>
> . . .
>
> (4) Subsections (1) and (2) do not apply to preclude an injunction or order, in respect of a nuisance or disturbance, against a farmer who is in contravention of an order of the Board made under clause 5(4)(b) related to that nuisance or disturbance.

61 It is clear that a court has the power under s. 2(4) to issue an injunction against a farmer who is in contravention of an order made by the Board under s. 5(4)(b) to cease a practice that is not a normal farm practice. In my view, the court, under s. 2(2), also retains the general power to issue an injunction against a farmer who creates a nuisance where the disturbance is *not* a normal farm practice and the Board has not issued such an order. It is undisputed that the protection under s. 2(1) is limited to agricultural operations that are carried on as a normal farm practice. In my view, the words "the agricultural operation" under s. 2(2) can only be referable and limited to the "agricultural operation carried on as a normal farm practice" to which the protection extends under s. 2(1). This interpretation is more consonant with the general principle that a superior court's jurisdiction cannot be ousted by legislation unless by clear and explicit statutory wording to this effect: see *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.).

62 However, the court's power to grant injunctive relief where the nuisance results from an operation that is not a normal farm practice is no greater than that exercisable by the Board. Indeed, the Board's general power to make inquiries and further orders to ensure compliance with its orders may present certain advantages to the litigants that are not as readily available before the courts.

63 Of course, as noted by the trial judge the Board does not have the power to award damages. However, in those cases where the disturbance is held to be not a normal farm practice, the Board can issue an order to stop the practice, and the complainant, if so inclined, can pursue his claim before the courts. Presumably, the offending practice will have ceased and the total damages can then be assessed.

64 For these reasons, it is my view that, absent special circumstances, complaints in respect of agricultural operations should generally be brought first before the Board before any action in nuisance is entertained by the courts.

***Sharpe J.A.* (*Abella J.A.* concurring):**

65 I have had the advantage of reading Charron J.A.'s reasons for judgment. I agree with paragraphs 52 to 64 of her reasons and with her conclusion that, absent special circumstances such as existed in the present case, complaints with respect to nuisances created by agricultural operations should generally be brought first before the Normal Farm Practices Board before any action in nuisance is entertained by the courts. However, I respectfully disagree with her conclusion that the trial judge erred in the manner in which he interpreted and applied the *Farm Practices Protection Act*, R.S.O. 1990, c. F.6 (the "1988 Act") and the *Farming and Food Production Protection Act, 1998*, S.O. 1998, c.1. For the reasons that follow, I would dismiss the appeal and uphold the award of damages he made in favour of the respondents.

FACTS

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66 My colleague has fully set out the facts, the legislation, and the findings of the trial judge.[4] I need not repeat her comprehensive discussion of these points. I would, however, place greater emphasis on the trial judge's findings with respect to the degree of disturbance caused to the respondents by the appellant's mushroom farm operation, as I believe those findings were an important factor in his ultimate decision that the appellants were liable in nuisance despite the protective legislation.

67 The trial judge generally accepted the evidence offered by the respondents describing the odours emanating from the appellant's mushroom farm and the effect those odours had upon the respondents. The odours were described in various graphic terms, including the following: "like a septic tank"; "rotten eggs, putrid, stink, rank and nauseating"; "decaying animals, cow manure"; "nauseating and like rotten flesh"; "like an outhouse, ammonia, sour, putrid, rotten vegetables"; "like ammonia or rotten meat and as bad, terrible and unbearable stenches"; "having one's face buried in faeces"; "worse than the pig farm"; and "unbelievably terrible."

68 The trial judge accepted the respondents' evidence that these odours were regular and persistent and that they significantly interfered with the use and enjoyment of their properties. The respondents significantly curtailed their outdoor activities, including walking and gardening. Several respondents complained of sore throats and breathing difficulties, which they attributed to the odours. The trial judge found that the odours "have affected the physical well-being of the plaintiffs to a significant degree and very substantially disrupted their use of their lands." The trial judge also found that the respondents were not unusually sensitive, nor were they unfamiliar with odours emanating from farming operations. Indeed, several of them compared the odours emanating from the appellant's operation to those experienced from a nearby pig farm. The odours from the appellant's operation were said to be stronger, more prevalent, and more of an interference with enjoyment and use of the respondent's property than those from the pig farm.

69 I would also point out that at trial, the appellant led evidence disputing that of the respondents as to the significance of the offensive odours emanating from the mushroom farm. The trial judge specifically rejected the evidence of Mac Snobelen, Clay Taylor, Brent Taylor, and David Van Dusen in this regard. As the trial judge noted, the gist of the testimony of these witnesses "was that there were seldom any offensive odours in the immediate area of the composting operation and virtually never any offsite". The trial judge concluded "that in their effort to minimize the plaintiffs' complaints they deliberately gave the court an inaccurate impression of the odours produced by composting."

ANALYSIS

70 The central issue on this appeal is the meaning to be given the phrase "normal farm practice". It is common ground that if the activities of the appellant qualify as a "normal farm practice", the respondent's claim in nuisance must be dismissed. For ease of reference, I repeat here the statutory definitions of "normal farm practice". The 1988 Act defined that term as follows:

> "normal farm practice" means a practice that is conducted in a manner consistent with proper and accepted customs and standards as established and followed by similar agricultural operations under similar circumstances and includes the use of innovative technology used with advanced management practices.

The 1998 Act contains the following definition:

> "normal farm practice" means a practice that,
>
> > (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or
> >
> > (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices.

71 It appears to be common ground that the inquiry into whether a farming operation qualifies as a "normal farm practice" is both fact and site-specific. I agree with Charron J.A. at para. 42 that "the determination of what constitutes a 'normal farm

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practice' must be made in a proper context, and that, depending on the practice under review, the context may be broad indeed, involving the consideration of many relevant factors including the proximity of neighbours and the use they make of their lands."

72 There appear to be no judicial decisions, apart from that under appeal in this case, interpreting these provisions of either of the statutes. In some cases, the Farm Practices Protection Board under the 1988 Act appears to have taken a broadly contextual, site-specific, and evaluative approach. In *Bader v. Dionis* (2 September 1992), FPPB92-01, the Board found that the use of acoustical bird scaring devices was a normal farm practice, but warned at p. 6 that "this does not mean that in all situations where it is in close proximity to residential dwellings that the use of a bird banger will be a normal farm practice." In *Thuss v. Shirley* (27 December 1990), FPPB 90-2, the Board dealt with a red ginseng operation that required sandy soil with little or no organic material. The soil was susceptible to wind erosion, and blowing sand seriously disrupted the activities on, and enjoyment of, neighbouring non-agricultural properties. There was no evidence of similar operations in Ontario, but there was evidence that the farm had followed the practices of its Korean advisers. The Board concluded at p. 4 that the farm practice for this crop "will, by necessity, have to be innovative" and that "[i]nnovative management practices . . . cannot be deemed normal if they result in severe erosion. Consequently, in this case, the blowing soil and related sand storms, do not result from a normal farm practice." The underlying premise of this conclusion is that even though a practice may be appropriate from the perspective of the farming operation that seeks to defend it, it will not be acceptable if it causes disproportionate harm to neighbouring non-agricultural users.

73 The Normal Farm Practices Protection Board saw fit to express strong disagreement with the approach taken by the trial judge in the case on appeal when the situation of the appellants' operation came before it in another proceeding. In *Gardner v. Greenwood Mushroom Farms* (21 September 2000), 2000-01, the complainants argued that the appellant was bound by the result in the judgment under appeal here. The Board rejected that contention and went on to state its concern that the trial judge did not fully appreciate the Board's approach to the determination of "normal farm practices". The Board expressed the view (at p. 7) that the trial judge had "placed too much weight upon the order in which competing land uses arrive in a particular area as a basis for determining normal farm practice." The Board added at p. 9 that "even though normal farm practices may cause 'discomfort and inconvenience' to other persons, those discomforts and inconveniences are the price which may have to be paid if the Province of Ontario chooses to maintain viable agricultural businesses."

74 However, when dealing with another mushroom farm operation in *Gunby v. Mushroom Producers' Co-operative Inc.* (30 July 1999), 99-02, the Board found that the operation satisfied the statutory definition of "normal farm practice" but at the same time expressed disappointment "that the mushroom industry in Ontario does not appear to take a leading role in the development of technology which would reduce the production of anaerobic gases. We strongly urge the mushroom industry to expend the money that is necessary to develop aerated floors and biofilters in mushroom production within Ontario. Otherwise, the entire industry may be adversely affected by a future ruling of this Board which may conclude that the standard of normal farm practice has shifted from conventional Phase 1 production to aerated floor and biofilter technology." This latter decision, like the others I have cited, indicates that the Board does take into account a broad range of factors, including the nature and the extent of the harm suffered by third parties, in determining whether farm practices gain the protection of the Act. In effect, the Board adopts an appropriately evaluative approach that is in keeping with the legislative language, and does not strictly equate "normal farm practice" with those practices actually adopted by industry in Ontario.

75 The appellants argue that the preamble to the Act indicates a legislative intention to "encourage the development and improvement of agricultural lands for the production of food . . . " and that this legislative purpose would be frustrated, if not defeated, if landowners could complain of a disturbance on the ground that they were there first. I agree that the preamble has an important bearing on the interpretation of the Act and that terms of a statute must be interpreted in light of its purposes. However, statutory interpretation does not occur in a vacuum and there are other important legal principles that a court can and should take into account. This Act represents a significant limitation on the property rights of landowners affected by the nuisances it protects. By protecting farming operations from nuisance suits, affected property owners suffer a loss of amenities, and a corresponding loss of property value. Profit-making ventures, such as that of the appellants, are given the corresponding benefit of being able to carry on their nuisance creating activity without having to bear the full cost of their activities by compensating

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their affected neighbours. While the Act is motivated by a broader public purpose, it should not be overlooked that it has the effect of allowing farm operations, practically, to appropriate property value without compensation.

76 It is, of course, open to the legislature to limit individual rights of property in order to achieve some broader social objective. On the other hand, it is a well-established principle of statutory interpretation that if legislation is inconclusive or ambiguous, the court may properly favour the protection of property rights: Côté at pp. 473-75, 482-86. In *Manitoba Fisheries Ltd. v. R.* (1978), [1979] 1 S.C.R. 101 (S.C.C.) at p. 109, the Supreme Court of Canada adopted the following passage from *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (U.K. H.L.) at p. 542:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

77 There is also authority for the proposition that a court will lean against an interpretation that would allow one party to appropriate the property of another: *Homeplan Realty Ltd. v. Avco Financial Services Realty Ltd.*, [1979] 2 S.C.R. 699 (S.C.C.). at p. 706. Undoubtedly in the modern era, there has been an increasing judicial acceptance of laws restricting rights of private property to achieve some broader social purpose, but as pointed out by R. Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 373, when interpreting such statutes the courts still have a role in achieving an appropriate balance:

> The idea that a legislature might intend to limit the free and full enjoyment of individual property rights for the purpose of securing a public benefit or promoting the interests of a larger community is familiar to modern courts and excites little resistance. The focus is on striking an appropriate balance between individual property rights, which remain important, and legislative goals.

78 In my opinion, a broad approach, relating the inquiry to the specific circumstances pertaining to the site with a view to striking an appropriate balance between the rights of affected property owners and nuisance creating farming operations, is borne out by the language of the statute. I agree with the trial judge that the legislative language indicates that there should be a qualitative or evaluative element to the interpretation of "normal farm practice". As I read both the 1988 and the 1998 Acts, farming operations do not automatically gain statutory protection by showing that they follow some abstract definition of industry standards.

79 First, both statutes require that the "circumstances" be taken into consideration. This means that the same practice may qualify as a normal farm practice in one situation, but not in another where the circumstances are different. The definition of "normal farm practice" requires that the operation at issue be assessed with regard to the "customs and standards as established and followed by similar agricultural operations under similar *circumstances*" (emphasis added). Section 6 of the 1998 Act, exempting a "normal farm practice" from the application of municipal ordinance, sheds some light on the question. Section 6(1) provides that "[n]o municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation", and s. 6(2) allows the Normal Farm Practices Protection Board to determine whether the practice at issue is a normal farm practice for the purposes of non-application of a municipal by-law. Section s. 6(15) directs the Board to consider, among other factors, "[t]he specific circumstances pertaining to the site." Although these provisions do not apply directly to the circumstances of the present case, the phrase "normal farm practice" should be given a consistent interpretation and, if "the specific circumstances pertaining to the site" bear upon the definition of "normal farm practice" in one context, it would be anomalous to exclude site-specific considerations form the definition in another context. As Cory J. stated in *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.) at p. 400: "Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act": see also P.-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000) at p. 332. In my opinion, the same holds equally true for phrases recurring throughout a statute.

80 Second, the farming operation must also satisfy the tribunal hearing the case that, in the circumstances, the customs and standard are, in the words of the 1988 statute, "proper and accepted" and in the words of the 1998 statute, "proper and acceptable". The words "proper and acceptable" connote a qualitative, evaluative inquiry. The *Shorter Oxford English Dictionary* (Oxford:

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Clarendon Press, 1993) defines "proper" as (*inter alia*) "of requisite standard or type; fit, suitable, appropriate; fitting, right" and "acceptable" as "worth accepting; likely to be accepted; pleasing, welcome, tolerable." These words qualify and limit the phrase "customs and standards as established and followed by similar agricultural operations under similar circumstances". I read this qualification as adding another important dimension to the inquiry.

81 In my respectful view, this statutory language indicates that the farming industry does not have *carte blanche* to establish its own standards without independent scrutiny. Not all industry standards prevail - only those that are judged to be "proper and acceptable". In my view, this statutory language requires the adjudicative body to consider a wide range of factors that bear upon the nature of the practice at issue and its impact or effect upon the parties who complain of the disturbance, with a view to determining whether the standard is "proper and acceptable." An analogy may be drawn from the law of negligence, where reliance on custom and established practice is relevant but not decisive on the requisite standard of care. In *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 (S.C.C.) at p. 474, Iacobucci J. dealt with this issue in the context of an occupier's liability case: " . . . the existence of customary practices which are unreasonable in themselves, or which are not otherwise acceptable to courts, in no way ousts the duty of care owed by occupiers under s. 3(1) of the [*Occupier's Liability*] Act."

82 To the extent there is any ambiguity in the legislation as to whether or not the words "proper and acceptable" limit or qualify the industry standards, the principles I have discussed suggest that ambiguity should be resolved in favour of the respondents whose property is adversely affected without compensation.

83 In deciding that the appellants failed to satisfy the "normal farm practice" standard, the trial judge was strongly influenced by two factors. First, as I have already mentioned, he found that the degree and intensity of the disturbance created an intolerable situation for the respondents. The second was the fact that the respondents were there first and that the appellants' mushroom farm operation created a significantly greater and different disturbance than anything that had been experienced before in the area.

84 The appellants take issue with the trial judge's approach. They argue that he erred in taking into account both the degree and extent of the disturbance and the fact that the respondents were there first. I disagree. In my view, the trial judge was warranted in taking these closely related factors into account in assessing the appellants' claim that they were simply following "proper and acceptable" customs and standards of the farming industry.

85 I agree that a strict or automatic "first in time, first in right" approach would not be warranted and that it would result in an unduly restrictive interpretation of the Act that would unduly limit the establishment of new farming operations. However, I would not go to the other extreme and accept the proposition that the timing factor should be excluded as entirely irrelevant. In my view, the relative timing of the establishment of the farming operation and the occupancy of those who complain of the disturbance it creates is one of the relevant contextual, site-specific circumstances to be considered. On this point. I find the reasons of the trial judge to be persuasive (at para. 283):

> The consideration of this factor would also seem to be a fair and reasonable way of balancing the interests of the public in agriculture and in providing housing. Within a five minute drive of the courthouse where this trial took place there are numerous examples of situations where there are agricultural operations immediately beside housing subdivisions. Indeed, the subdivisions are spreading rapidly into what has been farmland. In considering, for example, how these statutes would operate if the mushroom farm were immediately adjacent to one of these subdivisions, it would seem to me to be appropriate to consider what was the normal farm practice in the area before the subdivisions were built. If [the appellant] GMF were adjacent to one of these subdivisions it would seem to me to be relevant to consider whether the farmland was first used for a mushroom farm before or after the subdivisions were built. Another example would be the situation where a mushroom farm was started in an area where there were already other mushroom farms operating in close proximity to residences. That would seem to me to be a significantly different situation from the one here where the previous farm operations adjacent to the plaintiffs' residences did not produce anything close to the degree and frequency of offensive odours which were introduced by GMF.

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86 I do not agree that the trial judge's reasons rest on any strict or absolute rule of "first in time first in right." He expressly stated at para. 285: "I recognize that there is a broad spectrum of farm types and of agricultural practices and I am not suggesting that a farm will not be complying with normal farm practice if it commences operations in an area where that type of farm has not operated before." As I read his reasons, timing was one of the factors he took into account, albeit in this case an important factor, but it was only part of the much larger picture of a very significant disturbance suffered by the respondents.

87 The second and related factor was the serious nature of the disturbance suffered by the respondents. Again, it seems to me that this was an important aspect of the site-specific circumstances the trial judge was entitled to take into account in determining whether the appellant's operation constituted a "normal farm operation" within the meaning of the Act.

88 In my view, the trial judge was entitled to take these factors into account in assessing whether the appellants had brought themselves within the statutory exemption from liability afforded normal farm practices. I would not interfere with his determination that they failed to do so.

89 For these reasons, I would dismiss the appeal with costs

Other issues

90 I agree with that portion of the reasons of Charron J.A. dealing with the issues raised by the intervention of the Ontario Federation of Agriculture. It follows that I do not agree with the trial judge's determination that he could not award an injunction or damages in lieu of an injunction. However, as there was no cross appeal on that point, I would not interfere with the remedy as ordered by the trial judge.

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on November 1, 2001 has been incorporated herein.

1 The Greenwood Mushroom Farm is a partnership consisting of Tri Gro Enterprises Ltd and G.M.F. Part 2. G.M.F. Part 2 is also a partnership: its partners are the appellants Brent Taylor Holdings Ltd., Rick Campbell Holdings Ltd., and Snobelen Mushrooms Ltd. The latter corporation owns and operates the corporate appellant Mac Snobelen Holdings Ltd. The individual defendants are employees or officers and directors of the defendant corporations and the action was dismissed as against them. The dismissal of the action against the individual defendants is not an issue on this appeal.

2 This hypothetical is set out in a "fact sheet" entitled The Farming and Food Production Protection Act (FFPPA) and Nuisance Complaints.

3 Sometime before trial, the appellants moved for the dismissal of the respondents' action on the ground that it was barred under the *Farm Practices Protection Act.* Alternatively, they sought an order staying the action. The motion was heard and dismissed by Chadwick J. on October 26, 1998. The motions judge held that there was a genuine issue for trial i.e. whether the appellants' operation fell within the definition of "normal farm practice" and he therefore refused to grant summary judgment. However, it does not appear from the motions judge's endorsement that the alternative question of a stay was considered, and the parties on appeal could not provide any explanation.

4 The trial judge's reasons are reported at [1999] O.J. No. 3217 (Ont. S.C.J.).

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TAB 2

2000 CarswellOnt 163
Ontario Court of Appeal

R. v. Seaway Gas & Fuel Ltd.

2000 CarswellOnt 163, [2000] O.J. No. 226, 128 O.A.C. 268, 142 C.C.C. (3d) 213, 183 D.L.R. (4th) 412, 45 W.C.B. (2d) 208, 47 O.R. (3d) 458 (Eng.), 47 O.R. (3d) 468 (Fr.)

Her Majesty the Queen, Appellant and Seaway Gas & Fuel Ltd. Param Jeet Phambri, Respondents

Carthy J.A., MacPherson J.A., Moldaver J.A.

Judgment: February 2, 2000
Heard: December 10, 1999
Docket: CA M24193, C32393

Counsel: *Diane M. Lahaie*, for Appellant.
Leo D. Courville, for Respondents.

Subject: Criminal

Table of Authorities

Cases considered by *MacPherson J.A.*:

R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353 (S.C.C.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, [1994] 1 S.C.R. 311 (S.C.C.) — referred to

Statutes considered:

Provincial Offences Act, R.S.O. 1990, c. P.33
s. 139 — referred to

Tobacco Control Act, 1994, S.O. 1994, c. 10
Generally — considered

s. 3(1) — considered

s. 3(3) — considered

s. 3(6) — considered

Tobacco Products Control Act, R.S.C. 1985, c. 14 (4th Supp.)
Generally — referred to

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Regulations considered:

Tobacco Control Act, 1994, S.O. 1994, c. 10

General, O. Reg. 613/94

s. 1

s. 13

s. 13(1)

s. 13(5)

Words and phrases considered

ACCEPTABLE

[Per MacPherson J.A. (Carthy and Moldaver JJ.A. concurring):] [. . .] I do not think there is an inconsistency between the words 'prescribed' in s. 3(3) of the Act [*Tobacco Control Act, 1994*, S.O. 1994, c. 10] and s. 1 of the regulation [O.Reg. 613/94] and 'acceptable' in s. 13(5) of the regulation. In *The New Oxford Dictionary of English* (1998), the principal definition of the word 'acceptable' is: "able to be agreed on; suitable .... adequate; satisfactory..." (at p. 10). In my view, this definition is consistent with the definition of 'prescribed' in the context of the Act. When s. 1 of the regulation lists five forms of identification as 'prescribed', and s. 13 of the same regulation lists the same five forms of identification as 'acceptable', the two adjectives mean the same thing — a vendor must insist that a prospective customer produce one of them.

MAY

[Per MacPherson J.A. (Carthy and Moldaver JJ.A. concurring):] [. . .] I do not think that the word 'may' in s. 13(1) of the regulation [O. Reg. 613/94] means that other forms of identification may be considered by a store operator. In the context of five 'prescribed' forms of identification in s. 1 [of the Regulation] and five 'acceptable' forms of identification in s. 13(5) [of the Regulation], the word 'may' in s. 13(1) simply means that the customer may produce any of the five listed forms of identification, not something completely different.

PRESCRIBED FORM OF IDENTIFICATION

[Per MacPherson J.A. (Carthy and Moldaver JJ.A. concurring):] The real issue is precisely the one identified by the trial judge in her reasons: "What is an issue in the matter before this court is whether it was acceptable I.D." That issue falls to be determined on the interpretation to be given to the words 'prescribed form of identification' in s. 3(3) of the Act [*Tobacco Control Act, 1994*, S.O. 1994, c. 10].

By O. Reg. 613/94, the Ontario government has defined the contents of 'prescribed form of identification'. Section 1 of the regulation states that "[t]he following forms of identification are prescribed for the purposes of subsection 3(3) of the Act." Five forms of identification are then listed — an Ontario driver's licence with a photograph of the person to whom the licence is issued, a Canadian passport, a Canadian citizenship card including photograph, a Canadian Armed Forces card, and a photo card issued by the Liquor Licence Board of Ontario.

In my view, [. . .] these five items constitute an exhaustive list of the forms of identification that a vendor of tobacco products may examine when deciding whether a prospective customer is entitled to buy a package of cigarettes. I reach this conclusion for several reasons.

First, the dictionary definition of the word 'prescribed' suggests exclusivity and compulsion. In her judgment, the trial judge stated:

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"Prescribed" not being defined in the Interpretation Act, I then verified the definitions in the dictionary. The dictionary definitions of "prescribed" are as follows:

1. "To set down as a direction or rule to be followed; to lay down the rules of the law." — Canadian Law Dictionary.

2. "To lay down as a guide, direction, or rule of action." — Webster's Collegiate Dictionary.

3. "To lay down or impose authoritatively." — Oxford English Dictionary.

This is a fair selection of dictionary definitions. Having set them out in her reasons, the trial judge did not state explicitly how she interpreted these definitions. In my view, the words 'rule to be followed', 'rule of action' and 'impose authoritatively' suggest something that is mandatory. In the context of s. 3(3) of the Act that means that a vendor must insist that a customer produce one of the five statutory forms of identification.

APPEAL by Crown from judgment affirming dismissal of charge of selling tobacco products to minor contrary to s. 3(1) of Tobacco Control Act, 1994.

***MacPherson J.A.*:**

Introduction

1 Thousands of store owners and operators throughout Ontario sell cigarettes to customers. The legal issue presented by this appeal is of genuine practical consequence to them. The issue is: what is the responsibility in law of store owners and operators with respect to the sale of cigarettes to young people? Specifically, what forms of identification may a vendor accept to verify that a potential customer is legally permitted to purchase cigarettes?

A. Factual Background

(1) The parties and the events

2 At about 3:40 p.m. on August 13, 1997, Raymond Gervais went to Seaway Gas & Fuel Ltd. ("Seaway"), a small gas bar and store in Cornwall, to buy cigarettes. Raymond was born on March 26, 1981. Accordingly, he was 16 years old and was not legally permitted to purchase cigarettes.

3 Mrs. Param Phambri, the store clerk, requested identification. Raymond produced a laminated school identification card with writing at the top indicating Conseil Scolaire Public de Stormont, Dundas and Glengarry Public School Board. The card also contained the school's logo or insignia and a recent photograph of Raymond with a date of birth of March 26, 1978 (thus establishing, it appeared, that he was 19 years old which is the legal age for purchasing cigarettes).

4 Mrs. Phambri sold a package of DuMaurier King Size cigarettes to Raymond. He departed the store and rode away on his bicycle. Two provincial offences officers, Inspectors Robert Gilchrist and Yves Decoste, had been conducting surveillance on Seaway. They stopped Raymond a few blocks from the store. He provided the inspectors with his proper name and address. When asked about his date of birth, Raymond replied truthfully — March 26, 1981. Raymond admitted to the inspectors that he had purchased cigarettes at Seaway and that he had produced a student card as identification. Raymond had himself prepared the card with its false birth date, March 26, 1978, with the assistance of his computer.

5 Later the same day, Inspectors Gilchrist and Decoste proceeded to Seaway. They questioned Mrs. Phambri and advised her that she was being charged under the *Tobacco Control Act*, S.O. 1994, c. 10, with selling tobacco products to someone under the age of 19.

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6 Mrs. Phambri called her husband Kulwant Phambri, the owner and president of Seaway. He came to the store. The inspectors informed him that charges would be laid against both Seaway, the corporate entity, and Mrs. Phambri, the store clerk who made the sale.

(2) The litigation

7 The charges against Seaway and Mrs. Phambri proceeded to trial on March 18, 1998 before Her Worship Justice of the Peace Louise Rozon. Seaway and Mrs. Phambri were charged with violating s. 3(1) of the *Tobacco Control Act* which provides:

> 3. (1) No person shall sell or supply tobacco to a person who is less than 19 years old.

8 On June 2, 1998, Justice of the Peace Rozon rendered her decision. She dismissed the charges against both Seaway and Mrs. Phambri. In reaching this conclusion, the trial judge considered s. 3(3) of the *Tobacco Control Act* and a regulation dealing with forms of identification under the Act.

9 Section 3(3) of the Act provides a defence to a charge under s. 3(1). It provides, in part:

> 3. (3) It is a defence to a charge under subsection (1) ... that the defendant believed the person receiving the tobacco to be at least 19 years old because the person produced a prescribed form of identification showing his or her age and there was no apparent reason to doubt the authenticity of the document or that it was issued to the person producing it.

10 Referring to the words in the bottom half of this provision, the trial judge found that Mrs. Phambri was diligent about seeking identification from Raymond Gervais and that the identification appeared to be authentic:

> The identification produced is a laminated public school board card with photo, name, and date of birth. The card does not appear to have been tampered with, i.e. date of birth.

11 The trial judge recognized that this did not end the inquiry. Raymond Gervais had produced a school identification card when asked for proof of age. Was this 'a prescribed form of identification' within s. 3(3) of the Act? On that question, it was necessary for the trial judge to consider a regulation promulgated under the *Tobacco Control Act*, namely O. Reg. 613/94:

> 1. The following forms of identification are prescribed for the purposes of subsection 3(3) of the Act:
>
> > 1. A driver's licence issued by the Province of Ontario with a photograph of the person to whom the licence is issued.
> >
> > 2. A Canadian passport.
> >
> > 3. A Canadian citizenship card with a photograph to whom the card is issued.
> >
> > 4. A Canadian Armed Forces identification card.
> >
> > 5. A photo card issued by the Liquor Licence Board of Ontario.

12 In interpreting this provision, the trial judge considered a number of factors. She examined the dictionary definition of the word 'prescribed'. She also discussed the difficulty non-Ontario customers would have in places like Cornwall (which is very close to both Quebec and New York state) if they were required to produce one of the prescribed forms of identification. In addition, she referred to s. 13 of the regulation which required retailers to post signs informing customers of the forms of identification "that *may* ... be produced under subsection 3 (3) of the Act." [Emphasis is trial judge's.] Finally, the trial judge noted that s. 13 of the regulation requires stores to post signs listing the five forms of identification, but with the introductory words "Acceptable I.D."; in her view, if only the five forms of identification set out in s. 1 of the regulation were permitted, the regulation would have said "*The* acceptable I.D." or "*Only* acceptable I.D." [Emphasis is trial judge's.]

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13 Taking these considerations together, the trial judge reached the conclusion:

> I am satisfied that Ontario Regulation 613/94 is a guide to be followed and other forms of I.D. may be presented.

Since she found that Mrs. Phambri had exercised due diligence in requesting identification, and that the identification produced seemed to be authentic as to both the person and his age, she dismissed the charges against Seaway and Mrs. Phambri.

14 The Crown appealed. The appeal was heard by Judge B. MacPhee of the Ontario Court of Justice (Provincial Division) in Cornwall on February 3, 1999. On March 23, 1999, the appeal judge rendered his decision, dismissing the appeal. On the legal issue of whether the five forms of identification set out in s. 1 of the regulation was an exhaustive list of acceptable identification, the appeal judge agreed with the trial judge's negative answer. He said:

> I see no error in the Justice of the Peace's assessment of s. 13 of the regulation as it affects s. 1 of the regs. and thereby s. 3(3) of the Act. ... The Tobacco Control Act and its regulations as drafted, allow for the proof of age through credible documentation other than that listed in the regulations.

15 The Crown sought leave to appeal Judge MacPhee's decision. Pursuant to s. 139 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, Rosenberg J.A. granted leave on June 4, 1999.

B. Issue

16 There is a single legal issue in this appeal. What are the acceptable forms of identification that a customer may show to a store operator who challenges his or her capacity, in terms of age, to purchase cigarettes? Or, put another way, is it a defence to a charge under s. 3(1) of the *Tobacco Control Act* (selling tobacco products to underage persons) for the store operator to establish that he or she reviewed a form of identification, but not one listed in s. 1 of O. Reg. 613/94?

C. Analysis

17 My starting point is the same as that of both parties. The *Tobacco Control Act* ("the Act") is a regulatory statute which creates strict liability offences; the offences come within the middle category of offences set out by Dickson J. in his important and innovative decision in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.). Dickson J. described this category of offence, and its consequences for both the Crown and the accused, in this fashion, at p. 1326:

> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

18 Section 3(1) of the Act, which prohibits the sale of tobacco to a person who is less than 19 years old, is a strict liability offence. Thus, in Dickson J.'s words, "the doing of the prohibited act *prima facie* imports the offence." There is no dispute in the present case that the respondents, the store and its clerk, sold cigarettes to a person less than 19 years old.

19 However, a strict liability offence is not an absolute liability offence: this is the fundamental lesson of *Sault Ste. Marie (City)*. There is a balancing of factors in strict liability offences. On the one side, an absence of *mens rea* to commit the offence does not assist the accused. On the other side, however, the accused can, in Dickson J.'s words, "avoid liability by proving that he took all reasonable care". This is the common law statement of the defence of due diligence.

20 In the present case, however, the Ontario legislature has attempted to define the contents of the due diligence defence in respect of the offence of selling tobacco products to young people. In effect, the legislature has provided a statutory definition

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of what constitutes 'all reasonable care' for this offence. The legislature has done this in s. 3 (3) of the Act which, for ease of reference, I set out again:

> 3. (3) It is a defence to a charge under subsection (1) ... that the defendant believed the person receiving the tobacco to be at least 19 years old because the person produced a prescribed form of identification showing his or her age and there was no apparent reason to doubt the authenticity of the document or that it was issued to the person producing it.

21 It can be seen that there are three components to this statutory defence: the defendant believed the person receiving the tobacco was at least 19 years old because (1) the person produced a prescribed form of identification showing his or her age; (2) there was no apparent reason to doubt the authenticity of the document; and (3) there was no apparent reason to doubt that the document was issued to the person presenting it. The respondents do not challenge the power of the legislature both to create a strict liability offence and to provide a due diligence defence. Nor does the respondent suggest that there is anything unreasonable about the contents of the due diligence defence established by s. 3(3) of the Act. Accordingly, the crucial issue on this appeal is the interpretation of this provision.

22 In the present appeal, there is no issue with respect to (2) and (3). The trial judge found that the store clerk, Mrs. Phambri, properly asked her customer for identification. The customer, Raymond Gervais, produced a school identification card which included his name, photo and date of birth. The trial judge found: "The card does not appear to have been tampered with, i.e. date of birth." Moreover, the photo on the card was a picture of her customer. Accordingly, the trial judge held that there was no apparent reason for Mrs. Phambri to doubt either the authenticity of the card or the identity of the person producing it. The Crown does not quarrel with these aspects of the trial judge's decision.

23 The real issue is precisely the one identified by the trial judge in her reasons: "What is an issue in the matter before this court is whether it was acceptable I.D." That issue falls to be determined on the interpretation to be given to the words 'prescribed form of identification' in s. 3(3) of the Act.

24 By O. Reg. 613/94, the Ontario government has defined the contents of 'prescribed form of identification'. Section 1 of the regulation states that "[t]he following forms of identification are prescribed for the purposes of subsection 3(3) of the Act." Five forms of identification are then listed — an Ontario driver's licence with a photograph of the person to whom the licence is issued, a Canadian passport, a Canadian citizenship card including photograph, a Canadian Armed Forces card, and a photo card issued by the Liquor Licence Board of Ontario.

25 In my view, subject to a minor qualification I will make at the conclusion of these reasons, these five items constitute an exhaustive list of the forms of identification that a vendor of tobacco products may examine when deciding whether a prospective customer is entitled to buy a package of cigarettes. I reach this conclusion for several reasons.

26 First, the dictionary definition of the word 'prescribed' suggests exclusivity and compulsion. In her judgment, the trial judge stated:

> "Prescribed" not being defined in the Interpretation Act, I then verified the definitions in the dictionary. The dictionary definitions of "prescribed" are as follows:
>
> > 1. "To set down as a direction or rule to be followed; to lay down the rules of the law." — Canadian Law Dictionary.
> >
> > 2. "To lay down as a guide, direction, or rule of action." — Webster's Collegiate Dictionary.
> >
> > 3. "To lay down or impose authoritatively." — Oxford English Dictionary.

27 This is a fair selection of dictionary definitions. Having set them out in her reasons, the trial judge did not state explicitly how she interpreted these definitions. In my view, the words 'rule to be followed', 'rule of action' and 'impose authoritatively' suggest something that is mandatory. In the context of s. 3(3) of the Act that means that a vendor must insist that a customer produce one of the five statutory forms of identification.

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28 Second, I do not think there is an inconsistency between the words 'prescribed' in s. 3(3) of the Act and s. 1 of the regulation and 'acceptable' in s. 13(5) of the regulation. In *The New Oxford Dictionary of English* (1998), the principal definition of the word 'acceptable' is: "able to be agreed on; suitable .... adequate; satisfactory ..." (at p. 10). In my view, this definition is consistent with the definition of 'prescribed' in the context of the Act. When s. 1 of the regulation lists five forms of identification as 'prescribed', and s. 13 of the same regulation lists the same five forms of identification as 'acceptable', the two adjectives mean the same thing — a vendor must insist that a prospective customer produce one of them.

29 Third, I do not think that the word 'may' in s. 13(1) of the regulation means that other forms of identification may be considered by a store operator. In the context of five 'prescribed' forms of identification in s. 1 and five 'acceptable' forms of identification in s. 13(5), the word 'may' in s. 13(1) simply means that the customer may produce any of the five listed forms of identification, not something completely different.

30 Fourth, I do not think that s. 3(6) of the Act assists the respondents. Section 3(6) provides:

> 3. (6) No person shall present as evidence of his or her age identification that was not lawfully issued to him or her.

In their factum, the respondents submit that this provision is "a logical limit to the extent of due diligence to be exercised by a clerk or store owner." Since it appeared to the store clerk that the school identification card had been lawfully issued to the customer producing it, the store clerk was justified in making the sale.

31 I do not agree with this submission. The purpose of s. 3(6) is to create an offence for persons who produce a fake version of one of the five forms of prescribed identification. The section does not purport to convert other forms of identification (e.g. a student identification card) into prescribed forms of identification simply because they are authentic and have been lawfully issued to the holder by the relevant authority (e.g. a school board).

32 Fifth, it needs to be recalled that the Act is an important public health statute. The Act and its regulations attempt to regulate in a strict and careful fashion the distribution of a dangerous product. In *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 (S.C.C.), the Supreme Court of Canada considered the federal *Tobacco Products Control Act*, R.S.C. 1985, c. 14 (4th Supp.), and some of the regulations promulgated pursuant to it. Referring to the general purposes of the regulations, Sopinka and Cory JJ. said, at p. 353:

> These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good.

Later in their reasons, the justices referred to "the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking" (at pp. 353-54).

33 In my view, this reasoning is entirely applicable to the Ontario *Tobacco Control Act* and suggests that the provisions of the Act and regulations should be interpreted with a judicial eye firmly focussed on the public health purposes of the legislation. One of the most important purposes of the legislation is to make sure that minors are not able to buy cigarettes. The legislation should be strictly interpreted to help achieve that purpose.

34 Sixth, I do not think that it is an accident that the government chose only five — and five quite specific — forms of identification. The wallets of young people are filled with identification cards — school cards, sports team cards, club membership cards, retail store cards, movie rental cards, and a myriad of other types of cards. It would be easy for a minor to alter the information, including birth date, on some of these cards. That is what Raymond Gervais did in this case; as the trial judge put it: "Mr. Gervais admitted in evidence that he prepared the I.D. on his computer."

35 The five forms of identification listed in s. 1 of O. Reg. 613/94 fall into a different category. They are quite formal documents issued by federal and provincial authorities. They are not easy to obtain; care is taken by the authorities in issuing them. I think a fair inference is that the Ontario legislature chose these five forms of identification because it knew that the

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authorities are careful in scrutinizing the relevant information before they are issued. In other words, there is a strong likelihood that the information on, for example, a Canadian passport or an Ontario driver's licence is accurate.

36 Seventh, the position of Ontario merchants is one that combines privilege and responsibility. The privilege is the merchant's opportunity to sell products to the public and to earn a profit, or even to gain a livelihood, thereby. The responsibility arises from the fact there is a direct interface or relationship between the merchant and the customer. With respect to regulated products, it is crucial that the merchant understand and respect the limits of its privilege to sell to the public. As expressed by Dickson J. in *Sault Ste. Marie (City)*, *supra*, at p. 1322:

> The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger.

37 Applying this passage to the sale of tobacco products in Ontario, the message to vendors is a simple one: you must be scrupulously vigilant in ensuring that you do not sell tobacco products to minors. One of the ways a vendor fulfils this responsibility is by insisting that a young person seeking to buy cigarettes is in fact old enough to do so, as demonstrated by production of one of the five forms of identification prescribed in the regulation.

38 For these reasons, I do not think that the interpretation of s. 3(3) of the Act by the trial and appeal judges was correct.

39 I need to make a minor qualification to the conclusion I have reached. I recognize that there is at least one anomaly in the legislation in this domain. What is a store operator to do with the young person he or she challenges who produces identification from another jurisdiction that is similar to one of the five prescribed forms of identification in the Ontario regulation? For example, must a store operator refuse to sell cigarettes to a challenged young person who produces an apparently valid Quebec driver's licence or United States passport? This situation can arise anywhere in Ontario but is, of course, particularly prevalent in a place like Cornwall which is very close to both Quebec and New York state.

40 Moreover, the anomaly is not limited to only visitors to Ontario. An additional category would be current Ontario residents who possess only formal documents from another jurisdiction — for example, a student from British Columbia, with a valid British Columbia driver's licence, attending an Ontario university.

41 Section 1 of O. Reg. 613/94 does not provide an answer to the store operator in these situations. My answer to these scenarios is only partial, but it is the traditional answer of the common law method: they are not this case.

42 The Ontario legislature is properly concerned with proscribing consumption of tobacco products by young people. It has, therefore, legislated in this area. Part of the legislative response is a statutory due diligence defence anchored in a limited number of formal Canadian and Ontario government-issued documents.

43 This statutory due diligence defence, by its terms, does not cover every situation. It does not address the situation of sales to young people from other jurisdictions with identification similar to that prescribed in the Ontario law. Nor does it cover sales to some current Ontario residents who might only possess identification from other jurisdictions.

44 It may well be that, with respect to sales to young people in these categories, the common law defence of due diligence, grounded in Dickson J.'s language in *Sault Ste. Marie (City)* — "leaving it open to the accused to avoid liability by proving that he took all reasonable care" — would play a residual role and provide protection to store operators. However, whatever difficulties might be presented by a relatively small group of consumers of tobacco products, those difficulties should not detract from the clear and strict regime the legislature has put in place for merchants and the vast majority of their customers. With respect to those customers, the merchant must insist that the young person he or she challenges produce one of the five prescribed forms of identification.

Disposition

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45 I would allow the appeal. Convictions should be entered against both respondents for committing the offence of selling a tobacco product to a minor contrary to s. 3(1) of the *Tobacco Control Act*. In the circumstances of this case, it is appropriate to grant both respondents absolute discharges.

***J.J. Carthy J.A.*:**

I agree.

***M.J. Moldaver J.A.*:**

I agree.

Appeal allowed; convictions entered and absolute discharges granted.

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TAB 3

Canadian Contractual Interpretation Law

SECOND EDITION

Geoff R. Hall
B.A. (McGill), M.A., LL.B. (Toronto), LL.M. (Harvard)

Partner, McCarthy Tétrault LLP

LexisNexis®

not resolved the two conflicting lines of authority, and eventually for definitive resolution by the Supreme Court of Canada.

The case in favour of a generalized duty applying in all cases seems to be stronger than the case for a duty arising only in a subset of cases. This is for three main reasons. First, a limited duty results in a very hazy dividing line between contracts in which a duty arises and those in which it does not. Such a line causes unpredictability and increased litigation costs which are undesirable. Second, the common law provinces of Canada are out of step with the rest of North America, where a duty of good faith performance arising in every case is recognized in Québec and in the United States. Third, a party's undermining of the purpose of a contract, even if consistent with a strict reading of the party's contractual obligations, is a recipe for a breakdown of the contractual relationship and for litigation. An obligation to perform in good faith encourages parties to act cooperatively to achieve the purpose of their contract even if unforeseen circumstances arise or one of the parties decides in retrospect that it does not like the obligations it has undertaken.

9.2 CIRCUMSTANCES IN WHICH A DUTY OF GOOD FAITH PERFORMANCE HAS BEEN RECOGNIZED

The courts have recognized a myriad of circumstances in which a duty of good faith in contractual performance arises, with at least six circumstances in which the duty clearly does exist and some other circumstances in which it might exist. Unfortunately, there is little rhyme or reason to these circumstances, leaving unclear what the overarching principle is and precisely when the duty arises.

9.2.1 There is a duty to exercise a discretionary power in good faith

One area in which the duty of good faith clearly does exist is in the case of a discretionary power. There is no doubt that such a power must be exercised in good faith.

Greenberg v. Meffert[2] involved a contract which provided that the payment of a commission to a salesperson was solely within his employer's discretion. The words of the contract suggested complete discretion, even to refuse payment completely. However, the Ontario Court of Appeal found a duty to exercise the discretion in good faith, regardless of whether the discretion is assessed by subjective or objective standards:

> In my opinion, the company's discretion in this matter is not unbridled, firstly, because the nature of this contract and the subject-matter of the discretion are such that the company's decision should be construed as being controlled by objective standards; and secondly, because the exercise of the discretion,

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[2] [1985] O.J. No 2539, 18 D.L.R. (4th) 548 (Ont. C.A.), leave to appeal to S.C.C. refused (1985), 30 D.L.R. (4th) 768*n* (S.C.C.).

> whether measured by subjective or objective standards, is subject to a requirement of honesty and good faith.
>
> .....
>
> Apart altogether from the question of reasonableness, a discretion must be exercised honestly and in good faith. That proposition is so fundamental as to require no elaboration.[3]

This principle has been repeatedly applied in subsequent case law.[4] As expressed by the Newfoundland Court of Appeal:

> Thus, even where the language of an agreement appears to give an unfettered discretion to one party to act with reference solely to his or her own interests, such a discretion may be circumscribed by obligations of good faith once the language is construed in the context of the relationship of the parties.[5]

9.2.2 There is a duty to act in good faith in complying with a condition precedent

Another area in which a duty of good faith performance clearly arises is in respect of compliance with a condition precedent. This results from the decision of the Supreme Court of Canada in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*[6]

Dynamic Transport involved a contract to purchase real estate which required subdivision control approval before the contemplated transaction could close. The agreement did not specify whether the vendor or the purchaser was to seek such approval, but under the applicable subdivision control legislation (in Alberta) only the vendor could make an application for approval. Subdivision approval was not secured, for the simple reason that the vendor took no steps to do so, and the vendor sought to be excused from further performance of the contract as a result. The Supreme Court of Canada rejected this contention finding the vendor to be "under a duty to act in good faith and to take all reasonable steps to complete the sale".[7]

Dynamic Transport is a good example of why a duty to perform contractual obligations in good faith is so sensible. Without it, the vendor could have completely undermined the whole purpose of the contract simply by doing nothing to seek subdivision control approval despite being the only party able to seek it. It could not possibly have been the intention of the parties to the contract that the vendor be able to evade its obligations so easily, yet a strict reading of

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3 *Ibid.*, at 554 and 556.

4 See *Brule Construction Ltd. v. Ottawa (City)*, [1991] O.J. No. 1980, 51 O.A.C. 260, 47 C.L.R. 253 (Ont. C.A.); *Shibamoto & Co. v. Western Fish Producers, Inc. (Trustee of)*, [1992] F.C.J. No. 480, 145 N.R. 91 (F.C.A.); *Elmdale Investments Ltd. v. Myers*, [2000] O.J. No. 4989, 40 R.P.R. (3d) 225 at paras. 11-14 (Ont. S.C.J.); and *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 4656, 68 O.R. (3d) 457 at para. 45 (Ont. C.A.).

5 *Imperial Oil Ltd. v. Young*, [1998] N.J. No. 248, 167 Nfld. & P.E.I.R. 280 at para. 161 (Nfld. C.A.).

6 [1978] S.C.J. No. 52, [1978] 2 S.C.R. 1072 (S.C.C.) [*Dynamic Transport*].

7 *Ibid.*, at 1084.

TAB 4

1985 CarswellOnt 727
Ontario Supreme Court, Court of Appeal

Greenberg v. Meffert

1985 CarswellOnt 727, [1985] O.J. No. 2539, 18 D.L.R. (4th) 548, 31 A.C.W.S. (2d) 123, 37 R.P.R. 74, 50 O.R. (2d) 755, 7 C.C.E.L. 152, 9 O.A.C. 69

GREENBERG v. MEFFERT et al.

Zuber, Morden and Robins JJ.A.

Heard: February 6, 1985
Judgment: May 16, 1985

Counsel: *Ronald Carr*, for appellant.
Morley Wolfe, Q.C., for respondents Montreal Trust Company and Eric H. Meffert.
Martin Kerbel, Q.C., for respondent Donato Melfi.

Subject: Contracts; Torts; Property; Employment

Table of Authorities

Cases considered:

Minster Trust Ltd. v. Traps Tractors Ltd., [1954] 1 W.L.R. 963, [1954] 3 All E.R. 136 — *applied*

Authorities considered:

Corbin on Contracts (1960), Vol. 3A, ss. 644-648.

4 Hals. (4th ed.), p. 612, paras. 1198-99.

Hudson's Building and Engineering Contracts (10th ed., 1970), c. 7.

Restatement, Contracts (2nd ed.), s. 228.

Williston on Contracts (3rd ed.), ss. 675A, 675B.

Words and phrases considered:

sole discretion

APPEAL from trial judgment dismissing plaintiff's claim for commission.

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

1 This appeal concerns the effect to be given to a clause in a contract of employment which grants a company "the sole discretion" to determine whether a salesman whose employment has been terminated shall receive commissions to which he would have been entitled had the employment relationship not been terminated.

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2 The appellant is an experienced real estate salesman who initially became associated with the respondent Montreal Trust Company as the manager of its investment property office in Toronto. He had set up the office for the company and was paid a percentage of its profits together with any commissions he might earn as a salesman. In June 1980, the company instituted a new policy which required that all managers be salaried employees and not act as sales agents. This was not satisfactory to the appellant and it was agreed that he would relinquish his managerial position and continue with the company as a salesman.

3 The terms of his employment in this capacity are set forth in a "contract of employment" dated June 26, 1980. The contract stipulates the "commission split" between the company and the appellant and, among other things, provides that a company manual entitled "Terms of Relationship Between Montreal Trust Company and its Sales Agents" shall form part of the contract. The manual is some six pages in length but I shall make reference only to cl. 11 which is headed "Commissions & Listings" and is crucial to this appeal. It reads:

> The sales agent is prohibited by law from taking any listings in his or her own name, and agrees that all listings shall be taken in the name of the company and turned over to the company within one day of receiving information. *In the event that a listing is sold after the sales agent's employment is terminated, any commission he or she receives will be at the sole discretion of the company, and the commission earned on the listing will be disbursed at the company's discretion*. It is further provided that the sales agent has no authority to change, alter, reduce or waive any commission earned by the company on transactions involving himself or herself, other sales agents or brokers, without the express consent of the company. The sales person is not entitled to any listing commission for a listing held in his or her possession or any listing that is given in conjunction with any offer.
>
> *It is understood that all listings shall be the property of the company and that you shall be entitled to commission or other remuneration only if you are an agent of the company on the date the property is sold or listed*.

(Emphasis added.)

4 During the summer of 1980, the appellant on his own initiative sought and obtained a listing from Costain Limited, a major real estate corporation, for the sale of a very large residential complex in the City of Ottawa. This listing, while an open listing, was expressly found by the trial Judge to constitute "a listing" within the meaning and intent of cl. 11. The correctness of that finding, with which I respectfully agree, was not disputed in this appeal.

5 Having obtained the listing, the appellant then proceeded to inspect the property, to photograph it, to assemble the necessary financial data and other relevant information, and to prepare a brochure for presentation to prospective purchasers. In July, he procured an offer for $8.8 million which was accepted by Costain but was cancelled when certain conditions could not be satisfied. Shortly thereafter, the respondent Donato Melfi, another sales agent with Montreal Trust, found a purchaser who was interested in acquiring the property. Together with the appellant, he commenced negotiations which, as matters developed, extended over several months and followed a course not unusual in transactions of this magnitude. In January 1981, an agreement was finally reached and the property was sold by Costain to the purchaser introduced by Melfi for $9.1 million. As a result, the Montreal Trust Company received a commission of $175,000.

6 The company refused to pay the appellant any part of that commission, and as a result this action was instituted against it and the respondents Melfi and Eric Meffert, the latter being the manager of the company's office at the time. The appellant's claim against the company was based on its alleged breach of contract in not paying him the listing agent's commission or, alternatively, on the basis of quantum meruit; as against the other respondents, his claim was based on statements which allegedly constituted agreements requiring these respondents to pay the listing agent's commission or, alternatively, on the basis that they had themselves improperly received the listing agent's commission and on the doctrine of unjust enrichment were obliged to pay it to the appellant. The action was dismissed at trial against all respondents.

7 Had the appellant been in the employ of the company when the sale took place, he would unquestionably have been entitled to the listing agent's share of the commission. His employment relationship, however, was terminated during the currency of the negotiations. It appears that on September 18, 1980, apparently without prior notice, the company closed its investment

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property office and moved its sales personnel to a residential sales office at another location. This led to the resignation of a number of agents including the appellant. The facts surrounding the incident are of no consequence to this appeal save that the termination of the appellant's employment as of September 18, 1980, clearly brought into play cl. 11 of his contract. Thereafter, his entitlement to commission as the listing agent of the property in question became dependent on the provisions of that clause.

8 After leaving the company, the appellant, not surprisingly, became concerned about his potential commission. By then the negotiations were progressing favourably, and the prospect of a sale was good. Indeed, an agreement between Costain and Melfi's client was executed as early as October 27, 1980, but for reasons irrelevant to this appeal that agreement was later terminated. After further negotiations, the parties successfully concluded the agreement of January 1981, on the basis of which the transaction was closed.

9 Since I am of the opinion that the appellant's appeal must stand or fall on the basis of the written contract, I think it unnecessary to detail all that transpired between the date of termination of the appellant's relationship with the company and the date the commission was received by the company. It is, however, important to note that the appellant sought assurances that his commission as the listing agent would be protected. For this purpose he contacted both the respondent Melfi and the respondent Meffert. Meffert, as I have indicated, was the manager of the Montreal Trust office and admittedly was the person through whom the company acted throughout this matter. He was assured by Melfi that "whatever happens he [Melfi] would take care of me"; and, more important, was assured by Meffert, "Don't worry, the company won't screw you." The trial Judge found those statements to have been made, but concluded that they did not of themselves constitute promises of such a nature as to provide the basis for a cause of action.

10 Accepting that conclusion, it is nonetheless clear that the statements could not have been made honestly or in good faith. They no doubt were designed to forestall any action by the appellant that might interfere with the negotiations or the closing of the transaction. The fact is that these respondents had devised a scheme whereby they would divide the listing agent's commission between themselves and the appellant would receive no part of it. The trade record sheets of the company relating to the sale from the time of the incompleted October 27, 1980, agreement were drawn so as to show Melfi as both the "listing salesman" and the "selling salesman". These documents were prepared by Meffert and signed by Melfi both of whom were fully aware that the appellant, and not Melfi, was the listing salesman. According to the trade record sheet upon which the commission was divided, the $175,000 commission when received by the company was to be paid as follows:

Listing Salesman, Don Melfi $57,625.00

Selling Salesman, Don Melfi $65,625.00

Office, M.T.C. 1992 Yonge St. $51,750.00

11 Meffert, as manager of the company, authorized payment accordingly and, as the evidence revealed, when Melfi received the listing and selling commissions he in turn paid Meffert $30,000. Since Meffert, as manager, held a salaried position and was not entitled to any commission, he was asked at trial to explain the basis upon which he received these moneys. He testified, as did Melfi, that the $30,000 payment represented, to the extent of $2,000, the repayment of a loan and, to the extent of $28,000, the payment of a "consulting fee". The so-called "consulting fee" was purportedly paid in consideration of Meffert's assistance to Melfi with respect to certain unnamed and incompleted transactions and was said to be entirely unrelated to the subject transaction. The trial Judge did not believe this. He characterized the payment of $28,000 as "a bribe" saying:

> Meffert accepted a payment of $28,000.00 from Melfi which, in my opinion, amounted to a bribe to exercise his discretion and as such his company's discretion in favour of Melfi in so far as the selling [sic, listing] commission was concerned.

12 However, notwithstanding his view as to the patent impropriety of the respondents' conduct, the trial Judge went on to dismiss the appellant's claim insofar as it was based upon an alleged breach of the terms of the employment contract for the brief reasons set forth in the following paragraph of his judgment:

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> ... I am prepared to accept that the obtaining of the information from Costain by Greenberg constituted a 'listing' within the provisions of the employment agreement. In my opinion, those parts of the employment agreement already quoted [cl. 11] can be read together. In order to be paid a commission the selling agent must have been employed by the company on the date the 'listing' was obtained but can only obtain payment 'at the sole discretion of the company'. Meffert may well have been bribed by Melfi to exercise the company's discretion in the way that it did but this exercise of discretion is not reviewable by a court as is the exercise of a discretion by some boards or tribunals.

13 With deference, I am unable to agree with that disposition of the case. The learned trial Judge's reference to the law relating to judicial review of the discretionary power of administrative tribunals is not apt. This is an action in contract. Whether a Court may interfere with the exercise of a discretion conferred by a contract depends upon the interpretation of the contract and the effect to be given its terms.

14 Clause 11, as I indicated earlier, is critical to the dispute in this case. The concluding paragraph of the clause, to repeat it, reads:

> It is understood that all listings shall be the property of the company and that you shall be entitled to commission or other remuneration only if you are an agent of the company on the date the property is sold or listed.

15 Plainly, an agent's entitlement to commission is conditional upon his being an agent of the company on the date the property is either sold or listed. Here, the appellant was in fact an agent of the company on the date the property was listed and it follows, reading this part of cl. 11 alone, is entitled to the listing agent's share of the commission. Had he remained in the company's employ, he would without question have been entitled to the commission he earned by obtaining the listing. That entitlement, at least insofar as this provision is concerned, would be unaffected by the termination of his employment. On what basis then may he be deprived of his commission?

16 This brings into consideration the earlier provision of cl. 11 which deals specifically with a listing that is sold after a sales agent's employment is terminated. This provision, which must be read together with the concluding paragraph of cl. 11, states:

> In the event that a listing is sold after the sales agent's employment is terminated, any commission he or she receives will be at the sole discretion of the company, and the commission earned on the listing will be disbursed at the company's discretion.

17 From that, the company contends that the determination of whether a former sales agent is to be paid any commission on a listing is wholly within its discretion. That discretion, being a "sole discretion", may be exercised on the basis of purely personal or subjective considerations so that, the argument goes, if the company denies payment in circumstances which, viewed objectively, may appear unreasonable or even arbitrary, its decision is nonetheless not open to challenge. In short, the company's position is that a sales agent whose employment is terminated is not entitled to receive the commission earned on a listing if for any reason the company sees fit not to make the payment.

18 Notwithstanding the able argument of counsel for the company, that contention must fail. In my opinion, the company's discretion in this matter is not unbridled, firstly, because the nature of this contract and the subject matter of the discretion are such that the company's decision should be construed as being controlled by objective standards; and secondly, because the exercise of the discretion, whether measured by subjective or objective standards, is subject to a requirement of honesty and good faith.

19 Provisions in agreements making payment or performance subject to "the discretion", "the opinion" or "the satisfaction" of a party to the agreement or a third party, broadly speaking, fall into two general categories. In contracts in which the matter to be decided or approved is not readily susceptible of objective measurement — matters involving taste, sensibility, personal compatibility or judgment of the party for whose benefit the authority was given — such provisions are more likely construed as imposing only a subjective standard. On the other hand, in contracts relating to such matters as operative fitness, structural completion, mechanical utility or marketability, these provisions are generally construed as imposing an objective standard of

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reasonableness. See, generally, 4 Hals. (4th ed.), p. 612, paras. 1198-99; Corbin on Contracts (1960), Vol. 3A, ss. 644-648; Williston on Contracts (3rd ed.), ss. 675A and 675B; Hudson's Building and Engineering Contracts (10th ed., 1970), c. 7.

20 In any given transaction, the category into which such a provision falls will depend upon the intention of the parties as disclosed by their contract. In the absence of explicit language or a clear indication from the tenor of the contract or the nature of the subject matter, the tendency of the cases is to require the discretion or the dissatisfaction to be reasonable: Minster Trust Ltd. v. Traps Tractors Ltd., [1954] 1 W.L.R. 963, [1954] 3 All E.R. 136 at 145. This construction imposes the least hardship in that it produces a result that cannot be said to be unfair or unjust to either of the parties. Other things being equal, I think it preferable that provisions of this kind be construed as implying the less arbitrary standards of the objective test: Restatement, Contracts (2d), s. 228.

21 Returning to the instant case, it is significant that the clause in issue appears in a detailed manual defining the terms of the employment relationship which was prepared by the company and is weighted in its favour. Counsel concedes, and properly so, that any ambiguity or uncertainty in the clause should by the familiar rule of interpretation be construed most favourably to the appellant, and I approach the clause accordingly.

22 The subject matter of the discretion in this case is "the commission earned on the listing". It is significant that that commission was earned while the appellant was in the company's employ; the services rendered to earn the commission were fully performed before the employment was terminated; and, but for the termination, the appellant would have been entitled to the commission when the property was sold. Regardless of whether the agent remained with the company, the company profited from his performance when a sale of the listing was effected. In the context of this employment relationship, it is my view that the sole discretion held by the employer ought not to be construed so as to authorize the employer to deprive a former salesman of commission earned through services performed during his employment without reasonable grounds for so doing.

23 Clause 11 makes it clear that all listings obtained by the agent become and remain the property of the company. On that understanding, as I view the clause, the company agrees to pay the agent his commission provided he is an agent on the date the property is either sold or listed. That promise is modified in the case of listings sold after the agent's employment is terminated; in that event the commission will be payable at the discretion of the company. To construe the discretionary power as the company urges it should be construed, the clause would mean no more than "We will pay you your commission only if we feel like it." That construction renders the clause meaningless, indeed, illusory.

24 A sales agent signing this contract has the right to expect that he will be dealt with fairly. Termination of employment does not automatically eliminate his entitlement to commission, call for the imposition of a penalty, or relieve the company of all obligation towards him. The clause does not so provide; quite to the contrary, its presence serves to assure the agent that notwithstanding termination, the company will make a discretionary decision with respect to the commission earned on the listing. If this provision is to have purpose and substance, the discretion must be exercised in a reasonable way, not arbitrarily or capriciously but for good reason. Simple fairness dictates that construction, and particularly so where the exercise of the discretion can result in a windfall to the company. It can keep for itself a commission which but for the termination it would not have obtained, while the agent whose listing led to the sale receives nothing. In this employment relationship, based as it is upon a splitting of commissions, I think it only fair and just, and not too onerous, to require the employer company to show that in the circumstances relevant to the transaction its decision was not unreasonable.

25 Manifestly, in this case the exercise of the discretion was not based on reasoned considerations. Meffert admittedly represented the company in this matter. He, in collusion with Melfi, directed payment of the listing agent's commission to Melfi so that the commission could be divided between them. This kick-back arrangement, or bribe as the trial Judge termed it, obviously formed the basis of the purported exercise of discretion on the company's behalf. The company, it is to be noted, did not seek to disassociate itself from the individual respondents but throughout these proceedings has sought to justify their conduct. Its failure to recognize any contractual responsibility to act fairly or reasonably towards the appellant in the exercise of its discretionary power is evidenced by the testimony at trial of its Ontario manager, who indicated that the company had no interest in the arrangements between Melfi and Meffert. "What Mr. Melfi does with his share of the commission", he said, "is Mr. Melfi's business and that has nothing to do with the company."

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26 Apart altogether from the question of reasonableness, a discretion must be exercised honestly and in good faith. That proposition is so fundamental as to require no elaboration. The collusive conduct here clearly deprived the discretion of those qualities and contaminated the decisional process. That patently improper conduct vitiated not only the reasonableness required in the objective criteria but the good faith and honesty required whether the discretion is objective or subjective. In either case the decision to deprive the appellant of any commission was not made honestly and in good faith and cannot stand. Fair dealing is implicit in the contract. The clause in issue, in my opinion, ought not to be construed so as to shield the company's improper exercise of discretion from any review.

27 In light of the unjustifiable basis upon which the company purported to discharge its contractual obligation and in the absence of any valid reason for denying the appellant his commission, the matter must now be dealt with by treating the discretion as having been exercised favourably to the appellant. It follows that the appellant is entitled to the commission earned on the listing. The company, it might be added, has made no claim over against the individual respondents and has not sought to compel them to disgorge this commission. Having reached this conclusion I need not consider the appellant's alternate claim against the company, nor need I consider his claims against the individual respondents to which I referred earlier and which, as framed, were correctly dismissed by the learned trial Judge.

28 In the result, I would allow the appeal and award the appellant judgment against Montreal Trust Company in the amount of $57,625 together with the costs of the appeal and the trial. The appellant is entitled also to prejudgment interest, the calculation of which I would leave to counsel. If they are unable to agree, they may make written submissions to the Court. The appeal against the respondents Meffert and Melfi is dismissed but, in the circumstances, without costs.

Appeal allowed.

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TAB 5

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

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Franchises Act, R.S.A. 2000, c. F-23
s. 7 — referred to

Uniform Commercial Code, 2012
Generally — referred to

Aricle 1-201(b)(20) "Good faith" — considered

Aricle 1-302(b) — considered

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Article 1-304 — considered

APPEAL by plaintiff from judgment reported at *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), allowing appeal from decision by trial judge allowing plaintiff's action for damages.

POURVOI formé par la partie demanderesse à l'encontre d'un jugement publié à *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), ayant accueilli l'appel interjeté à l'encontre de la décision de la juge de première instance d'accueillir l'action en dommages-intérêts de la partie demanderesse.

***Cromwell J.* (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

II. Facts and Judicial History

Overview and Issues

2 The appellant, Mr. Bhasin, through his business Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. ("Can-Am") beginning in 1989. The relationship between Mr. Bhasin and Can-Am soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him. The litigation leading to this appeal ensued.

3 Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 544 A.R. 28 (Alta. Q.B.), at paras. 51, 238 and 474.

4 An enrollment director's agreement that took effect in 1998 governed the relationship between Can-Am and Mr. Bhasin. (That Agreement replaced a previous agreement of an indefinite term that had governed their relationship since the outset in 1989.) The Agreement was a commercial dealership agreement, not a franchise agreement. There was no franchise fee and it was not covered by the statutory duty of fair dealing such as that provided for in s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23.

5 That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr. Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

6 The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 — the provision at the centre of this case — provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

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7 Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them: trial reasons, at para. 461. The trial judge found, in effect, that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

8 When Mr. Hrynew moved his agency to Can-Am from one of its competitors many years before the events in question, Can-Am promised him that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am: trial reasons, at para. 238. He was in a strong position with Can-Am because he had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission which regulated Can-Am's business: para. 284.

9 Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business: trial reasons, at para. 303. Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions: para. 238. He also actively encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place: para. 282; see also paras. 251 and 287. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew: para. 240. Mr. Bhasin steadfastly refused to participate in such a merger: para. 247.

10 The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-196.

11 Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: trial reasons, at para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

12 In fact, Can-Am repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as PTO, was under an obligation to treat the information confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true: trial reasons at para. 195. It also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal": para. 247. When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement: paras. 207-11.

13 At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was obliged to take less remunerative work with one of Can-Am's competitors.

14 Mr. Bhasin sued Can-Am and Mr. Hrynew. Moen J. in the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The court held that the corporate respondent was in breach of the implied term of good faith, Mr. Hrynew had intentionally induced breach of contract, and the respondents were liable for civil conspiracy.

15 The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

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16 The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: *Bhasin v. Hrynew*, 2013 ABCA 98, 84 Alta. L.R. (5th) 68 (Alta. C.A.).

17 The appeal raises four issues:

(a) Did Mr. Bhasin properly plead breach of the duty of good faith?

(b) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

(c) Are the respondents liable for the torts of inducing breach of contract or civil conspiracy?

(d) If there was a breach, what is the appropriate measure of damages?

III. Analysis

A. Did Mr. Bhasin Properly Plead Breach of the Duty of Good Faith?

18 The Court of Appeal held that Mr. Bhasin had not properly pleaded the good faith issue and that the trial judge had therefore erred in considering it. Mr. Bhasin contests this conclusion, while the respondents support it. I agree with Mr. Bhasin.

19 The allegations in the statement of claim clearly put the questions of improper purpose and dishonesty in issue. These facts are sufficient to put Can-Am's good faith in issue. The question of whether this conduct amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately. The defendants did not move to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim. Good faith was a live issue that was fully canvassed in a lengthy trial: A.F., at paras. 92-94. Written submissions by both parties at trial referred to the good faith issue and even in his opening at trial, Mr. Bhasin's counsel raised the issue of good faith.

20 The trial judge held that any deficiency in the pleadings did not cause prejudice to the respondents: paras. 23 and 48. This is an assessment she was uniquely positioned to make and her conclusion ought to be treated with deference on appeal. The good faith issue was fully argued in and addressed by the Court of Appeal and has been fully argued on the merits in this Court.

21 In my view, the trial judge did not make a reversible error by adjudicating the issue of good faith and we should address the merits of that issue.

B. Did Can-Am Owe Mr. Bhasin a Duty of Good Faith?

(1) Decisions and Positions of the Parties

(a) Decisions

22 The trial judge accepted Mr. Bhasin's position that there was a duty of good faith in this case and that it had been breached. In brief, her reasoning was as follows.

23 First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

24 Second and in the alternative, the trial judge held that a term of good faith performance should be implied based on the intentions of the parties in order to give business efficacy to the agreement. She concluded that "[w]hen one considers the whole

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of the relationship ... it is clear that the parties had to operate in good faith and there was a requirement of fairness between them. In other words, good faith was necessary to give business efficacy to the whole 1998 Agreement": para. 101.

25 The 1998 Agreement contained an "entire agreement clause" stating that there were no "agreements, express, implied or statutory, other than expressly set out" in it: cl. 11.2. The trial judge held, however, that this clause did not preclude the implication of a duty of good faith. The parties, she reasoned, cannot rely on exclusion clauses to avoid contractual obligations where there is an imbalance of power and that courts refuse to let parties shelter under entire agreement clauses where it would be unjust or inequitable to do so: paras. 116-18.

26 Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

27 The Court of Appeal reversed and held that there had been no breach of contract. The duty of good faith in employment contracts could not be extended by analogy to other types of contract. In any event, the duty of good faith in the employment context is limited to the manner of termination and does not include reasons for non-renewal: C.A. reasons, at paras. 27 and 31. Nor was this a circumstance in which a term could be implied because it was so obvious it was not thought necessary to mention or was necessary to make the contract work: para. 32. Even if there were an implied duty of good faith in this case, the impugned conduct concerned the non-renewal of a contract, which occurs on expiry, unlike a termination clause: para. 31.

28 Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

(b) Positions of the Parties

29 Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used its non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

30 Mr. Bhasin's second position, emphasized in oral argument, is that the Court should at least recognize a duty of honest performance of contractual obligations: transcript, at pp. 8, 10 and 24. Mr. Bhasin relies on the trial judge's findings that Can-Am acted dishonestly towards Mr. Bhasin throughout the period leading up to the non-renewal. It repeatedly lied to him about the nature of the organizational changes required by the Alberta Securities Commission, the nature of the audits that were to

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be carried out by Mr. Hrynew, and was dishonest about its intention to force him out: trial reasons, at paras. 195, 221, 246-47 and 267.

31 Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this case could not be said to be discretionary, because it provided simply that on six months notice either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

(2) Analysis

(a) Overview

32 The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

34 In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) Good Faith as a General Organizing Principle

(i) Background

35 The doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634 (Eng. Ch.), at p. 138, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (Australia H.C.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113 (Eng. K.B.), "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith": p. 157. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (Eng. K.B.), at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts: see also *Herbert v. Mercantile Fire Insurance Co.* (1878), 43 U.C.Q.B. 384 (Ont. Q.B.); R. Powell, "Good Faith in Contracts" (1956), 9 Curr. Legal Probs. 16.

36 However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), at para. 1-039; W. P. Yee, "Protecting

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Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commerical Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

37 This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

38 Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (N.S. T.D.), aff'd on narrower grounds (1992), 112 N.S.R. (2d) 180 (N.S. C.A.); *McDonald's Restaurants of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303 (B.C. C.A.), at para. 99; *Crawford v. New Brunswick (Agricultural Development Board)* (1997), 192 N.B.R. (2d) 68 (N.B. C.A.), at paras. 7-8. They see a broad role for good faith as an implied term in all contracts that establishes minimum standards of acceptable commercial behaviour. As Kelly J. put it in *Gateway Realty*, at para. 38:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" — a conduct that is contrary to community standards of honesty, reasonableness or fairness.

39 Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.), at para. 54; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (Alta. C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15 (Ont. C.A.), at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

40 This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 85; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), at para. 46. This is even more appropriate where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.

41 As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

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(ii) Survey of the Current State of the Common Law

42 Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev.* 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Library Ltd. v. Stiletto Visual Programmes Ltd.* (1987), [1989] 1 Q.B. 433 (Eng. C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

43 Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 J.C.L. 55.

44 Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at p. 457, *per* McLachlin J.; see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), *per* McLachlin J., concurring. The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

45 Considerations of good faith are also apparent in contract interpretation: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134 to 8.146.

46 Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev.* 70, at p. 71.

47 There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar. Rev.* 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S.

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Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 Va. L. Rev. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (Ont. C.A.), at paras. 49-50).

48 While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith. They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

> Although the line between the two types of implication is difficult to draw, it may be realistic to assume that implied duties of good faith are likely, on occasion at least, to slide into the category of legal incidents rather than mere presumed intentions. Certainly, it would be difficult to defend the implication of terms on each of the cases considered here on the basis of the traditional business efficiency or officious bystander test. In the control of contractual discretion cases, for example, it may be more realistic to suggest that the implied limitation on the exercise of the discretion is intended to give effect to the "reasonable expectations of the parties." [pp. 865-66]

49 The first type of situation (contracts requiring the cooperation of the parties to achieve the objects of the contract) is reflected in the jurisprudence of this Court. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.), the parties to a real estate transaction failed to specify in the purchase-sale agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. By law, the vendor was the only party capable of obtaining such permission. The Court held that the vendor was under an obligation to use reasonable efforts to secure the permission, or as Dickson J. put it, "[t]he vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale": p. 1084. It is not completely clear whether this duty was imposed as a matter of law or was implied based on the parties' intentions: see p. 1083; see also *Gateway Realty* and *CivicLife.com*.

50 *Mitsui & Co. (Canada) Ltd. v. Royal Bank*, [1995] 2 S.C.R. 187 (S.C.C.), is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

51 This Court's decision in *Freedman v. Mason*, [1958] S.C.R. 483 (S.C.C.), falls in the third type of situation in which a duty of good faith arises (where a contractual power is used to evade a contractual duty). In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

52 The jurisprudence is not always very clear about the source of the good faith obligations found in these cases. The categories of terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation sometimes are blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle.

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53 Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

54 For example, this court confirmed that there is a duty of good faith in the employment context in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.). Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

55 This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at para. 63, citing *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29. The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy (para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Alta. Q.B.), at paras. 84-85, *per* Murray J.).

56 This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

57 Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional ... hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied according to the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract'" (2014), 77 *Mod. L. Rev.* 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (Eng. C.A.) (BAILII), where it confirmed that good faith was not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

58 Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract*, (9th Australian ed. 2008), at 10.43 to 10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works)* (1992), 26 N.S.W.L.R. 234 (New South Wales C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the

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basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corp. v. Hungry Jacks 's Pty Ltd.*, [2001] NSWCA 187 (New South Wales C.A.) (AustLII). The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42: 9 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev.* 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

59 This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear: Belobaba; O'Byrne, "Good Faith in Contractual Performance", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev.* 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term — in the law's failings.

60 Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

61 The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law. & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

62 I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

(iv) Towards an Organizing Principle of Good Faith

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

64 As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R.

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M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

67 This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. (as she then was) outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery ....
>
> . . . . .
>
> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

68 The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

69 The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31.

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Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

72 In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

74 There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

75 Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

76 It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance", at p. 95; Farnsworth, at 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

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77 That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

78 Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (Australia C.A.) (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance", at p. 96.

79 Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge, Clark, and Peden, "When Common Law Triumphs Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

80 Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

81 Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

82 Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

83 The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Banque de Montréal c. Ng*, [1989] 2 S.C.R. 429 (S.C.C.), at p. 436.

84 In the United States, § 1-304 of the U.C.C. provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." The U.C.C. has been enacted by legislation in all 50 states. While the provisions of the U.C.C. apply only to commercial contracts, § 205 of the *Restatement (Second) of Contracts* (1981) provides for a general duty of good faith in all contracts. This provision of the *Restatement* has been followed by courts

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in the vast majority of states. The notion of "good faith" in the *Restatement* substantially followed the definition proposed by Robert Summers in an influential article, where he proposed that "good faith" is best understood as an "excluder" of various categories of bad faith conduct: p. 206; see § 205, comment a. The general definition of "good faith" in the U.C.C. is also quite broad, encompassing honesty and adherence to "reasonable commercial standards": § 1-201(b)(20). This definition was originally limited to "honesty in fact", that is, a duty of honesty in performance, and was only later expanded: A. D. Miller and R. Perry, "Good Faith Performance" (2013), 98 *Iowa L. Rev.* 689, at pp. 719-20. Honesty in performance is also a key component of "good faith" under the *Restatement*: § 205, comments a and d.

85 Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.* (1933), 263 N.Y. 79 (U.S. N.Y. Ct. App. 1933). Similarly, though there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 (S.C.C.); *Banque nationale du Canada c. Houle*, [1990] 3 S.C.R. 122 (S.C.C.); *Québec (Commission hydroélectrique) c. Banque de Montréal*, [1992] 2 S.C.R. 554 (S.C.C.). The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

86 The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

87 This distinction explains the result reached by the court in *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981). The terminating party had decided in advance of the required notice period that it was going to terminate the contract. The court held that no disclosure of this intention was required other than what was stipulated in the notice requirement. The court stated:

> ... there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. [pp. 989-90]

United Roasters makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

88 The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.), at para. 5; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties*

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Ltd. (1970), [1971] S.C.R. 306 (S.C.C.), cited with approval in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 19.

89 Mr. Bhasin, supported b many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason, at p. 487*; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at p. 7. In other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

90 It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

91 I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (U.S. N.J. Sup. Ct. 1972), aff'd, 07 A.2d 598 (U.S. N.J. Sup. Ct. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (U.S. Pa. S.C. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass. 1984), at p. 1184; *Pitney-Bowes Inc. v. Mestre* (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla. 1981), cert. denied, 464 U.S. 893 (U.S. Sup. Ct. 1983).

92 I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

93 A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

(3) Application

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94 The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

95 The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or any renewed term:

> 3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

96 The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

97 The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

98 The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

99 By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

100 In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did not tell him the truth that from Can-Am's perspective this was a "done deal". The trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

101 When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding

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its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

102 Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. Bhasin's agency as if it were required to do so by the Commission even though it had arranged to have one of its employees conduct the audit of Mr. Hrynew's agency: trial reasons, at para. 198.

103 As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

C. Liability for Civil Conspiracy and Inducing Breach of Contract

104 In light of this conclusion, I agree with the Court of Appeal's rejection of Mr. Bhasin's claims based on the torts of inducing breach of contract and unlawful means conspiracy.

105 The trial judge specifically found that Mr. Hrynew did not encourage Can-Am to act dishonestly in its dealings with Mr. Bhasin and that Can-Am's dishonest conduct was not fairly attributable to Mr. Hrynew: paras. 271 and 287. It follows that Mr. Hrynew did not induce Can-Am's breach of its contractual duty of honest performance.

106 The trial judge dismissed the claim for conspiracy to injure and there is no basis to interfere with that finding. However, the trial judge held the respondents liable for unlawful means conspiracy, with the unlawful means being the breach of contract and inducing breach of contract: para. 326. Because, in light of my conclusions, the only relevant breach of contract in this case is the breach of the duty of honest performance and there was no inducement of breach of contract, the only relevant unlawful means pertained to Can-Am alone and not Mr. Hrynew. Accordingly, there can be no liability for civil conspiracy: see *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 (Ont. C.A.), at para. 43.

107 I therefore agree with the result reached by the Court of Appeal that there could be no liability for inducing breach of contract or unlawful means conspiracy: para. 36. It follows that the claims against Mr. Hrynew were rightly dismissed.

D. What Is the Appropriate Measure of Damages?

108 I have concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. It is therefore liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. While the trial judge did not assess damages on that basis given her different findings in relation to liability, she made findings that permit this Court to do so.

109 The trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency": paras. 258-59. In reaching this conclusion, the trial judge was well aware of the difficulties that Mr. Bhasin would have in selling his business given the "almost absolute controls" that Can-Am had on enrollment directors and that it owned the "book of business": para. 402. She also heard evidence and made findings about what the value of the business was, taking these limitations into account. These findings, in my view, permit us to assess damages on the basis that if Can-Am had performed the contract honestly, Mr. Bhasin would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew.

110 It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. The defendant's expert at trial valued Mr. Bhasin's business as of 2001 (the time of non-renewal) as approximately $87,000. While there is some confusion in the record about the date of evaluation and the relevance of discount

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rates, I am persuaded that the trial judge found that the business was worth $87,000 at the time that the Agreement expired and that she made this finding fully alive to the difficulties standing in the way of a sale of the business given the contractual arrangements between Can-Am and its enrollment directors: see, e.g., para. 451. In addition, we have had no suggestion in argument that this figure should be reassessed. In fact, the defendants, as appellants before the Court of Appeal, submitted to that court that if damages were payable, they should be assessed at the value of the business at the time of the expiry of the Agreement and noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

111 I conclude therefore that Mr. Bhasin is entitled to damages in the amount of $87,000.

IV. Disposition

112 I would allow the appeal with respect to Can-Am and dismiss the appeal with respect to Mr. Hrynew. I would vary the trial judge's assessment of damages to $87,000 plus interest. Mr. Bhasin should have his costs throughout as against Can-Am. There should be no costs at any level in favour of or against Mr. Hrynew.

Appeal allowed in part.

Pourvoi accueilli en partie.

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TAB 6

2009 BCSC 1169
British Columbia Supreme Court

Hayes Forest Services Ltd., Re

2009 CarswellBC 2286, 2009 BCSC 1169, [2009] B.C.W.L.D. 7080, [2009] B.C.W.L.D. 7082, [2009] B.C.W.L.D. 7252, [2009] B.C.J. No. 1725, 180 A.C.W.S. (2d) 861, 57 C.B.R. (5th) 52

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-3 And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57 And In the Matter of Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd.

Burnyeat J.

Heard: July 8, 10, 24, 2009; August 14, 2009
Judgment: August 27, 2009
Docket: Vancouver S085453

Counsel: S.C. Fitzpatrick for Teal Cedar Products Ltd.
J.I. McLean for Hayes Forest Services Limited, Hayes Holding Services Limited, Hayes Helicopter Services Ltd.
E.J. Milton, Q.C. for Western Forest Products Inc.
J. Cytrynbaum for G.E. Canada Corporation
J. Mistry for Steelworkers Locals 1-80, 1-85
F.R. Dearlove for Canadian Imperial Bank of Commerce

Subject: Natural Resources; Civil Practice and Procedure; Corporate and Commercial; Public; Insolvency; Estates and Trusts

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Philip's Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1, [1992] 1 W.W.R. 651, 60 B.C.L.R. (2d) 311, 1991 CarswellBC 502 (B.C. S.C.) — referred to

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Generally — referred to

s. 11 — referred to

s. 11(4) — referred to

Forest Act, R.S.B.C. 1996, c. 157
Generally — referred to

s. 160 — referred to

s. 162 — referred to

Rules considered:

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R. 13(1) — pursuant to

R. 13(6) — pursuant to

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R. 44 — pursuant to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157
Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally — referred to

s. 4(1) — referred to

s. 5 — referred to

ss. 48-51 — referred to

APPLICATION by company under *Companies' Creditors Arrangement Act* for approval of sale of logging contract; APPLICATION to lift stay of proceedings.

***Burnyeat J.*:**

1 Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd. ("Hayes") apply pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), the *Forest Act*, R.S.B.C. 1996, c. 157 and its Regulations, Rules 3(3.1), 10, 12, 13(1), 13(6), 14 and 44 of the *Rules of Court* and the inherent jurisdiction of the Court for Orders approving the sale of that "certain replaceable stump to dump logging contract" ("Contract") between Hayes Forest Services Limited and Teal Cedar Products Ltd. ("Teal") to North View Timber Ltd. ("North View") relating to Timber Forest Licence 46 ("TRL46"). A $50,000.00 deposit has been paid by North View, and a further $277,000.00 would be paid at the time of the closing contemplated by the purchase. The balance of the purchase price of $1,614,266.00 is to be paid at the rate of $3.00 per cubic metre of the timber harvested under the Contract.

2 In opposing that application, Teal applies to lift the stay of proceedings granted under the July 31, 2008 Order so that Teal may commence arbitration proceedings in respect of the issue of whether it is reasonable to withhold its consent to the assignment of the Contract to North View and adjourning the application of Hayes pending the completion of the arbitration proceedings. In the alternative, Teal requests an order adjourning the application pending the production of certain documentation and information concerning the proposed sale to North View. In the further alternative, Teal seeks an order that a sale of the Contract be approved to 0858434 B.C. Ltd. ("858") for a purchase price of $1,400,000.00, with a down payment of $400,000.00, and with the balance of the purchase price to be paid at the rate of $2.00 per cubic metre of timber harvested under the Contract.

3 As part of a July 31, 2008 Order, a Monitor was appointed to report to the Court and the creditors from time to time. In a June 25, 2009 letter to counsel for Hayes, the Monitor states in part regarding the proposed sale to North View:

> In our opinion, the offer represents a reasonable price for this asset in today's market and we believe that the Company has diligently attempted to market this asset over an extended period of time.

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> The purchase price is payable based on Northview logging activity under the contract. We believe that this is the only realistic mechanism to conclude a sale at this value. In order to protect its position and ensure future payments are made, the Company will receive a deposit of $327,000 on completion of the sale, and take security over the contract such that in the event Northview defaults on its future obligations the Company will be in a position to enforce that security and retake ownership of the contract.

Background

4 A "replaceable stump to dump" logging contract in respect of Tree Farm Licence 46 dated January 9, 1990 was entered into by Fletcher Challenge Canada Ltd. as the holder of the contract and Pat Carson Bulldozing Ltd. as the contractor. The interests of the original parties have both been acquired by other parties. The interest of Pat Carson Bulldozing Ltd. was acquired by Hayes Forest Services Limited. The interest of Fletcher Challenge Canada Ltd. was acquired by Teal pursuant to a January 19, 2004 Asset Purchase Agreement and a May 6, 2004 Assignment of Agreement. From January 1, 2008 through August 2, 2008, Hayes logged approximately 43,000 cubic meters of timber for Teal under the Contract.

5 These proceedings under the *CCAA* were commenced on July 31, 2008. At the time of the July 31, 2008 "initial Order", there were four ongoing disputes regarding key operating and financial terms of the Contract. In each dispute, the dispute resolution mechanism under the provisions under the *Forest Act* and its Regulations and under the Contract required mediation, arbitration and court proceedings. The applicable "Dispute Resolution" mechanism under the Contract was set out in paragraph 22.01:

> The Company and the Contractor mutually agree that where a dispute arises between them regarding a term, condition or obligation under this Agreement, and the Work under this Agreement is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, then either party may require the dispute to be resolved in accordance with the Dispute Resolution Clause attached as Schedule "D" to this Agreement.

6 Portions of the Schedule "D" referred to in Paragraph 22.01 of the Contract are attached as Appendix "A" to these Reasons for Judgment.

7 In a September 30, 2008 letter, Hayes notified Teal that Hayes was in the process of seeking expressions of interest with respect to the purchase of the Contract as part of the restructuring contemplated under the *CCAA* filing. In an October 10, 2008 response, counsel for Teal advised counsel for Hayes that:

> Teal is certainly prepared to consider any potential assignee of the contract, and will expect the usual information, including financial information, that would normally be produced in that process.

8 The relationship between Hayes and Teal was such that a number of positions were taken by Teal which resulted in applications by Hayes in the *CCAA* proceedings. Hayes took the position that monies were owing by Teal under the Contract. Against what was owing, Teal attempted to set-off "unliquidated claims" it alleged it had under rate disputes arising out of the Contract. An Order was made on August 15, 2008 prohibiting such a set-off.

9 An attempt was made by Teal along with Western Forest Products Ltd. ("Western") to set aside the *CCAA* proceedings on September 4, 2008. That application was unsuccessful.

10 In October, 2008, Teal reduced the contract rate payable to Hayes for work done under the Contract. An order was made compelling payment on the existing contractual rates.

11 Teal sought to lift the stay of proceedings imposed under the July 31, 2008 Order to permit it to proceed with the various ongoing rate disputes under which it claimed Hayes owed it in excess of $2,500,000. Hayes consented to the lifting of the stay of proceedings to permit those claims to proceed. By November, 2008, Teal had not taken any steps to prosecute the arbitrations contemplated under the Contract. Hayes obtained an order establishing a "bar date" by which time Teal was required to have those claims arbitrated. Before the bar date was reached, Teal and Hayes settled all rate disputes between them on the basis that Hayes was not indebted to Teal. That settlement agreement was approved by the Court in February, 2009.

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12 In November 2008, Teal made an offer to Hayes to purchase the Contract for $764,112 with $191,028 on closing and the remainder at the rate of $2.00 per cubic meter of timber harvested under the Contract paid quarterly with the first payment to be made on April 1, 2009. The offer had a December 15, 2009 completion date. The offer provided that Teal would be the successor employer for those employees of Hayes engaged under the Contract who were not eligible for compensation under the B.C. Forestry Revitalization Trust. The offer was open for acceptance until December 1, 2008. The offer was not accepted by Hayes.

13 Under the Contract, Teal was to provide a 2009 logging plan to Hayes. The 2009 logging plan was provided to Hayes on December 9, 2008. On January 12, 2009, a representative of Teal advised a representative of Hayes that Teal was "... suspending operations indefinitely with respect to the work allocated to Hayes ..." Since December, 2008, Teal has not assigned work under the Contract to Hayes. Under the Contract, Hayes is entitled to 34.6% of the stump to dump logging work available relating to TFL46.

Possible Transfer of the Contract to North View

14 The *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/93, and paragraph 18 of the Contract governs the question of whether the Contract can be assigned. Section 4(1) of the Regulation provides: "Every replaceable contract must provide that the interests of the contractor are assignable, subject to the consent of the licence holder, and that consent must not be withheld unreasonably." In accordance with that section, paragraph 18 of the Contract provides:

> 18.01 The Contractor may assign any of its rights or interests under this Agreement, provided the Contractor first obtains the consent of the Company. The Company will not unreasonably withhold its consent to any assignment proposed by the Contractor.
>
> 18.02 Any assignment or transfer by the Contractor of this Agreement or of any interest therein ... without the written consent of the Company will be void....

15 In a May 8, 2009 letter to Teal, Hayes requested the consent of Teal to the assignment of the Contract to North View and advised that they contemplated completing the transfer prior to June 15, 2009. The letter also stated:

16 The outstanding payments under the Purchase Agreement will be secured by a security interest granted by the Purchaser (North View) to Hayes in all of the Purchaser's rights, title and interest in and to the Logging Contract and all proceeds thereof or therefrom.

17 In a May 14, 2009 letter, Hayes provided further information to Teal with respect to North View. In a May 15, 2009 letter, Teal sought information concerning North View and forwarded a questionnaire for completion and return. In a May 22, 2009 letter, Hayes provided the questionnaire to Teal. At that stage, it is clear that not all of the questions set out in the questionnaire had been answered in full. In any event, the questionnaire was not answered to the satisfaction of Teal. Despite the fact that all of the questions it had set out had not been answered, Teal wrote to Hayes on May 29, 2009 advising that it would be withholding their consent to the assignment of the Contract because Teal was of the view that the information provided did not justify providing their consent.

18 The matters which remained of concern to Teal were set out in that letter, being that North View:

> 1. is not a going concern;
>
> 2. when it last operated, was a minor business with revenues of about 1 to 2% of what the Contract currently delivers to the contractor and financial statements that suggest it is financially not viable or capable of performing the Contract;
>
> 3. has no experience performing a Coastal stump to dump contract;
>
> 4. has no equipment or crew or substantive projections of the equipment or crew it needs to perform its obligations under the Contract;

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5. despite the difficult circumstances in the Coastal forest industry, has no business plan demonstrating that it can viably perform the obligations under the Contract, and no apparent financial resources to fund acquisition of equipment or ongoing expenses of operations; and

6. has no executed assignment of the Contract conditional on our consent being provided.

19 The letter then detailed the nature of the concerns of Teal. Despite the position having been taken, Hayes continued to provide information and Teal continued to request further information. On June 5, 2009, Hayes provided further information regarding North View and on June 8, 2009, Teal requested further information. In a June 12, 2009 letter, Teal advised that it was continuing to withhold its consent setting out detailed reasons regarding why they were continuing to take that position. The following "summary" was provided by Teal regarding the proposed assignment to North View:

> In summary, the evidence continues to indicate North View is not a suitable assignee. It is a small and virtually inactive company, particularly in the context of the operation required under the Contract. It has no experience performing a Coastal stump to dump operation, let alone a significant one; no experience with a union operation; few financial resources; no commitments from financial institutions or others to provide the necessary working capital to begin operations; and no equipment or crew. Moreover, it has no firm plans to address these issues in the context of the five-year replaceable contract it seeks to obtain.
>
> In our view, these and the other concerns we have raised comprise, at any time, reasonable grounds for us to withhold consent.
>
> However, beyond this, you are proposing to assign this important Contract to a company with these shortcomings at a time when the Coast forest industry is, as you acknowledge, in a severe downturn. In these conditions, few licensees, Teal included, can afford to expend scarce resources dealing with weak or failing contractors. Teal has already incurred significant time and expenses addressing the financial difficulties experienced by you as the current contractor. You incurred these difficulties despite your significant resources and experience in Coastal, unionized, stump to dump operations. If a contractor with significant resources and experience has had difficulties, it is most probable an under-resourced and inexperienced contractor such as North View will also face significant difficulties. Teal is no position to bear the costs in time, money and process of another failure of the contractor holding this Contract. It is unreasonable to expect Teal to put itself in that position by consenting to an assignment to a contractor with North View's shortcomings.

Should the Dispute Go to Arbitration?

20 The "Dispute Resolution Clause" set out in the Contract provides for a period of 30 days for the parties to attempt to resolve any dispute arising, the ability of either party to then refer the matter to arbitration, the ability of each party to have two days to complete their submissions and the requirement that the arbitrator shall hand down the arbitral award within seven days of the completion of the submissions. However, each party is entitled to an "examination for discovery" as that term is defined in the Rules of Court, including discovery of documents and discovery of one officer representative of the other party, to a maximum of three days. Once the award of the arbitrator has been received, a party would be at liberty to apply to this Court to have the award set aside. Any party not satisfied with the decision of a Judge of this Court could then apply to the Court of Appeal to overturn the decision reached by a Judge of this Court. These parties have had a history of a number of their disputes going to the Court of Appeal.

21 Teal contacted Mr. Daniel B. Johnston regarding his availability to act as an arbitrator. Although Mr. Johnston is Counsel for the law firm representing Hayes, Mr. Johnston has served as an mediator and arbitrator in disputes between Hayes and Teal pertaining to the Contract in the past and has advised Teal that it is "highly likely" that he would be available for "a few days over the next six weeks to act as the arbitrator...."

22 But for the filing under the *CCAA*, disputes under the Contract would be governed by the Dispute Resolution provisions under the Contract and under ss. 162 and 160 of the *Forest Act* and ss. 5 and 48 - 51 of the Regulation under that *Act*: *Hayes*

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Forest Services Ltd. v. Teal Cedar Products Ltd. (2008), 82 B.C.L.R. (4th) 110 (B.C. C.A.). However, the Court under the *CCAA* has the jurisdiction to decide a dispute which arises under the Contract between Hayes and Teal despite the provincial statutory authority and the terms of the Contract: *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.).

23 In *Luscar*, *supra*, the Court dealt with the issue of whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between the parties who had previously agreed under a contract to arbitrate their disputes. The question before the Court was whether the dispute should be resolved as part of the "supervisory role of the reorganization" of the company under the *CCAA* or whether the Court should stay the proceedings while the dispute was resolved by an arbitrator. The decision of the Learned Chambers Judge was that the dispute should be resolved as expeditiously as possible by the Court of Queen's Bench under the *CCAA* proceedings.

24 In upholding the ruling of the Learned Chambers Judge, and concluding that the discretion of the Learned Chambers Judge had been exercised properly, Hunt J.A., on behalf of the Court stated:

> The above jurisprudence persuades me that "proceedings" in s. 11 includes the proposed arbitration under the B.C. Arbitration Act. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated bys. 15(5) of the Rules. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision-making process. Thus, the efficacy of CCAA proceedings (many of which are time-sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-CCAA arbitration. For these reasons, having taken into account the nature and purpose of the CCAA, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under s. 11 of the CCAA.
>
> (at para. 33)
>
> The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
>
> (at para. 50)

25 I agree that the language of s. 11(4) of the *CCAA* is broad enough to allow this Court to substitute a decision in these proceedings for the arbitration process contemplated under the Contract. In this regard, see also the decision in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) where the Court allowed the arbitration stipulated under a contract to be replaced by a claim of the landlord being dealt with by the Court under the terms of a plan of arrangement.

26 Of similar effect are other decisions where the contracts between landlords and tenants were affected by the power contained under s. 11 of the *CCAA*: *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]); *Philip's Manufacturing Ltd., Re* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.); *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) with additional reasons at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]); *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.); and *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.).

27 *Skeena*, *supra*, dealt with the interaction between logging contracts established under the *Forest Act* and the scheme of judicial stays and creditors' compromises available under the *CCAA*. The Court authorized the termination of contracts similar to the Contract here despite the provisions in the contracts themselves. In this regard, Newbury J.A. on behalf of the Court stated at paragraph 37:

> In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Re Dylex Ltd.* (1995) 31 C.B.R. (3d) 106 (Ont. Ct.

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(Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal*; *supra*, and *ReArmbro Enterprises Inc.* (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Syndicat national de l'amianted'Asbestos inc. v. Jeffrey Mines Ltd*, [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

28 In May 31, 2008 Oral Reasons for Judgment (Supreme Court of British Columbia Action No. S080752). In *Backbay Retailing Corporation, and Gray's Apparel Company Ltd.*, the Court approved an assignment of the interests of the Petitioner's interests in leases in certain retail outlets to a third party despite the objection of the landlords and despite the fact that leases provided that the approval or consent of the landlords was required prior to the transfer, assignment or assumption of the leases. The new tenants were not prepared to agree to be liable for past defaults under the leases and required that all of the rights under the leases including those that were expressed to be personal to Petitioners be assigned to them. The petitioners had asserted no common law entitlement to the orders that they sought but, rather, had submitted that the Court has a statutory discretion under the *CCAA* to make the orders sought so long as that is consistent with the objectives of the *CCAA* to facilitate a restructuring. Citing with approval the decision in *Playdium*, *supra*, Hinkson J. concluded that the proposed purchase and sale agreement was in the best interests of the Petitioners, would afford significant benefits to their landlords, and that the refusal of the proposed tenants to assume the liabilities of the immediate predecessors was not a reasonable basis upon which to withhold consent.

29 Hinkson J. also cited with approval the decision of Kent J. in *Gauntlet Energy Corp., Re* (2003), 336 A.R. 302 (Alta. Q.B.): "Interference with contractual rights of creditors and non-creditors is consistent with the objective of the CCAA to allow struggling companies an opportunity to survive whenever reasonably possible." (at para. 58). Hinkson J. also relied on the decision in *Doman Industries Ltd., Re* (2003), 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]) and *T. Eaton Co., Re*, [1997] O.J. No. 6388 (Ont. Gen. Div.). In July 11, 2008 Oral Reasons for Judgment, Levine J.A. denied leave to appeal the Order of Hinkson J.

30 I have concluded that I should override the arbitration provisions in this Contract to allow a Court determination of the issue of whether Teal is or is not unreasonably withholding its approval for the transfer of the Contract to North View. First, I am satisfied that the determination of this issue is less expeditious and more expensive under the arbitration provisions. The past history between these parties is that the arbitration proceedings have been both lengthy and incredibly costly. In the context of a previous application, counsel for Teal indicated that the cost of an arbitration might approach $250,000.00. Second, an arbitration award is subject to judicial review, further lengthening and complicating the decision-making process. Third, there are time constraints imposed by North View regarding the purchase of this Contract. Those deadlines cannot be met by the arbitration proceedings contemplated under the Contract. Fourth, there is no reason why the question whether the consent has been unreasonable withheld or not cannot be determined by the Court. Although a number of arbitrators are experienced in dealing with the type of issues that would arise in the arbitration of other issues which have arisen between Hayes and Teal, the question of whether consent has been unreasonably or reasonably withheld is an issue which is commonly dealt with by the Court and requires no forestry related expertise. Taking into account all of those factors, I am satisfied that the issue raised by the dispute between the parties should be dealt with by this Court in the *CCAA* proceedings. The application of Teal to lift the stay of proceedings granted on July 31, 2008 is dismissed.

Can the Court Approve the Assignment of the Contract, Even Though It Is Not Unreasonable for Teal to Withhold Its Consent?

31 I am satisfied that the *CCAA* Court can approve an assignment even if I reach the conclusion that it is not unreasonable for Teal to withhold its consent. In *Playdium*, *supra*, Spence J. dealt with a proposal to transfer all of the assets of Playdium to a new corporation as the only viable alternative to a liquidation of the assets of the company. Under that tenancy, an agreement could

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not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. Famous Players had argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding management expertise and how their agreement might be brought into good standing. Save for the *CCAA* Order in place, Spence J. concluded that there could be no assignment but that the *CCAA* Order affords "... a context in which the court has the jurisdiction to make the order." Spence J. concluded that he had jurisdiction to compel the assignment of leases over the objections of other parties and held that he had the jurisdiction to approve the assignment of leases even though it would not have been unreasonable for Famous Players to withhold its consent to the assignment. I am prepared to adopt the path taken by Spence J. in *Playdium*, *supra*, if I conclude that it is reasonable for the consent of Teal to be withheld.

Has the Consent of Teal Been Unreasonably Withheld?

32 The determination of the reasonableness of withholding consent is a question of whether a reasonable person would have withheld consent in the circumstances. The determination will be dependent on such factors as the commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed assignee. *Exxonmobil Canada Energy v. Novagas Canada Ltd.*, [2003] 3 W.W.R. 657 (Alta. Q.B.), dealt with the assignment of the management of the interest of Exxonmobil Canada Energy in a gas processing plant. Regarding the argument that the assignment had been unreasonably withheld, Park J. concluded that it was reasonable to have refused the consent to the assignment and, in these regards, made the following statements:

> The reasons for including a consent requirement in the assignment was to allow each party the opportunity of reasonably assessing any future contractual partners. If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed. (at para. 54)
>
> On an objective basis it is entirely reasonable to enquire into the financial capability of a proposed business partner in determining whether to accept that party as a business partner. There must be adequate information provided to EMC regarding the strength of the Solex financial covenant. Further, if NCLP and Solex wish to argue (as they did) that EMC would be in a better position with the financial covenant of each of Solex and NCLP, in the absence of Solex being novated into the Agreement, then it would be reasonable for Solex and NCLP to provide adequate information on the strengths of those financial covenants rather than leaving EMC to surmise.
>
> However, it is not the final strength or weakness of Solex's financial covenant which prevents consent. Rather it is the failure of Solex to provide relevant and material financial information which will enable EMC to assess the financial strength of Solex on a go forward basis. The absence of financial information provided by Solex means that EMC has reasonably withheld its consent. EMC in the circumstances cannot satisfy itself as to the financial ability of Solex to meet its prospective obligations as the proposed assignee under the Agreement.
>
> Finally, I note that EMC has not withheld its consent for improper reasons. As I noted previously, the desire of EMC to resolve outstanding issues between itself and NCLP is a separate issue, and is not tied to EMC's desire to receive proper and adequate financial information from Solex as a separate entity. EMC did not withhold its consent in order to secure additional benefits as argued by Solex and NCLP.
>
> (at paras. 58-60)

33 The reasonableness of withholding consent has often been considered in the context of leases. In *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 9 R.P.R. (4th) 103 (Ont. S.C.J.), Cullity J. concluded that the landlord was justified in its decision based on the lack of information concerning the business experience of the proposed assignee stating:

> In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:
>
>> 1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable: *Shields v. Dickler*, [1948] O.W.N. 145 (C.A.),at pages 149-50; *Sundance Investment Corporation Ltd. v. RichfieldProperties Limited et*

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> *al*, [1983] 2 W.W.R. 493 (Alta. C.A.), at page 500;cf. *Welch Foods Inc. v. Cadbury Beverages Canada Inc.* (2001), 140 O.A.C. 321 (C.A.), at page 331. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent: *Whiteminster Estates v. HedgesMenswear Ltd.* (1972), 232 Estates Gazette 715 (Ch. D.), at pages715-6; *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] O.J. No. 4100 (S.C.J.), at para. 35.
>
> 2. In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: *Bromley ParkGarden Estates Ltd. v. Moss*, [1982] 2 All E.R. 890 (C.A.), at page 901-2 per Slade L.J. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances: *Pimms, Ltd. v. Tallow Chandlers in the City of London*, [1964] 2 All E.R. 145 (C.A.), at page 151.
>
> 3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms: *Jo-EmmaRestaurants Ltd. v. A. Merkur & Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. Div. Ct.); *Re Town Investments Ltd.*, [1954] Ch. 301 (Ch. D.) -but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion: *Federal Business Development Bank v. Starr* (1986), 55 O.R. (2d) 65 (H.C.), at page 72. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: *Bromley Park Garden EstatesLtd. v. Moss*, above, at page 901 per Dunn L.J.)
>
> 4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor: *Ashworth Frazer Ltd., v. Gloucester City Council*, [2001] H.L.J. 57.
>
> 5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases see, for example, *Shanley v. Ward* (1913), 29 T.L.R. 714 (C.A.); *Dominion Stores Ltd. v. Bramalea Ltd.*, [1985] O.J.No. 1874 (Dist. Ct.)
>
> 6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court: *Bickel et al. v. Duke ofWestminster et al.*, [1976] 3 All E.R. 801 (C.A.), at pages 804-5;*Ashworth Frazer Ltd. v. Gloucester City Council*, above, at para. 67;*Dominion Stores Ltd. v. Bramalea Ltd.*, above, at para. 25.

(at para. 9)

34 Of the six general areas of concern raised by Teal, the objection that there was no executed Assignment of Contract is no longer an issue as an executed assignment conditional on the consent of Teal has now been provided.

35 Regarding the concern regarding the lack of equipment or crew, I am satisfied that this should not be an impediment to the assumption of the contractual obligations by North View. Some of the crew that will be required has already been contracted through Horsman Trucking Ltd. ("Horsman"), who has entered into a services subcontract with North View. In general, I accept the evidence of Donald P. Hayes who makes this statement in his July 2, 2009 Affidavit:

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> At present there is no work available under the Teal Bill 13 Contract and no equipment is currently required. When logging recommences under the Contract, the Purchaser will be able to acquire equipment either directly or be able to subcontract out portions of the work (as is currently done by Hayes) and service the Contract without difficulty.
>
> There is currently a surplus of logging equipment on Vancouver Island. The most recent auction of equipment was held in June, 2009 by Ritchie Bros. in Duncan, BC. The sale prices at that recent Ritchie Bros.' auction were extremely low and any contractor on the Island will have no difficulty acquiring the necessary equipment at some of the lowest historic prices for that equipment.
>
> There is current an abundance of logging equipment from Coastal BC operations that has been returned to various leasing companies. I am aware of certain lessors that are now re-leasing this equipment without the requirement of a down payment by the new lessee. Essentially the new lessee simply makes payments based on the returned value of the equipment. This will make it very easy for any contractor or subcontractor to acquire any equipment needed to service a contract for logging or road building.

36 I am also satisfied that North View sets out a satisfactory explanation regarding equipment in its July 16, 2009 letter to Teal:

> I have made inquiries in the market as to the availability of equipment. Hayes has all of the equipment for sale that I would require to start the operations. I confirm that in the event of short notice from Teal that Hayes would rent or rent to purchase suitable equipment as required including a grapple yarder, log loaders, back spar, cat etc.
>
> Finning also has new and used inventory in stock. I am also aware of several contractors who are shut down and will likely have equipment for short term rent or rental purchase.
>
> Pick up trucks are readily available for purchase or lease in the market and Hayes will sell me the industrial box liners required.
>
> Until there is a logging plan and a start date, I have not tried to firm up equipment arrangements. Without the logging plan and a start date, I cannot be sure of the equipment actually required or the timing of that requirement.

37 Regarding the concern that North View is not a going concern, while it is clear that North View is an entity which is not presently operating, my review of the experience of the principals of North View allows me to conclude that the principals have sufficient experience to allow North View to be successful in performing the work that is provided by Teal under the Contract. The principal of North View has over 35 years of logging experience and worked as a subcontractor for Hayes between 2005 and 2008 on the work required under the Contract. As well, North View will have the assistance of the principals of Hayes, and has contracted with an experienced hauler to subcontract the hauling of timber to the dump operations.

38 I also accept the following evidence regarding the proposed operations of North View under the Contract which is set out in the July 24, 2009 Affidavit of Donald P. Hayes:

> The contract will be operated as follows:
>
>> (a) Falling. The falling work under the contract is currently done by a sub contractor, Gemini, they had done the falling work for years, and will continue to do so for North View Timber Ltd. ("North View");
>>
>> (b) Yarding. Mr. Horsman is one of the most experienced yarders on the coast and has done this work on this contract for Hayes. He will do this work;
>>
>> (c) Loading. This work will be contracted out to an experienced loader. The loading takes place in close proximity to the yarding and can be supervised by the yarder, in this case Mr. Horsman;

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(d) Hauling. The hauling will be subcontracted to Horsman Trucking Ltd, a well know and experienced hauler on the Island. I have know them for years and they have a good reputation.

39 I am satisfied that Teal should have no hesitation in concluding that the equipment, crew and expertise to undertake the work required under the Contract will be available to North View. In this regard, I am also mindful of the fact that, if North View fails to perform under the Contract, Hayes will be in a position to take back the Contract and then perform the logging required under the Contract. In the past, Teal was satisfied with the performance of Hayes under the Contract, and should have some solace that Hayes will be in a position to perform under the Contract if North View does not.

40 Regarding the concern of Teal that North View is not financially capable, I note that a $50,000.00 deposit has already been paid, that an agreement has been reached with Horsman to sell to Horsman the hauling subcontract for $400,000.00 so that the further $277,000.00 required at the date of closing will be available, that $100,000.00 will be set aside to meet capital requirements, and that preliminary discussions are underway with B.D.C. and Caterpillar Finance regarding financing once any logging plan proposed by Teal is known. In this regard, I am satisfied that the payments under the Contract must be made by Teal every two weeks, and I take into account the advice received from North View that its expenses need to be paid monthly so that the working capital that would otherwise be required to service this Contract is reduced.

41 Finally, Teal is concerned that North View has no "business plan". I am satisfied that this concern is answered in the July 16, 2009 letter from North View to Teal:

I have not regularly prepared business plans. My practice is to study the logging plan, when I receive it and then determine the equipment and people that I need. I then closely supervise the production and all purchases to control the cash flow.

I have had Mr. Donald P. Hayes assist me with the preparation of the

Business Plan. Mr. Hayes is a Chartered Accountant and the President of Hayes Forest Services Limited, the current operator of the contract. This is a much more detailed plan than I could produce myself. I have reviewed it with Mr. Hayes and based on my knowledge I confirm that in my opinion the Business Plan reflects the economic conditions in the industry and uses reasonable assumptions concerning rates, costs, financing and working capital needs including the payment of the $3.00 per cubic meter promissory note to Hayes. I further confirm that I believe that the contract is viable at market rates.

This Business Plan has not been independently reviewed but was developed in conjunction with Mr. Hayes who has operated this contract for over 20 years and is extremely knowledgeable in respect of this contract. Once the actual logging plan is provided, it will likely require material changes to the Business Plan.

42 As well, it should be obvious to Teal that it is difficult to put forward a "business plan" when the 2009 and 2010 work allocated under the Contract is not known. While it is clear that North View does not have the present capacity or business plan in place to handle a cut of 125,000 cubic metres, it is also clear that there is no current work under the Contract and this yearly volume has not been required of Hayes for over three years.

43 In the context of leases, the Court must look at all of the circumstances to determine if consent has been reasonably withheld: *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1987), 13 B.C.L.R. (2d) 367 (B.C. S.C.) at para. 51. The *Forest Act* and the *Timber Harvesting Regulations* require similar contracts to be assignable and puts the onus on licence holders such as Teal to justify their refusal to consent to any assignment. Taking into account all of the circumstances surrounding this question, I am satisfied that Teal has not shown that it is reasonable to withhold its consent. At the same time, I am satisfied that Hayes has met the burden of showing that a reasonable person would not have withheld consent.

44 In this regard, I have concluded that at least part of the refusal to provide consent was designed by Teal to achieve a collateral purpose that is wholly unconnected with the bargain between Teal and Hayes. In November 2008, Teal made an offer to purchase the Contract for $764,112.00. From this, I can conclude that Teal believes that there is significant value to it if the Contract cannot be performed by Hayes or if Teal can otherwise obtain the benefits of the Contract in order that they can be

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transferred to another operator. Teal has also provided an offer through 858 to purchase the Contract for $1,400,000.00. This is further evidence of the value to Teal of stopping a transfer of the Contract to North View in the hope that the Contract will revert to it by virtue of the inability or unwillingness of Hayes to perform under the Contract.

What Should Be Made of the Offer of 858?

45 The offer of 858 was open for acceptance until August 11, 2009 and was directed to the attention of Hayes Forest Services Ltd. ("Offer"). It was a condition of the Offer that Horsman enter into a replaceable services sub-contract with 858 in the same form as the Horsman contract with North View. As at August 14, 2009, no confirmation had been received from Horsman that they were prepared to accept that stipulation. The purchase price under the Offer is $1,400,000, with $400,000 at the time of closing (being the amount that would be available to 858 under the Horsman contract) and with balance of the purchase price by a promissory note for $1,000,000.

46 In response to the concern raised by Hayes that Teal would be in a position to control the amount of work that would be available to 858 so that 858 would not be in a position to pay the balance due and owing under the Promissory Note quickly or at all, the following provision was inserted after the first draft of the Offer was forwarded to Hayes:

> 2.11 **Amount of Work Dispute.** Teal and the Purchaser agree that if, at any time before the Purchaser pays the Contract Purchase Price in full, the Vendor reasonably believes that Teal has failed to meet its obligation under Paragraph 2.05 of the Teal Contract, the Vendor may give notice (the "**Dispute Notice**") to Teal and the Purchaser specifying in reasonable detail the particulars of the default, in which case a dispute is deemed to exist between the Vendor and Teal under this Agreement, which dispute, despite the reference in Paragraph 2.05 of the Teal Contract to resolving amount of work disputes in accordance with the Contract Regulation (as defined in the Teal Contract), will be resolved as follows:
>
> (a) as soon as reasonably practicable after the notice is given, the Vendor and Teal will:
>
> (i) cause their respective appropriate personnel with decision making authority to meet in an attempt to resolve the dispute through amicable negotiations; and
>
> (ii) provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate those negotiations;
>
> (b) if the dispute is not resolved by such negotiations within 15 days of the Vendor having given the Dispute Notice, either the Vendor or Teal may, within 30 days after the Dispute Notice was given, deliver a Notice (a "Mediation Notice") to the other party requiring the dispute to go to mediation, in which case the Vendor and Teal will attempt to resolve the dispute by structured negotiation with a mediator administered under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre before a mediator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre;
>
> (c) if:
>
> (i) the dispute is not resolved within 14 days after the mediator has been agreed upon or appointed under Section 2.11(b); or
>
> (ii) the mediation is terminated earlier as a result of a written notice by the mediator to the Vendor and Teal that the dispute is not likely to be resolved through mediation, either the Vendor or Teal may, not more than 14 days after the conclusion of the period referred to in Section 2.1 1(c)(i) or the receipt of the notice referred to in Section 2.11(c)(ii), as the case may be, commence arbitration proceedings by giving a notice of arbitration to the other party, in which case the dispute will be referred to and finally resolved by arbitration administered under the British Columbia International Commercial Arbitration Centre's Shorter Rules for Domestic Commercial Arbitration before an arbitrator agreed upon by the Vendor and Teal or, failing agreement, appointed by the

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Centre, and the decision of the arbitrator will be final and binding on the Vendor, the Purchaser and Teal, but will not be a precedent in any subsequent arbitration under this Section;

(d) pending resolution or other determination of the dispute under this Section, the Purchaser will continue to perform its obligations under the Teal Contract; and

(e) if, as a result of the resolution or other determination of the dispute under this Section, Teal allocates an additional amount of work to the Purchaser, the Purchaser will perform that additional amount of work in accordance with the terms of the Teal Contract.

47 Some of the objections to the Offer are summarized in the August 10, 2009 letter from counsel for Hayes to counsel for Teal:

As you are aware our client has entered into a contract with North View Logging Ltd. to sell that contract to North View. Having done so Hayes is not in a position to enter into a second contract to sell the same contract.

Apart from that problem, there are a number of other issues that make this offer problematic from Hayes' perspective, these include:

1. The proposed purchase price is substantially less than the North View offer, some $250,000. In addition, to obtain an extension of the closing of the transaction to North View, Hayes has had to agree to a break fee of $50,000 payable to North View if Hayes sells the contract to Teal. A copy of that agreement is enclosed;

2. The rate of payment on the Promissory Note is only $2 per M3 as opposed to the $3 per M3 to be paid by North View;

3. The Purchaser is a shell company incorporated on August 6, 2009 that appears to have no assets. It is proposed that the sale proceeds derived from the Horsman Trucking subcontract be used to fund the cash component of the transaction, with the balance to be paid by the $2 per M3 payable under the Promissory Note. The Purchaser will not have any of its assets invested in this contract and is not at any financial risk. There is no consequence to the Purchaser simply walking away from its obligations and allowing Teal to cancel the underlying Bill 13 contract for non performance;

4. The only security proposed is from what appears to be a shell company and even that is limited to the underlying Bill 13 contract itself. If the Purchaser, a Teal nominee, defaults in performance, Teal will cancel the Bill 13 contract, and the "security" held by Hayes would vanish;

5. Payment under the promissory note is wholly dependent upon Teal allocating the amount of work that the holder of the Bill 13 contract is entitled to. An arm's length purchaser, such as North View, has a strong economic interest in enforcing its rights as against Teal to ensure that it receives the volume of work it is entitled to. The Purchaser proposed by Teal is a Teal nominee and will have no such economic interest. Teal has taken every step it can in the course of the CCAA proceedings to terminate the Bill 13 contract. We see no reason to expect that this attitude will change once both sides of the Bill 13 contract are in the control of Teal;

6. Teal can arbitrarily reduce and or delay the amount payable under the Promissory Note by allocating work that could or should be done by Hayes to other contractors working for Teal on TFL 46. It is doing so now;

7. There is no evidence of the ability of the Purchaser to do the work required under the contract, its finances, equipment or personnel.

48 Many of the objections raised by Hayes regarding the Offer parallel many of the objections raised by Teal regarding the North View offer. While Teal and 858 have common shareholders, none of the information that Teal required of North View is available to Hayes or the Court regarding the Offer of 858. If it is the position of Teal that the Court should approve the offer of

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858 because it is reasonable to do so and is in the best interests of the creditors of Hayes to do so, then I conclude that Teal has not met the burden of showing that it is. In the context of whether withholding consent has been reasonable or not, a number of factors apply. If those factors are applied to the application of Teal, it is clear that a reasonable person would withhold consent and it is clear that approval of the offer of 858 would not be ordered. It is difficult for Teal to argue on one hand that a reasonable person would withhold consent for the proposed assignment to North View but, at the same time, the Court should approve the proposed transfer to 858, even though there is even less information available to allow the Court to reasonably assess the future contractual partner recommended by Teal. There is no information regarding the financial capability of 858. There is nothing which would allow the Court to satisfy itself as to the financial ability of 858 to meet its prospective obligations. As well, the Court is not in a position to approve offers where the offer continues to contain conditions precedent that have not been met. In this regard, the approval of Horsman to "transfer" its contract with Hayes to 858 so that 858 receives $400,000.00 remains an unfulfilled condition.

49 There are also significant economic advantages to the creditors of Hayes to accept the North View offer and for the Court to make a finding that the consent of Teal has been unreasonably withheld so that the assignment of the Contract to North View should be approved. First, the offer of North View is $214,266.00 better. Second, the balance of the purchase price is paid off more quickly as the payment will be based on $3.00 per cubic metre, whereas the payment of the balance of the purchase price contemplated by 858 will be based on a payment of $2.00 per cubic metre. Third, if there is default, it is clear that the creditors of Hayes will benefit if there is a reversion of the Contract to Hayes. I cannot conclude that is the case with the Offer. Fourth, it may well be that Hayes will have to pay a $50,000.00 cancellation fee to Horsman if the Offer is approved by the Court.

50 It also should be noted that 858 is bringing none of its own money "to the table". Rather, all of the $400,000.00 that will be due on closing comes from the funds that would be available from Horsman if Horsman is prepared to enter into a similar subcontract with 858. As well, all payments of the $2.00 per cubic metre contemplated under the Offer are wholly dependent upon Teal allocating the amount of work that is contemplated under the Contract. North View has a stronger economic interest to enforce its rights against Teal to ensure that it receives the volume of work it is entitled to under the Contract whereas 858 has no such economic interest. As well, what is proposed under the Offer provides ample opportunity for the arbitration process and appeals therefrom to delay the question of the allocation of work to 858.

51 I am satisfied that Teal has unreasonably withheld its consent for the assignment of the Contract from Hayes to North View. Even if I had not reached that conclusion, I am satisfied that the advantages to the creditors of Hayes far outweigh any disadvantages so that I should exercise the discretion available to me under the *CCAA* to approve the assignment of the Contract despite the consent of Teal being reasonably withheld. The sale to North View Timber Ltd. of the replaceable stump to dump logging contract between Hayes Forest Services Limited and Teal Cedar Products Ltd. is approved. The application by Teal Cedar Products Ltd. to approve a sale of that contract to 858434 BC Ltd. is dismissed.

52 The parties will be at liberty to speak to the question of costs.

Application for approval of sale granted; application to lift stay of proceedings dismissed.

APPENDIX "A"

Schedule "D"

Dispute Resolution Cause Timber Harvesting Contracts

Dispute Resolution

Where the Work performed by the Contractor under an agreement with the Company is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, and where a dispute arises over a term, condition or obligation under the agreement which cannot be resolved amicably between the parties within 30 days of the dispute arising, the Company and the Contractor mutually agree that either party may invoke the following dispute resolution provisions:

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(a) The parties may by agreement first attempt to resolve their dispute with the assistance of a single professionally qualified mediator. The mediator shall be chosen by agreement between the parties. In the event that the parties fail to agree on the choice of a mediator, then a mediator shall be chosen by a mutually agreed upon third party unrelated to the parties to this agreement.

(b) In the event that the mediator is unsuccessful in assisting the parties to resolve their dispute within 5 days of the commencement of the mediation, or either party wishes the dispute to proceed directly to arbitration, then either party may require by notice in writing that the. matter be referred to arbitration as provided for by the provisions of the Dispute Resolution Clause.

Where either party to the agreement has commenced an action in a court of competent jurisdiction regarding a term, condition or obligation under the agreement, and the action is in good standing, then the parties to the agreement shall not invoke or continue with the dispute resolution provisions of the agreement until such time as the court action has been finally concluded. Where a court issues a judgement in an action regarding a term, condition or obligation under the agreement and the judgement becomes final, then that judgement shall constitute the final resolution of the dispute between the parties.

Arbitration

The Company and the Contractor mutually agree that where a dispute is to be resolved by arbitration (the "Arbitration Proceeding"), it shall be so resolved by a single arbitrator to be agreed on by the parties. If the parties are unable to agree on the choice of arbitrator then a single arbitrator shall be selected pursuant to the Commercial Arbitration Act, S.B.C. 1996, c. 3 as amended.

The Arbitration Proceeding shall be conducted in Vancouver British Columbia or such other place as the parties may agree in writing. The rules of procedure for the Arbitration Proceeding shall be those provided for in the Commercial Arbitration Act for domestic commercial arbitrations. as amended by the provisions of the Dispute Resolution Clause.

Each party shall only be entitled to two days to complete their submissions to the arbitrator. Each party shall have the right of reply to the submission of the other for one hour only. ....

The arbitrator shall hand down the arbitral award within 7 days of the completion of the submissions and reply of the parties.

Discovery

Each party shall be entitled to the following pre-arbitration "examination for discovery" rights, as that term is defined in the Rules of Court of the Supreme Court of British Columbia:

(a) discovery of all relevant documents pertaining directly to the issue or issues in dispute between the parties;

(b) discovery of one officer or representative of the other party;

(c) each party shall be allowed to discover the officer or representative of the other for no more than one day for each $50,000.00 in dispute to a maximum of three days, and where no amount has been specified, then each party shall only be allowed a maximum of two days of discovery of the officer or representative of the other.

Costs of the Dispute Resolution

Where a provision in the agreement has been referred to mediation or arbitration by the Company or the Contractor, then any funds actually in dispute shall be deposited in an interest bearing trust account. Upon the resolution of the dispute, the funds and interest thereon shall be paid to the Company and the Contractor proportionately as agreed between the parties, or as directed by the arbitration award.

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The Company and the Contractor shall pay all costs associated with the provision of mediation or arbitration services forthwith upon an invoice for these services being rendered, equally, except as provided for below.

The Company and the Contractor shall each bear their own costs in resolving the dispute between them, with the following exceptions:

(a) Where one party is found, on a balance of probabilities

(i) not to have pursued its various rights and responsibilities under this agreement in good faith,

(ii) not to have used all reasonable effort to resolve its dispute with the other through mediation with a minimum of delay and expense, or

(iii) not to have used all reasonable effort to resolve its dispute with the other by the Arbitration Proceeding with a minimum of delay and expense,

then the offending party shall pay the disbursements and one half of all other direct expense incurred by the other;

(b) Where both parties are found, on a balance of probabilities, to have acted in bad faith or made less than all reasonable effort to resolve their dispute, then each party shall bear its own direct costs and disbursements and shall share equally all costs associated with the conduct of the mediation and/or the Arbitration Proceeding; and

(c) For the purposes of sub-paragraphs (a) and (b) of this paragraph, the costs associated with the provision of mediation and arbitration services and the Conduct of the Arbitration Proceeding shall be considered a disbursement.

Any award or division of costs referred to herein shall constitute a liquidated debt immediately due and payable by the one party to the other, and shall be satisfied to the extent possible by the indebted party to the other from the funds held in trust and referred to above.

Failure of Arbitration

Where the Contractor and the Company agree in writing, or where the arbitrator is unable to resolve the dispute, then the dispute shall be resubmitted for arbitration in accordance with the provisions of the Dispute Resolution Clause of the agreement.

Where the inability of the arbitrator to resolve the dispute arises out of the misconduct of one of the parties in the dispute or a party affiliated with one of the parties in the dispute, then the dispute shall be deemed to be settled in favour of the other party with that other party entitled to their full costs arising out of the dispute as a liquidated debt.

End of Document

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TAB 7

2001 CarswellOnt 3893
Ontario Superior Court of Justice [Commercial List]

Playdium Entertainment Corp., Re

2001 CarswellOnt 3893, [2001] O.J. No. 4252, 109 A.C.W.S. (3d) 207, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

Spence J.

Heard: October 29 and 30, 2001

Judgment: November 2, 2001 [*]
Docket: 01-CL-4037

Proceedings: additional reasons at [2001] CarswellOnt 4109 (Ont. S.C.J. [Commercial List])

Counsel: *Paul G. Macdonald, Alexander L. MacFarlane*, for Covington Fund I Inc.
Gary C. Grierson, J. Anthony Caldwell, for Famous Players Inc.
Craig J. Hill, for Pricewaterhouse Coopers Inc.
Roger Jaipargas, for Monitor
Gavin J. Tighe, for Toronto-Dominion Bank
Michael B. Rosztain, for Canadian Imperial Bank of Commerce
Geoff R. Hall, for Ontario Municipal Employees Retirement Board
David B. Bish, for Playdium Entertainment Corporation
Julian Binavince, for Cambridge Shopping Centres Limited

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Spence J.*:

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — followed

Dominion Stores Ltd. v. Bramalea Ltd. (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) — considered

GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 1 O.T.C. 322, 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to

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T. Eaton Co., Re (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

APPLICATION by corporations for approval of proposed transfer of assets.

***Spence J.*:**

1 These reasons are provided in brief form to accommodate the exigencies of this matter.

2 The Playdium corporations and entities (the "Playdium Group") have been engaged in restructuring efforts under the *Companies' Creditors Arrangement* Act (the "*CCAA*"). These efforts have been unsuccessful. It is now proposed that substantially all the Playdium assets will be transferred to a new corporation ("New Playdium") which will be indirectly controlled by Covington Fund I Inc. and Toronto-Dominion Bank. This transfer would be made in satisfaction of the claims of those two creditors and Canadian Imperial Bank of Commerce, the primary secured creditors and the only creditors with an economic interest in the Playdium Group.

3 The primary secured creditors intend that the Playdium Group's business will continue to be operated as a going concern. If successful, this would potentially save 300 jobs as well as various existing trade contracts and leases.

4 This transaction is considered to be the only viable alternative to a liquidation of Playdium Group and the adverse consequences that would flow from a liquidation. Interests of members of the public also stand to be affected, in respect of prepaid game cards and discount coupons, which are to be honoured by the new entity.

5 The proposed transaction would involve assignment to the new entity of the material contracts of the business, including the Techtown Agreement with Famous Players.

6 Playdium Group is not currently in compliance with the equipment supply provisions of s.9(e) of the Techtown Agreement. The new entity is to take steps, as soon as reasonably practicable, that are intended to achieve compliance with s.9(e). Famous Players disputes that the proposed steps will have that effect and opposes approval of the proposed assignment of the Techtown Agreement to the new entity.

7 Covington says that the assignment of the Techtown Agreement is a critical condition of the proposed transaction: without the assignment, the transaction cannot proceed.

8 Covington says that the structure of the proposed transaction is such that it does not require the consent of Famous Players. This is disputed by Famous Players, based on s.35 of the Agreement and the fact that the assignee is to be controlled by Covington and TD Bank.

9 Covington submits that it is in the best interests of all the shareholders that the proposed transaction, including the assignment of the Techtown Agreement, be implemented. Covington and TD Bank seek an order authorising the assignment and precluding termination of the Techtown Agreement by reason only of the assignment or certain defaults. Famous Players has not given any notice of default to date. The prohibition against termination for default is not to apply to a continuing default under para.9(e) of the Agreement.

10 The primary secured creditors also seek an extension of the existing stay until November 29, 2001 to finalize these transactions. To facilitate the transactions, Covington and TD Bank seek the appointment of Pricewaterhouse Coopers as Interim Receiver.

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11 Based on the cases cited, including *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]), and the statutory provisions and text commentary cited, the court has the jurisdiction to grant the orders that are sought, and may do so over the objections of creditors or other affected parties. Also, the decision in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), supports the appointment of an interim receiver to do what "justice dictates" and "practicality demands".

12 Famous Players says that no reason has been shown to expect the proposed course of action will bring the Techtown Agreement into compliance and make it properly operational; Covington has not shown it has expertise to bring to the business operations; the operations are grossly in default at present, and the indicated plans are inadequate to cure the default, which has serious adverse consequences to Famous Players.

The Relief Sought

13 The applicants revised the form of order that they seek, to provide (in paragraph 15) that a counterparty to a Material Agreement is not to be prevented from exercising a contractual right to terminate such an agreement as a result of a default that arises or continues to arise after the filing of the Interim Receiver's transfer certificate following completion of the contemplated transactions.

14 Famous Players moved for certain relief that was apparently formulated before the applicants' revisions to their draft order. From the submissions made at the hearing, I understand the position of Famous Players to be that it opposes the order sought by the applicants, at least insofar as it would approve the assignment of the Techtown Agreement, but the submissions of Famous Players did not address specifically the relief sought in their notice of motion, presumably because of the revision to the applicants' draft order as regards continuing defaults.

Section 35 of the Techtown Agreement

15 Section 35 permits an assignment to a Playdium affiliate. The proposed assignee is to be a new company, "New Playdium", to be incorporated on behalf of the Playdium Group, and to be owned by it at the precise time when the assignment occurs. The assignment will occur, it may be presumed, if and only if the contemplated transactions of transfer are completed. On completion of the contemplated transactions, New Playdium will be owned by a corporation controlled by Covington and TD Bank. That outcome reflects the purpose of the assignment, which is to transfer the benefit of the Techtown Agreement to the new owners. Accordingly the assignment, viewed in terms of its substance and not simply its momentary constituent formalities, is not a transfer to a Playdium affiliate. This view is in keeping with the decision in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]).

16 Under s.35, the Agreement therefore may not be assigned without the consent of Famous Players, which consent may not be unreasonably withheld. Famous Players says that it has not been properly requested to consent and it has not received adequate financial information and assurances as to the provision of satisfactory management expertise and as to how the Agreement is to be brought into good standing.

17 The submission to the contrary is that the Agreement is really in the nature of a lease, not a joint venture involving the requirement for the provision to the venture of management services. This submission has some merit. Playdium seems principally to be required to supply game equipment. Section 26 of the Agreement disclaims any partnership or joint venture. If the business is to be sold to the new owners as a going concern, it would be likely to have the same competence as before, unless the contrary is shown, which is not so. Covington says that financial information was offered and not accepted and (although this is either disputed or not accepted) that no further request was made for it.

18 Reference was made to the decision in *Dominion Stores Ltd. v. Bramalea Ltd.* (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) that an assignment clause of this kind is to be construed strictly, as a restraint upon alienation, and its purpose is to protect the

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landlord as to the type of business carried on. The case also says that a refusal for a collateral purpose or unconnected with the lease is unreasonable.

19 On the material filed, Famous Players has the prospect of a better deal with Starburst and this must be considered a factor in their withholding of consent. It is also relevant that Playdium is not in compliance with the Agreement and it is not clear how soon compliance is intended to be achieved under the Covington proposal. It is not clearly unreasonable for a party in the position of Famous Players to look for a better deal when the counterparty is in a condition of continuing non-compliance.

20 The propriety of the proposed Starburst deal is disputed on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. The relevance of this dispute is considered below.

Whether Court should approve the Assignment of the Techtown Agreement

21 This is the pivotal issue in respect of the motion.

22 Famous Players objects to the assignment. Famous Players refuses its consent. With regard to s.35 of the Agreement, and without reference to considerations relating to *CCAA* (which are dealt with below), I cannot conclude that the withholding of consent is unreasonable. So s.35 does not provide any right of assignment.

23 If there were no *CCAA* order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. The *CCAA* order affords a context in which the court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by *CCAA*: see the *Red Cross* decision.

The factors to be considered

24 The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under *CCAA* and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

25 Famous Players submits that, on the basis of the *Red Cross* decision, the court should approve the appointment of an interim receiver with power to vest assets, in a *CCAA* situation, where there is no plan, only where certain appropriate circumstances exist as set out in *Red Cross*, and those circumstances do not exist here.

26 In this regard, the first factor mentioned in *Red Cross* is whether the debtor has made a sufficient effort to obtain the best price and has not acted unprovidently. Famous Players says that there has been no substantial effort to develop a plan to sell the business components (such as the LBE's) as going concerns, no tender process, no marketing effort and no expert analysis. From the reports of the monitor it appears efforts were made to find prospects to purchase debt or equity or assets and there was no indication of viable deals. Whether or not the best price has been obtained, on the material it appears the value of the assets would not satisfy the claims of the principal secured creditors. There is nothing to suggest that a better deal could be done without including the Techtown Agreement; according to the monitor it would have been a key part of any viable plan. Famous Players is not in the position of a creditor looking to be paid out, so its submissions as to the need to get the best price do not seem to be well addressed to its proper interest in this case, and the others who have appeared who are creditors are not objecting to the process and the result.

27 The second factor mentioned in the *Red Cross* decision is that the proposal should take into consideration the interests of the parties. The proposal has potential benefits for trade creditors, employees and members of the public which would flow from continuing the business operations as proposed.

28 The other two criteria in *Red Cross* are that the court is to consider the efficacy and integrity of the process by which the offers were obtained and whether there has been unfairness in the working out of the process. Famous Players says that, as regards its interests, there has been no participation afforded to it in designing the proposal, although the Techtown Agreement is said to be critical to the proposal, and nothing to show how or when the s.9(e) requirements will be brought into compliance.

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There were discussions between the parties in August but they did not lead to any productive result. It is true that it is not clear how or when compliance will be brought about. This point is considered below.

The effect on Famous Players

29 Famous Players says that if the applicants are given the relief they seek, the proposed transactions will close and the *CCAA* stay will be lifted — which would happen at the end of November, on the present proposal — and the prospect would be that Famous Players would then issue notices of default in respect of s.9(e), notice of termination would follow and the entire matter would end up in litigation within two months. That is possible. It is also possible that the parties would work out a deal. Covington is to invest about $3 million in the new entity so there will be an incentive for it to find ways to make the new business work.

30 If the parties cannot resolve their differences, then litigation might well result. Famous Players would be saved that prospect if the assignment were not to be approved and the companies instead were liquidated in bankruptcy. The delay occasioned by a further stay and subsequent litigation would also presumably result in increased losses of revenue to Famous Players compared to a full compliance situation or an immediate termination. There is nothing before the court to suggest that, if Famous Players has to resort to litigation and succeeds, it would not be able to recover from the new company. On this basis, the right of Famous Players to seek relief for a default seems to address adequately the risk of continuing non-compliance with s.9(e). Accordingly, the provision preserving that right is a key consideration in favour of the motion.

31 The other reason Famous Players evidently has for opposing the applicants' motion is that it could do a better deal with Starburst. If that were the only reason it had for withholding consent to an assignment of the Agreement, it would not be a reasonable basis for withholding consent under s.35 of the Agreement. It can be inferred from that consideration that it should also not be regarded as, by itself, a proper reason to allow the objection to stand in the way of the proposed assignment as part of the proposal to enable the business to continue.

32 Moreover, as noted above, the propriety of the Starburst transaction is disputed, on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. Based on the submissions before the court, the dispute could not be said to be without substance. If the proposed transactions are allowed to proceed and litigation ensues between Famous Players and New Playdium, there would presumably also be an opportunity for the dispute about the possible breach, and its implications for the propriety of the proposed deal between Starburst and Famous Players, to be pursued in litigation.

33 If instead the proposed transactions are precluded by a denial of the requested order, Playdium would go into bankruptcy and it would lose any opportunity to obtain the benefit of any rights it would otherwise have to oppose the proposed deal between Starburst and Famous Players. Allowing the Playdium transactions to proceed would effectively preserve those rights.

Conclusion

34 For the above reasons the motion of the applicants is granted. The initial order of this court made February 22, 2001 shall be continued to November 29, 2001, and the stay period provided for therein shall be extended to November 29, 2001. The parties may consult me about the other terms of the order, and costs.

Application granted.

Footnotes

* Additional reasons at 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

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TAB 8

2008 BCSC 1876
British Columbia Supreme Court [In Chambers]

Backbay Retailing Corp., Re

2008 CarswellBC 3225, 2008 BCSC 1876, [2008] B.C.J. No. 2784,
[2010] B.C.W.L.D. 2, 181 A.C.W.S. (3d) 637, 59 C.B.R. (5th) 107

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, R.S.B.C. 2002, C. 57

AND IN THE MATTER OF BACKBAY RETAILING CORPORATION,
AND GRAY'S APPAREL COMPANY LTD. (Petitioners)

Hinkson J.

Heard: May 31, 2008
Oral reasons: May 31, 2008
Docket: Vancouver S080752

Counsel: M.C. Verbrugge, M. Martindale for Petitioners, Mariposa Stores Limited Partnership
M.C. Verbrugge for Gerhard Horn Investments Ltd.
K.M. Jackson for Monitor, Deloitte & Touche Inc.
W.A. Petersmeyer, K.K. Khalsa for Canada Customs and Revenue Agency
D.A. Garner for Ivanhoe Cambridge Inc., 20 VIC Management Inc., OMERS Realty Management Corporation, Morguard Investments Limited

Subject: Insolvency

Table of Authorities

Cases considered by *Hinkson J.*:

Blue Range Resource Corp., Re (1999), 245 A.R. 154, 1999 CarswellAlta 597, 1999 ABQB 1038 (Alta. Q.B.) — considered

Doman Industries Ltd., Re (2003), 2003 BCSC 376, 2003 CarswellBC 538, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) — considered

Gauntlet Energy Corp., Re (2003), 2003 ABQB 718, 2003 CarswellAlta 1209, 45 C.B.R. (4th) 47, [2004] 4 W.W.R. 373, 336 A.R. 302, 36 B.L.R. (3d) 250, 20 Alta. L.R. (4th) 314, 5 P.P.S.A.C. (3d) 236 (Alta. Q.B.) — followed

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — considered

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — considered

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Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

T. Eaton Co., Re (1997), 1997 CarswellOnt 5954 (Ont. Gen. Div.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11(4) — considered

APPLICATION by petitioners for approval of agreement to assign interest in leases to third party.

Hinkson J. **(orally):**

1 On February 1st, 2008, the petitioners sought and obtained protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1995, c. C-36 ("*CCAA*") pursuant to an initial order.

2 The petitioners apply for orders approving an agreement pursuant to which the petitioners propose to assign the interests in leases of certain retail outlets to a third party, who proposes to purchase the petitioners' business interests in the Mariposa Stores Limited Partnership ("Mariposa") and for various other orders pursuant to the *CCAA*.

3 The initial order was obtained without notice to or consultation with the landlords of various retail outlets where Mariposa carried on business. The petitioners' applications are unopposed, with the exception of their application for an order authorizing them to assign certain leases to the purchaser "and the need for the approval or consent of the landlords under the leases to the transfer, assignment and assumption of the leases by the petitioners to the purchaser if required under the terms of the leases" to be dispensed with. That part of the relief sought by the petitioners is opposed by some of the landlords (the "objecting landlords").

4 The monitor, Deloitte & Touche Inc., supports the petitioners' entire application, arguing that it is in keeping with the aims of the *CCAA* and in the best interests of the petitioners, their employees, their various creditors and their landlords.

5 The petitioners have entered into a purchase and sale agreement with 656750 Ontario Limited ("656750"). Under this agreement a number of the Mariposa leases are to be transferred and assigned to 656750. The agreement provides that 656750 will sell Mariposa's inventory from these premises on a consignment basis for a 91-day period. The agreement also provides that Mariposa's employees at these locations will continue in their employment, and the petitioners assert that the proposed purchase and sale agreement is the best possible result for Mariposa's creditors in the circumstances.

6 The orders sought by the petitioners include a provision permitting them to pay any arrears of rent and to bring the various leases into good standing if they are not presently in good standing. The purchasers are not prepared to agree to be liable for past defaults of Mariposa under the leases and require that all of the rights under the leases, including those that are expressed to be personal to Mariposa under the leases, be assigned to them.

7 The purchase and sale agreement is to close on Sunday, June the 1st, 2008.

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8 On the evidence before me, I am satisfied that the proposed purchase and sale agreement is in the best interests of the petitioners, their employees and their creditors, and that it will afford significant benefits to their landlords.

9 The leases in question all contain provisions that they may be assigned with the consent of the landlords and that such consent cannot be unreasonably withheld.

10 Counsel for the objecting landlords argued that his clients are concerned about entering into landlord/tenant relationships with a tenant who balked at assuming the liabilities of its immediate predecessors to its tenancy, as his clients assert that that is a usual term when a lease is assigned. I do not accept that this is a reasonable basis upon which to withhold their consent to the assignment of the leases in the circumstances facing the petitioners and their landlords.

11 The objecting landlords argue that the relief sought by the petitioners is unavailable at common law, or pursuant to any statutory authority, and is beyond the jurisdiction of the court. The petitioners assert no common law entitlement to the orders that they seek. Instead, they argue that the court has a statutory discretion under the *CCAA* to make the order sought so long as that is consistent with the objectives of *CCAA* to facilitate a restructuring and will enable the debtor to present a viable plan of arrangement to its creditors, and that it reasonably results from a balancing of the interests of all stakeholders including the landlords.

12 The petitioners and the monitor urge that the decision of Mr. Justice Spence in *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302, 18 B.L.R. (3d) 298 (Ont. S.C.J. [Commercial List]) [*Playdium*], should be followed in the circumstances of this case.

13 In *Playdium*, the purchaser, as part of an asset sale of a debtor company, sought an assignment of the material contracts, including certain lease agreements between the debtor and Famous Players. Without that assignment the sale transaction would not proceed. Famous Players did not consent to the assignment. The debtor company applied for an order permitting the assignment over Famous Players' objections.

14 Mr. Justice Spence found that he had jurisdiction to compel the assignments both arising from s. 11(4) of the *CCAA* and pursuant to the inherent jurisdiction of the court to force Famous Players to accept the assignment of the leases to a new tenant, even over the objections of creditors or other affected parties. He found this despite his conclusion that it would not have been unreasonable for Famous Players to have withheld its consent because there was evidence that it could get a better deal with another company. I have already found that the refusal of the objecting landlords to assign the leases in this case was unreasonable.

15 Mr. Justice Spence gave supplementary reasons for judgment in *Playdium Entertainment Corp., Re* at (2001), 31 C.B.R. (4th) 309, [2001] O.J. No. 449 (Ont. S.C.J. [Commercial List]) at para. 32:

> ... If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the court should not take such a restrictive view of the s. 11(4) jurisdiction.

16 Mr. Justice Spence went on to say at para. 42:

> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive

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for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

17 In *Gauntlet Energy Corp., Re*, 2003 ABQB 718, 336 A.R. 302 (Alta. Q.B.) at para. 58 [*Gauntlet*], Kent J. observed that:

> Interference with contractual rights of creditors and non-creditors is consistent with the objective of the ***CCAA*** to allow struggling companies an opportunity to survive whenever reasonably possible.

18 There are authorities that were relied upon by the petitioner such as *Gauntlet Energy Corp., Doman Industries Ltd., Re*, 2003 BCSC 376, 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]), and *T. Eaton Co., Re*, [1997] O.J. No. 6388 (Ont. Gen. Div.)), where the debtor company was restructured and sought to continue in business. Orders restricting rights of creditors and non-creditors were made in those cases to facilitate the resumption of business by those debtor companies.

19 Mr. Garner for the objecting creditors argues that those cases do not apply in the circumstances here where the debtor company does not propose to resume the former business activities and is in effect liquidating. I find that this is an overly restrictive view of the aims and scope of the *CCAA* and decline to draw that distinction. While Mariposa is to be liquidated, the business it conducted will be carried on under other ownership. I conclude that a continuation of the business that was that of Mariposa is captured within the scope of the *CCAA* and that the authorities applying to restructuring apply with equal force to situations where the final plan is the liquidation of a struggling company, but the continuation of its former business by a purchaser of that business.

20 In case I am wrong with respect to the scope of the legislation with respect to the proposed and ultimate liquidation of a struggling company while its business carries on under new ownership, I will address Mr. Garner's other submissions.

21 Mr. Garner argues that there is no specific provision in the *CCAA* permitting amendments to the contract and relies upon a passage from the reasons for judgment of Justice LoVecchio in *Blue Range Resource Corp., Re*, 1999 ABQB 1038, 245 A.R. 154 (Alta. Q.B.) at para. 36:

> The purpose of the ***CCAA*** proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.

22 While observing that courts have often relied upon the discretion provided by s. 11 of the *CCAA* and in some cases relied upon their inherent jurisdiction to "fill in the gaps" or "put flesh on the bones of the *CCAA*", Mr. Garner points to the decision of the Ontario Court of Appeal in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5, 253 D.L.R. (4th) 109 (Ont. C.A.) [*Stelco Inc., Re*], which he submits has clarified the discretion afforded by s. 11 of the *CCAA*. In that case the Ontario Court of Appeal concluded that the discretion is not open-ended or unfettered, but rather limited to "stay, restrain or prohibit proceeding against the debtor company during the plan negotiation period 'on such terms as it may impose'".

23 At paras. 43 and 44 of *Stelco Inc., Re*, Justice Blair for the Court stated:

> Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the ***CCAA*** to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.
>
> What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the

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course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

24 Mr. Garner argues that the petitioners' request to assign the leases without the consent of the objecting landlords is not a request to "stay or restrain or prohibit proceedings," but rather a request to impose a positive obligation on his clients to continue to honour the terms of the leases with parties not of their choosing and in respect of whom his clients' consent has not been obtained. Although he argues that the consent has not been unreasonably withheld, I have found otherwise.

25 Mr. Garner submits that I cannot rely upon my inherent jurisdiction to grant the order sought for two reasons:

(a) My inherent jurisdiction is supplementary to the s. 11 discretion and in any case is limited to situations where I am called upon to control the court's own process and not that of the debtor company; and

(b) I cannot rely upon inherent jurisdiction to grant a remedy under federal legislation when such a remedy has been found to be a provincial matter and ultra vires the federal powers.

26 In *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.) [*Skeena*], Madam Justice Newbury, for a unanimous court, discussed the discretion afforded by s. 11 of the *CCAA* at para. 46:

Applying this distinction to the issue at hand, I think the preferable view is that when a court approves a plan of arrangement under the CCAA which contemplates that one or more binding contracts will be terminated by the debtor corporation, the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. (As to the meaning of "discretion" in this context, see S. Waddams, "Judicial Discretion", (2001) 1 ***Cmnwth. L.J.*** 59). This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, rather than the integrity of their own process.

[emphasis in original]

27 Mr. Garner relies upon that clarification of the court's discretion articulated by Madam Justice Newbury in *Skeena*, and argues that while the discretion afforded by s. 11 of the *CCAA* permits a court to terminate a contract entered into by a debtor company, it does not permit the amendment of contractual relations between a party going forward and, as such, is distinguishable from the circumstances of this case. I do not agree.

28 Here the petitioners rely upon their contractual right to assign their leases, so long as the consent of their landlords is not unreasonably withheld. I have found that such consent is being unreasonably withheld, and therefore resort not to any inherent jurisdiction that I may or may not have, but to my jurisdiction pursuant to s. 11 of the *CCAA* to maintain the status quo; the ability of the petitioners to assign their leases in order to accomplish the objectives of the legislation is described by Kent J. in the passage from *Gauntlet Energy Corp.*.

29 I find that the scope of the *CCAA* includes allowing the struggling Mariposa an opportunity to survive to accomplish the proposed purchase and sale agreement. In order to provide that opportunity, I order that the leases to which the objecting landlords or parties are to be assigned as set out in the draft order prepared by the petitioners.

Conclusion

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30 I order that the petitioners are authorized to assign what the petitioners described as the "purchase leases" to 656750 and that the need for the approval or consent of the objecting landlords under the purchase leases to the transfer assignment and assumption of those leases is hereby dispensed with.

31 I further order that 656750 as assignee of the leases will be entitled to all the rights that are expressed to be personal to Mariposa.

32 I will allow the other orders sought by the petitioners, subject to clarification of Mr. Verbrugge's representation on the hearing of the motion.

Application granted.

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IN THE MATTER OF THE COMPANIES CREDITORS' ARRANGEMENT ACT, R.S.C., 1985, C. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No. CV-12-9667-00CL

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA et al.	v.	SINO-FOREST CORPORATION et al.	Court File No. CV-11-431153-00CP
Plaintiffs		Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

AUTHORITIES OF THE DEALERS
Dealer Settlement Approval Motion,
Returnable May 11, 2015

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