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

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

(Motion Returnable May 8, 2012)

May 4, 2012

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TAB 1

** Preliminary Version **

Case Name:

Century Services Inc. v. Canada (Attorney General)

Century Services Inc., Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada, Respondent.

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

2011 D.T.C. 5006

409 N.R. 201

296 B.C.A.C. 1

12 B.C.L.R. (5th) 1

2010 CarswellBC 3419

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EYB 2010-183759

2011EXP-9

J.E. 2011-5

2011 G.T.C. 2006

[2011] 2 W.W.R. 383

72 C.B.R. (5th) 170

[2010] G.S.T.C. 186

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Compromises and arrangements -- Where Crown affected -- Effect of related legislation -- Bankruptcy and Insolvency Act -- Appeal by Century Services Inc. from judgment of British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies allowed -- Section 222(3) of the Excise Tax Act evinced no explicit intention of Parliament to repeal s. 18.3 of CCAA -- Parliament's intent with respect to GST deemed trusts was to be found in the CCAA -- Judge had the discretion under the CCAA to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit debtor company to make an assignment in bankruptcy.

Appeal by Century Services Inc. from a judgment of the British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies. The debtor company commenced proceedings under the Companies' Creditors Arrangement Act (CCAA), obtaining a stay of proceedings with a view to reorganizing its financial affairs. Among the debts owed by the debtor company at the commencement of the reorganization was an amount of GST collected but unremitted to the Crown. The Excise Tax Act (ETA) created a deemed trust in favour of the Crown for amounts collected in respect of GST. The ETA provided that the deemed trust operated despite any other enactment of Canada except the Bankruptcy and Insolvency Act (BIA). However, the CCAA also provided that subject to certain exceptions, none of which mentioned GST, deemed trusts in favour of the Crown did not operate under the CCAA. In the context of the CCAA proceedings, a chambers judge approved a payment not exceeding $5 million to the debtor company's major secured creditor, Century Services. The judge agreed to the debtor company's pro-

posal to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. After concluding that reorganization was not possible, the debtor company sought leave to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the Bankruptcy and Insolvency Act (BIA). The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. The judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal found two independent bases for allowing the Crown's appeal. First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the ETA to allow payment to the Crown. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes.

HELD: Appeal allowed. Section 222(3) of the ETA evinced no explicit intention of Parliament to repeal CCAA s. 18.3. Had Parliament sought to give the Crown a priority for GST claims, it could have done so explicitly, as it did for source deductions. There was no express statutory basis for concluding that GST claims enjoyed a preferred treatment under the CCAA or the BIA. Parliament's intent with respect to GST deemed trusts was to be found in the CCAA. With respect to the scope of a court's discretion when supervising reorganization, the broad discretionary jurisdiction conferred on the supervising judge had to be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. The question was whether the order advanced the underlying purpose of the CCAA. The judge's order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the CCAA's objectives to the extent that it allowed a bridge between the CCAA and BIA proceedings. The order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that was common to both statutes. The breadth of the court's discretion under the CCAA was sufficient to lift the stay to allow entry into liquidation. No express trust was created by the judge's order because there was no certainty of object inferrable from his order. Further, no deemed trust was created.

Statutes, Regulations and Rules Cited:

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 69, s. 128, s. 131

Bank Act, S.C. 1991, c. 46,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-, s. 67, s. 86

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23

Cities and Towns Act, R.S.Q., c. C-19,

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Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36,

Employment Insurance Act, S.C. 1996, c. 23, s. 86(2), s. 86(2.1)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), s. 227(4.1)

Interpretation Act, R.S.C. 1985, c. I-21, s. 2, s. 44(f)

Personal Property Security Act, S.A. 1988, c. P-4.05,

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11,

Subsequent History:

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

Court Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Court Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that

reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J., Binnie, LeBel, **Deschamps**, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp.(Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed

trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision *creating* the trust and a *CCAA* or *BIA* provision explicitly *confirming* its effective operation. The *Income Tax Act*, the *Canada Pension Plan Act* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not *confirm* the continued operation of

the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Per Abella J (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18(3) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act,* that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to**: *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp, Re* (1992), 19 B.C.AC. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R.

(4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

Mary I.A. Buttery, *Owen J. James* and *Matthew J.G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 DESCHAMPS J.:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides

that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insol-

vencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

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

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent

before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s. 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid

to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222**... .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in

> trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it.

Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senator* s rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for

what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the

CCAA's override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282
> , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In

addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed

trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the en-

forcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, un-

der the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J.:--

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been

unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act <u>is deemed</u>, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, <u>to hold the amount separate and apart</u> from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, <u>in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act</u>. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) <u>Notwithstanding</u> any other provision of this Act, <u>the *Bankruptcy and Insolvency Act*</u> (except sections 81.1 and 81.2 of that Act), <u>any other enactment of Canada</u>, any enactment of a province or any other law, <u>where</u> at any time <u>an amount deemed by subsection 227(4) to be held by a person in trust</u> for Her Majesty <u>is not paid to Her Majesty</u> in the manner and at the time provided under this Act, <u>property of the person</u> ... equal in value to the amount so deemed to be held in trust <u>is deemed</u>

> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
>
> ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* .... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* .... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any en-

actment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp.* (*Re*) (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the

> *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can

> continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
>> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule

> of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) <u>except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law</u>, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or <u>any portion of an Act or regulation</u>".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), <u>despite</u> any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as <u>being</u> held in

> trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed with costs, ABELLA J. *dissenting.*

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,
(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province es-

tablishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that au-

thorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province es-

> tablishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

cp/e/qlecl/qlcal/qlced/qljyw/qlhcs/qljyw/qlhcs/qlana/qlcas/qlcas

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

TAB 2

Indexed as:
Hollick v. Toronto (City)

John Hollick, appellant;
v.
City of Toronto, respondent, and
Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment, the Environmental Commissioner of Ontario and Law Foundation of Ontario, interveners.

[2001] 3 S.C.R. 158

[2001] S.C.J. No. 67

2001 SCC 68

File No.: 27699.

Supreme Court of Canada

2001: June 13 / 2001: October 18.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (38 paras.)

Practice -- Class actions -- Certification -- Plaintiff complaining of noise and physical pollution from landfill owned and operated by city -- Plaintiff bringing action against city as representative of some 30,000 other residents who live in vicinity of landfill -- Whether plaintiff meets certification requirements set out in provincial class action legislation -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1).

The appellant complains of noise and physical pollution from a landfill owned and operated by the respondent city. He sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill. The motions judge found that the appellant had satisfied each of the five certification requirements set out in s. 5 of the Act and ordered that the appellant be allowed to pursue his action as representative of the stated class. The Divi-

sional Court overturned the certification order on the grounds that the appellant had not stated an identifiable class [page159] and had not satisfied the commonality requirement. The Court of Appeal dismissed the appellant's appeal, agreeing with the Divisional Court that commonality had not been established.

Held: The appeal should be dismissed.

The Class Proceedings Act, 1992 should be construed generously to give full effect to its benefits. The Act was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

In this case there is an identifiable class within the meaning of s. 5(1)(b). The appellant has defined the class by reference to objective criteria, and whether a given person is a member of the class can be determined without reference to the merits of the action. With respect to whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c), the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be common only where its resolution is necessary to the resolution of each class member's claim. Further, an issue will not be "common" in the requisite sense unless the issue is a substantial ingredient of each of the class members' claims. Here, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). The issue is whether there is a rational connection between the class as defined and the asserted common issues. While the putative representative must show that the class is defined sufficiently narrowly, he or she need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. The appellant has met his evidentiary burden. It is sufficiently clear that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. Moreover, while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries.

A class proceeding would not be the preferable procedure for the resolution of the common issues, however, as required by s. 5(1)(d). In the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions: judicial economy, access [page160] to justice, and behaviour modification. The question of preferability must take into account the importance of the common issues in relation to the claims as a whole. The preferability requirement was intended to capture the question of whether a class proceeding would be preferable in the sense of preferable to other procedures such as joinder, test cases and consolidation. The preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions. The appellant has not shown that a class action is the preferable means of resolving the claims raised here. With respect to judicial economy, any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the landfill emitted physical or noise pollution, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action. Nor would allowing a class action here serve the interests of access to justice. The fact that no claims have been made against the

Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. The argument that behaviour modification is a significant concern in this case should be rejected for similar reasons.

Cases Cited

Referred to: Rylands v. Fletcher (1868), L.R. 3 H.L. 330; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172; Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46; Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314; Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389; Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63; Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379; Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453; Rumley v. British Columbia, [2001] 3 S.C.R. 184, 2001 SCC 69.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(2).
Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 2(1), (2), 5(1), (4), (5), 6.

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Code of Civil Procedure, R.S.Q., c. C-25, Book IX.
Environmental Bill of Rights,1993, S.O. 1993, c. 28, ss. 61(1), 74(1).
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APPEAL from a judgment of the Ontario Court of Appeal (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (sub nom. Hollick v. Metropolitan Toronto (Municipality)), 127 O.A.C. 369, 32 C.E.L.R. (N.S.) 1, 41 C.P.C. (4th) 93, 7 M.P.L.R. (3d) 244, [1999] O.J. No. 4747 (QL), dismissing an appeal

from a decision of the Divisional Court (1998), 42 O.R. (3d) 473, 168 D.L.R. (4th) 760, 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, 31 C.P.C. (4th) 64, [1998] O.J. No. 5267 (QL), allowing an appeal from a decision of the Ontario Court (General Division) (1998), 27 C.E.L.R. (N.S.) 48, 18 C.P.C. (4th) 394, [1998] O.J. No. 1288 (QL), granting a motion to have an action certified as a class proceeding. Appeal dismissed.

Michael McGowan, Kirk M. Baert, Pierre Sylvestre and Gabrielle Pop-Lazic, for the appellant.

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Graham Rempe and Kalli Y. Chapman, for the respondent.
Robert V. Wright and Elizabeth Christie, for the interveners Friends of the Earth, West Coast Environmental Law Association and Canadian Association of Physicians for the Environment.
Doug Thomson and David McRobert, for the intervener the Environmental Commissioner of Ontario.
Written submissions only by Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.

Solicitors for the appellant: McGowan & Associates, Toronto.
Solicitor for the respondent: H. W. O. Doyle, Toronto.
Solicitors for the interveners Friends of the Earth, West Coast Environmental Law Association and Canadian Association of Physicians for the Environment: Sierra Legal Defence Fund, Toronto.
Solicitors for the intervener the Environmental Commissioner of Ontario: McCarthy Tétrault and David McRobert, Toronto.
Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

The judgment of the Court was delivered by

1 **McLACHLIN C.J.**:-- The question raised by this appeal is whether the appellant has satisfied the certification requirements of Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6, and whether the appellant should accordingly be allowed to pursue his action against the City of Toronto as the representative of some 30,000 other residents who live in the vicinity of a landfill owned and operated by the City. For the following reasons, I conclude that the appellant has not satisfied the certification requirements, and consequently that he may pursue this action only on his own behalf, and not on behalf of the stated class.

I. Facts

2 The appellant Hollick complains of noise and physical pollution from the Keele Valley landfill, which is owned and operated by the respondent City of Toronto. The appellant sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill, in particular:

A. All persons who have owned or occupied property in the Regional Municipality of York, in the geographic [page163] area bounded by Rutherford Road on the south, Jane Street on the west, King-Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991, or where such a person is deceased, the personal representative of the estate of the deceased person; and

B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the Family Law Act) of persons who were owners and/or occupiers ... .

The merits of the dispute between the appellant and the respondent are not at issue on this appeal. The only question is whether the appellant should be allowed to pursue his action as representative of the stated class.

3 Until 1983, the Keele Valley site was a gravel pit owned privately. It operated under a Certificate of Approval issued by the Ministry of the Environment in 1980. After the respondent purchased the site in 1983, the Ministry of the Environment issued a new Certificate of Approval. The 1983 Certificate covers an area of 375.9 hectares, of which 99.2 hectares are actual disposal area. The remainder of the land constitutes a buffer zone. The Certificate restricts Keele Valley to the receipt of non-hazardous municipal or commercial waste, and it sets out various other requirements relating to the processing and storage of waste at the site. It also provides for a Small Claims Trust Fund of $100,000, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "off-site impact".

4 The Ministry of the Environment monitors the Keele Valley site by employing two full-time inspectors at the site and by reviewing detailed reports that the respondent is required to file with the Ministry. In addition, the City of Vaughan has established the Keele Valley Liaison Committee, which is meant to provide a forum for community concerns related to the site. Until 1998, the appellant participated regularly at meetings of the Liaison Committee. Finally, the respondent maintains a telephone complaint system for members of the community.

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5 The appellant's claim is that the Keele Valley landfill has unlawfully been emitting, onto his own lands and onto the lands of other class members:

(a) large quantities of methane, hydrogen sulphide, vinyl chloride and other toxic gases, obnoxious odours, fumes, smoke and airborne, bird-borne or air-blown sediment, particulates, dirt and litter (collectively referred to as "Physical Pollution"); and

(b) loud noises and strong vibrations (collectively referred to as "Noise Pollution");

The appellant filed a motion for certification on November 28, 1997. In support of his motion, the appellant pointed out that, in 1996, some 139 complaints were registered with the respondent's telephone complaint system. (Before this Court, the appellant submitted that "at least 500" complaints were made "to various governmental authorities between 1991 and 1996" (factum, at para. 7).) The

appellant also noted that, in 1996, the respondent was fined by the Ministry of Environment in relation to the composting of grass clippings at a facility located just north of the Keele Valley landfill. In the appellant's view, the class members form a well-defined group with a common interest vis-à-vis the respondent, and the suit would be best prosecuted as a class action. The appellant seeks, on behalf of the class, injunctive relief, $500 million in compensatory damages and $100 million in punitive damages.

6 The respondent disputes the legitimacy of the appellant's complaints and disagrees that the suit should be permitted to proceed as a class action. The respondent claims that it has monitored air emissions from the Keele Valley site and the data confirm that "none of the air levels exceed Ministry of the Environment trigger levels". It notes that there are other possible sources for the pollution of which the appellant complains, including an active quarry, a private transfer station for waste, a plastics factory, and an asphalt plant. In addition, some farms in the area have private compost operations. The respondent also argues that the number of registered complaints -- it says that 150 people complained over the six-year period covered in the [page165] motion record -- is not high given the size of the class. Finally, it notes that, to date, no claims have been made against the Small Claims Trust Fund.

II. Judgments

7 The motions judge, Jenkins J., found that the appellant had satisfied each of the five certification requirements set out in s. 5(1) of the Class Proceedings Act, 1992: (1998), 27 C.E.L.R. (N.S.) 48. He found that the appellant's statement of claim disclosed causes of action under s. 99 of the Environmental Protection Act, R.S.O. 1990, c. E.19, and under the rule in Rylands v. Fletcher (1868), L.R. 3 H.L. 330; that the appellant had defined an identifiable class of two or more persons; that the issues of liability and punitive damages were common to the class; and that a class action would be the preferable procedure for resolving the complaints of the class. Finally, he found that the appellant would be an adequate representative for the class and that the appellant had set out a workable litigation plan. Though Jenkins J. struck out the appellant's claim for injunctive relief on the ground that damages would be a sufficient remedy and rejected his claims under the Family Law Act, R.S.O. 1990, c. F.3, on the grounds that the facts pleaded "cannot ... establish a basis for a claim for loss of care, guidance, and companionship" (p. 62). Jenkins J. concluded that the appellant had satisfied the certification requirements of s. 5(1). Accordingly he ordered that the appellant be allowed to pursue his action as representative of the stated class.

8 The Ontario Divisional Court, per O'Leary J., overturned the certification order on the grounds that the appellant had not stated an identifiable class and had not satisfied the commonality requirement: (1998), 42 O.R. (3d) 473. O'Leary J. interpreted the identifiable class requirement to require that "there be a class that can all pursue the same cause of action" against the defendant. He noted that "[t]o pursue such cause of action the members of the class must have suffered the interference with use and enjoyment of property complained of in the [page166] statement of claim" (p. 479). O'Leary J. concluded that the appellant had not stated an identifiable class (at pp. 479-80):

> [T]he evidence does not make it likely that th[e] 30,000 [class members] suffered such interference. It cannot be assumed that the complaints made to Toronto make it likely that the landfill was the cause of the odour or thing complained about... . [E]ven if one were to assume that the Keele Valley landfill site was the source of all the complaints, 150 people making complaints over a seven-year pe-

> riod does not make it likely that some 30,000 persons had their enjoyment of their property interfered with.

For the same reasons, he concluded that the appellant had not satisfied the commonality requirement, writing that "[b]ecause the class that was certified ... bears no resemblance to any group that was on the evidence likely injured by the landfill operation, there are no apparent common issues relating to the members of the class" (p. 480). O'Leary J. set aside the certification order without prejudice to the plaintiff's right to bring a fresh application on further evidence.

9 The Court of Appeal for Ontario, per Carthy J.A., dismissed Hollick's appeal ((1999), 46 O.R. (3d) 257), agreeing with the Divisional Court that commonality had not been established. Citing Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), Carthy J.A. noted that the definition of a class should not depend on the merits of the litigation. However, he saw no bar to a court's looking beyond the pleadings to determine whether the certification criteria had been satisfied. "If it were otherwise", he noted, "any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court" (p. 264). Carthy J.A. acknowledged that a court should not test the existence of a class by demanding evidence that each member of the purported class have, individually, a claim on the merits. The court should, however, demand "evidence to give some credence to the allegation that ... 'there is an identifiable class ...'" (p. 264) (emphasis deleted).

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10 Carthy J.A. did not find it necessary to resolve the issue of whether the appellant had stated an identifiable class, because in his view the appellant had not satisfied the commonality requirement. In Carthy J.A.'s view, proof of nuisance was essential to each of the appellant's claims. Because a nuisance claim requires the plaintiff to make an individualized showing of harm, there was no commonality between the class members. Carthy J.A. wrote (at pp. 266-67):

> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance... .
>
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation.

Carthy J.A. dismissed the appeal, affirming the Divisional Court's order except insofar as it would have allowed the appellant to bring a fresh application on further evidence.

III. Legislation

11 Class Proceedings Act, 1992, S.O. 1992, c. 6

5. -- (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) the claims or defences of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

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(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

IV. Issues

12 Should the appellant be permitted to prosecute this action on behalf of the class described in his statement of claim?

V. Analysis

13 Ontario's Class Proceedings Act, 1992, like similar legislation adopted in British Columbia and Quebec, allows a member of a class to prosecute a suit on behalf of the class: see Ontario Class Proceedings Act, 1992, s. 2(1); see also Quebec Code of Civil Procedure, R.S.Q., c. C-25, Book IX;

British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50. In order to commence such a proceeding, the person who seeks to represent the class must make a motion for an order certifying the action as a class proceeding and recognizing him or her as the representative of the class: see Class Proceedings Act, 1992, s. 2(2). Section 5 of the Act sets out five criteria by which a motions judge is to assess whether [page169] the class should be certified. If these criteria are satisfied, the motions judge is required to certify the class.

14 The legislative history of the Class Proceedings Act, 1992, makes clear that the Act should be construed generously. Before Ontario enacted the Class Proceedings Act, 1992, class actions were prosecuted in Ontario under the authority of Rule 12.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. That rule provided that

> [w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

While that rule allowed courts to deal with relatively simple class actions, it became clear in the latter part of the 20th century that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 26. They often involved vast numbers of interested parties and complex, intertwined legal issues -- some common to the class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise ad hoc solutions to procedural complexities on a case-by-case basis: see Western Canadian Shopping Centres, at para. 51. The Class Proceedings Act, 1992, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres (at paras. [page170] 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see Class Proceedings Act, 1992, s. 5(1)(a). Thus the certification stage is decidedly [page171] not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.

17 With these principles in mind, I turn now to the case at bar. The issue is whether the appellant has satisfied the certification requirements set out in s. 5 of the Act. The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J. H. Friedenthal, M. K. Kane and A. R. Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; Bywater, supra, at pp. 175-76; Western Canadian Shopping Centres, supra, at para. 38.

18 A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in Western Canadian Shopping Centres, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, [page172] an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

19 In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim -- or at least what might be termed a "colourable claim" -- against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see Western Canadian Shopping Centres, at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints against

the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated vis-à-vis the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that

> [i]n circumstances such as are described in the statement of claim one would expect to see evidence of the existence of a body of persons seeking recourse for their [page173] complaints, such as, a history of "town meetings", demands, claims against the no fault fund, [and] applications to amend the certificate of approval ... .

20 The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

21 The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, Class Actions in Canada (1996), at para. 4.205; Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class [page174] definition overinclusive because included students who had found work after graduation).

22 The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. The recommendations of the Ontario Law Reform Commission's 1982 report on this point should perhaps be given limited weight because, as discussed above, those recommendations were made in the context of a proposal that the certification stage include a preliminary merits test: see Report on Class Actions, supra, vol. II, at pp. 422-26 (recommending that both the representative plaintiff and the defendant be required, at the certification stage, to file one or more affidavits setting out all the facts upon which they intend to rely, and that the parties be permitted to examine the deponents of any such affidavits). The 1990 report of the Attorney General's Advisory Committee is perhaps a better guide. That report suggests that "[u]pon a motion for certification ... , the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely" (em-

phasis added): see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

23 This appears to be the existing practice of Ontario courts. In Caputo, supra, the representative brought a class action against cigarette manufacturers claiming that they had knowingly misled the public about the risks associated with smoking. In support of the certification motion, the class representative filed only a solicitor's affidavit based on information and belief. The court held that the evidence adduced by the class representative was insufficient to support certification, and that the defendant manufacturers should be allowed to examine the individual class members in order to obtain the information required to allow the court [page175] to decide the certification motion. The "primary concern", the court wrote, is "[t]he adequacy of the record", which "will vary in the circumstances of each case" (p. 319).

24 In Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. The representative provided no evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that "the CPA requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order" (emphasis added). While the Class Proceedings Act, 1992 does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order" (p. 381).

25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in Taub held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose [page176] a cause of action unless it is "plain and obvious" that no claim exists: see Branch, supra, at para. 4.60.

26 In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Environment and Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physi-

cal emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(1)(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions -- judicial economy, access to justice, and behaviour modification: see also Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453 (Div. Ct.); compare British Columbia Class Proceedings Act, s. 4(2) (listing factors that court must consider in [page177] assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues -- common and individual -- raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.

28 The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.

29 The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:

> The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower [page178] threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, supra, at para. 4.690. I would endorse that approach.

30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see Federal Rules of Civil Procedure, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia Class Proceedings Act, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, Class Actions: A Guide to [page179] the Class Proceedings Act, 1992 (1993), at p. 27.

31 I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 32; see also Cochrane, supra, at p. 27; M. A. Eizenga, M. J. Peerless and C. M. Wright, Class Actions Law and Practice (loose-leaf), at para. 3.62 ("[a]s part of the determination with respect to preferability, it is appropriate for the court to review alternative means of adjudicating the dispute which is before it"). In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

32 I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints -- those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the [page180] context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

33 Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. As noted above, one important

benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all. I am not fully convinced, however, that this is the situation here. The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action -- even if the compensatory scheme promises to provide redress more quickly: see Rumley v. British Columbia, [2001] 3 S.C.R. 184, 2001 SCC 69, at para. 38. The existence of such a scheme, however, provides one consideration that must be taken into account when [page181] assessing the seriousness of access-to-justice concerns.

34 For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in Western Canadian Shopping Centres, supra, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see Environmental Bill of Rights, 1993, S.O. 1993, c. 28, and Environmental Protection Act. I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.

35 I would note, further, that Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification: see Environmental Bill of Rights, 1993, ss. 61(1) (stating that "[a]ny two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be [page182] amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister") and 74(1) (stating that "[a]ny two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister"); Environmental Protection Act, s. 14(1) (stating that "[d]espite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a

contaminant into the natural environment that causes or is likely to cause an adverse effect"); s. 172(1) (stating that "[w]here a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may, within fourteen days after the injury or damage becomes apparent, request the Minister to conduct an investigation"); and s. 186(1) (stating that "[e]very person who contravenes this Act or the regulations is guilty of an offence").

36 I conclude that the action does not meet the requirements set out in s. 5(1) of Ontario's Class Proceedings Act, 1992. Even on the generous approach advocated above, the appellant has not shown that a class action is the preferable means of resolving the claims raised here.

37 I should make one note on the scope of the holding in this case. The appellant took pains to characterize this case as raising the issue of whether Ontario's Class Proceedings Act, 1992 permits environmental class actions. I would not frame the issue so broadly. While the appellant has not met the certification requirements here, it does not follow that those requirements could never be met in an environmental tort case. The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the [page183] facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts.

38 The appeal is dismissed. There will be no costs to either party.

cp/e/qllls

TAB 3

Indexed as:
Pezim v. British Columbia (Superintendent of Brokers)

The Superintendent of Brokers, appellant;
v.
Murray Pezim, Lawrence Page and John Ivany, respondents, and The Attorney General of British Columbia, the Ontario Securities Commission, the Alberta Securities Commission and the Securities Dealers Society of Ontario, interveners.
And between
The British Columbia Securities Commission, appellant;
v.
Murray Pezim, Lawrence Page and John Ivany, respondents, and The Attorney General of British Columbia, the Ontario Securities Commission, the Alberta Securities Commission and the Securities Dealers Society of Ontario, interveners.

[1994] 2 S.C.R. 557

[1994] S.C.J. No. 58

File Nos.: 23107, 23113.

Supreme Court of Canada

1994: February 24; 1994: June 23.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law -- Judicial review -- Securities Commission -- Commission part of larger regulatory framework -- No privative clause and right of appeal -- Appropriate standard of review of Commission's decisions -- Whether standard properly applied -- Securities Act, S.B.C. 1985, c. 83, ss. 1(1) "material change", "material fact", 14(1), (2), 44(1), 45(2), 49(1), 50(1), 67, 68, 144(1)(a), (b), (c), (d), 149(a), (b), (c), 154.2.

Securities -- Securities Commission -- Statutory duty on issuers of stock to disclose nature and substance of material change -- Prohibition against insider trading -- Series of transactions allegedly

breaching duty to disclose -- Whether transactions breaching duty to disclose and/or prohibition against insider trading.

Respondents were, respectively, the chair of the board, the vice president responsible for internal administration and the president of Prime, a company holding several wholly owned subsidiaries and controlling or managing about 50 public junior resource companies. Respondents were also directors of Calpine, a company controlled and managed by Prime. Both companies were reporting issuers listed on the Vancouver Stock Exchange and subject to the VSE's rules and policies concerning public disclosure of information and pricing of options. Both were subject to the continuing and timely disclosure requirements under s. 67 of the Securities Act and to the insider trading provisions under s. 68. The British Columbia Securities Commission administers the Act and ensures compliance with its requirements. It also regulates the VSE.

In the spring of 1990, the Superintendent of Brokers (the Commission's chief administrative officer) instituted proceedings against the respondents in connection with various types of transactions which occurred between July and October, 1989. The Superintendent alleged that the respondents had violated the timely disclosure provisions and insider trading provisions in three categories of impugned transactions: the drilling results and share options transactions, the private placement, and the ALC withdrawal. Respondents were prevented from having information relative to assay results by a "Chinese Wall".

In the first category, Prime or Calpine allegedly failed to disclose all material changes in four transactions in that assay results were publicly disclosed after the company had granted or repriced options. The fifth option transaction, although made after a detailed news release of assay results, allegedly violated a pricing formula under the VSE options policy.

The second series of impugned transactions involved the private placement of Calpine units. Calpine allegedly failed to disclose, contrary to s. 67, that Prime was the purchaser and that the sale significantly increased Prime's interest in Calpine. It was also alleged that Calpine had misled the VSE as to the firm brokering the private placement.

The third impugned transaction occurred when a broker disputed its contractual obligation either to find a purchaser or to buy a set number of Prime units on offer following the withdrawal of a firm (ALC) from a deal to purchase them. Prime was alleged to have violated s. 67 by not making timely and adequate disclosure of the dispute following ALC's withdrawal.

The Commission concluded that the respondents contravened s. 67 of the Act by failing to disclose material changes in their affairs. No insider trading contrary to s. 68 of the Act was found, however. The respondents were found responsible for these breaches as senior managers of the companies, were suspended from trading in shares for one year and were required to pay part of the costs incurred by the Commission and Superintendent. Respondents' appeal was limited to whether the Commission had erred as a matter of law in its conclusions on s. 67 (disclosure of material change), s. 144 (power of Commission to make orders) and s. 154.2 (power of Commission to make orders regarding costs) of the Act. The Court of Appeal allowed the appeal and set aside the Commission's orders. The Superintendent and the Commission now appeal from that decision.

These appeals dealt mainly with the appropriate standard of review for an appellate court reviewing a decision of a securities commission which is not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of statutory interpretation. The

appeals also raised issues of compliance with the timely disclosure requirements under applicable securities legislation.

Held: The appeals should be allowed.

The Securities Act is part of a much larger framework which regulates the securities industry throughout Canada primarily for the protection of the investor but also for capital market efficiency and ensuring public confidence in the system.

The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. The analysis must consider the tribunal's role or function, whether the agency's decisions are protected by a privative clause, and whether the question goes to the tribunal's jurisdiction. The courts have developed a spectrum that ranges from the standard of patent unreasonableness (where deference is at its highest, for example, where a tribunal is protected by a privative clause in deciding a matter within its jurisdiction) to that of correctness (where deference is at its lowest, for example, where there is a statutory right of appeal or where the issue concerns the interpretation of a provision limiting the tribunal's jurisdiction). The case at bar falls between these two extremes. On one hand lies a statutory right of appeal pursuant to s. 149 of the Securities Act. On the other lies an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise. Even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.

The breadth of the Commission's expertise and specialisation is reflected in the provisions of the Securities Act. The Commission is responsible for the administration of the Act, has broad powers with respect to investigations, audits, hearings and orders, and any decision, when filed in the Supreme Court of British Columbia Registry, has the force and effect of a decision of that court. The Commission has the power to revoke or vary any of its decisions. It also has a very broad discretion to determine what is in the public's interest. The definitions in the Act exist in a factual or regulatory context and must be analysed in context, not in isolation. This is yet another basis for curial deference. A higher degree of judicial deference is also warranted with respect to a tribunal's interpretation of the law where it plays a role in policy development. Here, the Commission's primary role is to administer and apply the Act. It also plays a policy development role but its policies are not to be treated as legal pronouncements absent statutory authority mandating such treatment. Thus, on precedent, principle and policy, those decisions of the Commission falling within its expertise generally warrant judicial deference.

Sections 67, 144 and 154.2 of Act were specifically considered with an eye to the tribunal's expertise and its need for deference. The decision to make an order and the precise nature of that order, under s. 144, as well as any decision obliging a person to pay the costs of a hearing necessitated by his or her conduct, pursuant to s. 154.2, are clearly within the jurisdiction and expertise of the Commission. The other provision at issue was s. 67 which involves an interpretation of the words "material change" and "as soon as practicable".

Both "material change" and "material fact" are defined in s. 1 of the Act. They are defined in terms of the significance of their impact on the market price or value of the securities of an issuer. The definition of "material fact" is broader than that of "material change"; it encompasses any fact that

can "reasonably be expected to significantly affect" the market price or value of the securities of an issuer, and not only changes "in the business, operations, assets or ownership of the issuer" that would reasonably be expected to have such an effect.

This case turned partly on the definition of "material change". Three elements emerge from that definition: the change must be (a) "in relation to the affairs of an issuer", (b) "in the business, operations, assets or ownership of the issuer" and (c) material, i.e., would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. Not all changes are material changes; the latter are set in the context of making sure that issuers keep investors up to date. The determination of what information should be disclosed is an issue which goes to the heart of the regulatory expertise and mandate of the Commission, i.e., regulating the securities markets in the public's interest.

This case also turns on the meaning of the words "as soon as practicable", in s. 67 of the Act, as to when a material change should be disclosed to the public. The timeliness of disclosure also falls within the Commission's regulatory jurisdiction.

Given the nature of the securities industry, the Commission's specialization of duties and policy development role, and the nature of the problem before the court, considerable deference was warranted in the present case notwithstanding the facts that there was a statutory right of appeal and that there was no privative clause.

The determination of what constitutes a material change for the purposes of general disclosure under s. 67 of the Act falls squarely within the regulatory mandate and expertise of the Commission. New information relating to a mining property (which is an asset) bears significantly on the question of that property's value. A change in assay and drilling results can amount to a material change as was the case here.

The obligation to disclose "as soon as practicable" takes on a different meaning when an issuer is about to engage in a securities transaction. Although a duty to inquire is not expressly stated in s. 67, such an interpretation contextualizes the general obligation to disclose material changes and guarantees the fairness of the market, which is the underlying goal of the Act. The Commission had jurisdiction to interpret s. 67 in this manner and was entitled to the court's deference.

A duty to inquire under s. 67 is not incompatible with the Act's insider trading provision (s. 68). If an issuer wishes to engage in a securities transaction, its directors must inquire about all material changes in the issuer's affairs. Consequently, the directors will have, at one point in time, knowledge of undisclosed material facts and material changes which constitute inside information. As long as the material facts and material changes are adequately disclosed prior to the transaction, there will be no possibility of insider trading. The directors' duty to inquire about material changes is not erased by the erection of a Chinese Wall because the disclosure requirements under s. 67 are on the issuer.

Each of the Commission's findings were supported by overwhelming evidence and should not be disturbed. The Commission concluded that information contained in drilling results can constitute a material change in a reporting issuer's affairs and that s. 67 imposes a duty on senior management to inquire as to the existence of material changes before causing a reporting issuer to engage in a securities transaction. It found that the respondents breached s. 67 by failing to disclose various material changes in the affairs of Prime and Calpine before causing these two companies to engage in securities transactions. The Commission also concluded that the non-disclosure of information concerning

the private placement issue and the withdrawal of ALC constituted a failure to disclose a material change. Although the material change arising from the controversy surrounding the withdrawal of ALC was self-evident, not all material changes are self-evident.

Section 144 of the Act gives the Commission a broad discretion to make orders that it considers to be in the public interest. Thus, a reviewing court should not disturb an order of the Commission unless the Commission has made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner.

The Commission exercised its discretion in a judicial manner. Further, it could make the orders it did with respect to the respondents even though the duty to make timely disclosure under s. 67 of the Act applies to a "reporting issuer". Although responsibility for timely disclosure is vested in the reporting issuer, effective responsibility rests with the senior officers and the directors of the reporting issuer. In addition, s. 144 of the Act not only gives the Commission a broad power to make orders it considers to be in the public interest but also confers upon the Commission the authority to make orders with respect to "a person". The Commission's order with respect to costs was well within its jurisdiction; considerable deference was in order.

Cases Cited

Referred to: Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756; Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; University of British Columbia v. Berg, [1993] 2 S.C.R. 353; Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722; United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316; Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; Pacific Coast Coin Exchange v. Ontario Securities Commission, [1978] 2 S.C.R. 112; Four Star Mgmt. Ltd. v. B.C. Securities Comm. (1990), 46 B.C.L.R. (2d) 195, leave to appeal refused sub nom. Williams (Byron Leslie) v. British Columbia Securities Comm., [1991] 1 S.C.R. xv; Gordon Capital Corp. v. Ontario Securities Commission (1991), 14 O.S.C.B. 2713; Re the Securities Commission and Mitchell, [1957] O.W.N. 595; Bay Street West Securities (1983) Inc. v. Alberta Securities Commission (1984), 56 A.R. 19.

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Securities Act, S.B.C. 1985, c. 83, ss. 1(1) "material change", "material fact", 14(1), (2), 44(1) [am. 1989, c. 78, s. 16], 45(2) [am. 1989, c. 78, s. 16], 47(1), (2), 48(1) [am. 1989, c. 58, s. 12], 49(1) [am. 1989, c. 78, s. 20], 50(1), 67, 68 [rep. & sub. 1989, c. 78, s. 25], 144(1)(a) [rep. & sub. 1989, c. 78, s. 39], (b) [rep. & sub. 1989, c. 78, s. 39], (c) [rep. & sub. 1989, c. 78, s. 39, am. 1990, c. 25, s. 49], (d) [rep. & sub. 1989, c. 78, s. 39], 149(a) [rep. & sub. 1989, c. 78, s. 43, am. 1992, c. 52, s. 27], (b) [rep. & sub. 1989, c. 78, s. 43], (c) [ad. 1992, c. 52, s. 27], 154.2 [ad. 1988, c. 58, s. 25].

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Alboini, Victor P. Securities Law and Practice, 2nd ed., vol. 2 (loose-leaf). Toronto: Carswell, 1984.
Johnston, David L. Canadian Securities Regulation. Toronto: Butterworths, 1977.
Stevens, George C. and Stephen D. Wortley. "Murray Pezim in the Court of Appeal: Draining the Lifeblood from Securities Regulation" (1992), 26 U.B.C. L. Rev. 331.

APPEALS from a judgment of the British Columbia Court of Appeal (1992), 66 B.C.L.R. (2d) 257, 96 D.L.R. (4th) 137, 24 W.A.C. 1, allowing an appeal from an order of the British Columbia Securities Commission. Appeals allowed.

M.J. Gregory Walsh and Catharine M. Esson, for the appellant the Superintendent of Brokers.
John L. Finlay and Susan E. Ross, for the appellant the British Columbia Securities Commission.
Alan J. Lenczner, Q.C., and Winton K. Derby, Q.C., for the respondents.
Deborah K. Lovett, for the intervener the Attorney General of British Columbia.
Stephen T. Goudge, Q.C., and Sandra Forbes, for the intervener the Ontario Securities Commission.
Frances L. Zinger and Glenda A. Campbell, for the intervener the Alberta Securities Commission.
Bryan Finlay, Q.C., and Philip Anisman, for the intervener the Securities Dealers Society of Ontario.

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Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.
Solicitors for the intervener the Ontario Securities Commission: Davies, Ward & Beck, Toronto.
Solicitor for the intervener the Alberta Securities Commission: The Alberta Justice, Edmonton.
Solicitors for the intervener the Securities Dealers Society of Ontario: Weir & Foulds, Toronto.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- These appeals (hereinafter referred to in the singular) deal mainly with the appropriate standard of review for an appellate court reviewing a decision of a securities commission which is not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of statutory interpretation. The appeal also raises issues of compliance with the timely disclosure requirements under applicable securities legislation.

I. Facts

2 At the relevant time, the respondents were directors and senior managers of Prime Resources Corporation ("Prime"), a company which headed a large corporate network which consisted of Prime, various wholly owned subsidiaries, and Prime's "managed companies", a group of about 50 public junior resource companies controlled and managed by Prime. Murray Pezim was the chairperson of Prime's board of directors and was responsible for promoting and arranging financing for Prime and the managed companies. Lawrence Page was Prime's vice president and was responsible

for administration within Prime and for liaison with Prime's outside legal counsel. Finally, John Ivany was president and chief executive officer of Prime. He was also responsible for the overall direction of Prime and played a role in raising financing for the corporation.

3 One of Prime's managed companies was Calpine Resources Inc. ("Calpine"), which was involved in mineral exploration and development in northern British Columbia. Prime held 23 percent of Calpine's common shares. The respondents were also directors of Calpine.

4 Both Prime and Calpine were incorporated under the Company Act, R.S.B.C. 1979, c. 59 (as amended), and were reporting issuers whose common shares were listed for trading on the Vancouver Stock Exchange ("VSE"). As such, they were subject to the VSE's rules and policies concerning such matters as public disclosure of information and pricing of options. They were also subject to the continuing and timely disclosure requirements under s. 67 of the Securities Act, S.B.C. 1985, c. 83 (as amended) (the "Act"), which required disclosure of "material changes" in the affairs of a reporting issuer as soon as practicable, as well as the insider trading provisions under s. 68 of the Act. The British Columbia Securities Commission ("the Commission"), which is established by the Act, is charged with administering the Act and ensuring compliance with the requirements of the Act, as well as regulating the VSE.

5 In the spring of 1990, the Superintendent of Brokers ("Superintendent"), the chief administrative officer of the Commission, instituted proceedings against the respondents in connection with various types of transactions which occurred between July and October, 1989. The Superintendent alleged that the respondents had violated the timely disclosure provisions found in s. 67 of the Act, as well as the insider trading provisions found in s. 68. As a matter of convenience, the impugned transactions have been divided into three categories: the drilling results and share options transactions, the private placement, and the so-called ALC withdrawal. Each of these will be discussed in turn.

A. The Drilling Results and Share Options Transactions

6 In September 1988, Calpine announced the commencement of drilling on a property known as "Eskay Creek". On May 18, 1989, Calpine announced another drilling program on the same property for the summer of 1989.

7 Prime Explorations Ltd., one of Prime's wholly owned subsidiaries, was engaged to provide consulting and management services for the project. David Mallo, a staff geologist employed by Prime Explorations, was appointed manager of the Eskay Creek project and prepared regular written reports on the progress of the project. These reports, which contained information on the activity at the camp, as well as visual descriptions and ratings of the holes drilled since the last report, were sent to the president of Prime Explorations, Chet Idziszek, an experienced geologist. Idziszek was responsible for implementing and carrying out a system to compile the drilling and assay results, to ensure the confidentiality of the results, and to determine the time when public disclosure of the results was required. Idziszek also erected a "Chinese Wall" to prevent the non-geological officers of Prime Explorations, including the respondents, from having actual knowledge of the drilling results before they were released to the public.

8 Early in the first program, that is in the fall of 1988, news releases had been issued to disclose the drilling results from a single hole or even a partial hole. However, by the summer of 1989, the practice was to release results about every two weeks covering several holes.

9 During the summer program, the drilling concentrated on two zones of mineralization, known as the 21A zone and the 21B zone. Several holes were drilled including holes 71, 93, 101 and 109. During this period, share options were granted and news releases were issued.

10 The first disclosure on the summer program occurred in a news release, dated June 20, 1989, to announce the commencement of the drilling activity. Five subsequent news releases were issued on July 13, 19, August 2, 15 and 22. The first four of these five news releases were issued after, rather than before, Calpine and Prime granted new share options or reduced the price of previously issued options in favour of directors (including the respondents) and employees. The fifth news release was issued before the fifth impugned share options transaction. As a matter of convenience, I set out the following chronology of events which relate to the five share options transactions and news releases:

Date	Event
July 11/12, 1989	Idziszek and Mallo visit the drill camp and are very impressed with their visual observations. A new zone of mineralization is identified and Mallo states that there is a very good chance that the reserves are doubling.
July 12, 1989	Calpine grants options on 100,000 of its common shares to the Calpine Employee Plan at a price of $1.44 per share, the previous close being $1.63 per share.
July 13, 1989	A news release is issued describing the location of the drilling. The assay results for the first hole, hole 71, are ready but they are not disclosed in the news release.
July 19, 1989	Calpine issues a news release disclosing the first assay results from the summer drilling program.
July 26, 1989	While reviewing the daily fax sent from the drill camp, Mallo finds out that hole 109 is out of the ordinary. Mallo receives chip samples from hole 109 and has assays done on them. At least one of the samples shows very high gold and silver values.
July 28, 1989	While on vacation, Idziszek is advised that visible gold has been discovered in hole 109. He immediately phones the re-

	spondent Ivany to advise him of the discovery. He then calls Mallo who informs him of the results of the chip sample assays for hole 109.
July 31, 1989	In the morning, Calpine grants options on 100,000 of its common shares to Leslie MacConnell, a long-time associate of Pezim's, at a price of $2.32 per share, the previous close being $2.55. Idziszek and Mallo visit the drill camp, arriving about noon. After viewing the drill core and confirming the finding of visible gold, Idziszek phones Pezim at about 1:30 p.m. and informs him of the visible gold. In the late afternoon, Pezim signs and files a declaration in which he certifies that there are no undisclosed material changes in the affairs of Calpine.
August 1, 1989	Idziszek and Mallo begin to prepare a news release and correlate the assay results that are in the office.
August 2, 1989	At Pezim's request, trading in Calpine's shares is halted from 9:40 a.m. until 9:30 a.m. the following day. A news release is issued announcing the assay results for several more holes as well as the discovery of visible gold in hole 109.
August 14, 1989	The final gold and silver assays for holes 93 and 101 arrive. They included "very good numbers".
August 15, 1989	Prime reduces, to $2.13 per share, the exercise price of options on 3,351,383 of its common shares already granted, the previous close being $2.47. Most of these options are held by Senior Management of Prime, including the respondents. In the afternoon, Calpine issues a news release disclosing the assay results for holes 93 and 101.
August 16, 1989	The final total gold assays for hole 109 arrive at Prime Explorations in the afternoon.
August 17, 1989	Prime grants options on 125,000 of its common shares to Richard Warke and Murray Garrison, two Prime employees, at an exercise price of $2.28 per share, the previous close being $2.50. In the afternoon, Pezim signs and files a declaration in

	which he certifies that there are no undisclosed material changes in the affairs of Prime.
August 22, 1989	Calpine issues a news release (dated August 21) disclosing a detailed description of the assay results for hole 109, as well as information on visual observations of nearby holes that had been subsequently drilled.
August 24, 1989	Calpine grants options on 100,000 of its common shares to the Calpine Employee Plan and to Norman Pezim, Murray Pezim's brother, at an exercise price of $4.78 per share, the previous close being $6.

B. The Private Placement

11 On July 14, 1989, Calpine issued a news release announcing a private placement for two million units; each unit was to consist of one Calpine common share and one Calpine share purchase warrant, which entitles the holder to purchase one Calpine common share. The fact that the purchaser or placee was Prime was not disclosed in the news release even though the sale would increase Prime's interest in Calpine from 23 to 36 percent of the outstanding Calpine common shares.

12 On July 17, 1989, the respondent Ivany sent a notice letter to the VSE concerning the private placement. Prime Equities Inc., a wholly owned subsidiary of Prime, was named as agent for the private placement, but the notice did not indicate the name of the placee.

13 During the period from July 14 to August 10, 1989, the respondent Pezim told certain brokers and investors who asked him that it was Prime, directly or indirectly, that was purchasing the private placement.

14 On August 10, 1989, the VSE was advised that the private placement would be taken down by an entity related to Prime and that Prime Equities would not be involved in the transaction. Prime issued a news release on that same day identifying Prime as the placee and announcing that it would close the private placement by August 18, 1989.

15 On August 18, 1989, Calpine filed the required declaration with the VSE in which the respondent Page certified that there were no undisclosed material changes in Calpine's affairs.

16 Although the private placement purportedly closed on August 18, 1989, the money was not paid or the shares issued until December of that year. On December 11, 1989, Prime issued a news release announcing that it had completed, on December 7, 1989, the purchase of four million shares of Calpine by way of a private placement.

C. The ALC Withdrawal

17 In September 1989, Prime made a public offering of five million units, at $4.25 per unit, under a guaranteed agency agreement ("GAA") with three brokerage firms. Each unit was to consist of one Prime common share and one Prime share purchase warrant. Under the GAA, one of the bro-

kerage firms, Canarim Investment Corporation Ltd. ("Canarim") guaranteed either to find purchasers or purchase itself four million units. An English company, Alexanders, Laing and Cruickshank Ltd. ("ALC"), entered into a deal with Canarim to buy one million Prime units. The deadline for payment under the GAA was September 29, 1989.

18 On September 25, 1989, Tim Hoare, a principal of ALC and a director of Prime, advised Canarim that ALC was withdrawing its purchase because it had not been adequately consulted on the price of the offering. Peter Brown, Canarim's chairperson and a director of Prime, called Pezim and told him there was a problem. Pezim told Brown to give ALC a delayed delivery contract and said he would talk to Hoare personally to convince him to take the units. Pezim also told Brown that Canarim would have to pay for the units, but indicated that Prime would try to help Canarim offset any loss through other business. On September 29, 1989, neither ALC nor Canarim paid for the unwanted one million units.

19 On October 16, 1989, Brown formally notified Prime that Canarim would not take down or pay for the one million Prime units. The withdrawal of Canarim was disclosed on October 19, 1989 in a planned news release intended to disclose a share swap between Prime and another company. Following this news release, Canarim came under pressure from the brokerage community to take down the units. Accordingly, Canarim agreed to honour its obligation and advised Prime. This was disclosed by Prime in a news release on October 23, 1989.

20 Following a rather lengthy hearing relating to the three groups of impugned transactions described above, the Commission concluded that the respondents had contravened s. 67 of the Act by failing to disclose material changes in their affairs. However, no contravention of s. 68 of the Act, relating to improper insider trading, was found. The respondents were responsible for these breaches as senior managers of the companies and were suspended from trading in shares for a period of one year through the removal of their trading exemptions under the Act. Further, they were ordered to pay two-thirds of the costs incurred by the Commission and the Superintendent.

21 Pursuant to s. 149 of the Act, the respondents appealed to the British Columbia Court of Appeal. The order granting leave to appeal limited the appeal to the question of whether the Commission had erred as a matter of law in its conclusions on s. 67 (disclosure of material change), s. 144 (power of Commission to make orders) and s. 154.2 (power of Commission to make orders regarding costs) of the Act. The Court of Appeal allowed their appeal and set aside the orders of the Commission, Locke J.A. dissenting. The respondents were ordered to pay one tenth of the costs incurred by the Commission and the Superintendent. The Superintendent and the Commission now appeal from that decision.

II. Relevant Statutory Provisions

Securities Act, S.B.C. 1985, c. 83 (am. S.B.C. 1988, c. 58, S.B.C. 1989, c. 78, S.B.C. 1990, c. 25 and S.B.C. 1992, c. 52):

> 1. (1) In this Act
>
> . . .
>
> "material change" means, where used in relation to the affairs of an issuer, a change in the business, operations, assets or ownership of the is-

suer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement that change made by

(a) senior management of the issuer who believe that confirmation of the decision by the directors is probable, or
(b) the directors of the issuer;

"material fact" means, where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities;

67. (1) Where a material change occurs in the affairs of a reporting issuer, the reporting issuer shall

(a) as soon as practicable issue and file a press release that is authorized by a senior officer and that discloses the nature and substance of the change, and
(b) file a required report, as soon as practicable, but in any event no later than 10 days after the date on which the change occurs.

(2) Subsection (1) does not apply to a reporting issuer which immediately files the report required under subsection (1) (b) marked "confidential" together with written reasons why there should not be a press release under subsection (1) (a) so long as

(a) in the opinion of the reporting issuer, the disclosure required by subsection (1) would be unduly detrimental to its interests, or
(b) the material change in the affairs of the reporting issuer

(i) consists of a decision to implement a change made by senior management of the issuer who believe that confirmation of the decision by the directors is probable, and
(ii) senior management of the issuer has no reason to believe that persons with knowledge of the material change have made use of that knowledge in purchasing or selling securities of the issuer.

(3) Where a report has been filed under subsection (2), the reporting issuer shall advise the commission in writing, within 10 days of the date of filing the

initial report and every 10 days after that, that it believes the report should continue to remain confidential until

(a) the material change is generally disclosed in the manner referred to in subsection (1) (a), or
(b) if the material change consists of a decision of the type referred to in subsection (2) (b), that decision has been rejected by the directors of the issuer.

68. (1) No person that

(a) is in a special relationship with a reporting issuer, and
(b) knows of a material fact or material change with respect to that reporting issuer, which material fact or material change has not been generally disclosed,

shall purchase or sell

(c) securities of that reporting issuer,
(d) a put, a call, an option or another right or obligation to purchase or sell securities of the reporting issuer, or
(e) a security, the market price of which varies materially with the market price of any securities of the reporting issuer.

(2) No reporting issuer and no person in a special relationship with a reporting issuer shall inform another person of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed, unless giving the information is necessary in the course of business of the reporting issuer or of the person in the special relationship with the reporting issuer.

(3) No person that proposes to

(a) make a take over bid, as defined in section 74, for the securities of a reporting issuer,
(b) become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with a reporting issuer, or
(c) acquire a substantial portion of the property of a reporting issuer

shall inform another person of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed, unless giving the information is necessary to effect the take over bid, business combination or acquisition, as the case may be.

(4) A person does not contravene subsection (1), (2) or (3) if the person proves on the balance of probabilities that at the time of the purchase or sale referred to in subsection (1) or at the time of giving the information under subsection (2) or (3), as the case may be, the person reasonably believed that the material fact or material change had been generally disclosed.

144. (1) Where the commission or the superintendent considers it to be in the public interest, the commission or the superintendent, after a hearing, may order ...

(c) that any or all of the exemptions described in any of sections 30 to 32, 55, 58, 80 or 81 do not apply to a person,
(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer, and
(ii) is prohibited from becoming or acting as a director or officer of any issuer,

. . .

149. (1) A person directly affected by a decision of the commission, other than

(a) a decision under section 33 or 59,
(b) a decision under section 147 in connection with the review of a decision of the superintendent under section 33 or 59, or
(c) a decision by a person acting under authority delegated by the commission under section 6,

may appeal to the Court of Appeal with leave of a justice of that court.

154.2 The person presiding at a hearing required or permitted under this Act or the regulations may order a person whose affairs are the subject of the hearing to pay prescribed fees or charges for the costs of or related to the hearing that are incurred by or on behalf of the commission or the superintendent including, without limiting this,

(a) costs of matters preliminary to the hearing,
(b) costs for time spent by the commission or the superintendent or the staff of either of them,
(c) fees paid to an expert or witness, and
(d) costs of legal services.

III. Judgments Below

1. British Columbia Securities Commission

22 The Commission's reasons for judgment were handed down in two parts: the findings of the Commission and the decision of the Commission.

23 In its findings, released on November 16, 1990, the Commission began by commenting on its jurisdiction. It held that, because it was vested with the responsibility of regulating the financial markets, it had broad powers. More specifically, the Commission stated that its jurisdiction was not limited to breaches of the Act, but extended to "circumstances where no provision of any law has been violated...since, no matter how extensive the specific provisions are, there will be fertile and unscrupulous minds to invent schemes that will skirt the words of all published pronouncements". The Commission concluded its discussion of jurisdiction as follows:

> The Commission may from time to time judge the conduct of directors against a standard found in the Company Act. In other instances it may, through policy statements, impose a higher standard or one more specific in its terms. The Commission may exercise its jurisdiction even when there is no published policy. The focus of the Commission's inquiry remains constant: the conduct of market participants and its impact on the efficiency and fairness of the market. Where the public interest requires its intervention, the Commission's response is a proper exercise of its jurisdiction and a fulfilment of its mandate.

24 Following these comments, the Commission examined the various impugned transactions in order to determine whether or not ss. 67 and 68 of the Act had been breached. It divided its findings according to the three types of transactions identified above in the recital of the facts.

A. The Drilling Results and Share Options Transactions

25 The Commission found that Prime or Calpine had, on four occasions in July and August 1989, contravened s. 67 of the Act in failing to disclose all material changes in their affairs prior to granting or repricing options. The Commission's key holding was that the "Chinese Wall", an internal company stratagem, did not relieve the senior managers from their obligations under s. 67 of the Act, which mandates disclosure of material change "as soon as practicable". The Commission stated:

> The accumulation of drilling results for release at periodic intervals is, in most circumstances, a reasonable approach to the disclosure of such information. Where an issuer proposes to engage in a securities transaction, however, it must ensure that any undisclosed material change is disclosed before proceeding with the transaction. The words "as soon as practicable" have a different meaning in this context than they might in the absence of the securities transaction.

In the view of the Commission, there was a positive obligation on the managers to make inquiries to determine whether there had been a material change prior to engaging in any securities transactions. The "Chinese Wall", though effective in shielding the managers from knowledge, did not release them from this obligation.

26 With respect to the fifth options transaction, the Commission found that Calpine had abused the ten day average pricing formula under the VSE's options policy, in failing to set the price of the options at a level reflecting the dissemination of recently disclosed material changes.

27 The Commission also found that, in two filings with the VSE for approval of options transactions, Pezim falsely certified that there were no material changes in the affairs of Calpine and Prime, respectively, that had not been publicly disclosed.

28 Finally, with respect to s. 68 of the Act, the Commission found, as noted above, that the "Chinese Wall" was effective in shielding the respondents from having knowledge of undisclosed material facts or material changes. Accordingly, the respondents had no knowledge of the drilling results when Prime and Calpine granted and repriced the options. Consequently, there was no breach of s. 68 of the Act.

B. The Private Placement

29 The Commission found that Calpine's disclosure of the private placement on July 14, 1989 was not in compliance with s. 67 of the Act because it failed to disclose that Prime was the placee and what effect the private placement would have on the control of Calpine. The Commission stated the following:

> The fact that Calpine's major shareholder would, through the private placement, raise its interest from 23 per cent to 36 per cent, assuming exercise of the warrants, represented a change in the ownership of Calpine that, by significantly reducing the possibility of a challenge for control, would reasonably be expected to cause a significant effect on the market price or value of Calpine's shares. It was therefore a material change in Calpine's affairs and was required to be disclosed, under section 67 of the Act.

30 The Commission also found that Calpine misled the VSE on July 17, 1989 by representing that the private placement was to be brokered by Prime Equities, and that Page falsely certified to the VSE on August 18, 1989 that there were no material changes in the affairs of Calpine that had not been publicly disclosed. With respect to the private placement, the Commission found no contravention of s. 68 of the Act.

C. The ALC Withdrawal

31 The Commission could not accept the respondents' argument that, with respect to the ALC withdrawal, there was nothing to disclose. In its view, the situation Prime found itself in on September 25, 1989 "would reasonably have been expected to have a significant effect on the market price of Prime's shares". Consequently, the Commission found that, in failing to make timely and adequate disclosure of the dispute with Canarim following ALC's withdrawal, Prime contravened s. 67 of the Act.

D. The Orders

32 In its findings, the Commission did not make any orders and preferred instead to hear submissions from the parties, following the release of its findings, with respect to the terms of the orders to be made under ss. 144 and 154.2 of the Act.

33 In its decision, released December 17, 1990, the Commission reviewed the parties submissions relating to orders and concluded that the respondents' improper conduct was related to distributions of securities under the exemptions in the Act. Consequently, in order to indicate the seriousness with which it viewed the contraventions, the Commission considered it to be in the public interest to remove the respondents' right to rely on the exemptions. Since the respondents were directors and senior management of Prime and Calpine, and had responsibility for ensuring compliance with securities regulatory requirements, the Commission decided not to differentiate among them in making its orders.

34 With respect to costs, the Commission rejected the respondents' argument that the length of the investigation and the hearing related mostly to the allegations of insider trading, which were not established. Rather, it found that most of the hearing related to evidence concerning those matters in respect of which it did find contravention. It held further that the suspicions which led to the other allegations were aroused by the respondents' own conduct in failing to make required disclosure and in filing misleading documents with the VSE.

35 The Commission concluded by making the following orders:

- under section 144(1)(c) of the Act, that the exemptions described in sections 30 to 32, 55, 58, 80 and 81 do not apply to Pezim, Page and Ivany for a period of one year, beginning January 1, 1991; and
- under section 154.2 of the Act, that Pezim, Page and Ivany pay prescribed fees or charges for two thirds of the costs of or related to the hearing that have been incurred by the Commission and the Superintendent, with the amount to be determined on further application to the Commission if the parties are unable to agree on the amount.

2. British Columbia Court of Appeal (1992), 66 B.C.L.R. (2d) 257

Lambert J.A., Carrothers J.A. concurring

36 The majority did not expressly consider the appropriate standard of review in the circumstances. Lambert J.A. merely stated the following at the outset of his reasons, at pp. 262-63:

> I think we may consider alleged errors of law in relation to both the interpretation and the application of those three specified sections of the Act. Alleged errors in interpretation are, of course, errors of law. Alleged errors of application may be errors of law or errors of fact or errors of mixed law and fact. We are required and permitted to consider only alleged errors of application that are errors of law.

37 The majority went on to examine the three types of impugned transactions in order to determine whether or not the Commission had erred in finding a breach of s. 67 of the Act and no breach of s. 68.

A. The Drilling Results and Share Options Transactions

38 Lambert J.A. determined that the Commission's findings were predicated on a finding that drilling results could be a "material change" within the meaning of s. 67 of the Act. He distinguished between s. 67, a reporting provision dealing with a material change and s. 68, a prohibitory provision dealing with material facts. Drilling reports, he said, are capable of being material facts. However, information obtained from those reports does not constitute a material change as that term is defined in the Act. Lambert J.A. explained this conclusion as follows, at p. 268:

> In my opinion, geological information of the nature obtained on a continuing basis as a result of a planned drilling program does not constitute a change in the business, the operations, the assets, or the ownership of the issuer, no matter what information is obtained from the drilling results. Such information may constitute a basis for a perception that there has been a change in the value of an asset. But that is a far different thing than a change in an asset.

39 Having determined that the Commission erred in its interpretation of "material change", the majority of the Court of Appeal held that all the conclusions of the Commission with respect to the drilling results and options transactions were flawed and could not stand.

40 Having made the distinction between material facts and material changes, the majority of the Court of Appeal further held that s. 67 does not impose a duty to inquire into material facts prior to engaging in securities transactions. Lambert J.A. stated the following at p. 279:

> There is a duty to disclose material facts that are known. There is a duty to disclose material changes in the business, operations, assets or ownership of the issuer, and perhaps to make enquiries about whether there are such material changes if it should happen that they are not known. But there is no duty to enquire about material facts, and to find them out, and not to engage in securities transactions if there are any material facts that could have been found out. Section 68(2) [since repealed] specifically contemplates that there is no such duty.

B. The Private Placement

41 For reasons of convenience, I reproduce below the Commission's two findings with respect to the private placement:

> [The Commission]... found that Calpine's disclosure of the private placement on July 14 was not in compliance with section 67 of the Act because it failed to disclose that Prime was the placee and what effect the private placement would have on the control of Calpine.
>
> [The Commission]... also found that Calpine misled the Exchange [VSE] on July 17 by representing that the private placement was to be brokered by Prime Equities, and that Page falsely certified to the Exchange on August 18 that there were no material changes in the affairs of Calpine that had not been publicly disclosed.

42 With respect to the first finding, the majority found no error of law on the part of the Commission, holding that the effect of the private placement constituted a material change in the affairs of Calpine in the form of a change of ownership which could reasonably be expected to have a significant effect on the market price or on the value of the common shares of Calpine.

43 The majority also held that the Commission did not err in law in its conclusion in the first part of the second finding that Calpine ought to have disclosed that Prime was to be the placee, although Lambert J.A. at p. 273 thought that to say that Calpine "misled the [VSE]" was a "somewhat harsh way of describing the filing".

44 The majority did, however, overturn the second part of the second finding. According to Lambert J.A., the Commission's conclusion was flawed by the error in law encompassed by regarding the undisclosed assays as constituting material changes in the affairs of Calpine.

C. The ALC Withdrawal

45 Once again, the majority held that the Commission's finding was flawed by the error of law in misinterpreting the definition of "material change". According to Lambert J.A., the oral statements by Brown, Canarim's chairperson, that his company did not consider itself bound to take four million units but only three million units, did not amount to a default of the GAA, and thus it could not be said that there was a change in the "business, operations, assets or ownership of the issuer" under s. 67 of the Act. He was also of the view that the telephone calls and meetings relating to the negotiations did not amount to a material change. Lambert J.A. stated that it may well have been counterproductive for the respondents to issue a press release during the difficult and delicate negotiations and thus may not have been in the public interest.

D. The Orders

46 With respect to s. 144 of the Act, the majority of the Court of Appeal held that the words "in the public interest" limit the range of orders that may be made by the Commission under that provision. It continued as follows at p. 281:

> If there is no rational link between the conduct of the person in question and the order made by the commission, or if that rational link is not a rational link for which the justification rests on the public interest, then such an order of the commission would be outside the commission's powers under s. 144(1).

47 Lambert J.A. then seemed to hold that there was no link between the order made in this case and the respondents' conduct since the order that was chosen was made in respect of personal trading. Lambert J.A. did not pursue this argument given his findings that the Commission had erred in law in finding a breach of the Act. Accordingly, the majority held that the Commission's orders under s. 144 could not stand.

48 On the issue of costs, the respondents argued that, because the Act requires the Commission to fund its own activities, there was a reasonable apprehension of bias with respect to the order that they pay two-thirds of the costs of the hearing. The majority rejected this argument stating that it was not the appropriate time in the proceedings to raise such an argument. The fact that the Commission was required to be self-funding did not impact on the legality of its order. Nevertheless, the majority ordered that the order of the Commission be set aside and that the respondents pay one

tenth of the Commission's costs of the investigation. Disputes relating to costs were to be brought back to the Court of Appeal.

Locke J.A., dissenting

49 In most comprehensive reasons, Locke J.A. began by stating that the appeal was being heard under a general appellate provision and not as an application for judicial review under a particular statute. He then reviewed several cases dealing with the purpose and characteristics of securities commissions and concluded at p. 300 that "[i]n the case of appeals from specialized tribunals...an appellate court should be slow to interfere unless the tribunal is shown to be clearly wrong either on fact or law".

50 Locke J.A went on to examine the three types of impugned transactions as identified in the facts.

A. The Drilling Results and Share Options Transactions

51 In interpreting the disclosure requirements of s. 67 of the Act, Locke J.A. rejected the narrow approach advocated by the respondents. He held, at p. 308, that "information per se is capable of being an 'asset' within the meaning of the Act". This interpretation of the Act, according to Locke J.A. at p. 309, is consistent with its aims, which include "prevent[ing] high-pressure sales tactics, seeing that disclosure is complete, and ensuring that all individuals are informed before actually entering into a securities transaction". Locke J.A. then reviewed the drilling results as well as their potential effect. He held that the information found in these results could indeed be interpreted as a material change in the assets of the company within the meaning of the Act.

52 Noting that the Act is not penal legislation but rather is regulatory in scope, Locke J.A. would have interpreted its provisions as advocated by the appellants. He concluded at p. 315 that there was "overwhelming evidence to support each finding of the commission" and would not tamper with them.

B. The Private Placement

53 After reviewing the facts surrounding the private placement, Locke J.A again concluded that there was ample evidence to support the Commission's findings and that there was no basis for interfering with them.

C. The ALC Withdrawal

54 Locke J.A. reviewed the facts and the findings relating to the ALC matter, and concluded, at p. 329, that there was "no justifiable reason" for the respondents' delay in informing the public of the default. He added, at p. 329, that Ivany's natural reluctance to inform the public as well as his hopes to remedy the situation "constitute[d] no legal excuse for withholding the information".

D. The Orders

55 With respect to the orders handed down by the Commission, Locke J.A. stated, at p. 339, that the appropriateness of a penalty is a matter for a commission to decide and that a court should not interfere unless it is clear that "there is such an injustice as indicates a legal error". Locke J.A. found no such error.

56 On the issue of costs, Locke J.A. rejected the respondents' argument that there was an apprehension of bias. He also did not disturb the proportion of the costs (two thirds) which the respondents were ordered to pay. Locke J.A. did have concerns, however, regarding the compilation of the "expenses" charged as costs to the appellants under s. 154.2. However, as he pointed out at p. 344, his concerns relate to a matter "for legislators and not judges".

IV. Issues

57 Although the parties to this appeal have made specific allegations of error on the part of the Commission and of the Court of Appeal, the issues can be reduced to the following two questions:

1. What is the appropriate standard of review for an appellate court reviewing a decision of a securities commission not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of interpretation?
2. In the case at bar, did the British Columbia Court of Appeal exercise the appropriate standard of review?

V. Analysis

1. What is the appropriate standard of review for an appellate court reviewing a decision of a securities commission not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of interpretation?

58 In order to answer this first question, I should like to discuss a number of factors and principles which come into play.

A. The Nature of the Statute

59 It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation (1977), at p. 1.

60 Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

B. Principles of Judicial Review

61 From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts

have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

62 Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. See Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1089 (Bibeault), and Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756.

63 At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. See for example Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321; Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, and University of British Columbia v. Berg, [1993] 2 S.C.R. 353.

64 The case at bar falls between these two extremes. On one hand, we are dealing with a statutory right of appeal pursuant to s. 149 of the Act. On the other hand, we are dealing with an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise.

65 This Court's decision in Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 (Bell Canada), is particularly helpful in deciding the present case as it dealt with a statutory right of appeal rather than an application for judicial review. Gonthier J., writing for this Court, stated the following at pp. 1745-46:

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.
>
> However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. [Emphasis added.]

66 Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of

specialized tribunals on matters which fall squarely within the tribunal's expertise. This point was reaffirmed in United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316 (Bradco), where Sopinka J., writing for the majority, stated the following at p. 335:

> . . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in Bell Canada, supra, it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> On the other side of the coin, a lack of relative expertise on the part of the tribunal vis-à-vis the particular issue before it as compared with the reviewing court is a ground for a refusal of deference.

67 In my view, the pragmatic or functional approach articulated in Bibeault is also helpful in determining the standard of review applicable in this case. At page 1088 of that decision, Beetz J., writing for the Court, stated the following:

> . . . the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

68 As already mentioned, the primary goal of securities legislation is the protection of the investing public. The importance of that goal in assessing the decisions of securities commissions has been recognized by this Court in Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301 (Brosseau), where L'Heureux-Dubé J., writing for the Court, stated the following at p. 314:

> Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:
>
> > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

69 In National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, Wilson J., in a concurring judgment, referred at p. 1336 to financial markets as a field where specialized tribunals have an important role to play:

> Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.
>
> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. [Emphasis added.]

70 The breadth of the Commission's expertise and specialisation is reflected in the provisions of the Act. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings and orders. Section 144.2 provides that any decision of the Commission filed in the Registry of the Supreme Court of British Columbia has the force and effect of a decision of that court. Finally, pursuant to s. 153 of the Act, the Commission has the power to revoke or vary any of its decisions. Sections 14 and 144 are of particular importance as they reveal the breadth of the Commission's public interest mandate:

> 14. (1) The commission may, where it considers it to be in the public interest, make any decision respecting
>
> (a) a bylaw, rule or other regulatory instrument or policy, or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy, of a self regulatory body or stock exchange.
> (b) the procedures or practices of a self regulatory body or stock exchange,
> (c) the manner in which a stock exchange carries on business,
> (d) the trading of securities on or through the facilities of a stock exchange,

(e) a security listed and posted for trading on a stock exchange, and
(f) issuers, whose securities are listed and posted for trading on a stock exchange, to ensure that they comply with this Act and the regulations.

(2) A person affected by a decision made by the commission under subsection (1) shall act in accordance with it.

144. (1) Where the commission or the superintendent considers it to be in the public interest, the commission or the superintendent, after a hearing, may order

(a) that a person comply with or cease contravening, and that the directors and senior officers of the person cause the person to comply with or cease contravening,
(i) a provision of this Act or the regulations,
(ii) a decision, whether or not the decision has been filed under section 144.2, or
(iii) a bylaw, rule, or other regulatory instrument or policy or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body or stock exchange, as the case may be, which has been recognized by the commission under section 11,

(b) that

(i) all persons
(ii) the person or persons named in the order, or
(iii) one or more classes of persons

cease trading in a specified security or in a class of security,

(c) that any or all of the exemptions described in any of sections 30 to 32, 55, 58, 80 or 81 do not apply to a person,
(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer, and
(ii) is prohibited from becoming or acting as a director or officer of any issuer,

....

71 In reading these powerful provisions, it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest. To me, this is an additional basis for judicial deference.

72 It must also be noted that the definitions in the Act exist in a factual or regulatory context. They are part of the larger regulatory framework discussed above. They are not to be analyzed in isolation but rather in their regulatory context. This is something that requires expertise and thus falls within the jurisdiction of the Commission. This is yet another basis for curial deference.

73 Finally, it is noteworthy that various courts, including this Court, have shown deference towards the decisions of securities commission: Pacific Coast Coin Exchange v. Ontario Securities Commission, [1978] 2 S.C.R. 112; Brosseau, supra; Four Star Mgmt. Ltd. v. B.C. Securities Comm. (1990), 46 B.C.L.R. (2d) 195 (C.A.), leave to appeal refused, sub nom. Williams (Byron Leslie) v. British Columbia Securities Comm., [1991] 1 S.C.R. xv; and Gordon Capital Corp. v. Ontario Securities Commission (1991), 14 O.S.C.B. 2713 (Div. Ct.).

C. The Role of the Commission

74 Where a tribunal plays a role in policy development, a higher degree of judicial deference is warranted with respect to its interpretation of the law. This was stated by the majority of this Court in Bradco at pp. 336-37:

> . . . a distinction can be drawn between arbitrators, appointed on an ad hoc basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference is due their interpretation of the law notwithstanding the absence of a privative clause. [Emphasis added.]

75 In the case at bar, the Commission's primary role is to administer and apply the Act. It also plays a policy development role. Thus, this is an additional basis for deference. However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

76 Thus on precedent, principle and policy, I conclude as a general proposition that the decisions of the Commission, falling within its expertise, warrant judicial deference.

D. The Questions of Law at Issue

77 As mentioned above, it is also necessary to focus on the specific question of law at issue to determine whether it falls within the tribunal's expertise and whether deference is warranted. The specific sections at issue in this case are ss. 67, 144 and 154.2 of the Act.

78 The decision to make an order and the precise nature of that order, under s. 144, as well as any decision obliging a person to pay the costs of a hearing necessitated by his or her conduct, pursuant to s. 154.2, are clearly within the jurisdiction and expertise of the Commission. The other provision

at issue is s. 67 which involves an interpretation of the words "material change" and "as soon as practicable".

79 Both "material change" and "material fact" are defined in s. 1 of the Act. They are defined in terms of the significance of their impact on the market price or value of the securities of an issuer. The definition of "material fact" is broader than that of "material change"; it encompasses any fact that can "reasonably be expected to significantly affect" the market price or value of the securities of an issuer, and not only changes in the "business, operations, assets or ownership of the issuer" that would reasonably be expected to have such an effect.

80 The use of these two terms in the Act also reflects the differences in their scope. For example, a prospectus relating to a public distribution of securities must disclose all material facts relating to the issuer: ss. 44(1), 45(2), 49(1) and 50(1). However, the prospectus need be amended only when a material change occurs: ss. 47(1), (2) and 48(1).

81 Sections 67 and 68 of the Act also reflect the differences between a material change and a material fact. As Victor P. Alboini points out in Securities Law and Practice, 2nd ed., vol. 2 (1984), at p. 18-13, "[t]he concept of 'material change' should be distinguished from that of 'material fact'. Undisclosed material facts concerning a reporting issuer may not require timely disclosure...although they do restrict trading". Under the timely disclosure provision of the Act, s. 67, only material changes require that a press release be issued and that a report be filed. In contrast, under the insider trading provision, s. 68, a person who is in a special relationship with a reporting issuer is prohibited from buying or selling securities of the issuer when the person knows of either a material change or a material fact which has not been publicly disclosed.

82 As already mentioned, the present case turns partly on the definition of "material change". Three elements emerge from that definition: the change must be (a) "in relation to the affairs of an issuer", (b) "in the business, operations, assets or ownership of the issuer" and (c) material, i.e., would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. Thus, not all changes are material changes; the latter are set in the context of making sure that issuers keep investors up to date. Consequently, it would seem wholly uncontroversial that the determination of what information should be disclosed is an issue which goes to the heart of the regulatory expertise and mandate of the Commission, i.e, regulating the securities markets in the public's interest.

83 This case also turns on the meaning of the words "as soon as practicable" in s. 67 of the Act which reveal when a material change should be disclosed to the public. In my view, the timeliness of disclosure also falls within the Commission's regulatory jurisdiction.

84 In summary, having regard to the nature of the securities industry, the Commission's specialization of duties and policy development role as well as the nature of the problem before the court, considerable deference is warranted in the present case notwithstanding the fact that there is a statutory right of appeal and there is no privative clause.

2. In the case at bar, did the British Columbia Court of Appeal exercise the appropriate standard of review?

A. The Drilling Results and Share Options Transactions

85 The Commission's conclusion that s. 67 was violated in the context of the share options transactions can be subdivided into two parts. The first element of the conclusion is that undisclosed drilling results can constitute a material change in the affairs of a reporting issuer. Locke J.A. of the Court of Appeal agreed. Lambert J.A., however, writing for the majority of the Court of Appeal, was of a different view. He held at p. 268 that information obtained from assay results cannot constitute a material change:

> In my opinion, geological information obtained from observations of visible matter and geological information from drill cores in the form of assay results, or in the form of a properly plotted plan prepared from the results of a number of assays, are all capable of being material facts. Let us assume that the geological information relied upon by the commission constituted material facts in this case. That does not mean that the same geological information constituted material changes. In my opinion, geological information of the nature obtained on a continuing basis as a result of a planned drilling program does not constitute a change in the business, the operations, the assets or the ownership of the issuer, no matter what information is obtained from the drilling results. Such information may constitute a basis for a perception that there has been a change in the value of an asset. But that is a far different thing than a change in an asset. [Emphasis added.]

86 As already mentioned, the determination of what constitutes a material change for the purposes of general disclosure under s. 67 of the Act is a matter which falls squarely within the regulatory mandate and expertise of the Commission. Consequently, when the majority of the Court of Appeal rejected the Commission's findings on this matter, it fell into error. Furthermore, the majority's view on this point is, in my opinion, clearly wrong and is inconsistent with the economic and regulatory realities the Act sets out to address. Counsel for the respondents conceded this point, during the hearing of this appeal, and stated that "information from a drilling program can be tantamount to a material change".

87 In the mining industry, mineral properties are constantly being assessed to determine whether there is a change in the characterization of the property. Thus, from the point of view of investors, new information relating to a mining property (which is an asset) bears significantly on the question of that property's value. Accordingly, I agree with the approach taken by the Commission, namely that a change in assay and drilling results can amount to a material change depending on the circumstances.

88 George C. Stevens and Stephen D. Wortley, authors of "Murray Pezim in the Court of Appeal: Draining the Lifeblood from Securities Regulation" (1992), 26 U.B.C. L. Rev. 331, are of the same view. In commenting on the above quoted passage, they stated the following at pp. 336-37:

> To the geologist or the mining property valuator, Lambert J.A.'s statement is astonishing. Every mine starts from host rock. Every drill hole leads not merely to a change of perception of the asset: it is a piece in the puzzle that ultimately determines whether the asset is moose pasture or ore. Each new result may change the characterization of the asset from rock, to mineral deposit, to inferred ore, to

> probable ore and ultimately, with enough holes supported by a feasibility study, to proven ore.
>
> Even more astonishing was the Court's conclusion, without receipt of any evidence, that drilling results would never constitute a change in the operations or assets of an issuer.
>
> . . .
>
> Can the Court really suggest that there has not been a change in a company's assets when, following adequate sampling, a discovery is made on a portion of its property that had been previously categorized as having no known mineralization? Surely, given the basic aim of the Act - to protect the investing public through full, true and plain disclosure of all material facts relating to securities - one could conclude (as did Mr. Justice Locke, the dissenting judge) that the Commission did not make a "plain and vital mistake" in the application of the words in s. 67 of the Act to the facts before it....

89 Consequently, I am of the view, as found by the Commission and Locke J.A., that the assay results constituted a change with respect to or in the companies' assets and is "material" for the purposes of the Act.

90 The second element of the Commission's conclusion that s. 67 was violated in the context of the share options transactions is that the obligation to disclose "as soon as practicable" takes on a different meaning when an issuer is about to engage in a securities transaction:

> Where an issuer proposes to engage in a securities transaction...it must ensure that any undisclosed material change is disclosed before proceeding with the transaction. The words "as soon as practicable" have a different meaning in this context than they might in the absence of the securities transaction.
>
> Senior Management were responsible for managing the affairs of Prime and Calpine and for ensuring that they complied with their obligations under the Act. In carrying out this responsibility, Senior Management ought to have made reasonable inquiries, before causing Prime and Calpine to engage in securities transactions, to ensure that all material changes in their affairs had been disclosed.
>
> . . .
>
> Considering the importance of the principles involved here, any securities transactions by Prime or Calpine in their own securities warranted inquiries and any reasonable inquiries would have led to any undisclosed material changes that may have existed. [Emphasis added.]

91 By stating the following at p. 279, the majority of the Court of Appeal appeared to disagree:

> ...the commission erred in law by interpreting and applying the defined phrase "material change" in s. 67 as if it were equivalent to the phrase "material fact"....

As a consequence of that error in law, the commission regarded Prime and Calpine and the senior officers of those issuers as having a duty, before Prime or Calpine engaged in any securities transaction, to make enquiries of the senior geologist who was responsible for releasing all geological information as soon as it was practicable to do so in comprehensible form, about whether there was any material geological information that had not been released.

There are sound arguments both for and against the imposition of such a duty. But in balancing those arguments the legislature has chosen against imposing that duty.

92 However, in this next passage at p. 279, the majority seems to say that, although there is no duty to inquire about material facts, there may be a duty to inquire about material changes:

> There is a duty to disclose material facts that are known. <u>There is a duty to disclose material changes in the business, operations, assets or ownership of the issuer, and perhaps to make inquiries about whether there are such material changes if it should happen that they are not known</u>. But there is no duty to inquire about material facts, and to find them out, and not to engage in securities transactions if there [were] any material facts that could have been found out. Section 68(2) [since repealed] specifically contemplates that there is no such duty.

93 From this passage, it appears that the majority of the Court of Appeal is itself unclear as to whether or not there is a duty under s. 67 to inquire as to the existence of material changes before causing a reporting issuer to engage in securities transactions. In any event, I find that it was well within the Commission's jurisdiction to interpret s. 67 in the manner it did, and I fully agree with its position on this point. Although a duty to inquire is not expressly stated in s. 67, such an interpretation contextualizes the general obligation to disclose material changes and guarantees the fairness of the market, which is the underlying goal of the Act. Stevens and Wortley, supra, also support this position, at pp. 338-39:

> Now the duty to disclose all material facts arises when a company enters the public market. Its prospectus must contain full, true and plain disclosure of all material facts. Compliance with that fundamental rule does indeed put a duty of inquiry on those who sign the prospectus, Lambert J.A.'s statement notwithstanding. Thereafter, the duty to disclose material facts is really a duty to disclose *changes* from the basket of facts disclosed originally and from time to time afterwards. That is why the Act uses "material facts" and "material changes" in different contexts.
>
> Nowhere, however, in this underlying statutory scheme of continuous disclosure is there a principle that states the duty of inquiry imposed upon management when a company first enters the securities markets is in some way lessened

> thereafter. On this point the Court has made unhappy new law. [Emphasis in original.]

94 It must be noted that a duty to inquire under s. 67 is not incompatible with the insider trading provision of the Act, s. 68. If an issuer wishes to engage in a securities transaction, its directors must inquire about all material changes in the issuer's affairs. Consequently, the directors will have, at one point in time, knowledge of undisclosed material facts and material changes which constitute inside information. However, as long as the material facts and material changes are adequately disclosed prior to the transaction, there will be no possibility of insider trading. It must also be noted that the erecting of a Chinese Wall, which prevents directors of a company from having inside information, does not erase the duty imposed on directors to inquire about material changes, as the disclosure requirements under s. 67 are on the issuer.

95 Having concluded that information contained in drilling results can constitute a material change in the affairs of a reporting issuer and that s. 67 imposes on senior management a duty to inquire as to the existence of material changes before causing a reporting issuer to engage in a securities transaction, the Commission went on to review the circumstances surrounding the share options transactions of July 12 and 31, August 15 and 17, 1989. The Commission made the following findings: (1) The July 12 transaction was completed after a new zone of mineralization had been identified, as well as a possible doubling of the reserves, but before the news release of July 13 was issued. (2) The July 31 transaction was concluded after the discovery of visible gold and extensive other mineralization in hole 109, but before the news release of August 2. (3) The August 15 transaction was completed after Prime was in possession of the assay results for holes 93 and 101 but before the news release was issued that afternoon. (4) The August 17 transaction followed the arrival of the gold assays for hole 109; the news release relating to these assays was issued on August 22. Based on these findings, the Commission held that the respondents failed to disclose various material changes in the affairs of Prime and Calpine before causing these two companies to engage in securities transactions. Consequently, the respondents had contravened s. 67 of the Act.

96 Like Locke J.A., I find that there was overwhelming evidence to support each of the Commission's findings and I would not disturb any of them. Consequently, the majority of the Court of Appeal erred in interfering with the Commission's conclusion that, with respect to the share options transactions, the respondents breached their timely disclosure obligations under s. 67 of the Act.

97 As the majority of the Court of Appeal did not discuss the fifth impugned share options transaction, the Commission's finding with respect to this transaction will stand.

B. The Private Placement

98 The majority of the Court of Appeal agreed with the Commission that s. 67 of the Act was breached when Calpine failed to disclose the identity of the placee or the fact that Prime was to increase its control over Calpine from 23 to 36 percent, assuming exercise of the warrants. In this respect, it is worth noting that by obtaining a 36 percent holding in Calpine, Prime thereby could prevent the passing of a special resolution as defined in s. 1 of the Company Act, which in turn empowered Prime to prevent a number of important transactions for which a special resolution of shareholders is required under the Company Act (see, for example, ss. 255, 267 and 272).

99 The majority also agreed that Calpine misled the VSE on July 17, 1989 by representing that the private placement was to be brokered by Prime Equities. However, the majority overturned the

Commission's finding that Page falsely certified to the VSE on August 18, 1989 that there were no material changes in the affairs of Calpine that had not been publicly disclosed. It predicated its conclusion on the fact that undisclosed assays cannot constitute a material change.

100 As already mentioned, the determination of what constitutes a material change goes to the heart of the expertise and mandate of the Commission. Furthermore, having regard to the realities of the mining industry, information from assay results can properly be characterized as a material change in the business, operations, assets or ownership of a reporting issuer. To conclude, I agree with Locke J.A. that the findings of the Commission on the private placement issue reveal no error.

C. The ALC Withdrawal

101 The majority of the Court of Appeal overturned the Commission's finding that s. 67 had been breached by not disclosing the ALC withdrawal. The majority viewed the ALC withdrawal in contractual terms and stated that it did not have to be disclosed until there was repudiation of the contract and such repudiation was accepted by Prime.

102 In my view, this narrow approach is wrong and is inconsistent with the purpose of the Act, i.e., to protect the investing public. Again, like Locke J.A., I find there is little basis for disagreeing with the Commission's conclusions. ALC's withdrawal represented a $4.25 million contractual dispute. It would seem wholly uncontroversial to consider such a dispute a change in the business, operations, ownership or affairs of a reporting issuer. As Stevens and Wortley point out, supra, at p. 338, "an account receivable that was to be transformed into cash on September 29 became instead nothing more than a disputed claim for breach of contract". Accordingly, non-disclosure of this dispute constituted a failure to disclose a material change. Thus, the majority of the Court of Appeal erred in rejecting the Commission's findings on this point.

103 In stating the above, I do not wish to imply that it is always self-evident as to what constitutes a material change. In this respect, it is interesting to note that the Chair of the Ontario Securities Commission has encouraged in that province an early warning system which allows informal disclosure to the Commission of a proposed transaction on a confidential basis. According to Alboini, supra, at pp. 18-14 and 18-15, such a system "allows for appropriate steps to be taken by the Commission to permit stock watches, while also creating an opportunity to discuss with Commission members or staff possible orders or applications that may be required in order to facilitate the transaction from a regulatory point of view".

D. The Orders

104 The respondents' argument that there must be a rational link between the conduct of the person in question and the order made by the Commission must be rejected. As we have seen, s. 144 of the Act gives the Commission a broad discretion to make orders that it considers to be in the public interest. Thus, a reviewing court should not disturb a Commission's order unless the Commission has made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner.

105 The discretion given to Securities Commissions to determine what is in the public interest was discussed by the Ontario Court of Appeal in Re the Securities Commission and Mitchell, [1957] O.W.N. 595, at p. 599:

> The Chairman and other members of the Commission are selected and appointed by the Lieutenant-Governor in Council for their high qualifications, ability and experience. It is the function and duty of the Commission under s. 8 of The Securities Act to form an opinion whether or not it is in the public interest to suspend or cancel the registration of any person. It is intended by the legislation that the Commission shall have extremely wide powers of discretion in forming its opinion.
>
> The opinion of the Commission should not be set aside or altered upon an appeal unless the Commission has erred in some principle of law or unless it appears clearly that the Commission has not proceeded to form its opinion in a judicial manner or unless it appears that the opinion of the Commission is so clearly wrong as to amount to an injustice requiring a remedy on appeal.

These words were adopted with approval in Bay Street West Securities (1983) Inc. v. Alberta Securities Commission (1984), 56 A.R. 19 (C.A.).

106 In the present case, the Commission exercised its discretion in a judicial manner. Following the release of its findings, it held a supplementary hearing to receive submissions from both parties as to the appropriate sanctions to impose on the respondents. In its final decision, the Commission held that the respondents were responsible for Prime and Calpine's contravention of the timely disclosure requirements of the Act. It further held that the respondents' conduct was related to distributions of securities under the exemptions in the Act. Consequently, the Commission removed the respondents' trading exemptions under the Act for a period of one year.

107 Some may argue that the Commission could not make the orders it did with respect to the respondents because the duty to make timely disclosure under s. 67 of the Act applies to a "reporting issuer". This argument must be rejected for two reasons. First, as Alboini points out, supra, at p. 18-26, "[a]lthough responsibility for timely disclosure is vested in the reporting issuer... effective responsibility rests with the senior officers and the directors of the reporting issuer". Second, not only does s. 144 of the Act give the Commission a broad public interest to make orders it considers to be in the public interest, it also confers upon the Commission the authority to make orders with respect to "a person".

108 In summary, it was clearly within the Commission's jurisdiction to order that the trading exemptions not apply to the respondents for a period of one year. Furthermore, the Commission's orders were not vexatious or erroneous in law. Consequently, the order under s. 144 of the Act must stand.

109 The Commission's order with respect to costs was also well within its jurisdiction. Consequently, considerable deference is in order. Moreover, although the respondents argued that the length of the investigation and the hearing related mostly to the allegations of insider trading, which were not proven, this was not the case. The Commission specifically stated so:

> The Respondents argued that we should make no order for payment of costs. They said that the length of the investigation and the hearing were made necessary only by the allegations related to insider trading and breach of directors' duties, which were not proven. However, most of the hearing related to evidence

> concerning those matters in respect of which we did find contraventions. Furthermore, the suspicions which led to the other allegations, about which the Respondents complained, were aroused, quite reasonably, by the Respondents' own conduct in failing to make required disclosure and in filing misleading documents with the [VSE]. [Emphasis added.]

110 Since no persuasive basis has been suggested for overturning the order relating to costs, I would not interfere with it.

VI. Conclusion and Disposition

111 The majority of the Court of Appeal erred in failing to appreciate the Commission's role in an area requiring special knowledge and sophistication. It also failed to recognize the Legislature's intent to confer a broad public interest mandate on the Commission to carry out its role. There was ample evidence to support each of the Commission's findings. There being no reviewable error of law, the majority of the Court of Appeal erred in interfering with the Commission's findings. Consequently, I would allow the appeal, set aside the judgment of the British Columbia Court of Appeal and substitute therefor the findings and orders of the Commission. The appellants shall have their costs here and in the court below.

qp/d/hbb/DRS/DRS

TAB 4

Indexed as:

British Columbia Securities Commission v. Branch

Bruce Douglas Branch and Pal Arthur Levitt, appellants;
v.
British Columbia Securities Commission, respondent, and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta, interveners.

[1995] 2 S.C.R. 3

[1995] S.C.J. No. 32

File No.: 22978.

Supreme Court of Canada

1994: February 28 and March 1; 1995: April 13.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Charter of Rights -- Fundamental justice -- Self-incrimination -- Right to silence -- Securities commission investigation -- Company's officers ordered to testify under oath and to produce documents pursuant to s. 128(1) of Securities Act -- Whether s. 128(1) infringes s. 7 of Canadian Charter of Rights and Freedoms -- Securities Act, S.B.C. 1985, c. 83, s. 128(1).

Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Securities commission investigation -- Company's officers ordered to produce documents pursuant to s. 128(1) of Securities Act -- Whether s. 128(1) infringes s. 8 of Canadian Charter of Rights and Freedoms -- Securities Act, S.B.C. 1985, c. 83, s. 128(1).

The British Columbia Securities Commission commenced an investigation into a company following a report by the company's auditors disclosing questionable expenditures. The appellants, two of the officers of the company, were served with summonses compelling their attendance for examination under oath and requiring them to produce all information and records in their possession relating to the company. The summonses were issued pursuant to s. 128(1) of the province's Securities Act. When the appellants failed to appear, the Commission petitioned the British Columbia Supreme Court for an order committing the appellants in contempt. In response, they applied for a declaration to the effect that s. 128(1) violates ss. 7 and 8 of the Canadian Charter of Rights and Freedoms. The application was dismissed. The superior court judge rejected the appellants' claims in respect of privilege against self-incrimination and of a right to remain silent under s. 7. He also concluded that the seizure authorized by s. 128(1)(c) of the Securities Act is not "unreasonable" within the meaning of s. 8. The appellants were ordered to comply with the summonses, or, in default, to show cause or be held in contempt. An appeal to the British Columbia Court of Appeal was dismissed.

Held: The appeal should be dismissed.

(1) Section 7

Per Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.: In R. v. S. (R.J.), [1995] 1 S.C.R. 451, it was decided that the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of the Charter, requires that persons compelled to testify be provided with subsequent "derivative use immunity" in addition to the "use immunity" guaranteed by s. 13 of the Charter. The accused has the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established, in order to have the evidence admitted the Crown will have to satisfy the court on a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony. In order to trigger the derivative use immunity, the witness may only claim such protection in a subsequent proceeding where he is an accused subject to penal sanctions or in any proceeding which engages s. 7.

In S. (R.J.), it was also decided that courts could, in certain circumstances, grant exemptions from compulsion to testify. The crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution. It would be rare indeed that the evidence sought cannot be shown to have some relevance other than to incriminate the witness. If it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only potential prejudice is the possible subsequent derivative use of the testimony, then the compulsion to testify will occasion no prejudice for that witness since he will be protected against such use. If the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable. The purpose of calling a par-

ticular witness will not be readily apparent and such purpose must be inferred in many cases from the overall effect of the evidence proposed to be called. If the overall effect is that it is of slight importance to the proceeding in which it is compelled but of great importance in a subsequent proceeding against the witness in which the witness is incriminated, then an inference may be drawn as to the real purpose of the compelled evidence. The issue of compellability may arise at the time when the witness is called to testify (subpoena stage) and at a subsequent penal proceeding against the witness (trial stage). The burden of proof with respect to the predominant purpose of the compelled testimony will be on the witness who asserts that it is not sought for a legitimate purpose. If this is established, the witness should not be compelled unless the party seeking to compel the witness justifies the compulsion.

The liberty interest under s. 7 of the Charter is engaged at the point of testimonial compulsion. Once it is engaged, the question is whether there has been a deprivation of this interest in accordance with the principles of fundamental justice. Here, s. 128(1) of the Securities Act does not violate s. 7. The purpose of the Act, which is to protect our economy and the public from unscrupulous trading practices, justifies inquiries of limited scope. An inquiry such as the one at hand legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance -- namely, obtaining evidence to regulate the securities industry. The inquiry is of the type permitted by our law as it serves an obvious social utility. The predominant purpose of the Commission's inquiry in this case is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate the appellants, and there is nothing in the record at this stage to suggest otherwise. The proposed testimony thus falls to be governed by the general rule applicable under the Charter, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return. The appellants are also entitled to claim the protection of subsequent derivative use immunity. This is a protection that is afforded to witnesses notwithstanding that the source of their evidence may derive from corporate activity.

Documentary compulsion may also entail jeopardy in so far as it engages the appellants' liberty interest under s. 7. The appellants, as representatives of the corporation, may receive the benefit of that protection in so far as they are personally implicated by their own evidence. At the stage of compellability, like the oral testimony, the documents are compellable subject to a possible claim against their subsequent use under the "but for" test. That test is not applicable to determining their compellability. The documents are properly compellable unless they are excluded on the basis of the principles applicable to testimonial compulsion. The rationale both at common law and under s. 7 for these principles is that in certain circumstances compellability would impinge on the right to silence. This right, however, attaches to communications that are brought into existence by the exercise of compulsion by the state and not to documents that contain communications made before such compulsion and independently thereof. If, as in this case, the person subpoenaed is compelled to testify, then all communications including those arising from the production of documents will be compelled. If not compelled, the communications arising from production of documents would also not be admissible. The communicative aspects of the production of documents may, however, be of significance at the derivative evidence stage at which the witness seeks to exclude all evidence which would not have been obtained but for the compelled testimony.

Per Gonthier J.: The reasons of Sopinka and Iacobucci JJ., and the additional comments of L'Heureux-Dubé J. relating to evidence in a regulatory context, were agreed with.

Per L'Heureux-Dubé J.: As expressed in the concurring reasons given in R. v. S. (R.J.), [1995] 1 S.C.R. 451, the possibility of imprisonment flowing from a failure to testify is sufficient to trigger s. 7 protection at the subpoena stage. Where the witness can demonstrate at that stage that, under the circumstances, it would be fundamentally unfair to require that he testify, then the principles of fundamental justice under s. 7 of the Charter require that he not be compellable. Where, however, there is no possibility that the individual may be deprived of liberty at the subsequent proceeding, he cannot claim that it would be fundamentally unfair to compel his testimony. As a corollary, the less proximate the possibility of a deprivation of liberty in the subsequent proceeding, the less likely it is that the fact of testimonial compulsion will, itself, be fundamentally unfair. A subpoena will only be quashed at the subpoena stage in the clearest of cases.

It is generally a satisfactory proxy for the existence of fundamentally unfair conduct on the part of the Crown, in violation of s. 7, to inquire into whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the witness, rather than to further some legitimate public purpose. The regulatory context of the present appeal, however, requires that this test be applied with somewhat greater deference than might otherwise be the case. Conduct which may be fundamentally unfair in a traditional criminal context may not be so in the context of administrative proceedings in a highly complex and tightly regulated field, such as the securities industry. Activity in that industry is of immense economic value to society generally and, in order to safeguard the public welfare and trust, securities market participants, who are engaged in this licensed activity of their own volition, must conform with the extensive requirements set out by the provincial securities commissions and should expect to be questioned occasionally by regulators as to their market activities. Further, in view of the complex nature of the securities industry, the investigatory powers in s. 128(1) are the primary vehicle, and often the only tool, for the effective investigation and deterrence of trading practices contrary to the public interest. Finally, consideration must be given to the other Charter rights at stake. It would be ironic to conclude that a proceeding involving testimonial compulsion is contrary to the principles of fundamental justice if the only equally effective alternative, reasonably available to the state to pursue a pressing and substantial objective, would constitute a far more dramatic intrusion into individual rights. Here, notwithstanding that one of the primary purposes of an investigation under s. 128(1) is to engage in a form of civil discovery of the witness as well as of the company to illuminate or investigate irregularities, the appellants have not demonstrated that, in the present context and under the circumstances, it would violate their s. 7 rights to be compelled to testify at the Commission's inquiry. Courts must differentiate between unlicensed fishing expeditions that are intended to unearth and prosecute criminal conduct, and actions undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner. Whereas the former may run afoul of s. 7, the latter do not.

A person compelled to testify in a s. 128 inquiry shall enjoy, under s. 13 of the Charter, full testimonial immunity in any subsequent proceedings undertaken by the state. Even if the "but for" standard is an appropriate level of s. 7 protection in a purely criminal context, it may not be equally suited for use in predominantly regulatory contexts. Many of the interests underlying the principle against self-incrimination are simply not engaged as dramatically in situations in which an individual voluntarily participates, for his own profit, in a licensed activity, the effective regulation of which is essential to pressing and substantial societal interests. The existence of derivative evidence immunity could significantly undermine the Commission's ability to administer and enforce securities regulations effectively. Without the benefit of a closer examination of the specific contexts in

which imprisonment may arise as a possible eventual consequence under the Securities Act, it is inappropriate for this Court, at the subpoena stage, to define the exact parameters of appropriate derivative evidence immunity to come into effect at the trial stage. Although Sopinka and Iacobucci JJ. recognize some derivative evidence immunity at the trial stage, their reasons are taken to leave open the possibility that this protection may vary according to context.

As a practical matter, particularly in the regulatory context, authorities often seek a substantial fine rather than imprisonment upon conviction, notwithstanding that the legislation provides for the possibility of imprisonment. In such cases, agreement between all parties and the trial judge at the outset of the trial proceedings that imprisonment will not be sought as a sanction upon conviction will negate the need for a s. 7-based derivative evidence immunity, since the individual accused will not face the possibility of a deprivation of liberty.

The compulsion to produce pre-existing documents in s. 128(1)(c) does not violate s. 7 if it is found that the person subpoenaed is compellable to testify. The compelled production of pre-existing documents does not engage self-incriminatory concerns since they have not been generated subject to state compulsion. There is thus nothing fundamentally unfair in requiring the production of such documents and in the possibility that they may subsequently be relied upon by the state in a proceeding against the individual who has been compelled to produce them. The "but for" standard does not apply at the trial stage to pre-existing documents.

(2) Section 8

Section 128(1) of the Securities Act does not violate s. 8 of the Charter. The Act is essentially regulatory legislation designed to protect the public, including the investors, and discourage detrimental forms of commercial behaviour. Persons involved in the securities market, a highly regulated industry, do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. They know or are deemed to know the rules of the game. The effective implementation of securities legislation, which has obvious implications for the nation's material prosperity, depends on the willingness of those who choose to engage in the securities trade to comply with the defined standards of conduct. The provisions of the Act are pragmatic sanctions designed to induce such compliance. The Act thus serves an important social purpose and the social utility of such legislation justifies the minimal intrusion that the appellants may face. The demand for the production of documents contained in the summonses is one of the least intrusive of the possible methods which might be employed to obtain documentary evidence. Moreover, documents produced in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal. Those who are ordered under s. 128(1) "to produce records and things" can claim only a limited expectation of privacy in respect of business records. Section 128(1) does not unreasonably infringe on this limited expectation of privacy. The Hunter criteria were not appropriate in the present context to determine the applicable standard of reasonableness.

Cases Cited

By Sopinka and Iacobucci JJ.

Applied: R. v. S. (R.J.), [1995] 1 S.C.R. 451; distinguished: Hunter v. Southam Inc., [1984] 2 S.C.R. 145; considered: Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. McKinlay Transport

Ltd., [1990] 1 S.C.R. 627; referred to: R. v. Hebert, [1990] 2 S.C.R. 151; Re Robinson and The Queen (1986), 28 C.C.C. (3d) 489; Re Transpacific Tours Ltd. and Director of Investigation & Research (1985), 25 D.L.R. (4th) 202; Haywood Securities Inc. v. Inter-Tech Resource Group Inc. (1985), 24 D.L.R. (4th) 724; Bishop v. College of Physicians & Surgeons of British Columbia (1985), 22 D.L.R. (4th) 185; College of Physicians & Surgeons of British Columbia v. Bishop (1989), 56 D.L.R. (4th) 164; Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557; R. v. Amway Corp., [1989] 1 S.C.R. 21; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Collins, [1987] 1 S.C.R. 265; Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. 584; R. v. Borden, [1994] 3 S.C.R. 145; R. v. Kokesch, [1990] 3 S.C.R. 3; R. v. Wiley, [1993] 3 S.C.R. 263; R. v. Primeau, [1995] 2 S.C.R. 60; R. v. Jobin, [1995] 2 S.C.R. 78; Starr v. Houlden, [1990] 1 S.C.R. 1366; R. v. Container Materials Ltd., [1940] 4 D.L.R. 293; R. v. Famous Players, [1932] O.R. 307; Baron v. Canada, [1993] 1 S.C.R. 416; Ventouris v. Mountain, [1991] 3 All E.R. 472; R. v. Wurm (1979), 24 A.R. 380; Dubai Bank Ltd. v. Galadari, [1989] 3 All E.R. 769.

By L'Heureux-Dubé J.

Referred to: R. v. S. (R.J.), [1995] 1 S.C.R. 451; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. Director of Serious Fraud Office, Ex parte Smith, [1993] A.C. 1; Dubois v. The Queen, [1985] 2 S.C.R. 350; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154; R. v. Ellis-Don Ltd., [1992] 1 S.C.R. 840; Roper v. Royal Victoria Hospital, [1975] 2 S.C.R. 62; Irvine v. Canada (Restrictive Trade Practices Commission), [1987] 1 S.C.R. 181; Ontario Securities Commission v. Biscotti (1988), 40 B.L.R. 160; R. v. Beare, [1988] 2 S.C.R. 387.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 5(2).
Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 9, 10, 13, 15(1).
Securities Act, S.B.C. 1985, c. 83, ss. 126(1) [rep. & sub. 1988, c. 58, s. 16], 127, 128(1), (3), 144(1) [am. idem, s. 21], (2).

Authors Cited

Reid, Alan D., and Alison Harvison Young. "Administrative Search and Seizure Under the Charter" (1985), 10 Queen's L.J. 392.

APPEAL from a judgment of the British Columbia Court of Appeal (1992), 63 B.C.L.R. (2d) 331, 88 D.L.R. (4th) 381, [1992] 3 W.W.R. 165, dismissing the appellants' appeal from a judgment of Wood J. (1990), 43 B.C.L.R. (2d) 286, 68 D.L.R. (4th) 347, allowing the respondent's application for an order that the appellants be committed for contempt for failure to attend in answer to summons issued under s. 128 of the British Columbia Securities Act. Appeal dismissed.

Alastair Rees-Thomas, for the appellants.
Mark L. Skwarok, for the respondent.
Michael R. Dambrot, Q.C., and John S. Tyhurst, for the intervener the Attorney General of Canada.

Leah Price and Michel Hélie, for the intervener the Attorney General for Ontario.
Jacques Gauvin and Gilles Laporte, for the intervener the Attorney General of Quebec.
Louise Walsh Poirier, for the intervener the Attorney General of Nova Scotia.
Marva J. Smith, for the intervener the Attorney General of Manitoba.
George H. Copley, for the intervener the Attorney General of British Columbia.
Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.
Richard F. Taylor, for the intervener the Attorney General for Alberta.

Solicitors for the appellants: Rees-Thomas & Company, Richmond, B.C.
Solicitor for the respondent: Mark L. Skwarok, Vancouver.
Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: George Thomson, Toronto.
Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Ste-Foy.
Solicitor for the intervener the Attorney General of Nova Scotia: The Attorney General of Nova Scotia, Halifax.
Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.
Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.
Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.
Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

The judgment of Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

1 **SOPINKA AND IACOBUCCI JJ.**:-- This appeal raises issues also dealt with in three other appeals heard at the same time: R. v. S. (R.J.), [1995] 1 S.C.R. 451, R. v. Primeau, [1995] 2 S.C.R. 60, and R. v. Jobin, [1995] 2 S.C.R. 78. In particular, it asks whether individuals who might subsequently be charged with a criminal or quasi-criminal offence can be compelled to give evidence and produce documents. However, unlike those other appeals, this appeal asks questions about compellability outside of the criminal justice system. In that respect, the importance of this context and consequential issues regarding search and seizure are the focus of this appeal. Before turning to the facts of this appeal, however, we wish to consider the Court's decision in S. (R.J.).

2 In S. (R.J.), a majority of this Court held that the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of the Canadian Charter of Rights and Freedoms, requires that persons compelled to testify be provided with subsequent "derivative use immunity" in addition to the "use immunity" guaranteed by s. 13 of the Charter. In addition, a majority of the members of the Court (albeit a different majority) were of the view that courts could, in certain circumstances, grant exemptions from compulsion to testify.

3 This appeal presents the opportunity to build on the consensus reflected in S. (R.J.), and achieve greater clarity and guidance on the rules to be applied in this area. Specifically, we offer

additional comments on derivative use immunity and the circumstances relating to exemptions from compulsion to testify.

4 With respect to derivative use immunity, it should be remembered that what was discussed by Iacobucci J. on the subject was intended to be comments of general application only and that further refinement will have to await development that can only take place through the consideration of cases as they arise.

5 At pages 565-66 of S. (R.J.), Iacobucci J. discussed the burden of proof on the accused regarding derivative use immunity. He stated that the general Charter rule would operate, namely, the party claiming a Charter breach must establish it on a balance of probabilities. Iacobucci J. went on to state that as a practical matter the Crown will likely bear the burden of responding because it is the Crown which can be expected to know how evidence was, or would have been, obtained. This means that the accused has the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established, in order to have the evidence admitted, the Crown will have to satisfy the court on a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony. This is explained in more detail in the reasons of Iacobucci J. in S. (R.J.) (at p. 562). Finally, it goes without saying that in order to trigger the derivative use immunity, the former witness may only claim such protection in a subsequent proceeding where he or she is an accused subject to penal sanctions or in any proceeding which engages s. 7 of the Charter. We also refer to our further discussion on this matter below.

6 Regarding exemptions from compulsion, Iacobucci J., writing for the majority on "derivative use immunity", recognized that a colourable attempt to compel the evidence of a witness could in certain circumstances be objectionable. In S. (R.J.) it was not necessary to determine conclusively when such exemptions were available and there was no agreement on the precise test to be applied. There was, however, sufficient consensus to form the basis for a more precise and acceptable test which can be applied to resolve this appeal and the companion appeals of Primeau and Jobin.

7 In view of the conclusions reached in S. (R.J.), any test to determine compellability must take into account that if the witness is compelled, he or she will be entitled to claim effective subsequent derivative use immunity with respect to the compelled testimony or other appropriate protection. The common feature of the respective compellability tests proposed in the reasons in S. (R.J.) is that the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. This test strikes the appropriate balance between the interests of the state in obtaining the evidence for a valid public purpose on the one hand, and the right to silence of the person compelled to testify on the other.

8 In applying this test, the Court must first determine the predominant purpose for which the evidence is sought. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution. In S. (R.J.), Sopinka J. suggested some guidelines for determining whether this is the predominant purpose. In other proceedings, discerning the purpose is more complex. Where evidence is sought for the purpose of an inquiry, we must first look to the statute under which the inquiry is authorized. The fact that the purpose of inquiries under the statute may be for legitimate public purposes is not determinative. The terms of reference may reveal an inadmissible purpose notwithstanding that the statute did not so intend: see Starr v. Houlden, [1990] 1 S.C.R.

1366. Indeed, even if the terms of reference authorize an inquiry for a legitimate purpose in some circumstances, the object of compelling a particular witness may still be for the purpose of obtaining incriminating evidence.

9 It would be rare indeed that the evidence sought cannot be shown to have some relevance other than to incriminate the witness. In a prosecution, such evidence would simply be irrelevant. There may, however, be inquiries of this type and it would be difficult to justify compellability in such a case. In the vast majority of cases, including this case, the evidence has other relevance. In such cases, if it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only prejudice is the possible subsequent derivative use of the testimony then the compulsion to testify will occasion no prejudice for that witness. The witness will be protected against such use. Further, if the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable.

10 We recognize that the purpose of calling a particular witness will not be readily apparent and that such purpose must be inferred in many cases from the overall effect of the evidence proposed to be called. If the overall effect is that it is of slight importance to the proceeding in which it is compelled but of great importance in a subsequent proceeding against the witness in which the witness is incriminated, then an inference may be drawn as to the real purpose of the compelled evidence. If that relationship is reversed then no such inference may be drawn. As stated in S. (R.J.), the issue of compellability may arise at the time when the witness is called to testify (the subpoena stage) and at a subsequent penal proceeding against the witness (the trial stage). By reason of the foregoing, the true purpose of the evidence will often not be apparent until the latter stage.

11 As in the case of any breach of Charter rights, the burden of establishing a breach is on the party alleging it. In this context, the burden of proof with respect to the predominant purpose of the compelled testimony will be on the witness who asserts that it is not sought for a legitimate purpose. If this is established, the witness should not be compelled unless the party seeking to compel the witness justifies the compulsion as referred to above.

12 In light of the foregoing elaboration of the principles enumerated in S. (R.J.) we now turn to the facts and issues raised in this appeal.

I. Facts

13 Terra Nova Energy Inc. is a British Columbia company listed on the Vancouver Stock Exchange (the company is now called Sato Science International Inc., and it was formerly called Wesgold Resources Inc.). The appellants, Bruce Douglas Branch and Pal Arthur Levitt, were directors of Terra Nova from the time of its incorporation until December 1988.

14 In July 1987, Terra Nova published its annual financial statements. Included was a report from its auditors which disclosed that the auditors were unable to express an opinion as to whether the financial statements were fairly presented in accordance with generally accepted accounting principles. References were made to serious deficiencies in the control, documentation, and approval procedures of Terra Nova. Questionable expenditures exceeded $1.3 million. Ten days after the ap-

pearance of the statements, the Vancouver Stock Exchange halted trading in Terra Nova's shares, and soon after suspended trading pending clarification of the obvious concern.

15 On October 23, 1987, the respondent British Columbia Securities Commission made an order under s. 144(2) of the Securities Act, S.B.C. 1985, c. 83, requiring Branch and Levitt, along with other former officers of Terra Nova, to cease trading in Terra Nova's securities for 15 days (on November 3, 1987, the Commission ordered that the cease-trading order persist until the conclusion of a hearing held pursuant to s. 144(1) of the Act). Four days later, acting under s. 126(1) of the Act, the Commission appointed three individuals to conduct an investigation.

16 On June 27, 1988, summonses were served on Branch and Levitt compelling their attendance for examination. The summonses also required production of all information and records in the possession of Branch and Levitt relating directly or indirectly to Terra Nova and other named companies. The statutory authority for these orders can be found in s. 128(1) of the Act.

17 On June 30, 1988, Branch and Levitt attended at the Commission with their counsel, Mr. Hamilton. Hamilton stated on their behalf that the investigation appeared to be preliminary to possible criminal or quasi-criminal charges, and he indicated that Branch and Levitt would rely upon their right to remain silent. Hamilton indicated that Branch and Levitt would not submit to an investigation without further particulars or disclosure. On July 13, 1988, the Commission informed Branch and Levitt that such requests would not be honoured.

18 On July 14 and 15, 1988, respectively, Branch and Levitt were served with fresh summonses. On August 5, 1988, the Commission petitioned the Supreme Court of British Columbia for an order committing Branch and Levitt in contempt. In response, Branch and Levitt asked for a declaration to the effect that s. 128(1) of the Securities Act violates ss. 7, 8, 9 and 15(1) of the Charter.

19 The application for a declaration was dismissed: (1990), 68 D.L.R. (4th) 347, 43 B.C.L.R. (2d) 286. Wood J. ordered Branch and Levitt to comply with the summonses, or, in default, to show cause or be held in contempt. An appeal to the British Columbia Court of Appeal was dismissed: (1992), 88 D.L.R. (4th) 381, 63 B.C.L.R. (2d) 331, [1992] 3 W.W.R. 165. This Court granted leave to appeal: [1992] 2 S.C.R. v.

II. Relevant Constitutional and Statutory Provisions

Canadian Charter of Rights and Freedoms

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Securities Act, S.B.C. 1985, c. 83

126. (1) The commission may, by order, appoint a person to make an investigation the commission considers expedient

(a) for the administration of this Act,
(b) to assist in the administration of the securities laws of another jurisdiction,
(c) in respect of matters relating to trading in securities in the Province, or
(d) in respect of matters in the Province relating to trading in securities in another jurisdiction.

. . .

127. (1) An investigator appointed under section 126 or 131 may, with respect to the person who is the subject of the investigation, investigate, inquire into and examine

(a) the affairs of that person,
(b) any records, negotiations, investigations, loans, borrowings and payments to, by, on behalf of, in relation to or connected with that person,
(c) any property, assets or things owned, acquired or disposed of in whole or in part by that person or by a person acting on behalf of or as agent for that person,
(d) the assets at any time held by, the liabilities, debts, undertakings and obligations at any time existing and the financial or other conditions at any time prevailing in respect of that person, and
(e) the relationship that may at any time exist or have existed between that person and any other person by reason of

(i) investments made,
(ii) commissions promised, secured or paid,
(iii) interests held or acquired,
(iv) the lending or borrowing of money, securities or other property,
(v) the transfer, negotiation or holding of securities,
(vi) interlocking directorates,
(vii) common control,
(viii) undue influence or control, or
(ix) any other relationship.

(2) An investigator may, for purposes of subsection (1),
(a) enter in or on the land or premises of a person at any reasonable time without a warrant for the purpose of carrying out an inspection or examination,
(b) require the production of any records, property, assets or things for inspection or examination, and

(c) on giving a receipt, remove any records or property inspected or examined under paragraph (b) for the purpose of making copies or extracts of the records or property.

(3) Any copying or making of extracts under subsection (2) shall be completed as soon as possible and the records or property shall be promptly returned to the person who produced or finished them.

(4) No investigator shall enter any room or place actually being used as a residence without the consent of the occupant, except under the authority of a warrant issued under the Offence Act.

(5) No person shall withhold, destroy, conceal or refuse to give or produce any information, record, property, asset or thing reasonably required for an investigation, inquiry or examination under this section.

128. (1) An investigator appointed under section 126 or 131 has the same power

(a) to summon and enforce the attendance of witnesses,
(b) to compel witnesses to give evidence on oath or in any other manner, and
(c) to compel witnesses to produce records and things

as the Supreme Court has for the trial of civil actions, and the failure or refusal of a witness

(d) to attend,
(e) to take an oath,
(f) to answer questions, or

(g) to produce the records and things in his custody or possession

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

. . .

(3) A witness giving evidence at an investigation conducted under section 126 or 131 may be represented by counsel.

III. Judgments

Supreme Court of British Columbia (1990), 68 D.L.R. (4th) 347

20 Wood J. noted that Branch and Levitt claimed a right against self-incrimination and a right to remain silent under s. 7 of the Charter "at the investigative stage of any true penal consequence proceeding" (p. 355). He quickly made two points in respect of these claims. First, he said, it is wrong to suppose that s. 7 protects rights in the abstract; there must first be a deprivation of life, liberty, or security of the person. Second, he said that the applicants wrongly confused or equated the right to remain silent and the privilege against self-incrimination.

21 Wood J. apparently did not accept that a Commission investigation leads to "true penal consequences", in so far as the investigators are only empowered to report. Following Re Robinson and The Queen (1986), 28 C.C.C. (3d) 489 (B.C.S.C.), Wood J. held that the investigation could not result in a deprivation of life, liberty, or security of the person. For two reasons, however, Wood J. proceeded to assume that s. 7 was engaged: (1) because of the risk of imprisonment if the summonses were ignored; and (2) because the testimony of the applicants could generate derivative evidence which could later be used against them. However, he expressed "grave doubts" about whether s. 7 was actually engaged on the facts before him.

22 Wood J. proceeded to deal with the argument that a compulsion to testify violates a constitutionalized privilege against self-incrimination, and he followed Re Transpacific Tours Ltd. and Director of Investigation & Research (1985), 25 D.L.R. (4th) 202 (B.C.S.C.), in that regard. Wood J. stated that he was bound by Re Transpacific, and he rejected the privilege-against-self-incrimination argument.

23 On the question whether the applicants could claim a right to silence, Wood J. accepted such a right could exist in s. 7 of the Charter as a principle of fundamental justice (his decision being rendered before R. v. Hebert, [1990] 2 S.C.R. 151). To define its scope, he considered the pre-Charter context, reviewed case law, and then concluded in these terms (at p. 367):

> Apart from the judgment of Munroe J. in Re Wilson Inquest, which was overruled on appeal, I have not been able to find any Canadian case where the right of a suspect to remain silent in the face of a statutory compulsion to testify under oath, has been recognized.
>
> Furthermore . . . both federal and provincial statute books are replete with laws which provide inquiry powers similar to those found in s. 128(1) of the Securities Act . . . [which suggests] that Canadian law has not heretofore recognized, as a principle of fundamental justice, the right of such persons to stand silent in the face of a statutory compulsion to speak.

24 Wood J. then turned to the post-Charter context. He cited Haywood Securities Inc. v. Inter-Tech Resource Group Inc. (1985), 24 D.L.R. (4th) 724 (B.C.C.A.), in which Macfarlane J.A. stated (at pp. 748-49):

> I agree that if the sole aim and purpose of the proceeding was to obtain evidence to support a charge or to assist the criminal prosecution of the witness, it might be arguable that the witness ought not to be compelled to divulge information which might lead to his conviction. But, in my view, such a result would follow only if the proceedings, in which such evidence was given, were so de-

> void of any legitimate public purpose, and so deliberately designed to assist the prosecution of the witness that to allow them to continue would constitute an injustice. In such circumstances, the continuance of the proceedings could be said to constitute a violation of the principles of fundamental justice.

Wood J. characterized this passage as correctly reflecting the limit of the post-Charter right to remain silent. He stated (at p. 369), "it cannot be said that the statutory compulsion to testify found in s. 128(1) of the Act comes even close to meeting" the Haywood Securities test. Accordingly, Wood J. rejected the claims in respect of a right to silence.

25 Finally, Wood J. considered whether s. 128(1)(c) of the Securities Act authorizes an unreasonable search or seizure contrary to s. 8 of the Charter. He considered himself bound by British Columbia authority to find that s. 128(1)(c) authorizes a "seizure": Bishop v. College of Physicians & Surgeons of British Columbia (1985), 22 D.L.R. (4th) 185 (B.C.S.C.), and College of Physicians & Surgeons of British Columbia v. Bishop (1989), 56 D.L.R. (4th) 164 (B.C.S.C.). Turning to the question of the seizure's reasonableness, Wood J. followed the same authority and scrutinized the statute. First, he stated at p. 371 that the purpose of the Securities Act is "to protect the general public from being defrauded as a result of the dishonest activities of those who trade in securities", and he further suggested that this purpose is "regulatory and administrative, not criminal or quasi-criminal". Second, he stated that the targets of seizure were records and things which would provide "highly relevant" or even "crucial" evidence. Third, he discussed the character of the premises where the seizure might occur, and noted that "[t]here is no intrusion into the homes, offices or privacy of those who are the subject of an order" (p. 372). Finally, in terms of the legitimate expectations of the public and the individuals involved, he stated (at p. 372):

> . . . the public has a legitimate expectation that the commission will discharge the regulatory duties entrusted to it, by effectively investigating those activities from which the trading public require protection, and by exercising its regulatory powers so as to ensure that the purpose of the legislation, namely, the protection of the public, is achieved.
>
> On the other hand, the individual who is the object of such an investigation has from the outset known that he or she is participating in a highly regulated and controlled activity, namely, trading in securities. To apply to be licensed, which is a prerequisite to such participation, is to accept the expectation of constant and vigilant supervision. . . .

26 For these reasons, Wood J. concluded that the seizure authorized by s. 128(1)(c) of the Securities Act is not "unreasonable" within the meaning of s. 8 of the Charter.

27 Wood J. summarily disposed of other arguments based on ss. 7, 9 and 10 of the Charter. He ordered Branch and Levitt to attend the investigation and to answer questions put to them. Alternatively, he held that they would be required to show cause "why they should not be committed to jail, or fined, or both, for their contempt in wilfully disobeying the order of this court" (p. 374).

British Columbia Court of Appeal (1992), 88 D.L.R. (4th) 381

28 Southin J.A., for the court, stated that she "could find no error" in the reasons of Wood J. The only real question on appeal, she indicated, was whether the intervening decision of this Court in

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, cast doubt upon his judgment. As regards s. 7 of the Charter, Southin J.A. adopted the approach of L'Heureux-Dubé J. in Thomson Newspapers, and so she effectively affirmed Wood J. on this point. With respect to s. 8 of the Charter, Southin J.A. suggested that Sopinka J.'s reasons in Thomson Newspapers were "compelling", such an order under s. 128(1)(c) might not constitute a seizure at all. But she held that Wood J. was correct to state that he was bound to find a seizure, and she concluded that if, in fact, a seizure was authorized, it was, "as both Mr. Justice La Forest and Madam Justice L'Heureux-Dubé held [in Thomson Newspapers], reasonable" (p. 384).

29 Southin J.A. dismissed the appeal.

IV. Issues

30 The following constitutional questions were stated on February 25, 1993:

> 1. [Does] s. 128(1) of the Securities Act, S.B.C. 1985, c. 83, infringe[] ss. 7 or 8 of the Canadian Charter of Rights and Freedoms?
> 2. If the answer is yes, is the limitation one which is reasonable, prescribed by law, and demonstrably justified pursuant to s. 1 of the Charter?

V. Analysis

1. Section 7 of the Charter

31 This case is unlike S. (R.J.) in two respects. First, it is outside the criminal realm, and is within a regulatory regime. Secondly, since Bruce Branch and Pal Arthur Levitt are directors of Terra Nova, it must be discerned whether corporate officers may raise Charter violations.

32 The s. 7 Charter challenge against s. 128(1) of the Securities Act involves two issues:

(a) testimonial compulsion; and
(b) documentary compulsion.
(a) Testimonial Compulsion

33 In light of the four sets of reasons of this Court in S. (R.J.), supra, the trial judge erred as to when the liberty interest is engaged. The liberty interest is engaged at the point of testimonial compulsion. Once it is engaged, the investigation then becomes whether or not there has been a deprivation of this interest in accordance with the principles of fundamental justice.

34 The portion of s. 128(1) of the Securities Act which is relevant to testimonial compulsion reads as follows:

> 128. (1) An investigator appointed under section 126 or 131 has the same power
>
> . . .
>
> (b) to compel witnesses to give evidence on oath or in any other manner.
>
> . . .

We must determine the predominant purpose of such an inquiry at which a witness is compelled to attend. In Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, Iacobucci J., writing for the Court referred to the regulatory nature of the Securities Act (at p. 589):

> It is important to note from the outset that the [Securities Act] is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation (1977), at p. 1. [Emphasis added.]

The goal of protecting our economy is a goal of paramount importance. In Pezim, the preeminence of securities regulation in our economic system was emphasized (at pp. 593 and 595):

> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.
>
> . . .
>
> The breadth of the [British Columbia Securities] Commission's expertise and specialisation is reflected in the provisions of the [Securities Act]. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings and orders.
>
> . . .
>
> In reading these powerful provisions, it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest. . . .
>
> It must also be noted that the definitions in the [Securities Act] exist in a factual or regulatory context. They are part of the larger regulatory framework discussed above. They are not to be analyzed in isolation but rather in their regulatory context.

35 Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and not to in-

criminate Branch and Levitt. More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch and Levitt. Both orders of the Commission and the summonses are in furtherance of the predominant purpose of the inquiry to which we refer above. The proposed testimony thus falls to be governed by the general rule applicable under the Charter, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return: S. (R.J.), supra.

36 An issue may arise in subsequent proceedings as to who can claim the benefit of derivative use immunity, the individuals or the corporation or both. While this issue might be left to be determined when it arises in such proceedings, in view of the fact that the test for compellability is premised on the availability of subsequent derivative use immunity on the basis of the "but for" concept, we believe it should be addressed.

37 Clearly, the individuals Branch and Levitt are entitled to claim the protection of subsequent derivative use.

This is a protection that is afforded to witnesses notwithstanding that the source of their evidence may derive from corporate activity. See R. v. Amway Corp., [1989] 1 S.C.R. 21. On the other hand, the protection depends on the applicability of s. 7 of the Charter. This Court has held that s. 7 does not apply to a corporation. See Thomson Newspapers, supra. It should be remembered that it will be up to the judge hearing the matter to decide the specific application of subsequent derivative use immunity having regard to all the circumstances.

(b) Documentary Compulsion

38 This appeal raises the possibility of documentary compulsion, which entails jeopardy in so far as it engages the appellants' liberty interest. Specifically, the likelihood of a self-incriminatory result is what is to be avoided. There are two main issues:

(i) the identity of the person facing the prospect of self-incrimination; and
(ii) most significantly, the nature of the compulsion, that is, whether the documents contain a compelled answer merely reduced to writing, or exist separately and apart from the compelled person.

(i) Identity of the Person Facing the Prospect of Self-Incrimination

39 The right against self-incrimination is a personal right that serves to protect an individual's liberty interest. Is a corporation or its officer(s) eligible for Charter protection against self-incriminatory effects? We do not believe that a right against self-incrimination can be applied to artificial entities in any meaningful way. It is the self-conscriptive effect of compulsion which the Charter guards against. This is a flesh and bone protection which cannot be easily extended to corporations. The following passage of Sopinka J. in Amway, supra, is pertinent (at p. 40):

> Applying a purposive interpretation to s. 11(c), I am of the opinion that it was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth. Although disagreement exists as to the basis of the principle against self-incrimination, in my view, this factor plays a dominant role.

In the United States it was this factor which was largely responsible for denying Fifth Amendment protection to corporations. The American situation is summed up in the following statement from Paciocco, Charter Principles and Proof in Criminal Cases, at p. 459:

> Apart from this substantial obstacle, it appears that the most sensible way of resolving issues about the application of Charter provisions to corporations is to interpret them purposively. Even on this basis, section 13 should not be held to extend to corporations through the expedient of considering certain corporate officers to be the corporation for the purpose of testifying. This is because the principle that an accused should never be conscripted by his opponent to defeat him does not extend to corporations in a meaningful way. As stated in Wigmore on Evidence in recounting the American position which holds the privilege against self-incrimination to be inapplicable to corporations, "(t)his sentiment . . . is almost entirely confined to flesh-and-bone individuals." Why? Because it has to do with the intrinsic value of human beings and the necessity of according them a meaningful right to privacy until the real prospect of their guilt is raised so that they will truly be free. "(A) corporation, unlike an individual, cannot suffer the indignities prohibited by the amendment's protection of the accused's person and thoughts". [Emphasis added.]

40 It is now well settled that a corporation cannot avail itself of the protection afforded by s. 7 of the Charter. In Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, this Court stated that the word "Everyone" in s. 7 excludes corporations and other artificial entities incapable of enjoying life, liberty or security of person, and includes only human beings. However, as was stated above in our analysis of testimonial compulsion, Branch and Levitt, as representatives of the corporation may receive the benefit of immunity protection in so far as they are personally implicated by their own evidence. Hence, the issue turns to the nature of the compulsion.

(ii) Nature of the Compulsion

41 As a preliminary matter, the issue in respect of these documents is whether their production can be compelled in the investigative proceeding being conducted by the Commission and not their subsequent use. In S. (R.J.) the Court decided that with respect to oral testimony a witness who is subpoenaed to testify is entitled to raise compellability at the subpoena stage and, if compelled, to raise the matter again in subsequent proceedings against the witness in which the previous testimony may be used. In addition, if the subsequent proceeding is not stayed, the witness can object to any use of his or her previous testimony on the basis of the "but for" test. The "but for" test in S. (R.J.) does not apply to the subpoena stage. The "but for" test assumes that the witness has been compelled to testify and seeks to offer protection against self-incrimination by restricting the scope of subsequent use. The inquiry in issue in this appeal is not a subsequent proceeding necessitating resort to the "but for" test.

42 At the stage of compellability, therefore, like the oral testimony, the documents are compellable subject to a possible claim against their subsequent use under the "but for" test. That test is not

applicable to determining their compellability. Moreover, the documents are not sought in a proceeding against the witness. Put another way, the "but for" test is a variant of the use immunity which is provided in s. 5(2) of the Canada Evidence Act, R.S.C., 1985, c. C-5. It takes over where that section leaves off providing greater use immunity. The circumstances under which they are applied, however, are the same. The witness must provide the evidence and rely on a prohibition with respect to its subsequent use for protection. To use the "but for" test when it is sought to introduce the document in the first instance would be analogous to using s. 5(2) to exclude a document in the same circumstances. In fact its purpose is the opposite.

43 Accordingly, so far as S. (R.J.) bears on this issue, the documents are properly compellable unless they are excluded on the basis of the principles mentioned above. The rationale both at common law and under s. 7 of the Charter for these principles is that in certain circumstances compellability would impinge on the right to silence. This right, however, attaches to communications that are brought into existence by the exercise of compulsion by the state and not to documents that contain communications made before such compulsion and independently thereof. The participation of the compelled witness in the process of production is a relevant consideration, in so far as the state may lack alternate means of acquiring of the information. This is a distinction that is well recognized in our law and is applied generally in the rules of privilege. For example, a solicitor-client privilege cannot be claimed for all documents that have passed between solicitor and client for the purpose of obtaining legal advice unless the documents were brought into existence for this purpose. If a document is not privileged when the party to litigation receives it, merely depositing a copy of the document with a party's solicitor or making a copy of that document by the solicitor for litigious purposes would not make it privileged: Ventouris v. Mountain, [1991] 3 All E.R. 472 (C.A.); R. v. Wurm (1979), 24 A.R. 380 (Alta. S.C.T.D.); and Dubai Bank Ltd. v. Galadari, [1989] 3 All E.R. 769 (C.A.).

44 In Thomson Newspapers, supra, Sopinka J. illustrated this distinction between communications brought into existence by the exercise of state compulsion, versus documents that contain communications made before and independently of such compulsion, by reference to the law relating to the execution of search warrants. At page 608, Sopinka J. stated:

> It is a distinction that is made virtually every day in connection with police investigations. While suspects are entitled to remain silent, their documents may be seized by means of a search warrant under the Criminal Code. No right to remain silent or privilege against self-incrimination will avail to protect against seizure of the documents. Examples abound of the routine admission of documentary evidence which has been seized: see for example Morris v. The Queen, [1983] 2 S.C.R. 190; R. v. Gaich (1956), 24 C.R. 196 (Ont. C.A.); and R. v. Hannam, [1964] 2 C.C.C. 340 (N.S.C.A.)

45 We know of no instance in which it was suggested that the common law right to silence which protected communications by a suspect to the police extended to documents of a suspect.

46 This distinction is one that was made by Lamer J. (as he then was), in R. v. Collins, [1987] 1 S.C.R. 265, in relation to the admissibility of evidence obtained in a manner that violated the Charter under s. 24(2). That is a distinction which we have continued to make.

47 In some cases, the production of documents from the possession of a person may have communicative aspects. Possession of a document may permit an inference of knowledge of the contents of the document. See R. v. Container Materials Ltd., [1940] 4 D.L.R. 293 (Ont. S.C.). Furthermore, if the party in possession has recognized, adopted or acted on the document an admission of acceptance of its contents as true may be inferred. See R. v. Famous Players, [1932] O.R. 307 (S.C.).

48 This aspect of the matter is, however, not of concern at the compellability stage. If the person subpoenaed is compelled to testify, then all communications including those arising from the production of documents will be compelled. If not compelled, the communications arising from production of documents would also not be compelled. The communicative aspects of the production of documents may, however, be of significance at the derivative evidence stage at which the witness seeks to exclude all evidence which would not have been obtained but for the compelled testimony. We are not, however, at that stage in this case and it would not be useful to try to elaborate on this aspect of the matter until it arises. We also leave for future consideration the relevance of the regulatory context in determining the scope of s. 7 protection against self-incrimination in a case where the documents do not pre-exist the statutory compulsion to produce, but rather have been created by statutory compulsion.

2. Section 8 of the Charter

49 To reiterate, the issue raised by this portion of the appeal is whether s. 128(1) of the Securities Act infringes s. 8 of the Charter. The foundation for a s. 8 analysis was laid by Dickson J. (as he then was) in Hunter v. Southam Inc., [1984] 2 S.C.R. 145. As Dickson J. stated, at pp. 159-60, one of the clear purposes of the Charter is the protection of the individual's reasonable expectation of privacy:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [Emphasis in original.]

50 Dickson J. set forth several criteria which had to be met in order that a search be reasonable. These criteria were summarized by Wilson J. at p. 499 of Thomson Newspapers:

> (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;
> (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something

which will afford evidence of the particular offence under investigation will be recovered; and

(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

51 It is important to note, however, that these criteria were articulated in the context of an appeal concerning the validity of a section which was, in essence, criminal or quasi-criminal. It is clear that the context within which the alleged violation takes place must be considered, for it is the context which determines the expectation of privacy that is legitimately expected. The following comments of Wilson J. in R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, at p. 645, are instructive:

> Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.

52 Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: per La Forest J. in Thomson Newspapers. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: Thomson Newspapers.

53 While the expectation of privacy with respect to criminal matters seems certain, the standard of reasonableness to be applied in the regulatory and administrative realm is less well defined. Wilson J. found in McKinlay Transport, at pp. 645-46, that the point was aptly made by A. D. Reid and A. H. Young in "Administrative Search and Seizure Under the Charter" (1985), 10 Queen's L.J. 392, at pp. 398-99:

> There are facets of state authority, generically associated with search or seizure, that are so intertwined with the regulated activity as to raise virtually no expectation of privacy whatsoever. . . . Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, corporations, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.
>
> There are other situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a "spot check" basis, or on the strength of suspected non-compliance. The search may be in the form of a request for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced in-

> spection may be the most effective way to induce compliance. They are based on a view that inspection may be the only means of detecting non-compliance, and that its detection serves an important public purpose.

54 Thus, it is incumbent that an examination of the nature of the securities context be undertaken. As mentioned above, the primary goal of securities legislation is the protection of the investor, but other goals include capital market efficiency and ensuring public confidence in the system. In Pezim, supra, the Court noted that the British Columbia Securities Act is regulatory in nature and stated at p. 589 that it forms part of a much larger framework which regulates the securities industry throughout Canada:

> Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The [British Columbia Securities] Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The [Vancouver Stock Exchange] falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

55 With this in mind, the obvious question becomes what degree of privacy can those subject to investigation under the British Columbia Securities Act reasonably expect in respect of activities and matters with which such investigations may be concerned. The relevant provisions of the Act are reproduced below for ease of analysis.

> 128. (1) An investigator appointed under section 126 or 131 has the same power
>
> (a) to summon and enforce the attendance of witnesses,
> (b) to compel witnesses to give evidence on oath or in any other manner, and
> (c) to compel witnesses to produce records and things
>
> as the Supreme Court has for the trial of civil actions, and the failure or refusal of a witness
>
> (d) to attend,
> (e) to take an oath,
> (f) to answer questions, or
> (g) to produce the records and things in his custody or possession
>
> makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

56 It is clear that in numerous instances a regulatory regime will be needed in order to act as a check on an individual's self-interest. There are surely times when one's own motivations and objective are not of benefit to society on a wider scale. As we have already mentioned, the primary goal

of securities regulation is the protection of the investing public. The importance of this goal, as against the reasonable expectation of privacy of securities traders, is what we are considering here. At this intersection, the words of our colleague, La Forest J., in Thomson Newspapers, supra, at pp. 506-7, ring particularly true:

> But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or home-owner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

57 There are areas of business, for example, that are subject to regulation as a matter of course. Persons who carry on the business of trading in securities realize that the industry is heavily regulated and for good reason. It is a crucial part of our economy that is at stake. In Pezim, supra, at pp. 592-93, this Court relied on the following position articulated by Fauteux J. in Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. 584, at p. 588:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

58 In our opinion, persons involved in the business of trading securities do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. It is widely known and accepted that the industry is well regulated. Similarly, it is well known why the industry is so regulated. The appellants in this case were well aware of the dictates of the Securities Act. Once again, we rely on the words of La Forest J. at p. 507 of Thomson Newspapers:

> It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity. As A. D. Reid and A. H. Young point out in their article "Administrative Search and

> Seizure Under the Charter" (1985), 10 Queen's L.J. 392, at p. 399, there is a "large circle of social and business activity in which there is a very low expectation of privacy", and in which the "issue is not whether, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements".

59 Hence, the Securities Act is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compliance with the Act. After all, the Act is really aimed at regulating certain facets of the economy and business. This has obvious implications for the nation's material prosperity: Thomson Newspapers. As such, the effective implementation of securities legislation depends on the willingness of those who choose to engage in the securities trade to comply with the defined standards of conduct. In this respect, we fully agree with Wilson J.'s comments that "[a]t some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed": Thomson Newspapers, at p. 495.

60 Of equal importance is the nature of the seizure authorized by the Securities Act. The demand for the production of documents contained in the summonses is one of the least intrusive of the possible methods which might be employed to obtain documentary evidence. The importance of this distinction was stressed in Baron v. Canada, [1993] 1 S.C.R. 416. At page 443, the Court adopted the following statement from the reasons of Wilson J. McKinlay Transport, supra, at pp. 649-50:

> In my opinion, s. 231(3) provides the least intrusive means by which effective monitoring of compliance with the Income Tax Act can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production of records which may be relevant to the filing of an income tax return.

61 In R. v. Borden, [1994] 3 S.C.R. 145, it was stated that, "[t]he question of whether the seizure was unreasonable can be disposed of simply. In the absence of prior judicial authorization, a search or seizure will be unreasonable unless it is authorized by law, the law itself is reasonable and the manner in which the search was carried out is reasonable" (p. 165). In this case, the outstanding issue is whether the law is reasonable: R. v. Kokesch, [1990] 3 S.C.R. 3, R. v. Collins, supra, and R. v. Wiley, [1993] 3 S.C.R. 263. As we have indicated above, the Securities Act serves an important social purpose and the social utility of such legislation justifies the minimal intrusion that the appellants may face. The law in question, is therefore, reasonable.

62 As our final point, we note the distinction between business records and personal papers. We are of the view that in order to determine the relative privacy rights that attach, the type of document at issue is important. Documents produced in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal. Again, the words of La Forest J. in Thomson Newspapers, at pp. 517-18, are helpful:

> While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the indi-

> vidual to determine the manner in which he or she will order his or her private life. . . . But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state. On the contrary, as already mentioned, it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. Under these circumstances, I cannot see how there would be a very high expectation of privacy in respect of records and documents in which this information is contained.

63 Therefore, we conclude that those who are ordered under s. 128(1) of the Securities Act "to produce records and things" can claim only a limited expectation of privacy in respect of these materials. The operative question becomes whether s. 128(1) unreasonably infringes on this limited expectation of privacy.

64 In our view it does not. We have already mentioned that in a highly regulated industry, such as the securities market, the individual is aware, and accepts, justifiable state intrusions. All those who enter into this market know or are deemed to know the rules of the game. As such, an individual engaging in such activity has a low expectation of privacy in business records. In fact, "there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed": McKinlay Transport, supra, at pp. 641-42. Under such circumstances, the state authorized inspection of documents under s. 128(1) of the Securities Act does not violate s. 8 of the Charter.

VI. Disposition

65 We thus answer the constitutional questions as follows:

1. [Does] s. 128(1) of the Securities Act, S.B.C. 1985, c. 83, infringe[] ss. 7 or 8 of the Canadian Charter of Rights and Freedoms?

Answer: No.

2. If the answer is yes, is the limitation one which is reasonable, prescribed by law, and demonstrably justified pursuant to s. 1 of the Charter?

Answer: It is not necessary to answer this question.

66 We would dismiss the appeal with costs.

The following are the reasons delivered by

67 L'HEUREUX-DUBÉ J.:-- I agree with Sopinka and Iacobucci JJ. that this appeal should be dismissed and I would answer the constitutional question in the manner they propose.

I agree with their analysis and conclusions regarding s. 8 of the Canadian Charter of Rights and Freedoms. However, given my concurring reasons in R. v. S. (R.J.), [1995] 1 S.C.R. 451, and in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, I feel bound to make the following additional comments with respect to the application of s. 7 of the Charter.

A. Self-Incrimination and Section 7 of the Charter

68 The English House of Lords in R. v. Director of Serious Fraud Office, Ex parte Smith, [1993] A.C. 1, at pp. 31-32, recently identified the following four rationales as underlying the immunities stemming from the principle against self-incrimination:

1. An assertion of personal liberty and privacy;
2. A long history of reaction against abuses of judicial interrogation, notably by the Star Chamber and the Council;
3. Instincts about rules of fair play; and
4. The desire to minimize the risk that an accused will be convicted on the strength of an extra-judicial confession.

In my reasons in S. (R.J.), supra, I also explored the first principles underlying much of the Charter and common law, including the right to silence and the principle against self-incrimination. I concluded that the main rationale in Canada for the devout protection at common law against self-incrimination was concern over the reliability of the compelled evidence, and its potential to mislead a trier of fact. Although notions of individual dignity, fairness and privacy were also relevant to the inquiry, I preferred to treat these notions separately, within the rubric of fundamental fairness. As such, I sought to elaborate upon an approach to self-incrimination that was tailored to the type of rationale engaged by the impugned conduct (i.e., reliability considerations as opposed to fairness considerations). Given the importance of balancing societal and individual interests as carefully as possible within s. 7 of the Charter, I preferred to steer clear of any universal application of the principle against self-incrimination that might, as a consequence, be overbroad.

69 I then analyzed derivative evidence against the underlying rationales of reliability and fairness. I concluded that where evidence is conscripted by the state yet is not communicative in nature, concerns about the use of that evidence at trial relate not to the reliability of that evidence or its potential to mislead, but rather to notions of privacy, dignity and fairness to the individual. Since compelled testimony may not, by virtue of s. 13 of the Charter, be used to prove the relevance at trial of evidence derived from the compelled testimony, it follows that derivative evidence will only be admissible if it can be independently and reliably connected to the individual accused. As such, although derivative evidence is incriminating, it is not self-incriminating in the sense envisioned by our common law and our principles of fundamental justice, because it does not potentially engage reliability interests.

70 Since derivative evidence is not per se in violation of the principles of fundamental justice, I concluded that any objection to its use at trial must relate to the manner in which it was obtained rather than to the fact that it exists. Thus, any residual s. 7 protections governing the use of such evidence at trial should develop in a manner consistent with the underlying notions of dignity and

fairness rather than out of any abstract and potentially overbroad principle against self-incrimination.

71 In my reasons in S. (R.J.), I identified two stages at which s. 7 concerns might be addressed. The first stage is the subpoena stage (the time the witness is compelled). At this stage, the possibility of imprisonment flowing from a failure to testify is sufficient to trigger s. 7 protection. Where the witness can demonstrate at that time that, under the circumstances, it would be fundamentally unfair to require that he testify at all, then the principles of fundamental justice under s. 7 require that he not be compellable. The second stage that I identified in S. (R.J.) was the trial stage (the time the witness is tried). Again, at this stage, protections under s. 7 will only be triggered if the witness can demonstrate that he or she faces the possibility of a deprivation of life, liberty or security of the person as a result of the proceeding. In S. (R.J.), I noted that it would be open to an individual at the trial stage under such circumstances to demonstrate fundamentally unfair conduct by the Crown in its prior examinations of the witness.

72 The determination of whether there is a s. 7 violation at the subpoena stage is necessarily interrelated with the applicability of s. 7 at the trial stage. As I observed in S. (R.J.), since the fairness concerns underlying self-incrimination and the right to silence ultimately relate to the proceeding at which the individual is to be tried (see also Dubois v. The Queen, [1985] 2 S.C.R. 350, at pp. 362-63), it necessarily follows that the likelihood that an individual will actually face a charge involving a deprivation of liberty must be an important factor in the determination of compellability at the subpoena stage. Where there is no possibility that the individual may be deprived of liberty at the subsequent proceeding, then this individual cannot claim on the basis of s. 7 of the Charter that it would be fundamentally unfair to compel his or her testimony at the subpoena stage. As a corollary, the less proximate the possibility of a deprivation of liberty in the subsequent proceeding, the less likely it is that the fact of testimonial compulsion will, itself, be fundamentally unfair. For these reasons, and in light of my discussion in S. (R.J.) on the speculative nature of many of the other considerations relating to determinations at the subpoena stage, the subpoena will only be quashed at the subpoena stage in the clearest of cases. I note that this now appears to be the conclusion of my colleagues Sopinka and Iacobucci JJ. as well.

B. Testimonial Compulsion

1. The "Subpoena Stage"

73 The appellants in this case argue that any proceeding under any statute which exposes a person to penal consequences and which denies that person the right to silence and the privilege against self-incrimination violates s. 7 of the Charter. They further submit that if a proceeding is designed or can be used to conscript a person against him or herself and true penal consequences can result, then the proceedings are in violation of s. 7. They therefore ask this Court either to recognize a right to silence on the part of the directors sought to be compelled by the British Columbia Securities Commission or to replace this protection with a protection that is co-extensive with that protection -- derivative evidence immunity. In many ways, their arguments embody much of what Wilson J. referred to in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, as the "abstract approach" to the Charter, for their arguments attach much importance to the abstract values of self-incrimination and right to silence without attempting to relate those values to the context in which they arise. The respondent and the interveners, by contrast, urge a more contextual examination of the question, which focuses on the nature of the securities industry as well as on the methods

available to regulators to carry out their mandate of providing effective protection to the public against unscrupulous or misleading practices by market participants.

74 My colleagues Sopinka and Iacobucci JJ. state that a witness will not be compellable where the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify, rather than further some legitimate public purpose. For the reasons I set out in S. (R.J.), supra, I believe this test generally to be a satisfactory proxy for the existence of fundamentally unfair conduct on the part of the Crown, in violation of s. 7 of the Charter. I feel it necessary, however, to make the following additional remarks.

75 In my respectful view, the regulatory context of the present appeal requires that this s. 7 test be applied with somewhat greater deference than might otherwise be the case. The importance of applying the principles of fundamental justice with sensitivity to the context in which they are applied has been underlined by La Forest J. in R. v. Lyons, [1987] 2 S.C.R. 309, at p. 361:

> It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

(See also R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, and R. v. Ellis-Don Ltd., [1992] 1 S.C.R. 840.) Equally apposite is La Forest J.'s observation in Lyons, at p. 362, that

> s. 7 of the Charter entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined.

In my view, a standard of conduct which may be fundamentally unfair in the context of compelling the testimony of separately charged co-accused may not necessarily be fundamentally unfair in the context of administrative proceedings in a highly complex and tightly regulated field such as the securities industry. This, for several reasons.

76 First, the argument that fundamental fairness may require different standards in different contexts is evidenced by the different procedural protections that we generally accord to witnesses called to appear at hearings similar to that challenged in the present case. Although those conducting an investigation are always under a duty to act fairly, this Court has held that fairness in the context of such hearings does not require that the persons who are the "subjects" of the investigation participate in the examination of other witnesses, or that they be provided with an opportunity to adduce evidence or make submissions to the investigator: Roper v. Royal Victoria Hospital, [1975] 2 S.C.R. 62, and Irvine v. Canada (Restrictive Trade Practices Commission), [1987] 1 S.C.R. 181. See also Ontario Securities Commission v. Biscotti (1988), 40 B.L.R. 160 (Ont. H.C.).

77 Second, although activity in the securities sphere is of immense economic value to society generally, it must be remembered that participants engage in this licensed activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust. Participants must conform with the extensive regulations and requirements set out by the provincial securities commissions. Many of these requirements are fundamental to maintaining an efficient, competitive market environment in a context where imperfect information is endemic. They are also essential to prevent and

deter abuses of such asymmetries of information, and therefore to maintain the integrity of the securities system and protect the public interest.

78 Third, given the nature and breadth of this obligation, as well as the important economic stake that the investing public holds in its proper fulfilment, I fail to see how market participants would not expect to be questioned by regulators from time to time as to their market activities, in order for the securities commissions to be able to ensure that they, or the corporations they represent, have complied with prescribed standards. Although similar comments are more frequently made in relation to the notion of "reasonable expectation of privacy" under s. 8 of the Charter, I believe such considerations to be equally relevant to the application of the principles of fundamental justice under s. 7 of the Charter in the context of securities regulation. Indeed, as La Forest J. observed in Thomson Newspapers, supra, at p. 539, referring to his reasons in Lyons, supra, and R. v. Beare, [1988] 2 S.C.R 387, one must "consider (the impugned legislation) against the applicable principles and policies that have animated legislative and judicial practice in the field".

79 A fourth consideration is the nature and complexity of the securities industry and the difficulties faced by regulators in ensuring the continued protection of the public. The Attorney General for Ontario identifies the three types of market players regulated by the Securities Act, S.B.C. 1985, c. 83: market professionals and traders, issuers of securities, and owners and/or holders of securities. She argues, convincingly in my mind, that the investigatory powers impugned in the present case are the primary vehicle for the effective investigation and deterrence of insider trading, stock manipulation, and other trading practices contrary to the public interest that may be engaged in by any or all of these three types of players. Moreover, she argues that such powers are the only investigative vehicle currently available in respect of owners and holders of securities.

80 Finally, the fundamental fairness of the powers of testimonial compulsion and document production in s. 128(1) of the Act must be evaluated in light of all other rights equally guaranteed under the Charter. Where a company officer is summoned to attend a hearing before investigators, he knows what the subject of the inquiry is. He can prepare himself for the questions. He will generally be accompanied by his lawyers. At the hearing itself, he will be treated with courtesy and will be given every opportunity to consult his lawyers and consider his answers. He will produce those documents requested by the investigators. It would be ironic to conclude that such a proceeding is, itself, contrary to the principles of fundamental justice if the only equally effective alternative reasonably available to the state to pursue a pressing and substantial objective would constitute a far more dramatic intrusion into individual rights. Given the profound asymmetries of information between market players and market regulators in the securities industry, such a reasonable alternative might very well require conferring upon securities regulators broad, intrusive and sweeping search and seizure powers. I raise this point to demonstrate why it is important not to contemplate Charter rights and principles in the abstract, without regard for the potential repercussions of certain conclusions on the enjoyment of other equally important Charter rights: see Wholesale Travel, supra, at p. 247, per Cory J.

81 To recapitulate, although the distinction may often be difficult to draw, courts must try to differentiate between unlicensed fishing expeditions that are intended to unearth and prosecute criminal conduct, and actions undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner. Whereas the former may run afoul of s. 7 of the Charter, the latter do not.

82 As such, notwithstanding that one of the primary purposes of an investigation under s. 128(1) of the Securities Act is to engage in a form of civil discovery of the witness as well as of the company to illuminate or investigate irregularities or suspicious conduct, I agree with Sopinka and Iacobucci JJ. that it has not been demonstrated that testimonial compulsion at these proceedings would be fundamentally unfair to the witnesses. As I recognized in Thomson Newspapers, supra, at p. 578, "[c]ompelling the attendance of witnesses is an established investigatory tool in this age of governmental regulation of the economy." Although such powers of investigation may not always be necessary in regulatory contexts, I conclude that they are indeed necessary in the present instance, given the profound asymmetry of information facing securities regulators, the close relationship between such investigatory powers and the obligations voluntarily undertaken by those participating in this regulated activity, and the lack of a less intrusive alternative means to investigate and deter market irregularities and improper conduct by market players.

83 I find additional support for this conclusion in the following four considerations: (1) these kinds of inquiries are purely administrative in nature and do not adjudicate upon the guilt or innocence of the subject of the investigation; (2) it is generally a matter of speculation at the time of the testimony to know whether the compelled witness is speaking for himself or for the company, and whether the information disclosed could lead the state to take action against the individual or the company; (3) at the outset of an investigation, it is often uncertain whether any breach of the law has even occurred and, if so, whether any persons summoned may be implicated in this breach; and (4) even if the individual is shown by the investigation to be implicated in a breach and the state decides to take further action, it is far from certain that this action will entail the possibility of a deprivation of liberty, thereby bringing the state action within the purview of s. 7 of the Charter. As I noted earlier, the more remote or speculative the possibility of imprisonment at the trial stage, the less likely that relief against testifying will be offered at the subpoena stage. The witnesses in this case have not demonstrated how any of these considerations are inapplicable to the present circumstances.

84 Finally, I reiterate that the principles of fundamental justice are derived from our common law tradition.

What is or is not fundamentally unfair can be informed by examining these traditions. In the traditional criminal law domain, it has generally been seen as fundamentally unfair for the state to seek as its predominant purpose to compel an individual, subject to possible imprisonment for failure to answer, to respond to questions on matters that will incriminate that person, even if this power were accompanied by testimonial use immunity. I do not think that the same can necessarily be said with respect to the necessary regulation of complex industries, in which the information required for effective regulation is generally in the hands of private actors, and where no less intrusive alternative means of obtaining that information exists.

85 As such, I conclude that the directors have not demonstrated that, in these circumstances, it would violate their rights under s. 7 of the Charter for them to be compelled to testify at the inquiry under s. 128(1) of the Act.

86 At this juncture, I must add one last proviso. Having recognized that witnesses are entitled to challenge on substantive grounds the subpoena issued under s. 128(1) of the Act, we must be cognizant of the fact that the securities industry is acutely "time sensitive". The longer improper market activities are permitted to continue unabated, the greater the potential adverse impact on the investing public. In order to address this danger, the Commission is empowered with the ability, amongst

other things, to suspend all trading of particular securities and to suspend particular individuals from trading securities without a hearing in appropriate circumstances. Expeditious investigation into irregularities and suspected market misconduct is an important way by which to minimize the severity of such orders. I would therefore urge that challenges to the subpoena, should they be made, be heard as expeditiously as possible.

2. The "Trial Stage"

87 It goes without saying that s. 13 of the Charter mandates that the compelled witnesses shall enjoy full testimonial immunity in any subsequent proceedings undertaken by the state. My colleagues, however, would also appear to allow those who have been compelled to testify in a s. 128 inquiry to enjoy an additional derivative evidence immunity at the trial stage, along the lines of the "but for" approach outlined by Iacobucci J. in S. (R.J.). With all due respect, I cannot agree with this conclusion for two reasons. First, as I stated in S. (R.J.), I am opposed in principle to such immunity, for the significant practical and theoretical problems that it raises. I see no point in reviving that discussion again.

88 Second, even if the "but for" standard is an appropriate level of s. 7 protection in a purely criminal context, this does not mean that it is equally suited for use in predominantly regulatory contexts. As I have already noted, this Court has on many occasions recognized that the principles of fundamental justice under s. 7 of the Charter may vary in their application, depending upon the context. Many of the interests underlying the principle against self-incrimination, such as elements of fairness, basic human dignity and privacy, are simply not engaged as dramatically in situations in which an individual voluntarily participates, for his own profit, in a licensed activity, the effective regulation of which is essential to pressing and substantial societal interests. In this respect, I think it important to heed the admonition of Wilson J. in Edmonton Journal, supra, at pp. 1353-54:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case. [Emphasis added.]

In my respectful view, employing the identical "but for" standard in circumstances in which the underlying rationales of the principles against self-incrimination are not significantly engaged may elevate that principle to an exalted position that is not balanced, necessary or appropriate in many regulatory situations.

89 The potential difficulties of using such a rigid s. 7 standard within the ambit of the Securities Act is evident. Many of the interveners argue strenuously that it would significantly undermine their ability to administer and enforce securities regulations effectively if this Court were to grant blanket derivative evidence immunity to those who are subject to s. 128 investigations. I agree. Regulation is impotent unless it can also be effectively enforced, and information is of limited use unless it can be acted upon.

90 It is all very well to say that we are permitting the state to pursue certain important regulatory purposes by holding individuals to be compellable to testify at Securities Act investigations. At the same time, however, we must be careful not to defeat those very purposes by unconditionally granting derivative evidence immunity to those under investigation. The existence of such an immunity

could neutralize in large part the regulators' ability to enforce the Act. As such, it would also frustrate one of the main purposes of the investigatory powers conferred under s. 128 of the Act.

91 I must emphasize again that, unlike the traditional criminal law domain, the very nature of the securities industry is such that the information necessary for effective enforcement will generally be in the hands of private parties. Compelling the testimony of certain individuals may be the only reasonable means by which regulators can obtain evidence or gain a full appreciation of important information. The alternative, which I believe to be far less palatable, is for investigators to resort to highly intrusive search and seizure powers. This Court has previously recognized and taken into consideration the difficulties involved in regulating activities in a licensed sphere, where important information is generally only in the possession of the private individuals whose activity is the focus of the regulation: Wholesale Travel, supra, and Ellis-Don, supra. I believe that it is indisputable that the present case calls for a similarly contextualized application of s. 7 principles.

92 As always, a delicate balance must be forged. On one hand, of course, we must not deny individuals the fullest possible Charter protections where a reasonable and less intrusive alternative measure exists by which to address the pressing and substantial desired objective. Moreover, federalism concerns already dictate that provincial securities statutes not confer upon administrative or enforcement agencies powers that would trench upon the federal jurisdiction over criminal law and procedure. On the other hand, however, we must not so handcuff securities enforcement agencies within the Constitution as to prevent them from being able to perform their jobs effectively, and fulfil their mandate of protecting the public interest.

93 I accept the interveners' submission that the Securities Act provides for both civil and criminal penalties in order to address the full range of behaviour that may be involved. I further accept that imprisonment will generally be an exceptional remedy, saved for exceptional circumstances.

Without the benefit of a closer examination of the specific contexts in which imprisonment may arise as a possible eventual consequence, I do not think that it is appropriate for this Court, at the subpoena stage, to define the exact parameters of appropriate derivative evidence immunity to come into effect at the trial stage. To the extent that my colleagues recognize that individuals will enjoy some s. 7 derivative evidence immunity protection at the trial stage, I take them to leave open the possibility that this protection may vary according to context, and in particular according to the extent to which the various purposes underlying the principle against self-incrimination (e.g., reliability, privacy, dignity, fairness) are engaged in a given situation.

94 I would like to remark upon one last practical implication of coping with derivative evidence immunity. Often, particularly in the regulatory context, prosecuting authorities will seek a substantial fine rather than imprisonment upon conviction, notwithstanding that the legislation also provides for the possibility of imprisonment.

In my opinion, if the authorities know at the outset of the prosecution that they will not be seeking imprisonment upon conviction, then I see no reason why they cannot apprise both the accused and the trial judge of this fact at the beginning of the trial proceedings. Under such circumstances, since no possibility of a deprivation of liberty would therefore exist, there would consequently be no need for a court to engage in any derivative evidence immunity analysis under s. 7 of the Charter. In this way, particularly in complex investigations, the spectre of lengthy voir dires into whether or not the Crown would have had the evidence "but for" the compelled testimony will not be necessary. Both the court and the parties involved will spare themselves considerable time and resources, and only

those Charter protections consistent with the peril faced by the individual accused need be contemplated.

C. Document Production

95 I agree with Sopinka and Iacobucci JJ. that the compulsion to produce pre-existing documents in s. 128(1)(c) of the Securities Act does not violate s. 7 of the Charter if it is found that the person subpoenaed is compellable to testify. I believe it necessary to elaborate slightly upon their remarks, however.

96 Unlike testimonial compulsion, for which special considerations apply, it is not necessary to recognize any additional protections at the trial stage in order for pre-existing documents to be compellable at the subpoena stage. Indeed, as I noted in Thomson Newspapers, supra, at p. 588:

> . . . an order requiring an individual or the officer of a corporation to produce documents does not involve the fabrication of evidence; the individual or officer acts as a "mere conduit" for the delivery of pre-existing records. . . . Thus, there is no suggestion that the use of such evidence in a subsequent trial would affect the fairness of the proceedings.

A clear line must be drawn between, on one hand, the compelled production of pre-existing documents and, on the other hand, the compelled production of documents which are themselves produced pursuant to statutory compulsion. While the latter may, indeed, engage some self-incriminatory concerns since the individual will have generated them under state compulsion, it is evident that the former should not engage such concerns since they have not been generated subject to any such compulsion.

97 This conclusion is fortified by some very real and pragmatic concerns. The securities domain is a licensed field, which individuals enter for their own profit. Pre-existing documents are often the focus of investigations under the Securities Act. It would render the Securities Act virtually unenforceable to preclude the authorities from relying upon such documents at subsequent proceedings against the individuals who produced them. Moreover, given the complexity of securities matters, I suspect that it would also be virtually impossible for the Crown to demonstrate that it did not use the documents to gain an appreciation of the evidence against the individual. Indeed, we must recall that the compelled production of documents is the least intrusive means possible by which the state can obtain the documents, and therefore the most consistent with maintaining the dignity and privacy of the individuals involved. It would be wholly counter-intuitive to conclude that the state could not use such documents, or evidence derived therefrom, to incriminate the individual unless it obtained those documents through a far more invasive search and seizure procedure which would, in turn, be far more likely to affront notions of privacy, dignity and fairness to the individual.

98 As a result, I am satisfied that there is nothing whatsoever that is fundamentally unfair or otherwise contrary to s. 7 of the Charter in requiring the production of such records and in the possibility that such records may subsequently be relied upon by the state in a proceeding against the individual who has been compelled to produce them.

The "but for" standard adopted by the majority of this Court in S. (R.J.) does not apply at the trial stage to pre-existing documents. I also agree with my colleagues, however, that the question of the compellability of documents produced pursuant to statutory obligation is not raised in this appeal, and therefore remains to be addressed in future cases.

D. Disposition

99 Accordingly, I would dismiss the appeal, and answer the constitutional questions in the manner proposed by Sopinka and Iacobucci JJ.

The following are the reasons delivered by

100 GONTHIER J.:-- I agree with the reasons of Justice Sopinka and Justice Iacobucci. I also agree with the additional comments of Justice L'Heureux-Dubé relating to evidence in a regulatory context.

cp/d/hbb

TAB 5

Case Name:
Fantl v. Transamerica Life Canada

Between
Joseph Fantl, Plaintiff (Respondent), and
Transamerica Life Canada, Defendant (Respondent)

[2009] O.J. No. 1826

2009 ONCA 377

72 C.P.C. (6th) 1

95 O.R. (3d) 767

249 O.A.C. 58

2009 CarswellOnt 2383

Docket: C50166

Ontario Court of Appeal
Toronto, Ontario

W.K. Winkler C.J.O., S.T. Goudge and J.M. Simmons JJ.A.

Heard: April 6, 2009.
Judgment: May 7, 2009.

(81 paras.)

Civil litigation -- Civil procedure -- Parties -- Representation of -- Class or representative proceedings -- Procedure -- Representative plaintiff -- Disposition without trial -- Stay of action -- Another proceeding pending -- Appeal by former partner of dissolved firm from dismissal of motion to have his new firm named counsel for representative plaintiff in class proceeding dismissed -- Court would not interfere with plaintiff's choice of new counsel absent improper purpose or prejudice to class members -- Court not required to engage in comparison of firms to see which one was better -- Identical class action commenced by former partner stayed because first proceeding had already progressed to point of settlement -- Class Proceedings Act 1992, ss. 5, 12, 13, 33.

Legal profession -- Barristers and solicitors -- Retention of counsel -- Representation -- Order for change of counsel -- Appeal by former partner of dissolved firm from dismissal of motion to have his new firm named counsel for representative plaintiff in class proceeding dismissed -- Court would not interfere with plaintiff's choice of new counsel absent improper purpose or prejudice to class members -- Court not required to engage in comparison of firms to see which one was better -- Identical class action commenced by former partner stayed because first proceeding had already progressed to point of settlement.

Professional responsibility -- Self-governing professions -- Professionals -- Legal -- Barristers and solicitors -- Appeal by former partner of dissolved firm from dismissal of motion to have his new firm named counsel for representative plaintiff in class proceeding dismissed -- Court would not interfere with plaintiff's choice of new counsel absent improper purpose or prejudice to class members -- Court not required to engage in comparison of firms to see which one was better -- Identical class action commenced by former partner stayed because first proceeding had already progressed to point of settlement.

Appeal by Kim Orr, a law firm, from the dismissal of its motion seeking an order requiring Fantl to retain Kim Orr as solicitors for the plaintiff in a class proceeding. Fantl was the representative plaintiff in a class proceeding against Transamerica. Roy Elliott Kim O'Connor was the firm representing him. That firm dissolved and some of its lawyers went on to form Kim Orr, while others went on to form Roy Elliott O'Connor. Fantl chose to go with Roy Elliott O'Connor, because he was friends with Roy and was impressed by the experience of the Roy Elliott O'Connor lawyers in class proceedings. This was despite the fact Kim was the partner with the most involvement in Fantl's case, although Fantl mainly dealt with associate lawyers. Fantl served a notice of change of solicitors. Kim Orr moved for an order striking the notice and requiring Fantl to retain it. Alternatively, Kim Orr sought an order removing Fantl as the representative plaintiff and substituting two new plaintiffs. Kim Orr's motion was dismissed. The judge found Fantl had the right to choose his counsel and that the court should not intervene unless the choice would deny the plaintiff class adequate representation. He rejected Kim Orr's argument the proper test to apply was whether or not Fantl's choice of counsel was in the best interests of the class. The judge refused to engage in a comparison of the two law firms to determine which was superior. Kim Orr then brought a competing action against Transamerica with Kang as the proposed representative plaintiff. The Kang action overlapped significantly with the Fantl action. At the time of the appeal, Fantl's action had progressed to the point of settlement.

HELD: Appeal dismissed. The Kang action was stayed. Kim Orr conceded the lawyers at Roy Elliott O'Connor were competent. There was no evidence Fantl's choice of counsel was made for an improper purpose or that it would prejudice the class. The motions judge applied this, the proper test, in determining whether or not to allow Kim Orr's motion. This particular decision did not require the court's sanction, like other procedural steps in class proceedings. Kim's investment of time and effort while working at the dissolved firm would be protected through the process of dissolution. There was nothing to show Fantl was an inappropriate representative plaintiff. Because of the state of the Fantl action, it was in the best interests of the plaintiff class to stay the Kang action.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, s. 5(1), s. 12, s. 13, s. 20, s. 29(1), s. 29(2), s. 30(2), s. 33(1), s. 33(4)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1)

Appeal From:

On appeal from the order of the Divisional Court (Cunningham A.C.J.S.C.J., and Carnwath and Bellamy JJ.) dated December 3, 2008 and reported at 2008 CanLII 63563 (ON S.C.D.C.), dismissing an appeal from the order of Justice Paul M. Perell, dated April 23, 2008 and reported at 2008 CanLII 17304 (ON S.C.).

Counsel:

Alan J. Lenczner, Q.C. and Naomi Loewith, for the appellant Kim Orr Barristers P.C.

Bonnie A. Tough and Jennifer M. Lynch, for the respondent Joseph Fantl.

Mary Jane Stitt, for the respondent Transamerica Life Canada.

The judgment of the Court was delivered by

W.K. WINKLER C.J.O.:--

Overview

1 This appeal relates to a representative plaintiff's right to choose new counsel in a class proceeding, following the dissolution of the law firm originally retained by the plaintiff to prosecute the action.

2 The appellant is a law firm, Kim Orr Barristers P.C. ("KO"). Joseph Fantl is the representative plaintiff in a class proceeding brought against the defendant Transamerica Life Canada ("Transamerica"). Both Mr. Fantl and Transamerica are respondents in this appeal.

3 In 2006, Mr. Fantl retained the law firm of Roy Elliott Kim O'Connor ("REKO") to act in the prosecution of the intended class action lawsuit against Transamerica. A team of REKO lawyers worked on the matter. Toward the end of 2007, REKO dissolved.

4 Certain of the team of lawyers formerly engaged on the file joined the newly formed law firm of Roy Elliott O'Connor ("REO"). Others followed one of REKO's former partners, Won Kim, to form the appellant law firm KO, while the remaining lawyer chose to go elsewhere. Because of the disbanding of REKO, Mr. Fantl was forced to decide what firm to retain to continue the matter. He chose REO because he knew and was a friend of Peter Roy, and because he had some experience with, and respected members of, the firm. As such, he trusted them to carry the case forward.

5 Mr. Fantl served a notice of change of solicitors naming REO as counsel. KO brought a motion pursuant to s. 12 of the *Class Proceedings Act 1992*, S.O. 1992, c.6 (the "CPA"), asking for various forms of relief, including an order striking the notice of change of solicitors and an order requiring Mr. Fantl to retain KO. In the alternative, KO sought to have Mr. Fantl removed as representative plaintiff and two new representative plaintiffs (Yi-Yea (Riya) Kang and Jeong-Ae Seok) substituted

in his stead. The motion judge dismissed the motion in its entirety. KO appealed the decision of the motion judge to the Divisional Court, which dismissed the appeal. KO appeals to this court, with leave. An expedited hearing was granted given that a settlement has been reached and the settlement approval hearing relating to the case is imminent.

6 The motion judge, in refusing to grant the relief requested, held that a representative plaintiff has a right to retain counsel of his or her choice. He found that the test to be applied in determining whether the plaintiff's choice of counsel should stand is whether the counsel is adequate. Thus, he adopted the same test for counsel as is required by s. 5(1) of the CPA in determining whether a representative plaintiff may carry an action forward.

7 In this context, the motion judge noted that while the court has a broad supervisory jurisdiction in class proceedings, it should not intervene in a plaintiff's choice of counsel unless the choice would deny putative class members adequate legal representation. He rejected the appellant's theory that the proper test to be applied is whether the plaintiff's choice is in the best interests of the class. Hence, he refused to engage in a comparison of the two law firms to determine which group was superior. The Divisional Court upheld the reasons of the motion judge on these central issues.

8 Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff (the "Kang action"). The Kang action overlaps significantly with Mr. Fantl's action.

9 The appellant advances the same arguments on this appeal as were made to the courts below, contending that the motion judge erred by applying the wrong test. The competence of REO to act as class counsel is not in issue. This notwithstanding, on a comparison basis applying the test of best interests of the class, the appellant submits that the plaintiff ought to be directed to retain the KO firm. Consequently, the plaintiff's choice of counsel ought to be set aside and new representative plaintiffs appointed in place of Mr. Fantl.

10 The respondent submits that the motion judge applied the appropriate test and suggests that the key consideration in the analysis should be whether the plaintiff's decision caused any prejudice to the class members. Since there is no dispute as to the competence of REO counsel, and since the settlement discussions have advanced to the point of a settlement approval hearing, the motion judge's decision not to interfere with Mr. Fantl's choice of counsel should be upheld.

11 I cannot accede to the appellant's submissions. In my view, the representative plaintiff is entitled to select, and is indeed responsible for selecting, class counsel. In a circumstance like this, when a decision properly comes before the supervisory court for review, the criteria to be considered in determining whether the plaintiff's choice of counsel can stand are: competence of counsel; whether the choice was based on any improper considerations; and whether the choice resulted in any prejudice to the class. In the present case, competence of counsel is conceded. There is no evidence of any improper purpose in the selection of counsel or of any prejudice to the class as a result of that decision. Furthermore, the Kang action, commenced after the motion judge dismissed the appellant's motion, is an abuse of process.

12 I would dismiss the appeal, and exercise my discretion under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA") and s. 13 of the CPA, to stay the Kang action. My reasons, which differ from those of the motion judge, follow.

The Issues

13 There are three central issues on this appeal. First, is the representative plaintiff in an intended class proceeding, who is required to retain new counsel after the proceeding has been commenced, entitled to select counsel of his or her own choosing or is the court, in the exercise of its supervisory jurisdiction under the CPA, always required to approve class counsel?

14 Second, regardless of the answer to the first question, if the selection of counsel comes before the court for review, what is the proper test to be applied in determining whether the plaintiff's selection of class counsel should stand?

15 Third, the appellant has asked this court to review whether Mr. Fantl should be replaced as the representative plaintiff. This requested relief bears on the status of a competing action, launched by the appellant following the dismissal of its motion, in which Ms. Kang is the representative plaintiff.

Facts

16 This appeal arises from a proposed class action against Transamerica that has yet to be certified. Mr. Fantl is not the original representative plaintiff in this action. The action was initially started by Michael Millman, a chartered accountant in British Columbia who owned an insurance policy issued by the company that is now Transamerica, and which contained an investment option known as the Can-Am Fund. Mr. Millman sought to sue Transamerica on the basis that: (1) Transamerica had overcharged him for management expenses; and (2) that the Can-Am fund had not tracked or replicated the results of the S&P 500 total return index as had been promised.

17 The lawyer retained by Mr. Millman referred the claims to Sutts, Strosberg LLP in Ontario for the purpose of commencing a class action. On December 29, 2003, a statement of claim was issued by Mr. Millman's new counsel against Transamerica.

18 Although there is disputed evidence as to the timing and roles of the parties, the motion judge found that by autumn 2005, the case had been transferred to the law firm REKO. He further found that, upon the transfer of the file, Mr. Kim became the supervising lawyer on the case. Shortly thereafter, Mr. Millman indicated that he was no longer prepared to act as the representative plaintiff in the case.

19 Mr. Fantl was a long-standing friend of REKO partner Mr. Roy, and had been seeking legal advice from the firm on an unrelated matter at about the time that the original representative plaintiff removed himself from the file. During discussions, it emerged that Mr. Fantl was also an investor in the Can-Am Fund operated by Transamerica. REKO's lawyers invited him to act as the new representative plaintiff in the action and he accepted.

20 In May 2006, Mr. Fantl signed a retainer agreement with REKO. The retainer agreement was between Mr. Fantl and the law firm, and not between Mr. Fantl and any of REKO's individual lawyers.

21 Between September 2005 and April 2007, the case progressed. The statement of claim was amended, material for the certification was prepared and cross-examinations were conducted. The certification motion did not proceed in May 2007, as scheduled, because Mr. Kim and counsel for Transamerica began to explore the idea of consent certification and a settlement of the management expenses claim. The parties indicated in a case conference on September 12, 2007 that there was a prospect of settlement but that the scope of the funds implicated in the claim was growing significantly, beyond just the Can-Am fund.

22 The motion judge found that Mr. Kim had been the partner at REKO with the most involvement in Mr. Fantl's case, and that Mr. Kim had been assisted in this work to varying degrees by six associate lawyers. The motion judge also noted Mr. Fantl's evidence that he had had minimal contact with Mr. Kim throughout the course of the class action and that Mr. Kim had not provided him with any reports or advice on the case, apart from one brief conversation.

23 For reasons not disclosed to the motion judge, REKO dissolved on December 31, 2007. Mr. Kim established the firm now known as KO, and REKO's other former partners established the new firm called REO.

24 Mr. Roy wrote to Mr. Fantl to inform him of REKO's dissolution and to seek instructions with respect to carriage of the class action. On January 5, 2008, Mr. Fantl wrote to REO to say that he had chosen the firm to act as his lawyers for the class action. He cited his "personal knowledge of Mr. Roy, his abilities and integrity as a lawyer and my confidence in his judgment" as among the reasons for his choice. In this regard, the motion judge noted that Mr. Fantl had been the best man at Mr. Roy's wedding. In his affidavit evidence, Mr. Fantl also noted that his choice of counsel was influenced by the fact that "REO has extensive class action experience and the senior partners have a great deal of experience in complex litigation, including settlement of complicated cases." Mr. Fantl was not cross-examined on his affidavit. REO served the notice of change of solicitors and came on the record on January 18, 2008.

25 KO subsequently brought a motion to set aside the notice of change of solicitors, and to disqualify Mr. Fantl from being the representative plaintiff in the class action. It argued before the motion judge that Mr. Fantl had breached his duty to the intended class members by choosing REO and that, based on the success and progress achieved by Mr. Kim in the action, it was in the best interests of the class that KO be appointed as solicitor of record. KO also argued that, in the alternative, the court should replace Mr. Fantl with two new proposed representative plaintiffs, Ms. Seok and Ms. Kang. Mr. Fantl argued that the court's jurisdiction to govern the solicitor-client relationship was limited to the post-certification phase and that, in any event, Mr. Fantl had fulfilled his duty to the intended class members by choosing adequate counsel.

26 KO's motion was dismissed. The dismissal was upheld by the Divisional Court. Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff. The Kang action covers 25 of the 26 investment funds that are the subject of the proposed settlement agreement in the instant case. The only distinction between the two is that the Kang action does not include the Can-Am fund.

Decision of the motion judge

27 In his reasons, the motion judge characterized the "overarching issue in the case" as being whether the court has the jurisdiction to supervise the relationships arising in a class proceeding, both pre- and post- certification: para. 56. He held that, on the basis of the court's inherent jurisdiction to control its own process and the powers derived from s. 12 of the CPA, the court's jurisdiction to supervise a class proceeding "exists from the outset of the litigation and the Court has the jurisdiction to make orders to protect putative class members as potential parties to the litigation": para. 58.

28 Having determined that the court has the jurisdiction to supervise all relationships arising out of a class proceeding from the outset of the litigation, the motion judge turned specifically to a consideration of the solicitor-client relationship. He recognized that in an ordinary action, well estab-

lished principles dictate that a litigant has the autonomy to choose counsel without court interference. However, he noted that these principles cannot be transferred directly to the class action context due to the responsibilities owed by the representative plaintiff, class counsel and the court to absent class members.

29 The motion judge acknowledged previous case law suggesting that a solicitor-client relationship - with all its concomitant duties and obligations - may not exist between class counsel and proposed class members in the pre-certification stage. However, he held that a *sui generis* relationship exists between class counsel and proposed class members, and that at least some of the responsibilities inherent in the solicitor-client relationship are owed by counsel to the proposed class.

30 In considering the proper test for determining whether Mr. Fantl's choice of counsel should stand, the motion judge reviewed the case law that had developed in relation to the adequacy of the representative plaintiff, carriage motions and the removal or change of counsel. Ultimately, he likened the fact situation of the instant case as being akin to that of choosing a solicitor of record at the outset of litigation. He thus applied the standard applied by the court on a certification motion: whether the representative plaintiff has selected "competent counsel that will adequately represent the proposed class if the action is certified": para. 105.

31 In so deciding, the motion judge noted that this standard did not require the representative plaintiff to choose the best or more superior counsel. In this respect, while he stated that "Mr. Kim might or might not be a better choice", Mr. Fantl's choice of REO as solicitor of record met the standard of competency and adequacy: para. 110. Accordingly, the motion was dismissed.

Decision of the Divisional Court

32 On appeal, the appellant submitted before the Divisional Court that the motion judge had applied the wrong legal test when determining whether Mr. Fantl had properly appointed REO as the new class counsel.

33 The Divisional Court reviewed the motion judge's conclusions and found that he had committed no error of law. In particular, the Divisional Court endorsed the motion judge's central conclusion that, "having selected competent counsel to represent the class, the fact there are other counsel who may be a better choice does not change the standard Mr. Fantl must meet": para. 37.

Positions of the Parties

34 The thrust of the appellant's argument is that, even though the litigation is being conducted by a representative or intended representative plaintiff, where a decision is required in the conduct of the proceeding, including one that occurs at the pre-certification stage, the decision of the plaintiff must receive the court's approval.

35 The appellant contends that this is necessitated by an overriding concern for the interests of the absent class members. Accordingly, in its submission, the test to be applied by the court is whether the decision made by the plaintiff is in the best interests of the class. This, says the appellant, is the test to be applied by a court throughout a class proceeding, regardless of the issue to be decided or the stage of the proceeding.

36 The respondents advance a more limited view of the supervisory role of the court in the exercise of its jurisdiction under the CPA. They caution that it is not appropriate for the court to "descend into the arena" and assume the responsibility of the plaintiff in conducting the litigation.

Analysis

37 In addressing the issues raised in this appeal, I am guided by the reasons of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, which sets out the standards of review in appeals from a judge's order.

Issue 1: Supervisory jurisdiction of the court

38 It is now well settled that class proceedings are *sui generis* litigation. In part, this is because of the existence of the proposed class in addition to the putative representative plaintiff. As stated by Cullity J. in *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (S.C.), leave to appeal refused (2008), 232 O.A.C. 366 (Div. Ct.), at para. 10:

> From the commencement of a class proceeding the court, as well as the named plaintiff has responsibilities to members of the class....They are not parties to the proceeding but they are not strangers. Their rights are as much at stake as those of the plaintiffs. It is consistent with their *sui generis* status, and the objectives of the CPA, that their interests should not be vulnerable to the deficiencies in the ability of the named plaintiff to represent them. [Citations omitted.]

39 The existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues.

40 The supervisory jurisdiction of the court over the class proceeding is not in issue on this appeal. The parties acknowledge that the court has supervisory jurisdiction throughout the proceeding. They do, however, posit markedly different theories as to the circumstances in which this jurisdiction must or ought to be exercised.

41 While I do not agree with the appellant's position that the court must be actively engaged at every turn in the proceeding, I am equally circumspect about the "hands off" approach advocated by the respondents. Neither view accurately captures the role of the court in respect of a class proceeding.

42 The CPA is specific as to certain matters arising out of litigation conducted under the aegis of the statute that require court approval. These include, *inter alia*, the abandonment or discontinuance of an action, approval of settlements, notice to class members and class counsel fees: see ss. 29(1), 29(2), 20, and 32(2) of the CPA respectively. In addition to such enumerated and specific matters requiring court approval, the legislature has also seen fit to provide the court, under s. 12 of the CPA, with a broad, discretionary jurisdiction to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Although the court's ongoing supervisory jurisdiction is manifest in the CPA, this is not to say that every decision made by the plaintiff or counsel in the prosecution of the class action lawsuit requires the sanction of the court.

43 The motion under appeal was brought pursuant to s. 12 of the CPA. The appellant argues that a notice of change of solicitors should not have been delivered without first obtaining an order of the court on motion brought by the representative plaintiff, so as to have the court approve the new

class counsel. Further, the appellant contends that this determination should only be made on the basis of the "best interests of the class".

44 I disagree. The position advanced by the appellant appears to be an attempt to combine certain developed principles of class action jurisprudence so as to elevate the court's supervisory role over the proceeding to one of mandatory intervention. While it is true that the court has a responsibility to the absent class members, the prosecution of the action rests squarely with the representative plaintiff. The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.

45 This is clear from a reading of the CPA. In order to obtain certification, s. 5(1) of the CPA requires that the court be satisfied that the representative plaintiff "has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class". In other words, as stated by the Supreme Court of Canada in *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, at para. 41:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class. [Citations omitted.]

46 As is also stated in this passage, an important part of this representative plaintiff's plan is the retention of "competent" counsel.

47 I do not view it as necessary for the plaintiff to seek and obtain approval of the court for every decision involving the selection or change of counsel. However, I am of the view that the case management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change. Further, if this decision is contested and properly comes before the court on motion, the court is well within its jurisdiction to review the plaintiff's decision.

Issue 2: Test for reviewing a plaintiff's choice of counsel

48 The parties vigorously disputed the test to be applied when the court reviews a representative plaintiff's choice of counsel. In his reasons, the motion judge correctly identified the issues and canvassed the relevant case law in deciding that question. In my view, he made no error in holding that the choice of counsel upon REKO's dissolution was a matter for Mr. Fantl to deal with and that his decision did not warrant interference by the court. Nonetheless, I would arrive at that result for different reasons and based on a different analysis than that of the motion judge.

49 The appellant has argued that this court should evaluate Mr. Fantl's choice of counsel by determining whether he was acting in the "best interests of the class" in so choosing. On the other hand, the respondent contends that the motion judge was correct in applying a test of adequacy to Mr. Fantl's choice of counsel. In my view, both approaches miss the mark. Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors:

(1) Has the plaintiff chosen competent counsel?
(2) Were there any improper considerations underlying the choice made by the plaintiff? and
(3) Is there prejudice to the class as a result of the choice?

50 Unless this inquiry reveals something unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. The court is not a substitute decision maker for the plaintiff in the litigation. Accordingly, any intervention based on its supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members.

51 In formulating these criteria for review of the choice of counsel by the plaintiff, I am necessarily rejecting the argument of the appellant that the only test to be applied by the court is whether the choice is "in the best interests of the class". It must be remembered that the broad and guiding "best interests" principle developed in recognition of the distinction that must be made between the interests of individual class members and the interests of the class as a whole when the court is considering certain issues: see *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.), *Ford v. F. Hoffman-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.), and *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S.C.). Here, the context is very different.

52 Moreover, where the issue before the court is the plaintiff's choice of counsel, insofar as the "interests of the class" must be considered, they are sufficiently addressed under the prejudice criterion. Where there is no prejudice, the choice of "competent counsel" who has not been selected for any improper purpose will also be in the interests of the class.

53 By applying these criteria, the court avoids the "contest" approach proposed by the appellant, which pits two sets of competing lawyers against each other and undermines the role of the representative plaintiff in selecting counsel. Such an approach is neither necessary nor productive where, as here, competence is conceded and there is no evidence that the plaintiff has acted improperly or in a manner that prejudices the interests of the class.

54 The appellant contends that the "contest" approach is appropriate in the present circumstances because the choice of counsel is analogous to a carriage motion. I disagree. A carriage motion is a motion to determine which of two or more overlapping, competing intended class actions should be allowed to proceed and which should be stayed. A carriage motion involves a competition which, of necessity, requires a comparison of the competing proceedings. Unlike a carriage motion, there is no competition between proceedings here. It is for this reason that any analogy between a carriage motion and the present circumstances breaks down.

Application of the test to the instant case

55 The instant proceeding involves the choice of counsel upon dissolution of the class counsel law firm. The retainer agreement was entered into between Mr. Fantl and REKO, and not with Mr. Kim or any other individual lawyer. A team of lawyers at the predecessor firm dealt with the case.

56 On dissolution, some of the team formed the appellant, some formed REO and one lawyer joined another firm. Lawyers in each of these factions had participated in the work on the file to varying degrees. The lawyer who did the most work on the file was the associate who left and went to an unrelated firm.

57 The record indicates that, although Mr. Kim was the senior partner on the case, he did not take instructions from, or report to, Mr. Fantl, and that he only accompanied Mr. Fantl to cross-examinations. He attended one settlement meeting with the defendant at which defendant's counsel offered to settle the claim, expand the class definition and communicate this development to class members.

58 In the context of this file, and in the eyes of Mr. Fantl, there was more to the REKO firm than just Mr. Kim. Mr. Fantl was faced with three choices. He could go with the appellant, the REO firm or choose a different firm. He chose the REO firm.

59 The appellant argues that the failure to retain KO was akin to a dismissal of counsel. I do not accept this characterization of the facts before this court. The appellant was not terminated by the plaintiff. Indeed, KO had no relationship with the plaintiff capable of termination. Rather, its complaint is that the plaintiff did not choose to retain its lawyers after REKO's dissolution.

60 Turning to the first factor of the test, competence of counsel of choice was conceded in the present case. I note the appellant's submission that competence of counsel is not a useful benchmark since every lawyer in Ontario is competent and thus no motion challenging a plaintiff's choice of counsel is likely to ever be successful. I disagree. Where competence is a live issue, the court should consider under this head:

(1) The nature of the lawsuit;
(2) The complexity of the litigation;
(3) The fact that it was a class proceeding;
(4) The experience of counsel as to subject matter and class actions;
(5) The resources of counsel;
(6) The stage of the proceedings at which the review occurs; and
(7) Any other considerations the court might deem to be appropriate.

61 Moreover, when considering competence of counsel, the court must take into account the fact that, after certification, class counsel will be in a solicitor-client relationship with the class members, with all of the responsibilities that entails, extending until the implementation of a settlement or final disposition of any individual issues. In other words, given that the class may include a large number of people, this obligation may be significant and prolonged: see generally *Cassano v. The Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.), and *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (S.C.), at para. 7.

62 These criteria serve to advance an object of the CPA, namely to obtain first class representation for class members.

63 Turning to the second factor, there is no evidence of any improper purpose or motive on the part of the plaintiff in making his decision to retain REO. The appellant points to the plaintiff's friendship with Mr. Roy, one of the partners of REO, as the driving factor in choice of counsel. While that was a consideration, it was not the only factor for the plaintiff's choice of counsel. As noted by the motion judge and as indicated in the record, Mr. Fantl was attracted to REO because of the competence of counsel, which is not disputed, and its reputation in class action work.

64 In any event, I would not accept that the fact of an acknowledged friendship between the plaintiff and his counsel of choice would constitute an improper purpose in and of itself. An improper purpose would be one where the plaintiff was seeking to gain a personal advantage, the hope

of an advantage not shared by the class members or was motivated in some way that was inconsistent with the interests of the class.

65 Turning to the third factor, to the extent that prejudice was argued by the appellant, this line of argument focused on the economic prejudice to the appellant rather than on any prejudice to the interests of the class. The appellant emphasized what was characterized as the policy arguments in support of entrepreneurial lawyers, which were said to advance one of the goals of the CPA - access to justice. Effectively, the appellant's argument is that it would be unfair for a plaintiff, upon dissolution of his or her counsel's law firm, to choose any lawyer other than the lawyer who had previously acted as the lead counsel. In other words, in a class action, the lawyer's time and effort on the file constitutes an equity investment by the lawyer in the case. It is argued that if representative plaintiffs are allowed to switch counsel at will, there will be less of an incentive for counsel to take on class actions and make an investment of time and effort that may be lost.

66 There is no question that class proceedings are entrepreneurial in nature. However, the proposition advanced by the appellant would only be supportable if the creation of an entrepreneurial class action bar was a policy goal underpinning the CPA. This argument fails because as far as the CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself. Were it otherwise, one of the criticisms of the CPA, that it promulgates plaintiff-less litigation benefiting only the lawyers involved, would be well founded. Such is not the case.

67 Sections 33(1) and (4) of the CPA, which provide for contingency fees and a multiplier effect on fees to reward risk and success, are intended to provide sufficient incentives for lawyers to take on class proceedings that would not otherwise be attractive. This is the entrepreneurial aspect of class proceedings legislation that enhances access to justice. The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of the representative plaintiff in the litigation, including the choice of counsel.

68 In any event, Mr. Kim's investment of time and effort in the action while at REKO will be protected through the process of dissolving that firm.

69 In conclusion, in light of the three factors set out above, namely, that competence of counsel is not in issue, there is no evidence of any improper purpose or considerations in choice of counsel, and no demonstrated prejudice to the class, there is no reason to interfere with the choice of counsel by Mr. Fantl.

Issue 3: Substitution of the representative plaintiff and the status of the Kang action

70 Before Perell J., the appellant sought an order adding Ms. Seok and Ms. Kang as potential representative plaintiffs to replace Mr. Fantl as the plaintiff. Perell J. denied its request.

71 On appeal, the appellant argued that Mr. Fantl's decision not to retain the appellant, in the face of Mr. Kim's success on the file, suggests that Mr. Fantl will not best represent the class members, and, thus, ought to be removed. On behalf of Ms. Kang and Ms. Seok, it argued that they should be substituted as representative plaintiffs. The respondents opposed, saying that, as with the commencement of the Kang action, this is simply an attempt to determine who will represent the interests of the class.

72 Mr. Fantl has prosecuted the action to the point of settlement. There is no suggestion that he has been less than diligent in this respect. Indeed, Mr. Fantl stepped in to represent the class when

the original representative plaintiff chose to abandon that role. He did so after being approached by solicitors from REKO, some of whom now stand with opposing interests on this appeal.

73 While not necessarily determinative, the choice to approach Mr. Fantl to act in the representative capacity indicates that none of the counsel had any concerns about his ability to perform that role at that time. Moreover, when the plaintiff assumed the representation of the class, it must have been implicitly understood by his solicitors that he would be the one providing instructions for the litigation of the action.

74 In light of these factors and my conclusion above that Mr. Fantl chose competent counsel, did not act with an improper purpose or act to the prejudice of the class, there is no basis to interfere with the decision of the motion judge not to remove or replace Mr. Fantl as the representative plaintiff in this action.

Stay of Kang Action

75 The appellant commenced the Kang action following the dismissal of the motion to strike the notice of change of solicitors and replace the representative plaintiff, notwithstanding its admission before the motion judge that such a move would be "disingenuous": para. 99. Indeed, the Divisional Court commented on this development in the following terms at para. 11 of its reasons:

> Most remarkable of all, and independent of this motion under appeal, the lawyer has started a separate class proceeding against Transamerica in the name of Ms. Kang, the proposed representative plaintiff. This is the same Ms. Kang whom the lawyer seeks to have added as representative plaintiff with Mr. Fantl, or, in the alternative, to replace Mr. Fantl, his former client, with Ms. Kang and Ms. Seok.

76 I agree with the observation of the Divisional Court that the bringing of the Kang action after having lost the motion before the motion judge was "most remarkable". The only purpose for doing this can be to provide a platform for a carriage motion to challenge the instant proceeding as the proper proceeding to take the action forward to settlement on behalf of the class.

77 Apart from the fact that the appellant brought the second duplicative proceeding, which would in my view be determinative in and of itself, a carriage motion would also involve the appellant in bringing a proceeding against its former client.

78 The essence of the respondents' argument is that the Kang action amounts to an abuse of process. I agree. Accordingly, pursuant to the jurisdiction conferred upon this court under s. 134(1) of the CJA and s. 13 of the CPA, I would stay the Kang action.

79 If allowed to proceed, the Kang action would inevitably be stayed in any event. Considering the factors outlined by Cumming J. in *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.), at para. 49, there is no question that Mr. Fantl's action would proceed over the Kang action given that it is so "significantly more advanced than the other": *Setterington v. Merck-Frosst Canada Ltd.* (2006), 26 C.P.C. (6th) 173 (Ont. S.C.), at para. 22, and *Ricardo v. Air Transat A.T. Inc.* (2002), 21 C.P.C. (5th) 297 (Ont. S.C.), at para. 24.

80 Further, as this action is on the cusp of settlement, the delay caused by a carriage motion would only serve to postpone the class members' access to justice. Even the appellant recognized that time was of the essence in this case, given the imminent settlement approval hearing, when it sought and was granted an expedited hearing of this appeal. Therefore, regardless of whether the

competing actions are analyzed through the lens of best interests of the class or through that of prejudice, I reach the same inevitable conclusion that the Kang action should be stayed. The class members are entitled to certainty.

Conclusion

81 In conclusion, I would dismiss the appeal. Further, I would grant a stay of the Kang action. Mr. Fantl shall receive costs of $10,000 for the appeal and $5,000 for the leave motion inclusive of disbursements and G.S.T. The appellant shall also pay to Transamerica its costs of $6,350 for the appeal and $2,000 for the leave motion, inclusive of disbursements and G.S.T.

W.K. WINKLER C.J.O
S.T. GOUDGE J.A.:-- I agree.
J.M. SIMMONS J.A.:-- I agree.

cp/e/qlecl/qlmxb/qlaxw/qlaxr

TAB 6

Case Name:

Dobbie v. Arctic Glacier Income Fund

Between
Alexander Dobbie and Michael Benson A., Plaintiffs, and Arctic Glacier Income Fund, Arctic Glacier Inc., Richard L. Johnson, Keith W. McMahon, Douglas A. Bailey and in their personal capacities and as trustees of Arctic Glacier Income Fund, James E. Clark, Robert J. Nagy, Gary A Filmon and David R. Swaine, Defendants

[2011] O.J. No. 932

2011 ONSC 25

3 C.P.C. (7th) 261

2011 CarswellOnt 1301

Court File No. 59725

Ontario Superior Court of Justice

W.U. Tausendfreund J.

Heard: October 4-7 and 8, 2010.
Judgment: March 1, 2011.

(247 paras.)

Counsel:

Dimitri Lascaris, Michael G. Robb and Daniel E.H. Bach for the Plaintiffs.

R. Paul Steep and Dana M. Peebles for the Defendants.

Nigel Campbell and Andrew McLachlin for Gary Cooley, Proposed Defendant.

Jeffery S. Leon, Eric R. Hoaken and Jonathan G. Bell for Frank Larson, Proposed Defendant.

W.U. TAUSENDFREUND J.:--

Overview

1 The plaintiffs have commenced a proposed class proceeding. They claim that the defendants published misrepresentations relating to the sale of publicly traded securities in both the primary and secondary market. These securities experienced a substantial market value decline which the plaintiffs seek to recoup for the proposed class. This action is at the procedural infancy stage. To date, only the Statement of Claim has been filed. The parties have brought the following motions:

(a) The defendants seek an order that certain portions of the Amended Amended Statement of Claim dated September 3, 2010 ("Statement of Claim") advancing the plaintiffs' common law and statutory causes of action be struck, under Rule 21.01, and/or as improperly pleaded under Rule 25 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

(b) The plaintiffs seek:

(i) leave to pursue the alleged secondary market misrepresentations (the "Part XXIII.1 claim") under to s. 138.8(1) of Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "*OSA*").

(ii) certification of the proposed class action pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*").

Facts

2 The plaintiffs are residents of Ontario. Each purchased units of the defendant, Arctic Glacier Income Fund ("Income Fund") over the Toronto Stock Exchange during the class period.

3 The defendant, Arctic Glacier Inc. ("Arctic"), is a producer, marketer and distributor of packaged ice to consumers in Canada and the United States. Arctic is incorporated under the laws of Alberta and is headquartered in Winnipeg, Manitoba.

4 The Income Fund is an unincorporated mutual fund trust and is a reporting issuer in ten provinces, including Ontario. The other defendants are certain Officers, Directors and/or Trustees of Arctic and/or the Income Fund ("the Individual Defendants").

5 The Income Fund's purpose is to market Arctic as an Income Fund for public trading on the TSX.

6 When it was created, the Income Fund's sole assets were all the shares of Arctic. As such, the trading value of the Income Fund's units is based entirely on the financial and business results of Arctic. Facts and changes that are material to Arctic's business are facts and changes material to the value of the Income Fund's units.

7 Arctic Glacier International Inc. ("Arctic International"), a company incorporated in the State of Delaware in the United States, is a wholly-owned direct subsidiary of Arctic, and is the principal operating subsidiary of the Income Fund and Arctic in the United States.

8 In 2007, approximately 82% of the Income Fund's sales were generated in the United States and the balance in Canada.

9 Between 2002 and 2008, the Income Fund stated in public disclosures, including prospectuses, that the packaged ice industry was very competitive. The defendants also represented in these documents that the Income Fund and its subsidiaries were good corporate citizens operating lawfully in a very competitive market.

10 In March 2008, the Income Fund announced that it had become aware that the United States Department of Justice ("the DoJ") was conducting an anti-trust investigation of the packaged ice industry and that it was cooperating fully with the DoJ in this regard. Arctic's news release of March 9, 2008 included the following:

> Arctic Glacier is a good corporate citizen with strong, institutionalized internal policies and controls. We have always followed best practices in corporate governance and public disclosure, and we will continue to do so.

11 In September 2008, the Income Fund announced that it was suspending its income trust distributions, due, at least in part, to the cost of responding to the DoJ investigation.

12 In 2009, Arctic International pleaded guilty to a charge of participating, during the proposed Class Period, in a criminal, anti-competitive conspiracy in the United States. Under the terms of the plea agreement, Arctic International agreed to pay a fine of US $9 million, payable in installments over five years. In the U.S. plea agreement, Arctic International admitted that:

> Beginning January 1, 2001 and continuing until at least July 17, 2007, the defendant (Arctic International) and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in Southeastern Michigan and the Detroit, Michigan Metropolitan area. The charged conspiracy unreasonably restrained inter-state trade and commerce, in violation of s. 1 of the Sherman Act ...

13 The trading price of the Income Fund units lost significant value during the March-September 2008 period.

14 The plaintiffs plead a proposed class period from March 13, 2002 to September 16, 2008. They commenced this proposed class action on September 25, 2008.

15 I will now address each of the three motions sequentially.

A. Defendants' Motion to Strike

16 The defendants move under Rule 21.01(1) and Rule 25.11 of the *Rules of Civil Procedure* to strike certain parts of the Statement of Claim. The relevant parts of the rules are:

> **21.01(1)** A party may move before a judge,
>
> ...
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.

> **25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
> (b) is scandalous, frivolous or vexatious; or
> (c) is an abuse of the process of the court.

17 As one would expect, the defendants have yet to file a statement of defence. Accordingly, I must read the Statement of Claim generously and be guided by the test applicable to Rule 21.01(1)(b) that a pleading should not be struck unless it is "plain and obvious" that the existence of the cause of action could not be established at trial. However, the "plain and obvious" test does not absolve the plaintiffs from their obligation to observe the rules of pleadings and should not be seen as encouraging them to neglect such obligations: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.) and *Williams v. Canada* (2005), 76 O.R. (3d) 763 at paras. 15 and 17 (S.C.J.).

18 With respect to the application of Rule 25.11, I am guided by the principles summarized by Nordheimer J. in *Jama v. McDonald's Restaurants*, [2001] O.J. No. 1068 at para. 21 (S.C.J.):

> **21.** The defendants claim that the amended statement of claim is prolix, pleads evidence, will prejudice or delay the fair trial of the action and is scandalous, frivolous or vexatious. Various paragraphs of the amended statement of claim are challenged on this basis ... it is worthwhile to set out the principles that should be applied to this aspect of the motion. Those principles include:
>
> (a) motions under rule 25.11 should only be granted in the "clearest of cases";
> (b) any fact which can effect [*sic*] the determination of the rights of the parties can be pleaded but the court will not allow facts to be alleged that are immaterial or irrelevant to the issues in the action;
> (c) portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous;
> (d) facts may be pleaded but not the evidence by which those facts are to be proved;
> (e) similar facts may be pleaded as long as the added complexity arising from their pleading does not outweigh their potential probative value. [Citations omitted]

19 It is now settled that pleadings in actions under the *CPA* not only have to follow the usual rules, but must demonstrate a proper cause of action against each defendant: *Shaw v. B.C.E. Inc.*, [2003] O.J. No. 2695 at para. 5 (S.C.J.); *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 at para. 84 (Ont. S.C.J.).

The Pleadings at Issue

20 Under Rules 21 and 25, the defendants challenge various causes of action and remedies sought in the Statement of Claim:

(i) the common law pleading against the Income Fund;
(ii) the pleading of an underlying Anti-Trust Conspiracy;

(iii) the pleading under s. 130 of the *Securities Act*;
(iv) the pleading of negligence; and
(v) the pleading of negligent misrepresentation.

The Common Law Pleading Against the Income Fund

21 The plaintiffs assert both statutory and common law causes of action against the Income Fund. These will be discussed separately.

22 The statutory causes of action against the Income Fund are asserted under ss. 130 and 138.3 of the *OSA*. The claim under s. 138.3 may only be pursued with leave. This will be discussed in more detail.

23 In para. 13 of the Statement of Claim, the plaintiffs describe the Income Fund as an unincorporated, open-ended mutual trust fund. Rule 9.01 of the *Rules of Civil Procedure* provides:

> 9.01(1) a proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties.

24 In *Whiting v. Menu Foods Operating Limited Partnership* (2007), 53 C.P.C. (6th) 124 (Ont. S.C.J.), Lax J. relied on Rule 9.01(1) to determine that the proper parties in an action against a trust are the trustees (para. 25) and that a trust is an entity that is not capable of being sued in Ontario (para. 29).

25 The defendants assert that the plaintiffs cannot name the Income Fund as a defendant to the common law causes of action, as it lacks legal personality. Strathy J. affirmed this principle in *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 3486 at paras. 64-66 (S.C.J.):

> **64.** The trust is, however, most correctly described as a relationship. Waters quotes at p. 3 from G.W. Jeeton and L.A. Sheridan, *The Law of Trusts*, 10th ed. ...:
>
>> A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.
>
> **65.** It is well-established that a trust itself does not have legal personality - it operates through its trustees ... It is also held accountable through its trustees.
>
> **66.** The trustee derives his, her or its powers from the trust instrument ... Where a third party suffers an injury as a result of the use of the trust funds, or as a result of actions of the trustee ... then the third party is entitled ... to look to the trustee for redress ... It is through the trustee that compensation is obtained.

26 I find that there is no common law right of action against the Income Fund. The pleadings in the Statement of Claim alleging negligence, negligent misrepresentation and breach of trust are struck as against the Income Fund.

27 The claim against the Income Fund under s. 130 of the *OSA* creates a statutory right of action for misrepresentations contained in a prospectus. Where a person has purchased securities in an offering made through the prospectus, that right of action is available against an "issuer." The *OSA* defines an "issuer" as a person or company who has outstanding, issues or proposes to issue, a security. The *OSA* defines a "person" to include "a trust."

28 I find that the plaintiffs have a statutory claim against the Income Fund under s. 130 of the *OSA*. Pleadings with respect to it will stand. As stated, the claim under s. 138.3 of the *OSA* will be reviewed below.

Pleading of an Underlying Anti-Trust Conspiracy

29 The plaintiffs have pleaded that Arctic was engaged in an anti-trust conspiracy. However, that allegation is not advanced as a cause of action. The Statement of Claim alleges a course of illegal conduct by the defendants, or some of them. In their pleadings, the plaintiffs point to the defendants' alleged failure to disclose illegal activity and their allegedly false and materially misleading statements with respect to the nature and legality of their business activities as the foundation for the claims. The plaintiffs give that course of conduct the collective moniker of "Anti-Competitive Conspiracy."

30 The defendants state that to plead this conspiracy as the factual foundation for the claims advanced, the plaintiffs must plead all the requisite elements of the tort of conspiracy. This, the plaintiffs have not done. These elements are summarized in *Apotex Inc. v. Plantey USA Inc.* (2005), 5 B.L.R. (4th) 116 at para. 56 (Ont. S.C.J.):

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreements between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceeded [*sic*] to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

31 In support of their position that all of the requisite elements of the tort of conspiracy must be pleaded, the defendants rely on *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.) and *Sudbury Downs v. Ontario Harness Horse Assn.*, [2002] O.J. No. 5505 (S.C.J.). In my view, both of these cases must be distinguished from the present case, as both pleaded conspiracy as a cause of action, which is not advanced here.

32 I find that the pleading of the anti-trust conspiracy may stand. If the defendants should require further details, the appropriate recourse is a demand for particulars.

Pleading Under Section 130 of the *OSA*

33 The plaintiffs plead that the prospectuses of the Income Fund issued during the class period contained misrepresentations which are actionable under s. 130 of the *OSA*.

34 The defendants assert two deficiencies with the s. 130 *OSA* pleading:

(a) They state that neither plaintiff can advance this personal cause of action since neither purchased their units in the primary market; and

(b) This pleading must be limited to:

  (i) persons who purchased in Ontario; and

  (ii) reliance on those fund prospectuses should be within three years of the issuance of the Notice of Action in this matter on September 25, 2008, as contemplated by the limitation period set out in s. 138.14(b)(ii) of the *OSA*.

(a) Representative Plaintiffs

35 The plaintiffs concede that neither of them was a prospectus purchaser on the primary market. The defendants state that this is fatal to the plaintiffs' claim under s. 130(1) of the *OSA*.

36 It is well settled that for each defendant named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant: See *Hughes v. Sunbeam Corp.*, [2002] O.J. No. 3457 at para. 15 (C.A.). Each of the plaintiffs in this case has pleaded at least one cause of action against each of the defendants.

37 On this issue, I am guided by *Boulanger v. Johnson and Johnson Corp.*, [2003] O.J. No. 1374 at para. 41 (Div. Ct.), which states that plaintiffs may assert causes of action which are not their personal causes of action but which are asserted by them on behalf of class members.

(b) Territorial Restrictions and Limitation Period

38 The defendants assert that the class must be limited to those persons who purchased securities in Ontario, as each province has different securities legislation. In Ontario there appear to be two divergent lines of authority on this point. Both are 2010 decisions, released just two days apart. In *Coulson v. City Group*, 2010 ONSC 1596, Perell J. considered the objection of the defendants that the plaintiffs proposed a national class, yet pleaded only s. 130 of the *OSA*. The defendants in that case proposed that the class be limited to purchasers who acquired common shares pursuant to the prospectus as a result of a distribution in Ontario. Perell J. agreed with the position of the defendants and held:

> **146.** The fundamental point is that persons who cannot rely on s. 130 of the Ontario *Securities Act* must rely, if at all, on the securities legislation of other provinces, but this legislation has not been pleaded in the case at bar ...
>
> **147.** ... while the Defendants do not object to a national class, they do object to the class definition including persons who do not have a claim under s. 130 of the *OSA*. They argue that the class definition is too broad because it includes purchasers who would not have a claim against the underwriters pursuant to s. 130 of the Ontario *Securities Act*.
>
> **148.** I agree with the Defendants' argument ...

39 The plaintiffs rely on *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, the decision released two days before *Coulson.* Strathy J. in *Gammon Gold Inc.* followed *Silver v. Imax Corp.* (2009), 86 C.P.C. (6th) 273 (Ont. S.C.J.) ("Imax") and held:

> **117.** Like Van Rensburg J. in *Silver v. Imax - Certification,* I do not find it necessary at this stage to make a determination of the law applicable to the claims of non-resident members of the class who purchased their securities from underwriters in other provinces. Given the similarity between s. 130 of the *Securities Act* and the securities law of other provinces of Canada, this may not be an issue with respect to Class Members from other provinces.

40 I am reminded that on a motion to strike, which is before me, I must afford the claim a generous interpretation. I prefer the more permissive and less technical approach taken by Strathy J. in *Gammon Gold, supra.* However, relying on *Boulanger v. Johnson and Johnson Corp., supra* at paras. 54 and 55, to permit this claim for a national class to stand, I will require the plaintiffs to amend the Statement of Claim to plead the relevant provisions of the securities acts of those other provinces which the plaintiffs propose to have included in this class proceeding. For that purpose, leave to further amend is granted.

41 The defendant, Johnson, is not a trustee of the fund. Accordingly, the claim under s. 130 of the *OSA* as against the defendant, Johnson, is struck.

42 The limitation period in s. 138.14(b)(ii) of the *OSA* limits the plaintiffs' cause of action under s. 130 of the *OSA* to the two fund prospectuses issued after September 26, 2005. Each Statement of Claim must be amended to that end.

Pleading of Negligence *Simpliciter*

43 The plaintiffs advance a cause of action in negligence *simpliciter* based on Income Fund representations to the primary market during the class period through the four Fund prospectuses published prior to the s. 138.14 *OSA* limitation period and the two published afterwards. The Statement of Claim includes the following pleading:

> **92.** ... each of the Defendants ... ought to have known that the Income Fund's Class Period prospectuses were materially misleading as detailed above. Accordingly, the Defendants have violated their duties to the Class Members.
>
> **93.** The reasonable standard of care expected in the circumstances required the Defendants ... to act fairly, reasonably, honestly, candidly and with due care in the course of compiling and disseminating the Income Fund's prospectuses.
>
> **94.** The Defendants ... failed to meet the standard of care required by issuing prospectuses during the Class Period that were materially false and/or misleading as described above.
>
> **96.** The negligence of the Defendants ... resulted in the damage to Class Members who purchased under a prospectus. Had the Defendants ... complied with their duty of care ... then the Units offered by such prospectuses either would not

> have been offered to and purchased by the Class Members or, alternatively, such Units would have been offered at prices that corresponded to their true value ...
>
> **97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss ...

44 The defendants state that there is no common law duty of care owed by public issuers and their officers, directors and/or trustees through the publication of their prospectuses and seek to have those pleadings struck. The defendants state that the plaintiffs' duty of care analysis is flawed for three separate reasons:

(a) There is no such duty of care owed by the Income Fund at common law. It has been replaced by s. 130 of the *OSA*.
(b) The duty of care owed by the directors and trustees is to the Income Fund and not to the unitholders; and
(c) In any event, the claim of negligence is subsumed by the pleading of negligent misrepresentation and is therefore duplicative.

(a) Has section 130 of the OSA replaced the common law duty of care?

45 Section 130 of the *OSA* states:

> **130(1)** Where a prospectus ... contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against:
>
> (a) the issuer ...
> (b) each underwriter ...
> (c) every director of the issuer ...

46 Section 1 of the *OSA* defines a "misrepresentation" as:

(a) an untrue statement of material fact, or
(b) an omission to state a material fact ...

47 In s. 1 of the *OSA*, a "material fact," when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

48 The defendant relies on *Menegon v. Philip Services Corp.* (2001), 23 B.L.R. (3d) 151 (Ont. S.C.J.). This was a proposed class action regarding prospectus misrepresentations in which the plaintiffs intended to assert a common law duty of care said to be owed to a class of investors by the underwriters.

49 On motion by the defendants, the Court in *Menegon* struck out that portion of the claim. I find that *Menegon* is to be distinguished from the present case, at least on the basis that in *Menegon* the proposed defendants were underwriters who do not stand in the same relationship of proximity to shareholders as do directors and officers of the corporation in which those shareholders have invested.

50 In my view, s. 130 of the *OSA* does not create a duty, rather it provides a remedy. The statutory duty is found in s. 56 of the *OSA* which provides:

> **56(1)** A prospectus shall provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed and shall comply with the requirements of Ontario securities law.

51 Rather than replacing the common law duty of care, s. 56(1) of the *OSA* informs of that duty. This concept was recognized in *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 and *Haskett v. Equifax Canada Inc.*, [2003] O.J. No. 771 (C.A.) at para. 25.

52 I find that s. 130 of the *OSA* does not subsume common law claims, but preserves them. In that regard, I am also guided by s. 130(10) of the *OSA* which states:

> **(10)** The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law.

(b) Do directors and trustees owe a duty of care to investors?

53 The defendants state that the cause of action in negligence against the directors and trustees must be struck, as it creates an untenable conflict of interest for those individuals. The defendants rely on *Alvi v. Misir* (2004), 73 O.R. (3d) 566 (S.C.J.), in which a claim was brought by shareholders against directors of a corporation for their activities as directors. The Court in that case held at para. 57:

> **57.** In view of the fact that the statutory duties of good faith, loyalty and care are owed to the corporation, the directors cannot have separate duties of the same nature owing to the shareholders. Such parallel duties would create untenable and unrealistic conflicts ...

54 I distinguish *Alvi* from the facts before me. Here, the plaintiffs assert a cause of action on behalf of the proposed class at a time when they were not shareholders, but chose to purchase Income Fund units and thereby became "shareholders." Those decisions to purchase units resulted in damage to Class Members, as pleaded in paras. 96 & 97 of the Statement of Claim:

> **96.** The negligence of the Defendants resulted in the damage to Class Members who purchased under a prospectus. Had the Defendants complied with their duty of care by conducting reasonable due diligence into the Income Fund's business and affairs prior to the issuance of each of the Income Fund's Class Period prospectuses, then the Units offered by such prospectuses either would not have been offered to and purchased by the Class Members or, alternatively, such Units would have been offered at prices that corresponded to their true value. When the Anti-Competitive Conspiracy and the participation of Arctic and its affiliates therein were disclosed, the artificial inflation in the price of the Units was removed, and the trading price of the Units was corrected to reflect the true state of Arctic's business, affairs and financial position.

> **97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss upon the disclosure of the Anti-Competitive Conspiracy and the participation of Arctic and its affiliates therein.

55 The plaintiffs assert that the duties of the named trustees are owed specifically to the beneficiaries of the trust, namely the unit-holding plaintiffs. An assertion that the trustees of the Income Fund do not owe fiduciary duties to those beneficiaries ignores the essential nature of a trust.

56 In any event, I find that at this stage of the proposed class proceeding, it is not "plain and obvious" that the pleading of negligence against the directors of the company and the trustees of the Fund will fail.

(c) Are the claims in negligence and negligent misrepresentation duplicative?

57 The defendants state that the pleadings in negligence and negligent misrepresentation rely on the same duty of care. In support of their position that the claim of negligence is subsumed by the pleading of negligent misrepresentation and should therefore be struck, the defendants rely on *Deep v. M.D. Management* (2007), 35 B.L.R. (4th) 86 (Ont. S.C.J.) and *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.).

58 In *Deep* the Court struck the plaintiff's pleading in negligence in part because it failed to raise a cause of action separate from the cause of action for negligent misrepresentation. In like manner, the motions judge in *Imax* struck out the pleading of negligence, finding that the negligence pleading in that case was in substance a pleading of negligent misrepresentation. Justice van Rensburg stated at para. 88 in *Imax*:

> **88.** The negligence pleading in this case is in substance a pleading of negligent misrepresentation without the ingredient of reliance. There is also no pleading that the alleged negligence caused damage to the plaintiffs and no separate claim for a remedy based on negligence. Accordingly, the claims sounding in negligence *simpliciter* ... will not be permitted to proceed and the claim shall be amended accordingly.

59 A review of the pleadings in the case before me indicates that unlike *Deep* and *Imax*, the claims of negligence and negligent misrepresentation are pleaded quite differently and raise separate causes of action. The negligence *simpliciter* claim asserts that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants. The negligent misrepresentation pleading, on the other hand, points to a number of misrepresentations contained in various prospectuses and public disclosures.

60 To further distinguish these pleadings of negligence *simpliciter* from those considered by Justice van Rensburg in *Imax* in para. 88 above, I note para. 97 of the Statement of Claim in this action which states, referring to the allegations of negligence:

> **97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss ...

61 Materially identical pleadings in negligence and negligent misrepresentation were sustained in *McCann v. C.P. Ships*, [2009] O.J. No. 5182 (S.C.J.), *Mondor v. Fisherman* (2001), 18 B.L.R. (3d) 260 (Ont. S.C.J.) and *Metzler Investment v. Gildan Metzler Investment v. Gildan Activewear Inc.*, [2009] O.J. No. 5695 (S.C.J.).

62 In finding that the claim of negligence *simpliciter* advanced here focuses specifically on the theory that the prospectuses would not have been issued, or would have been issued showing a reduced offering price for the units, but for the negligence of the defendants, and that it therefore relies on a materially different theory than a negligent misrepresentation allegation, I also have regard to the B.C. Court of Appeal decision of *Collette v. Great Pacific Management Co.*, [2004] B.C.J. No. 381. In that case, the appellant sought damages for losses on units of two mortgages he purchased. The appellant alleged that the respondents breached due diligence obligations regrading the mortgage investments before offering the units for sale. On the issue of whether individual reliance must be shown, the Court stated at paras. 33 & 34:

> **33.** The respondents submit that the investors cannot succeed without proof of reliance on the misrepresentation by each investor individually, particularly with respect to the claims for negligent misrepresentation. The chambers judge concluded that proof of reliance was required for the claims in tort but not in contract.
>
> **34.** The reason for insistence on reliance is to establish causation. If causation can be established otherwise, then reliance is not required: see *Henderson, supra*, per Lord Goff at 776, and *Yorkshire Trust Co. v. Empire Acceptance Corp. Ltd.* (1986), 24 D.L.R. (4th) 140 at 145-47, 69 B.C.L.R. 357 at 354-55, 22 E.T.R. 96 (S.C.) per McLachlin J. Here if the mortgage units had not passed the due diligence test they would not have been offered for sale by the respondents to any clients. Causation is therefore established between a breach of due diligence duty and the investors' loss, independently of proof of individual reliance. In my view, proof of reliance does not present an obstacle to the appellant's case as framed. The appellant's case adequately links a breach of duty causally to the investors' losses.

63 I also note that the claim of negligence is limited to primary market purchasers while the negligent misrepresentation claim focuses on secondary market purchasers.

64 For reasons noted, I decline to strike the plaintiffs' claim of negligence *simpliciter*.

The Pleading of Negligent Misrepresentation

65 The plaintiffs advance a cause of action in negligent misrepresentation, based on the Income Fund's public disclosures in both the primary and the secondary markets. Relevant parts of these pleadings in the Statement of Claim are:

> **98.** On behalf of all Class Members, the Plaintiffs plead negligent misrepresentation.
>
> **99.** The Income Fund's disclosure documents referenced above were prepared, at least in part, for the purpose of attracting investments and with the intention that

> Class Members would rely upon the documents in making the decision to purchase Units. The Defendants ... knew or ought to have known that the Plaintiffs and the Class Members would rely upon those disclosure documents in making their decision to purchase the Units, and the Defendants ... intended that the Plaintiffs and the Class Members so rely.
>
> **100.** The Individual Defendants and Arctic made those omissions and the Misrepresentation and the related misrepresentations alleged herein by authorizing, permitting and/or acquiescing in the drafting and issuance of the disclosure documents referenced above, and/or by signing them.
>
> **101.** The Defendants ... made the omissions, the Misrepresentation, and the related misrepresentations alleged herein negligently, intending that the Plaintiffs and the other Class Members would rely upon them, which the Class Members did to their detriment.
>
> **102.** The Plaintiffs and each other Class Member relied upon the Defendants' ... omissions, the Misrepresentation, and the related misrepresentations alleged herein by reading and acting upon disclosure documents containing the omissions, the Misrepresentation, and the related misrepresentations alleged herein, or alternatively, by reading and acting upon documents that contained information derived from the omissions, the Misrepresentation, and the related misrepresentations.
>
> **103.** Further, given the relationship as pleaded below between the Income Fund's disclosures and the price of the Units, the Plaintiffs and each other Class Member relied upon the said omissions, the Misrepresentations and the related misrepresentations by the act of purchasing or acquiring Units in the open market.
>
> **104.** The Plaintiffs and each other Class Member suffered damages and loss, as particularized below, as a result of such reliance.

66 To establish the tort of negligent misrepresentation, the plaintiffs must establish the required elements recited by the Supreme Court of Canada in *R. v. Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 110:

> 1. There must be a duty of care based on a "special relationship" between the representor and the representee;
> 2. The representation in question must be untrue, inaccurate, or misleading;
> 3. The representor must have acted negligently in making said misrepresentation;
> 4. The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
> 5. The reliance must have been detrimental to the representee in the sense that damages resulted.

67 To identify the existence and scope of a duty of care in a claim of negligent misrepresentation, in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 20 the Supreme Court

of Canada applied what has become known as the two-stage *Anns* test (see *Anns v. Merton London Bureau Council,* [1978] A.C. 728). The first stage of the *Anns* test requires that there be a relationship between the parties justifying the imposition of a duty of care. It calls for considerations of foreseeability, proximity and policy. At the second stage of the *Anns* test, the court should consider whether there are any residual policy considerations militating against the recognition of a duty of care.

68 The defendants state that no duty of care can exist as pleaded by the plaintiffs. Accordingly, I must review in detail the application of the two-stage *Anns* test.

Relationship of Proximity

69 The defendants assert that the plaintiffs failed to plead the material facts necessary to demonstrate a special relationship of proximity, as neither reasonable foreseeability nor reasonable reliance was pleaded. The plaintiffs have asserted that a duty of care was owed to class members. The defendants in response submit that this pleading lacks the necessary relational proximity. The defendants rely on *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (C.A.) at para. 68 for the assertion that a duty of care cannot be owed only to the class members who purchased units, as opposed to the general public in this type of transaction. In my view, *Attis* does not assist the defendants. That decision focuses on the relationship between the government, policy decisions and members of the public. Further, the Court specifically states at para. 68 that relational proximity was not pleaded, contrary to the present case.

70 The defendants state that there is no direct causal proximity between the defendants' release of the documents and the plaintiffs' loss. They state that the decline in the price of the units of the Income Fund on the open market is the result of numerous forces and events. They state that this type of indirect relationship between the defendants' conduct and the proposed class members' losses is insufficient to ground a finding of proximity. They rely on *Paxton v. Ramji*, 2008 ONCA 697 at para. 71 in support of that position. In *Paxton*, the Ontario Court of Appeal considered whether a physician treating a female for acne, simultaneously owed a duty to a child then neither planned nor conceived, but subsequently born to that female person. The "indirect relationship" reviewed in para. 71 of *Paxton* related specifically to that fact situation and, in my view, has no application to the present case.

71 The defendants further rely on *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 at para. 27, stating that the proximity analysis must be grounded in the statutory scheme, where one exists. Yet, similarly to s. 130(10), s. 138.13 of the OSA provides,

> **138.13** The right of action for damages and the defences to an action under s. 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

I am also guided by Justice van Rensburg's analysis of this issue in *Imax*, [2009] O.J. No. 5585:

> **40** While there are no reported cases in Ontario where a common law claim of misrepresentation in the secondary market has been considered at trial, such claims have been permitted to proceed under a Rule 21 or class proceeding certification motion in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236

> (C.A.); *Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.), *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.) and *McCann v. CP Ships Limited*, [2009] O.J. No. 5182 ...
>
> **47** The present case is similar to *Mondor* and can be distinguished from *Menegon*. The Claim concerns representations made as part of a reporting issuer's continuous disclosure obligations, and not, as in *Menegon*, representations intended for the primary market that were made in a prospectus. The continuous disclosure obligations of a reporting issuer are prescribed by and under the *OSA*, and the intended recipients of such disclosure are the investing public.
>
> **48** Section 138.3 of the *OSA* provides for liability of issuers, their directors and in certain circumstances their officers and intermediaries to persons who acquired or disposed of an issuer's securities between the time a material misrepresentation in secondary market disclosure was made and its correction. While there is a specific statutory remedy, s. 138.13 of the *OSA* provides that the statutory right of action for damages and the defences to an action "are in addition to and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part."
>
> **49** There is no inconsistency or conflict between the pursuit of a statutory remedy for secondary market misrepresentation that imposes liability without proof of reliance but subject to a damages cap and other limitations, and a claim alleging a common law duty of care for negligent misrepresentation arising out of the same circumstances, where reliance is an element of the tort. The public policy concern of conflict with an existing statutory regime or remedy does not arise in this case.

72 In my view, the position advanced by the defendants that imposing a duty of care at common law could create requirements above and beyond those codified in the *OSA* should be left for trial and should not be resolved at this embryonic stage of the action. I find that the plaintiffs have made out a *prima facie* duty of care for pleading purposes. That takes me to the second stage of the *Anns* test.

Residual Policy Considerations

73 The defendants assert that recognizing a *prima facie* duty of care to the entire secondary market would raise the spectre of indeterminate liability as the entire investing public is not a limited class. They rely on *Hercules*, *supra*, in which the Supreme Court addressed certain policy considerations to limit or constrain the scope of possible unlimited liability. These comments of the Court are of note:

> **41.** A *prima facie* duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable.

74 The Supreme Court also noted at para. 46 that indeterminate liability would not inhere on the specific facts of those cases where:

> **46.** ... the defendant knew the identity of the plaintiff **(or the class of plaintiffs)** who would rely on the statement at issue, but also because the statement itself was used by the plaintiff for precisely the purpose or transaction for which it was prepared. [Emphasis added.]

Did the defendants know the identity of the plaintiffs?

75 The defendants rely on *Haig v. Bamford*, [1977] 1 S.C.R. 466 and *NPV Management Ltd. v. Anthony* (2003), 231 D.L.R. (4th) 681 (N.L. C.A.) for the proposition that the investing public is not a limited class.

76 The plaintiffs in this case have pleaded:

> **99.** The Income Fund's disclosure documents ... were prepared, at least in part, for the purpose of attracting investment and with the intention that Class Members would rely upon the documents in making the decision to purchase Units. The Defendants ... knew or ought to have known that the Plaintiffs and the Class Members would rely upon those disclosure documents in making their decision to purchase the Units, and the Defendants ... intended that the Plaintiffs and the Class Members so rely.

77 I return to *Hercules*, *supra*, and note that the Court, in para. 46 of that decision, included "a class of plaintiffs" when it stated at para. 37:

> **37.** ... in cases where the defendant knows the identity of the plaintiff **(or of a class of plaintiffs)** and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding **indeterminate liability will not be of any concern** since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the *Anns/Kamloops*, [1984] 2 S.C.R. 2, test and a duty of care may quite properly be found to exist. [Emphasis added.]

78 *Haig*, *supra* did not involve a public company. In that case, accountants prepared reports for a client with the knowledge that the documents were to be used to seek investments from a circumscribed class of investors. While the class of potential investors in this case is larger, the defendants here knew the class of persons who would rely on the continuous disclosure documents which the defendants prepared "for the purpose of attracting investments and with the intention that Class Members would rely upon the documents in making the decision to purchase Units."

79 *NPV*, *supra* must be distinguished on the basis that the pleadings in the present case allege that the impugned statements were made to attract investments. In *NPV*, the statements at issue were made to satisfy reporting and disclosure requirements.

80 I am also guided by the finding of Justice van Rensburg in *Imax*, *supra*. She held that the pleadings in *Imax*, which in this regard are materially similar to the pleadings in the present case, rendered *NPV* inapplicable.

81 The defendants' claim that the continuous disclosures made by the Income Fund were primarily for the purpose of fulfilling statutory requirements is to suggest that a securities issuer exists for the purpose of fulfilling statutory obligations. That ignores the obvious focus of these disclosures which is to attract investors. The intended recipients of such disclosure documents are members of the investing public, as pleaded in para. 97 of the Statement of Claim.

The Effect of Recognizing a Duty of Care

82 The defendants raise a number of residual policy considerations which do not address the relationship between the parties, but the effect of recognizing a duty of care on other legal obligations: see *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at 554.

83 First, they state that a *prima facie* duty of care may be negated when other causes of action provide remedies for the impugned conduct. They assert that the *OSA* provides such a remedy. As I stated above and as noted in *Imax*, *supra* at paras. 47 and 48, the specific statutory remedy of s. 138.13 of the *OSA* is "in addition to and without derogation from any other rights or defences ..."

84 The second concern raised by the defendants is that establishing the proposed common law duty of care would have a negative effect upon long-term unitholders by effectively creating an insurance scheme for short-term unitholders. In addition, the defendants say, it would have a negative chilling effect on the Canadian business sector. However, the plaintiffs assert that refusing to require corporate directors and officers to disclose the truth to the investing public would also have a negative effect on society. I am not persuaded at this early stage in the proceedings that it is plain and obvious that the claim of negligent misrepresentation will fail on this issue.

85 Third, the defendants argue that Canadian common law duties should be harmonized on this issue with those determined by American courts. In my view, harmonization with the laws of a foreign jurisdiction cannot trump well-settled Canadian principles for evaluating the existence of a duty of care at common law. Canadian and American laws differ in many respects. It is not the role of this court to seek uniformity for its own sake with the laws of a foreign jurisdiction.

Actual Pleading of Detrimental Reliance

86 Relying on *Lysko v. Braley* (2006), 79 O.R. (3d) 721 at para. 30 (C.A.), the defendants state that to plead reliance, the Statement of Claim must contain assertions that the plaintiffs altered their position by relying on the misrepresentation which resulted in a loss. The plaintiffs plead, although in a very general way:

> **102.** The Plaintiffs and each other Class Member relied upon the Defendants' ... omissions, the Misrepresentation, and the related misrepresentations alleged herein by reading and acting upon disclosure documents containing the omissions, the misrepresentations ...
>
> **103.** ... the Plaintiffs and each other Class Member relied upon the said omissions, the Misrepresentation and the related misrepresentations by the act of purchasing or acquiring Units in the open market.
>
> **104.** ... the Plaintiffs and each other Class Member suffered damages and loss, as particularized below, as a result of such reliance.

87 In my view, the appropriate remedy here is that of a demand for particulars.

88 The plaintiffs assert that reliance can be inferred from the act of purchasing units on the secondary market. The defendants state that reliance on such an inference is indistinguishable from the American doctrine of "fraud on the market." This theory was canvassed by Cumming J. in *Mondor*, *supra*:

> **59.** The "fraud on the market theory" is an implied statutory cause of action arising from Rule 10b-5 of the United States Securities and Exchange Commission. ... The theory results in deemed reliance where an actionable misrepresentation is established on the part of a company and there has been the purchase of its shares by an investor in the secondary market. This statutory cause of action was described by the United States Supreme Court in *Basic Incorporated v. Max L. Levinson*, 485 U.S. 224 (1988) at 241 as follows:
>
>> [It] is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business ... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements ... The causal connection between the defendants' fraud and the plaintiffs' purchase of each stock in such a case is not less significant than in a case of direct reliance on misrepresentations.
>
> **60.** The theory negates the necessity of requiring proof of subjective reliance from each member of the proposed plaintiff class. The theory has been described as a legal fiction which has the effect of overcoming the need to prove reliance ...
>
> **61.** The "fraud on the market theory" has been expressly rejected by Canadian courts because, *inter alia*, Canadian securities legislation does not include a similar concept, and that actual reliance is a necessary component under Canadian law concerning negligent and fraudulent misrepresentation.

89 In *Mondor* at paras. 65-67, Cumming J. held that actual reliance on a misrepresentation is a question of fact which may be inferred from all the circumstances. He then stated at para. 69:

> **69.** To foreclose the consideration of an arguable issue past the pleading stage, a moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected: *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463. Had the plaintiffs simply pleaded the "fraud on the market theory" I would have foreclosed that consideration. Given, however, that the case law recognizes that a person's reliance upon a representation may be inferred from all the circumstances, in my view it would be premature to foreclose the consideration of this issue in the case at hand beyond the pleading stage.

90 This reasoning applies to the facts of this case. I am also guided on this issue by the comments of Rady J. in *McCann*, *supra* at para. 59:

> **59.** It seems to me that the case law is in a state of evolution and the court, in certain circumstances, is prepared to relax the otherwise strict requirement to establish individual reliance. I think it would be an error to conclude, at this stage of the proceedings, that the plaintiff cannot possibly succeed in a claim for negligent misrepresentation. I would adopt the language of Justice Rooke in the *Eaton* case at para. 91 that "it is simply too early to determine whether, and to what extent, individual reliance will need to be examined in this case. A trial on the common issues will determine this need ..."

91 For these reasons, the pleading of negligent misrepresentation may proceed to trial.

B. Plaintiffs' Motion for Leave Pursuant to Part XXIII.1 of the *OSA*

Overview

92 Part XXIII.1 of the *OSA* became law on December 31, 2005. Prior to its promulgation, Canadian securities class actions were based essentially upon the common law, in particular, the tort of negligent/fraudulent misrepresentation. The intent of the legislation is described by Lax J. in *Ainslie v. C.V. Technologies Inc.* (2008), 93 O.R. (3d) 200 at para. 9 (S.C.J.):

> ... to create a system of statutory liability that would contain enough checks and balances ... so that issuers and their directors would be deterred from inadequate or untimely disclosure ...

93 The two seminal parts of this legislation are:

> **138.3(1)** Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or the company relied on the misrepresentation, a right of action for damages against,
>
> (a) the responsible issuer;
> (b) each director of the responsible issuer at the time the document was released;
> (c) each officer of the responsible issuer ...
> (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
>
> (i) the responsible issuer ... to release the document, or
> (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; ...

> **138.8(1)** No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.
>
> (2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

94 In attempting to interpret this legislation and to apply it to the facts of this motion, I am guided by the approach proposed by E.A. Driedger and adopted by the Supreme Court of Canada in numerous cases, including *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 at para. 25:

> **25.** ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

95 As already noted, the defendants on the above motion to strike and on this leave motion have chosen not to file any responding material. The plaintiffs suggest that this alone should be fatal to the defendants' opposition to the plaintiffs' motion to seek leave. The plaintiffs rely on s. 138.8(2) which states that each side "shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely." The plaintiffs also rely on the comments by van Rensburg J. in *Silver v. Imax Corp.*, [2008] O.J. No. 1844 (S.C.J.):

> **17.** The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information ... and that specifically authorizes examination on such information ...
>
> **19.** We are left with what the statute prescribes - a mandatory requirement for each plaintiff and each proposed defendant to set out facts by affidavit, with a right to cross-examine the deponents of such affidavits.

96 However, these comments should be put into context by noting that they were made by van Rensburg J. on a motion to compel answers to questions refused during cross-examinations on a pending motion. Lax J. in *Ainslie*, *supra*, like Justice van Rensburg in *Imax Corp.*, *supra*, was one of the first to consider an action brought under Part XXIII.1 of the *OSA*. In *Ainslie*, Justice Lax considered a motion by the plaintiffs to compel the defendants to file and serve an affidavit under s 138.8(2) of the *OSA*. I particularly note paras. 23 and 25 of that decision:

> **23.** I respectfully suggest that these comments should be confined to the facts and circumstances at issue in *IMAX*. These comments were made in *obiter* in resolving a refusals motion in circumstances where the defendants had filed affidavit material. It is important to recognize that in *IMAX*, the court was not addressing the interpretation of s. 138.8(2).

> **25.** Properly interpreted, the ordinary meaning of s. 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave.

97 I subscribe to this view advanced in *Ainslie* that the ruling in *IMAX* should be confined to the special facts of the refusals motion before the court. I find that the defendants, in opposing the plaintiffs' "leave" motion, may do so in the absence of filing any material.

Limitation Period

98 As a further preliminary matter, I must address the limitation period, as it applies to a claim under Part XXIII.1 of the *OSA*. The class period proposed by the plaintiffs is March 13, 2002 to September 18, 2008. Part XXIII.1 of the *OSA* did not come into force until December 31, 2005. Section 138.14 of the *OSA* provides:

> **138.14** No action shall be commenced under s. 138.3,
>
> (a) in the case of a misrepresentation in a document, later than the earlier of,
>
> (i) three years after the date on which the document containing the misrepresentation was first released ...

99 It is common ground that a three-year limitation period applies. What is at issue is the retrospective effect, if any, of Part XXIII.1 of the *OSA*.

100 The plaintiffs issued the Notice of Action on September 25, 2008. The defendants state that Part XXIII.1 is not retroactive and therefore the limitation period in s. 138.14 precludes the plaintiffs from relying on any core documents prior to September 26, 2005.

101 The plaintiffs state that Part XXIII.1 should be applied prospectively to an ongoing factual matrix. They rely on *Dell Computer Corp. v. Union*, [2007] 2 S.C.R. 801 at paras. 113-15:

> **113.** Professor P.-A. Côté writes in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 169, that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule". He adds that: "[a] statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation" (p. 152). A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified (p. 153). A statute of immediate effect can therefore modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact.
>
> **115.** Can the facts of the case at bar be characterized as those of an ongoing legal situation? If they can, the new legislation applies. If all the effects of the situation have occurred, the new legislation will not apply to the facts.

102 The retrospective application of a statute to a series of events that occurred both before and after that legislation came into force was addressed by the Supreme Court in *Épiciers Unis Métro-Richelieu Inc. v. Collin*, [2004] 3 S.C.R. 257 at p. 280-81:

> **46.** The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other. **New legislation does not operate retroactively when it is applied to a situation made up of a series of events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force** (Côté, *supra*, at p. 175). If events are under way when it comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation (Côté, *supra*, at pp. 152 *et seq.*). If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. **According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date** (Côté, *supra*, at pp. 133 *et seq.* and pp. 194 *et seq.*). When new legislation modifies those prior effects, its effect is retroactive (Côté, *supra*, at pp. 133 *et seq.*). Professor Driedger gave a good explanation of this distinction between retroactive and retrospective effect:
>
> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. **A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted.** A retroactive statute changes the law from what it was; **a retrospective statute changes the law from what it otherwise would be with respect to a prior event.**
>
> (E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69) [Emphasis added.]

103 The Statement of Claim details a series of 53 documents disseminated by the Income Fund for public consumption between March 13, 2002 and June 30, 2008. In many of these documents, the Income Fund repeatedly asserts that it is a good corporate citizen operating lawfully in a competitive industry. The plaintiffs allege that this repeated assertion is a misrepresentation. Whether that is so is an issue to be left to the trial judge, assuming leave is granted. What I find at this stage of the proceedings is that this repeated misrepresentation is one continuing fact situation: *Attorney General of Canada v. Confederation Trust Company*, [2003] O.J. No. 2754 at paras. 26-28. As such, commencing with the Income Fund Prospectus of March 13, 2002, the plaintiffs may rely on the disclosure documents in support of their position that these documents contain misrepresentations.

104 I also rely on s. 138.3(6) of the *OSA* to find that these representations made by the Income Fund, if found to be misrepresentations, may be treated and relied upon by the plaintiffs as a single misrepresentation.

The Statutory Leave Procedure

105 Section 138.8(1) of the *OSA* requires that any action claiming secondary market misrepresentation must have leave of the court. The section provides as follows:

> **138.8(1)** No action may be commenced under s. 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

106 Regarding the purpose of the leave test, I adopt these comments of van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222:

> **293.** The statutory cause of action for secondary market misrepresentation also serves a dual purpose, of permitting the recovery of damages by a shareholder, and as a deterrent to breach of a reporting issuer's continuous disclosure obligations under the *OSA*.
>
> **294.** Similarly, the statutory cause of action was introduced as remedial legislation; that is, in recognition of the obstacles to pursuing claims for secondary market misrepresentation under common law. Accordingly, the leave test prescribed by the legislature should be interpreted so as to permit access to the courts by shareholders with legitimate claims.

Leave Test - Part I: Is the action brought in good faith?

107 The first test under s. 138.8 is whether the action is brought in good faith. This is not to be presumed and must be established by the plaintiffs on a balance of probabilities: see *Imax*, 66 B.L.R. (4th) 222 at para. 295.

108 Each of the plaintiffs in their affidavits state:

> I have also commenced this action to ensure that the defendants are held accountable for their behaviour and to deter similar conduct by others. I have no ulterior motive, nor any improper or collateral purpose in commencing this action.

109 The plaintiffs also note that the proposed defendants, Gary D. Cooley ("Cooley") and Frank Larson ("Larson") pleaded guilty in the U.S. to conspiracy of a commercial nature involving some of these corporate defendants. The plaintiffs rely on these guilty pleas as evidence of their belief that they have a chance of success against Larson and Cooley in this proposed class action. The plaintiffs have a financial interest in the action, as they acquired units during the Class Period. They also note that there is no evidence:

> (a) that they have brought this motion for an improper purpose;
> (b) of malice, bad faith or dishonesty;
> (c) of a prior conflict between the parties; or
> (d) an intention to seek an improper advantage.

110 Neither the defendants nor the proposed defendant Larson dispute a finding that the plaintiffs are acting in good faith. That leaves the proposed defendant Cooley. He states that there is no evidence that he knowingly influenced the Income Fund with respect to the alleged misrepresentations and that accordingly there is no evidence from which the plaintiffs can establish good faith with regards to the claims they advance against Cooley.

111 To determine whether the plaintiffs' claim against Cooley has been brought in good faith in the context of s. 138.8, I have regard to the definition of "good faith" in *Black's Law Dictionary*, 9th ed., B. Garner, Ed. (St. Paul: Thomson Reuters, 2009):

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

112 I am also guided by the analysis of van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222:

> **308.** I interpret "good faith" in the context of s. 138.8, to require the plaintiffs to establish that they are bringing their action in the honest belief that they have an arguable claim, and for reasons that are consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose. "Good faith" involves a consideration of the subjective intentions of the plaintiffs in bringing their action, which is to be determined by considering the objective evidence.

113 The good faith inquiry with regards to Cooley involves an analysis of the objective evidence within the context of the legislative scheme. For liability to accrue under s. 138.3, an individual must be a responsible issuer, a director or officer of a responsible issuer or an influential person at the time the impugned document was released. The plaintiffs allege that at the relevant time Cooley was either an officer or an influential person.

114 Section 1(1) of the *OSA* defines "officer":

> with respect to an issuer or registrant, means,
>
> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b).

115 It is admitted that Cooley was a vice-president of Sales and Marketing of Arctic and Arctic International, Inc. Although he was not a director or trustee of the Income Fund, it should be noted that Arctic International is wholly-owned by Arctic Glacier Inc. which, in turn, is wholly-owned by the Income Fund.

116 As per s. 1(1)(a) of the above definition in the *OSA*, a vice-president of an issuer is an officer for purposes of s. 138.8. Having determined that Cooley was a vice-president, it is necessary to determine whether he was a vice-president of a responsible issuer. To answer this question at this stage of the analysis, I must only determine that there is enough objective evidence for the plaintiffs to support their good faith intentions in seeking leave to advance their s. 138.3 claims.

117 The definition of a "responsible issuer" is found in s. 138.1:

"responsible issuer" means,

> (a) a reporting issuer, or
> (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded;
>
> A "reporting issuer" is defined in s. 1(1) of the *OSA*. Of particular note is subsection (e):
>
> "reporting issuer" means an issuer ...
>
> (e) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with,
>
> (i) A statutory amalgamation or arrangement ...
>
> where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months

118 When the Income Fund was created, securities were exchanged so that the Income Fund became the holder of all the issued common shares of Arctic. At that time, Arctic Group, the predecessor of Arctic, had been in existence for more than 12 months.

119 I find that there is sufficient objective evidence for the purposes of the good faith determination to find that Cooley was an officer of a responsible issuer and might be liable under s. 138.3 through his acquiescence to the release of the misrepresentational documents.

120 As stated, the remaining defendants and the proposed defendant Larson do not challenge the assertion that the plaintiffs have brought this action in good faith. With respect to them and the proposed defendant Cooley, I note that the plaintiffs have a personal financial interest in the action as well as a stated intent in starting this action to hold the defendants accountable for their behaviour and to deter similar conduct by others. There is no evidence of ulterior motive or conflict of interest. Accordingly, I find that the plaintiffs have met the "good faith" test under s. 138.8(1)(a) of the *OSA*.

Part II of the Statutory Leave Test: Is there a reasonable possibility that the plaintiffs will succeed at trial?

121 To be granted leave on this motion, the plaintiffs must demonstrate at least a reasonable possibility of success at trial, assuming a finding that the action has been brought in good faith: see s. 138.8(1)(a) and (b) of the *OSA*. As stated in *Imax*, 66 B.L.R. (4th) 222 at para. 330:

> **330.** The statutory leave provision is designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence.

122 The legislative history of Part XXIII.1 of the *OSA* was extensively reviewed by van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222 and by Lax J. in *Ainslie, supra.* Drawing on these reviews, I am satisfied that Part XXIII.1 is on the one hand remedial, while on the other, it seeks "to protect defendants from coercive litigation and to reduce their exposure to costly proceedings." (*Ainslie, supra* at para. 15). It is this latter aim that the test in s. 138.8(1)(b) seeks to address. Having found that the plaintiffs brought this action in good faith, I must now decide whether "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff[s]."

123 The task here is to attempt to bring clarity to the meaning of "reasonable possibility," as that phrase relates to these facts.

124 In the context of a dangerous offender application brought by the Crown in *R. v. E.E.*, [2003] O.J. No. 1518 (S.C.J.), the defence sought to show that there was a reasonable possibility of eventual control of the accused in the community. In attempting to bring meaning to those words, the court stated:

> **41.** ... it is important to underline the word reasonable. It is not a mere possibility, or any possibility, but one that is reasonable. Clearly, that means a possibility that has a reasonable possibility of success, in the mind of the Court.
>
> **42.** The "possibility" must have an air of reality, and have more substance than simply faith or hope.

125 As already noted, statutory language should be read in its grammatical and ordinary sense. A review of dictionary meanings of these words indicates the following: *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) defines "reasonable" as:

> 1. Having sound judgment; moderate; ready to listen to reason.
> 2. In accordance with reason; not absurd.
> 3. Within the limits of reason; fair, moderate ...

126 *Black's Law Dictionary, supra,* defines "reasonable" as:

1. Fair, proper, or moderate under the circumstances.
2. According to reason.

127 The *Canadian Oxford Dictionary, supra,* defines "possibility" as:

> 1. The state or fact of being possible, or an occurrence of this.
> 2. A thing that may exist or happen ...

128 *Black's Law Dictionary, supra,* defines "possibility" as:

1. An event that may or may not happen ...

129 Van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222 at paras. 313-346, considered the language of s. 138.8(1)(b). I find no reason to depart from her analysis. In particular, I note the following paras:

> **324.**"Reasonable" is used instead of "mere" to denote that there must be something more than a *de minimis* possibility or chance that the plaintiff will succeed at trial. The adjective "reasonable" also reminds the court that the conclusion that a plaintiff has a reasonable possibility of success at trial must be based on a reasoned consideration of the evidence.
>
> **326.** In undertaking this evaluation the court must keep in mind that there are limitations on the ability of the parties to fully address the merits because of the motion procedure. There is no exchange of affidavits of documents, no discovery (although affiants may be cross-examined) and witnesses cannot be summoned. The credibility of a witness' evidence given by affidavit in a motion, irrespective of how searching an out-of-court cross-examination may be, can only be fully determined when it is tested in open court.
>
> **330.** The statutory leave provision is designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence.

130 In my view, in assessing the existence of a reasonable possibility of success at trial, I must consider the relevant evidence, within the context of this motion. The applicable standard is more than a mere possibility of success, but is a lower threshold than a probability.

Section 138.3 - Elements to be Proven

131 The plaintiffs have limited their claim to rely only on core documents. For the purposes of this motion, the defendants do not oppose the following aspects of the pleaded s. 138.3 offences regarding the core documents, namely that:

> - the Fund is a "responsible issuer";
>
> - the Fund documents are "documents" that were released by the Fund;
>
> - the Fund documents contain a "misrepresentation";
>
> - the Plaintiffs acquired the Fund's securities during the Class period;
>
> - the Trustees of the Fund, namely Clark, Nagy, Filmon and Swaine, are "directors" of the Fund;
>
> - McMahon was a *de facto* "officer" of the Fund in his roles as CEO and CFO of Arctic Glacier Inc.;
>
> - Bailey became *de facto* "officer" of the Fund as of December 29, 2006 ... when he became CFO of Arctic Glacier Inc.; and

- Johnson, as a director, and McMahon and Bailey as officers of Arctic Glacier Inc., are "influential persons" of the Fund because they are "directors" and "officers" of a subsidiary of the Fund.

132 To demonstrate that they have a reasonable possibility of success at trial, the plaintiffs must do so with each element of s. 138.3 and with each defendant: *Imax, supra,* at paras. 334-336.

133 Based on the admissions by the defendants, I find that the elements of the cause of action in s. 138.3 have been met for the purposes of this motion as against the Income Fund. Accordingly, leave under s. 138.8 is granted as against the Fund.

134 The defendants dispute, however, that there is a reasonable possibility of success at trial with respect to Arctic as a responsible issuer or an influential person. The defendants assert that Arctic is not an "influential person" because it is not a "promoter" or an "insider" of the Fund. Consequently, the defendants argue that Arctic's directors and officers are not directors and officers of a "responsible issuer" or an "influential person."

135 The defendants also dispute that the trustees of the Fund can be characterized as "influential persons" of the Fund, because they are not "promoters." Finally, the defendants allege that Bailey was not an "officer" of Arctic before December 29, 2006 and that he was not an "expert" of the Fund.

The Trustees

136 The defendants admit that the defendants Clark, Nagy, Filmon and Swaine, as trustees of the Income Fund, are "directors" of the Income Fund, under s. 138.3(1)(b) of the *OSA*. As directors of a responsible issuer, namely the Income Fund, liability accrues to the trustees under s. 138.3(1)(b), subject to any statutory defences.

137 The plaintiffs also state that these defendants Clark, Nagy, Filmon and Swaine are liable under s. 138.3(1)(b) of the *OSA* as "influential persons" within the meaning of 138.3(1)(d) of the *OSA*. An "influential person" is defined in s. 138.1 of the *OSA*:

> "influential person" means, in respect of a responsible issuer ...
>
> (a) a promoter ...

"Promoter" is defined in s. 1(1) of the *OSA*:

"promoter" means,

> (a) a person or company who, acting alone or in conjunction with one or more other persons, companies or a combination thereof, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of an issuer ...

These defendants, as trustees of the Income Fund, were directly involved in the formation of the Income Fund, which the defendants have conceded is "an issuer." Each trustee, as an "influential person" acting as the controlling mind of the Income Fund, would knowingly have influenced the Income Fund as the responsible issuer to release the core documents in question. Accordingly, I find that there is a reasonable chance of success at trial against the defendants Clark, Nagy, Filmon and Swaine under s. 138.3 as "directors" and as "influential persons."

Arctic Glacier Inc.

138 The plaintiffs assert that Arctic is liable under s. 138.3 as an "influential person" of the Income Fund. "Influential person" is defined in s. 138.1 of the *OSA*:

> "influential person" means, in respect of a responsible issuer ...
>
> (a) a promoter ...

139 The defendants have conceded that the Fund is a "responsible issuer" under the *OSA*. The plaintiffs assert that Arctic is a "promoter" of the Income Fund. "Promoter" is defined in s. 1(1) of the *OSA*:

> "promoter" means,
>
> (a) a person or company who ... takes the initiative in founding, organizing ... the business of an issuer, or ...

The plaintiffs submit that Arctic is a promoter, as it was involved in the formation of the Fund. The defendants dispute this characterization, stating that there is no evidence to support the finding that Arctic took the "initiative in founding or organizing" the business of the Income Fund. In support of their position, the plaintiffs point to the 2003 Renewal Annual Information Form issued by Arctic which states in part:

> **Recent Developments**
>
> The Arctic Group Inc. ("Arctic Group"), the predecessor corporation to Arctic Glacier Inc. was incorporated in 1996. In November 2001, the board of directors and management of Arctic Group considered several alternatives to enhance shareholder value ... The board of directors of Arctic Group concluded that the best alternative to accomplish these goals would be to convert Arctic Group into an income trust fund.
>
> **Arrangement Agreement**
>
> On January 31, 2002, Arctic Glacier, Arctic Group and the Fund entered into the Arrangement Agreement which provided for implementation of the Arrangement pursuant to Section 193 of the ABCA. ... The Arrangement became effective on March 22, 2002. On the Effective Date, each of the events below occurred in the following sequence:
>
> (a) all of the right, title and interest of Arctic Group securityholders in the Arctic Group securities was transferred to Arctic Glacier in exchange for Subordinated Notes ...
>
> (d) Arctic Glacier and Arctic Group were amalgamated and continued as one corporation and:

> (i) all of the issued and outstanding Arctic Group securities, all of which were then held by Arctic Glacier, were cancelled without any repayment of capital; and
> (ii) the name of the amalgamated corporation became "Arctic Glacier Inc." ...
>
> Upon completion of the Arrangement, the Fund became the holder of all of the issued and outstanding Common Shares and Subordinated Notes.

140 I find that Arctic and its predecessor, Arctic Group Inc., were "at the very heart of the ... re-organization of the company" and that Arctic is thus a "promoter": see *Gordian Financial Group Inc. (Re)* (1995), 4 ASCS 1690 at para. 34.

141 As a "promoter," Arctic is an "influential person." For liability to accrue to Arctic as an "influential person" under s. 138.3(1)(d), the plaintiffs must show that Arctic as an influential person, knowingly influenced,

> (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
> (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document ...

The Income Fund has no separate business and is entirely dependent upon the operations of Arctic. The documents at issue are reports of the business of Arctic. Additionally, these reports were signed by Arctic's officers. It follows that Arctic must have influenced the release of the impugned documents.

142 I find that Arctic, as an "influential person," knowingly influenced the release of the impugned documents. Accordingly, I find that the plaintiffs have a reasonable possibility of success at trial against Arctic as "an influential person."

143 The plaintiffs submit that Arctic can also be characterized as a "responsible issuer" as it is a "reporting issuer." A responsible issuer is defined in s. 138.1 as a "reporting issuer." This term is defined in s. 1(1) of the *OSA*:

> "reporting issuer" means an issuer ...
>
> (e) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with,
>
> (i) a statutory amalgamation or arrangement ...
>
> where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months ...

Referencing the 2003 Renewal Annual Information Form, the plaintiffs assert that as Arctic Group completed its initial public offering on March 25, 1997, it was in existence for at least 12 months prior to the amalgamation and was thus a "reporting issuer."

144 The defendants assert that Arctic is not a "reporting issuer." They state that on March 22, 2002, after Arctic Group was amalgamated into the new Income Fund, the common shares of Arctic were de-listed from the TSX when units of the Fund commenced trading. The Alberta Securities Commission followed with a decision on September 30, 2002 deeming Arctic to no longer be a reporting issuer under the securities legislation of Alberta, Saskatchewan, Manitoba, Ontario and Quebec. Accordingly, the defendants state Arctic has not been a "reporting issuer" as of March 22, 2002. I agree.

145 I find that Arctic is not a "responsible issuer."

Defendant McMahon

146 McMahon was the Executive Vice President of Arctic from April 2003 until December 2006, and Chief Financial Officer from April 2001 until December 2006. He became a director of Arctic September 21, 2007 and was the Chief Executive Officer of the Income Fund from December 2006 onwards. The defendants have admitted that McMahon, as CFO and CEO of Arctic was a *de facto* "officer" of the Income Fund for the entire Class Period.

147 The term "officer" is defined in s. 1(1) of the *OSA*:

> An officer, with respect to an issuer ... means,
>
> (a) a chair or vice-chair of the board of directors, chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager ...
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a)

148 The Income Fund performs its operations entirely through Arctic whose officers perform the role which officers of the Income Fund would, if the Income Fund had officers. It apparently does not. The various documents filed by the plaintiffs on this motion appear to indicate that the officers of Arctic held themselves out to be officers of the Income Fund, at least in the core documents.

149 Under s. 138.3(1)(c) of the *OSA*, officers of responsible issuers are liable if they "authorized, permitted or acquiesced in the release of the document."

150 Throughout the Class Period, McMahon signed Form 52-109FT2. Therein he certified that he reviewed the annual or interim filings of the fund and with respect to each such document that they "do not contain any untrue statement of material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made." Initially, McMahon signed some annual filings directly.

151 I find that during the Class Period, McMahon was an officer of the Income Fund and that, as such, the plaintiffs have a reasonable chance of successfully proving his liability under s. 138.3(1)(c) of the *OSA* at trial.

Defendant Bailey

152 Bailey was CFO of Arctic as of December 29, 2006 and continued to hold that position at least for the balance of the Class Period. Prior to that date, from October 6, 2003 to December 29, 2006, Bailey was the Vice President of Accounting and Corporate Comptroller of Arctic. The defendants have admitted for purposes of this motion that Bailey was a *de facto* officer of the Income Fund. As did McMahon, Bailey signed Form 52-109FT2 throughout the Class Period certifying that he reviewed the impugned documents and that they did not contain any untrue statements. He also signed some of the impugned documents directly. As is the case with McMahon, I find that the plaintiffs have established at least a reasonable possibility of success at trial as against Bailey as an officer of the Income Fund for the class period starting December 29, 2006.

153 For the period prior to December 29, 2006, when Bailey held the position of the VP of Accounting and Corporate Comptroller of Arctic, the plaintiffs characterize this position as an "officer" of the Income Fund. They rely on *Momentas Corp. (Re)*, 2006 LNONOSC 778 at para. 101 where the Ontario Securities Commission ("OSC") articulated the test for determining if a person is a *de facto* director or officer. The OSC found that if a person is "an integral part of the mind and management of the company," then that person is a *de facto* director or officer. The defendants dispute this characterization and the application of the *Momentas Corp.* test to these facts. They state that the only evidence with respect to Bailey's role in Arctic prior to December 29, 2006, is a reference to Bailey, as one of the officers of Arctic, as senior management of the Income Fund. The defendants state that this is insufficient. I agree.

154 The plaintiffs plead that Bailey is liable as an "expert," as per s. 138.3(1)(e) of the *OSA* in his role as an officer of Arctic prior to December 29, 2006. "Expert" is defined in s. 138.1 of the *OSA*:

> "expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company including, without limitation, an accountant ...

Prior to December 2006, Bailey was the VP of Accounting at Arctic. However, there is no evidence that statements, opinions or reports in the core documents made by Bailey prior to that date were made in his capacity as an "expert" (rather than as an officer of Arctic.) Further, there is no evidence that Bailey consented to being an "expert" as required by section 138.3(1)(e)(iii). I find that there is no reasonable possibility of establishing at trial that Bailey is an "expert" of the Fund.

155 The defendants have admitted that Bailey, as an officer of Arctic, is an "influential person" of the Fund from December 2006 onwards and I so find.

Defendant Johnson

156 The defendants have admitted that during the Class Period, Johnson was a director of Arctic. I have found that Arctic is an "influential person" as defined in s. 138.1 of the *OSA*. For purposes only of this motion, the defendants admit that Johnson, as a director of Arctic is an "influential person" of the Income Fund, as a "director" of Arctic, a subsidiary of the Income Fund.

157 I find that there is a reasonable possibility that the plaintiffs will succeed at trial against Johnson as an "influential person" of the Income Fund under s. 138.3(1)(d). In my view, a sufficiently strong inference can be drawn that Johnson as a director of a subsidiary of the Income Fund was in a position to knowingly influence the Income Fund to release the impugned documents.

Proposed Defendant Larson

158 The parties agree that during the Class Period, Larson was a senior Vice President, and from 2003 onwards, the Executive Vice-President of Arctic, although a resident and citizen of the United States. Based on my finding above, as an officer of Arctic, he was a *de facto* officer of the Income Fund.

159 As an officer of the Income Fund, liability would accrue against him if he authorized, permitted or acquiesced to the release of the impugned documents.

160 That leads me to the interpretation of the "acquiescence" threshold. The plaintiffs state that "acquiescence" is a low threshold which is met by Larson's position as Executive Vice-President of Arctic. They rely on *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (C.A.), in which the Court, at para. 47, stated that: "'[t]o acquiesce' is to agree tacitly, silently or passively to something ... acquiescence implies unstated consent."

161 Both Cooley and Larson have admitted their involvement in certain anti-competitive conduct by Arctic in the U.S. through its American subsidiary, Arctic International.

162 The defendants rely on *JLL Patheon Holdings, LLC v. Patheon Inc.* (2009), 64 B.L.R. (4th) 98 (Ont. S.C.J.). In the context of a third-party proxy solicitation, the Court held at para. 49:

> ... the ordinary meaning of "acquiescence" upon which JLL relies carries with it the correlative that the party has at least some element of control over the act in question in the sense of being able to oppose successfully the occurrence of the legal consequences that flow from "acquiescence." This is captured by the reference to "implied consent" in the definition of "acquiesce" in Black's Law Dictionary 7th ed., which reads as follows: "To accept tacitly or passively; to give implied consent to (an act)." That concept is also present in the definition in the *Katsigiannis* decision.

163 As Larson (and as did Cooley), by virtue of his guilty plea, admitted his involvement in anti-competitive conduct in the United States, it is clear that he, as an officer of the Income Fund (which was a responsible issuer), was probably aware that at least certain of the core documents in question contained misrepresentations. That is sufficient, in my view, to find that there is a reasonable possibility that the plaintiffs will succeed at trial against Larson as a *de facto* officer of the Income Fund.

164 The plaintiffs have also asserted that Larson was "an influential person" who would have liability if he "knowingly influenced the release of the impugned documents." Though I am satisfied that the plaintiffs have met the test with respect to "acquiesce," I am not satisfied that they have done so with respect to "knowingly influenced the release of the documents." Accordingly, I find that the plaintiffs do not have a reasonable possibility of proving at trial that Larson is an "influential person" under s. 138.3 of the *OSA*.

Proposed Defendant Cooley

165 Cooley became Vice President, Sales and Marketing of Arctic prior to the filing of the third quarter 2005 Report. The plaintiffs claim no prior liability as against Cooley. Both Cooley and Larson are listed in the Income Fund's 2006 Annual Report as senior management.

166 The same reasoning as applied to Larson also applies to this proposed defendant. I find that the plaintiffs have a reasonable possibility of success against Cooley as a *de facto* officer of the Income Fund, a responsible issuer, under s. 138.3(1)(c), but not as an "influential person."

Evidence of Anti-Competitive Conduct

167 To be granted leave, the plaintiffs must show that the evidence would support a finding, at least of a "reasonable possibility" that the Income Fund knew of or acquiesced in certain anti-competitive behaviour by one or more of its subsidiaries. To that end, the plaintiffs rely on two time periods, namely March 2002 to December 2004 and December 2004 to September 2008.

March 2002 to December 2004

168 During the period of 2002 - 2004, the plaintiffs allege that Arctic was engaged in unlawful, anti-competitive conduct in Alberta, as evidenced by an action filed by a competitor of Arctic, namely Polar Ice Express Inc. In this case, *Polar Ice Express Inc. v. Arctic*, 2007 ABQB 717, released December 3, 2007, Polar Ice contended that Arctic unlawfully interfered with Polar Ice's contractual relations and commercial interests in 2002. The plaintiffs in the present case point to the following findings made by the trial judge:

(a) In 2002, Arctic's sales manager for the Edmonton Region offered a $10,000 bribe to an employee of a customer, to grant Arctic an exclusive contract to supply ice;
(b) Arctic targeted stores approached by Polar and cut its price only to those stores;
(c) Arctic made other offers to liquor outlets and to Sobeys to match or even undercut Polar's price as a direct and deliberate attempt to induce those businesses to breach their contracts with Polar;
(d) The conduct of Arctic to that end was egregious which ordinarily would call for punitive damages;
(e) The trial judge did not award punitive damages but awarded damages in the amount of $50,000.

169 The plaintiffs state that this conduct was not disclosed during the class period, during which the defendants continued to represent themselves as "good corporate citizens."

170 In response, the defendants state:

(a) It is unclear when the impugned activity became known to Arctic. As the decision was not released until December 2007, Arctic could not have been aware of those findings prior to that date.
(b) The trial judge did not make a finding of systemic corporate wrongdoing.
(c) This Alberta decision is not sufficient evidence to support a finding that the plaintiffs have a reasonable possibility of success at trial with regard to the 2002 - 2004 period.

171 The question is whether the defendants had knowledge of the conduct or Polar's allegations in that action prior to the release of that decision in December 2007. In my view, it is at least reasonably possible that the defendants were aware of the conduct or allegations raised in that action. Accordingly, I find that the plaintiffs have a reasonable possibility of success at trial with regard to the 2002 - 2004 period.

December 2004 to September 2008

172 In December 2004, Arctic International, a wholly-owned subsidiary of Arctic, and consequently the Income Fund, acquired the Party Time Ice group of companies ("Party Time") based in Michigan. Party Time was then the largest ice business in Michigan, serving a population base of ten million people.

173 In 2009, Arctic International admitted to its participation in an anti-competitive conspiracy in Michigan during the period of January 1, 2001 to at least July 17, 2007. Arctic International pleaded guilty to a charge of participating in a criminal, anti-competitive conspiracy in the United States. Under the terms of the plea agreement, Arctic International agreed to pay a fine of $9 million U.S. Under the terms of the plea agreement, Arctic International admitted that:

> Beginning January 1st, 2001, and continuing until at least July 17th, 2007, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit, Michigan, metropolitan area. The charged conspiracy unreasonably restrained interstate trade and commerce, in violation of Section 1 of the Sherman Act ...

174 Canadian counsel for the Income Fund and the Corporate Secretary testified under oath that Arctic International had participated in the conspiracy.

175 The plaintiffs state that from the acquisition of Party Time in December 2004 until the end of the Class Period, there should be no doubt that the Income Fund's subsidiary, Arctic International, was not a "good corporate citizen operating lawfully in a very competitive market," contrary to the representations in the defendant company's core documents.

176 The defendants state that the U.S. Department of Justice charges were not laid within the Class Period and there is no evidence that the defendants knew or ought to have known about the anti-competitive activities in Michigan.

177 Although the evidentiary trail at this stage is not perfect, I nevertheless conclude that the plaintiffs have demonstrated at least a 'reasonable possibility" of success at trial with respect to the period of December 2004 to the end of the Class Period.

178 In the context of this leave motion, the defendants, as they did in the motion to strike, raised the concern that the plaintiffs failed to adequately plead an "anti-competitive conspiracy." As I did in the strike motion and based on the same reasoning, I find that the pleading of an anti-competitive conspiracy may stand.

Conclusion

179 For reasons noted, I find that the plaintiffs have met the "leave test" under s. 138.8 of the *OSA*. The plaintiffs may pursue a statutory claim for misrepresentation in the secondary market under s. 138.3(1) of the *OSA* against the defendants, and the proposed defendants Cooley and Larson, subject to my findings in these reasons. An order may go granting the plaintiffs' leave to plead the causes of action in Part XXIII.1 of the *OSA*, and that the proposed defendants, Cooley and Larson may be added as party defendants.

C. Certification Motion

180 The plaintiffs, by motion, seek an order certifying this action as a class proceeding.

181 Section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") articulates the test for certification:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

182 Certification of a class proceeding is mandatory if all five of the s. 5(1) requirements are met.

183 In considering the requirements detailed in s. 5(1) of the *CPA*, I remain mindful of these additional provisions in the *CPA*:

> 5(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.
>
> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> 2. The relief claimed relates to separate contracts involving different class members.
> 3. Different remedies are sought for different class members.
> 4. The number of class members or the identity of each class member is not known.
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

184 The test for certification is a procedural endeavour. It is not meant to be a test of the merits of the action. The question at a certification stage is not whether the plaintiffs' claims are likely to succeed on the merits, but whether the action can be appropriately prosecuted as a class proceeding: *Hollick v. Toronto*, [2001] 3 S.C.R. 158 at para. 16.

185 This point was further developed by the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 50:

> **50.***Hollick* also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion, the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

186 I also note this general observation on class proceedings by van Rensburg J. in *Silver v. Imax Corp.*,

[2009] O.J. No. 5585 at para. 10:

> **10.** Class actions offer three important advantages. They serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. By allowing fixed litigation costs to be divided over a large number of plaintiffs, access to justice is improved by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public (this is the "behaviour modification" element) (*Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, paras. 27-29). See also *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 14-16.

Section 5(1)(a) *CPA*: Do the pleadings disclose a cause of action?

187 Section 5(1)(a) articulates the same test I addressed above in the defendants' motion to strike.

188 The *CPA* is remedial and should be given a broad and liberal interpretation, as affirmed by McLachlin C.J.C. in *Hollick, supra* at paras. 14-16:

> **14.** The legislative history of the *Class Proceedings Act, 1992*, makes clear that the Act should be construed generously. Before Ontario enacted the *Class Proceedings Act, 1992,* class actions were prosecuted in Ontario under the authority of Rule 12.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. That rule provided that
>
> > [w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.
>
> While that rule allowed courts to deal with relatively simple class actions, it became clear in the latter part of the 20th century that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 at para. 26. They often involved vast numbers of interested parties and complex, intertwined legal issues -- some common to the

class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise *ad hoc* solutions to procedural complexities on a case-by-case basis: see *Western Canadian Shopping Centres*, at para. 51. The *Class Proceedings Act, 1992*, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.

15. The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class members would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": *Report on Class Actions, supra*, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is

> likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform,* at pp. 30-33.

189 I also note the principles applicable to a s. 5(1)(a) determination articulated by Cumming J. in *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 at para. 17:

> (a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
> (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
> (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
> (d) the novelty of the cause of action will not militate against the plaintiff;
> (e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
> (f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at pp. 990-91 S.C.R.; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494 (C.A.), at p. 679 O.R.; *Hollick, supra*, at para. 25*; M.C.C. v. Canada (Attorney General)*, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.), at para. 41.

190 The plaintiffs assert that the pleadings disclose at least four valid causes of action:

(i) Section 130 of the OSA

191 Within the three year limitation period from September 25, 2005 to September 25, 2008, the plaintiffs allege that their pleadings disclose a valid cause of action under s. 130 of the *OSA*. This section creates primary market remedies by assigning liability to issuers and associated persons when misrepresentations are published in prospectuses. As the plaintiffs' pleadings claim that the prospectuses issued May 17, 2006 and January 25, 2007 contained misrepresentations, the Statement of Claim discloses a valid cause of action under s. 130 of the *OSA.*

192 The plaintiffs also advance a claim under s. 130 of the *OSA* as against the Income Fund and its trustees: Clark, Nagy, Filmon and Swaine. Section 130(1)(e) of the *OSA* assigns liability to those who signed the prospectuses. In addition to the trustees, the defendant McMahon signed both prospectuses and the defendant Bailey signed the prospectus issued January 25, 2007.

193 On the defendants' motion to strike, I ruled that the plaintiffs' claim under s. 130 of the *OSA* may stand subject to proposed amendments to the Statement of Claim for which I granted leave to amend.

(ii) Negligence Simpliciter

194 On the defendants' motion to strike, I ruled that the plaintiffs' claim of negligence simpliciter may stand.

(iii) Negligent Misrepresentation

195 On this cause of action I have ruled, in response to the defendants' motion to strike, that this pleading may stand.

(iv) Breach of Trust

196 The plaintiffs plead a breach of trust against the trustees of the Income Fund, namely Clark, Nagy, Filmon and Swaine. This claim is not contested by the defendants.

197 Accordingly, I find that the pleadings disclose a cause of action as required by s. 5(1)(a).

Section 5(1)(b) *CPA*: Is there an identifiable class of two or more persons that would be represented by the representative plaintiffs?

198 The plaintiffs have defined the proposed class as follows:

> All persons and entities, wherever they may reside or be domiciled, other than Excluded Persons, who acquired Units of [the Income Fund] during the period from March 13, 2002 to September 16, 2008.

199 This portion of the certification test is meant to address three jurisprudential principles, noted in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 at para. 10 and in *Hollick, supra* at para. 17:

> (a) Identifying those persons who have a potential claim for relief against the defendants;
> (b) Defining the parameters of the lawsuit so as to identify those persons who are bound by the result; and
> (c) Describing who is entitled to notice pursuant to the Act.

200 McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 ("*WCSC*"), an appeal arising from the Alberta class action legislation with a test for certification similar to the *CPA*, stated at para. 38:

> **38.** The [class] definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known.

201 In analyzing this step of the certification test, I am also guided by these comments in *Hollick, supra* at para. 21:

> **21.** The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more nar-

> rowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended ...

202 I note that the lack of territorial limitations to the proposed class is not a barrier to certification: *Imax*, [2009] O.J. No. 5585 at para. 129 and *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151 at paras. 13-19.

203 The defendants state that the class as proposed is too large. They say that it is unworkable, as it includes all those who purchased units during the Class Period and not just those who still held units at the end of the Class Period in September 2008. These unitholders, the defendants state, were unaffected by the alleged misrepresentations, as they sold prior to the fall in the market price triggered by the DoJ investigation.

204 It may well be that individual issues may arise and that certain subclasses in due course may need to be identified. That issue would appear to be addressed by s. 6 of the *CPA*. I am also guided by these comments in *Imax*, [2009] O.J. No. 5585 at paras. 106 and 107:

> **106.** In any event, a proposed class will not be overbroad simply because it may include persons who ultimately will not have a claim against the defendants ...
>
> **107.** The submission by the defendants in this case that the class is overbroad because some of the class members may not have claims depends on their contention that there will be individual issues (such as reliance and damages) to be decided after the common issues have been determined. While the plaintiffs assert that reliance (based on the efficient market theory) and damages (contending that an aggregate assessment will be appropriate) will not be individual issues in this case, even if they are wrong and individual issues remain after the determination of the common issues, this is not an impediment to certification. As Cullity J. noted in *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (S.C.), at para. 69, "whenever, because of the existence of individual issues, a judgment on the common issues in favour of the plaintiffs will not determine a defendant's liability, it will always be possible -- and invariably likely -- that an acceptable class will include persons who will not have valid claims".

205 Although "early sellers" may eventually be found not to have suffered a loss as a result of the alleged misrepresentations, it is arbitrary at this stage to so conclude and this issue should be left for trial: *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 122.

206 I am also guided by these comments of the Supreme Court of Canada in *WCSC*, *supra* at para. 39:

> **39.** ... there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the

> resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.

207 In my view, any possible individual issues which may arise pale in comparison to the issues of the proposed class. Any such individual issues can and should be addressed by the trial judge and should not stand in the way of certification.

208 I find that the proposed class meets the requirements for an identifiable class under s. 5(1)(b).

Section 5(1)(c) *CPA*: Do the claims raise common issues?

209 The term "common issue" is defined in the *CPA*:

> 1. "common issues" means,
>
> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

210 Cumming J. in *Ford*, *supra* at para. 33 summarized the law regarding this step of the certification test:

> **33.** The definition of "common issues" in s. 1 of the *CPA* "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high". The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim ... is not required." This requirement has been described by the Court of Appeal "as a low bar". The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis". The common issues question should be approached purposively: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), at pp. 248-49 O.R.; *M.C.C. v. Canada*, *supra*, at para. 52; *Western Canadian Shopping Centres*, *supra*, at para. 39; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, at para. 29.

211 The underlying question, as held by the Supreme Court of Canada, is "whether allowing the suit to proceed as a representative one would avoid duplication of fact-finding or legal analysis": *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 29.

212 The plaintiffs have proposed this list of common issues:

> [1] Did some or all of the following disclosure documents of the Income Fund contain a misrepresentation?
>
> (The plaintiffs provide a detailed list of core documents issued by the Income Fund between March 13, 2002 and September 2008.)

[2] If the answer to [1] is yes, are the defendants or some of them liable to Class Members pursuant to Section 138.3 of the *Securities Act*?

[3] If the answer to [2] is yes, what damages are payable by each defendant in respect of that liability?

[4] If the answer to [1] regarding the prospectus of May 17, 2006 and of January 25, 2007 is yes, are the defendants or some of them liable to Class Members or some of them pursuant to s. 130 of the *Securities Act?*

[5] If the answer to [4] is yes, what damages are payable by each defendant in respect of that liability?

[6] Did the defendants, or any of them, owe the Class Members a duty of care? If so, which defendants owed what duty and to whom?

[7] If the answer to [6] is yes, did any or all of the defendants breach their duty of care? If so, which defendants breached their duty and how?

[8] If the answer to [7] is yes, did the defendants' breach of their duty of care cause damage to those Class Members? If so, what is the appropriate measure of that damage?

[9] In respect of the Class Members' negligent misrepresentation claim, what is the procedure whereby class members must demonstrate their individual reliance upon the defendants' misrepresentations?

[10] Did the trustees or some of them commit a breach of trust?

[11] If so, what damages are payable by the Trustees to the Class Members in respect of their breach of trust?

[12] Is the Income Fund vicariously liable or otherwise responsible for the acts of the other defendants?

[13] Is Arctic Glacier Inc. vicariously liable or otherwise responsible for the acts of the other defendants?

[14] Should one or more defendants pay punitive damages to the Class? If so, who, in what amount, and to whom?

[15] Should the defendants pay the cost of administering and distributing the recovery? If so, which defendants should pay, and how much?

213 The plaintiffs assert that these claims will substantially advance the case on behalf of the Class. They have characterized the misrepresentations throughout the class period as a single ongo-

ing misrepresentation and assert that the unit prices reflected that misrepresentation. As such, the plaintiffs state, the effect of the misrepresentation on the unit prices over time is an issue common to every Class Member.

214 The defendants concede all but five of the proposed common issues. The defendants challenge common issues 6, 7, 8, 9 and 14. The defendants raise these questions:

[6] Did the defendants or any of them, owe the Class Members a duty of care?

215 On the defendants' motion to strike the claim of negligence simpliciter, I declined to strike that claim. I noted that the pleadings with respect to that claim assert that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants.

216 Paragraph 97 of the Statement of Claim, referring to the allegations of negligence, reads:

> 97. As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices and suffered a corresponding loss ...

217 I find that this is a common issue.

[7] If the answer to [6] is yes, did any or all of the defendants breach their duty of care?

218 Although the alleged breach, namely the misrepresentations, took place over a period of about six years, these alleged misrepresentations repeated themselves and differed very little, if any, in substance from one to the other. In my view, these representations can be viewed as a single misrepresentation. Accordingly, I find that this purported breach would likely not require individual assessment and thus qualifies as a common issue.

[8] If the answer to [7] is yes, did the defendants' breach of their duty of care cause damage to those Class Members?

219 The pleaded damage to the Class Members is either a loss of value of their securities or their purchase of them at inflated values. These, in my view, are common issues.

220 In arriving at that view, I am guided, in part, by these comments of van Rensburg J. in *Imax*, [2009] O.J. No. 5585 at para. 182:

> **182.** Ultimately, the question when determining the common issues is to distinguish between issues that might be common to the class (or a subclass) and individual issues, and to ensure that issues that will require individual determinations are not included in the list of common issues. The fact that not all members of the class may be affected in the same way by the determination does not prevent the issue from being included as a common issue. Again, the cases emphasize that a common issue is not necessarily one where success for one member of the class necessarily results in success for all members.

[9] In respect of the Class Members' negligent misrepresentation claim, can class members' reliance be adequately demonstrated as a common issue?

221 The defendants assert that reliance is inherently individual and thus cannot be a common issue. They state that the individual nature of the reliance requirement is such that it would overwhelm the other common issues. The defendants rely in part on *Williams v. Mutual Life Assurance Company of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.). In that case, Cumming J. refused to certify a negligent misrepresentation claim, as the outcome of such cases would depend on a "myriad of individual evidentiary factors." He stated at para. 39: "[a] common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant."

222 The plaintiffs suggest that reliance can be inferred using the efficient market theory which presumes that misrepresentations to the market are reflected in the unit price. Thus, any purchaser can be deemed or inferred to have relied on such statements through the act of purchasing units.

223 It is generally accepted that a cause of action in negligent misrepresentation requires proof of reliance. For that reason, courts have concluded that negligent misrepresentation claims are unsuitable for certification: *McKenna v. Gammon Gold Inc.*, *supra* at para. 135.

224 As found by Strathy J. in *Gammon Gold, ibid.* at paras. 136 and 137:

> **136.** Issues of reasonable reliance have usually been considered to be individual issues that are not capable of being resolved on a common basis: *Lacroix v. Canada Mortgage and Housing Corp.*, [2009] O.J. No. 316, 68 C.P.C. (6th) 111 (S.C.J.) at para. 97; *Lawrence v. Atlas Cold Storage Holding Inc.* (2006), 34 C.P.C. (6th) 41, [2006] O.J. No. 3748 (S.C.J.), at paras. 91-93; *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 57; *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.) at paras. 57-60.
>
> **137.** Exceptions may be made where there is a single representation made to all members of the class or there are limited number of representations that have a common import: see, for example, *Hickey-Button v. Loyalist College of Applied Arts and Technology*, 211 O.A.C. 301, [2006] O.J. No. 2393.

225 Proof of reliance in a case of negligent misrepresentation can be made by inference, as opposed to direct evidence: *Mondor v. Fisherman,* [2001] O.J. No. 4620 and *Lawrence v. Atlas Cold Storage Holding Inc.* (2006), 34 C.P.C. (6th) 41. Two recent actions were certified in the face of claims of negligent misrepresentation: see *McCann v. CP Ships*, *supra* and *Silver v. Imax*, [2009] O.J. No. 5585.

226 Strathy J. in *Gammon Gold*, *supra* came to a different conclusion. He described the misrepresentations before him at paras. 160-161:

> **160.** In this case, multiple misrepresentations are alleged ... in press releases, regulatory filings, conference calls, annual reports and a multitude of other written and oral forms. The alleged misrepresentations relate to a variety of complaints, not simply the level of gold production. The plaintiff complains of undisclosed equipment failures, contracts with insiders, stock option expenses, non-compliant financial statements and inadequate disclosure controls. Individual inquiries would have to be made into what alleged misrepresentations were made to each class member and whether he or she relied upon any of those representations ...

> **161.** There is no basis on which reliance could be resolved as a common issue. The need to determine the issue individually would give rise to a multitude of questions in each case concerning the representations communicated to a particular investor, the experience and sophistication of the investor, other information or recommendations made to the investor and whether there was a causal connection between the misrepresentation(s) and the acquisition of the security ...

227 It appears, as stated by Rady J. in *McCann, supra* at para. 59 that the case law on this issue is "in a state of evolution." I recognize that depending on the type and number of alleged misrepresentations in a particular case, these could in certain circumstances overwhelm the common issues and would, as such, not be suitable to be resolved as a class proceeding. I find that the alleged misrepresentations made in this case in core documents are consistent and repetitive and can essentially be treated as one. As such, I distinguish these misrepresentations factually from those detailed in para. 160 in *Gammon Gold, supra.*

228 In my view, the alleged misrepresentations here can be readily managed as a common issue and may proceed as such.

[14] Should one or more defendants pay punitive damages to the Class? If so, who, in what amount, and to whom?

229 I am guided by and accept the reasoning on this issue by Strathy J. in *Gammon Gold, supra.* He distinguished *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (S.C.J.) but accepted Perell J.'s reasoning on the question of whether a claim for punitive damages is appropriate for certification. Strathy J. held at para. 170:

> **170.** Applying Justice Perell's test to the case presently before me, I find that the requirements for the certification of punitive damages as a common issue have been met. The nature of the present securities class action, as opposed to the product liability action before Perell J., makes the degree of misconduct, causation, harm, and the quantification of compensatory damages determinable by the common issues judge. There is no need for individual proof of loss to enable a common issues judge to assess punitive damages.

230 I agree. The claim for punitive damages may proceed as a common issue.

Section 5(1)(d) *CPA*: Would a class proceeding be the preferable procedure for resolution of the common issues?

231 In assessing this question, one should start with *Hollick, supra* at paras. 27-31. The Ontario Court of Appeal in *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 summarized the principles set out in *Hollick* as follows (para. 69):

> 1. The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
> 2. "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and man-

ageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,

3. The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

232 The plaintiffs state that in view of the large number of potential class members, certification of this action would enhance judicial economy, even if it would not resolve the claims of every class member. This was the finding in *Carom v. Bre-X* (2000), 51 O.R. (3d) 236 at para. 58 (C.A.): "[c]ertification can be the preferable procedure in situations far short of final resolution of the lawsuit."

233 The plaintiffs also rely on *CIBC v. Deloitte & Touche*, [2003] O.J. No. 2069 at para. 38 (Div. Ct.):

> **38.** ... [T]here is no reasonably available alternative procedure to a class proceeding which is preferable, since the decision in one action will not bind the defendants with respect to the common issues. Given these facts, a class proceeding will promote the objective of judicial economy.

234 The defendants interpret "judicial economy" differently. They state that as the DoJ in the United States has already completed a full investigation and charged culpable individuals and entities, a further judicial inquiry would not serve the goal of judicial economy. They state that this proposed litigation would impose crippling investigation-related costs on existing security-holders for a second time. However, the DoJ investigation was in relation to illegal acts in the United States and had no bearing on possible losses suffered by individual investors for whom compensation is sought in this proposed class action. In my view, in a judicial economy inquiry, the focus should be on the preferable procedure for hearing specific claims, not on whether litigating a specific issue would be economical for the defendant corporation.

235 The defendants have not advanced any evidence to suggest an alternate procedure for redress for Class Members whose securities have lost value as a result of the alleged misrepresentation: see *1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd.*, [2002] O.J. No. 4781 at para. 27 (S.C.J.):

> **27.** ... it would be antithetical to permit the defendants to defeat certification by simple reliance on bald assertions that joinder, consolidation, test cases or similar proceedings are preferable to a class proceeding. This is a simple shopping list of procedures that may be available in all cases. Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred. The defendant must support the contention that another procedure is to be preferred with an evidentiary foundation. As stated in *Hollick* [at para. 22]:
>
> > In my view, the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

236 The plaintiffs urge that certification will enhance access to justice for Class Members, as the cost of litigating the matter individually would be far greater than the particular loss at issue. In my view, certification here clearly advances the interests of access to justice. The claims of the Class Members have yet to be investigated by any Canadian judicial body and the American DoJ investigation into illegal activity is not an appropriate substitute.

237 As noted in *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 at para. 99, "the objective of behaviour modification is to ensure that actual and potential wrongdoers do not ignore their obligations to the public." The defendants submit that the fines imposed as a result of the guilty pleas in the United States have already achieved the objective of behaviour modification. However, as noted by the plaintiffs, this action is not brought to seek compensation for anti-competitive behaviour, but for the failure to disclose such anti-competitive behaviour, a wrong not addressed by those guilty pleas.

238 In finding that the plaintiffs have met the s. 5(1)(d) requirement, I also rely on these comments by Leitch J. in *Metzler Investment GMBH v. Gildan Activewear Inc.* (24 September 2010), London 58574CP at para. 11 (S.C.J.):

> **11.** ... the costs of pursuing this action on an individual basis would be prohibitive and uneconomical for any Class Member thereby reducing access to justice and insulating the defendants from these claims. In addition, a class proceeding allows a single determination of the significant legal issues in this case thus eliminating the prospect of a multiplicity of proceedings. Finally, as noted by the plaintiff, its ability to access the courts to prosecute claims against violators of securities law is an important means of enhancing investor protection and restoring investor confidence, while creating an incentive for public corporations to take precautions which will protect market integrity.

Section 5(1)(e): Is there a representative plaintiff who:

i. will fairly and adequately represent the interests of the class?

ii. has produced a workable litigation and notification plan?

iii. does not have conflicts of interest with other class members on the common issues?

239 In assessing adequate and fair representation of class interests, the Supreme Court in *WCSC*, *supra* noted at para. 41:

> **41.** In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class ...

240 The plaintiffs note that both representative plaintiffs indicated their intention to prosecute the claims with the view to advancing the best interests of the Class Members. There is no evidence to suggest otherwise.

241 The plaintiffs have prepared a litigation plan. As stated in *Fakhri v. Alfalfa's Canada, Inc.*, [2003] B.C.J. No. 2618 at para. 77 (S.C.):

> **77.** The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issue are demonstrated by the class members.

242 The defendants have not refuted the sufficiency of the plaintiffs' litigation plan.

243 Any conflicts of interest must be actual and current to disqualify the proposed representative plaintiffs: *Eaton v. HMS Financial Inc.*, [2008] A.J. No. 1127 at paras. 186-187. The defendants' suggestion that the representative plaintiffs may have a conflict of interest is but speculative. There is nothing before me to support a finding of an actual conflict.

244 I find that the plaintiffs have met the s. 5(1)(e) requirement.

245 I am satisfied that this action should be certified.

246 For a summary of my findings on the three motions addressed above, see Schedule A, attached.

247 If required, counsel may bring the matter of costs before me within 60 days.

W.U. TAUSENDFREUND J.

* * * * *

SCHEDULE A:

TABLE OF FINDINGS

Motion to Strike Pleadings	**Finding**
a. Common law claims against the Income Fund	Motion to strike granted
b. "Anti-Trust Conspiracy"	Motion to strike dismissed

c. Section 130 of the *OSA*	Motion to strike dismissed*
d. Common law claim in negligence	Motion to strike dismissed
e. Common law claim in negligent misrepresentation	Motion to strike dismissed

* = However, plaintiffs must amend Statement of Claim to plead all provincial securities acts upon which they wish to rely. In addition, the s. 130 claim is struck as against the defendant Johnson.

Motion for Leave	**Finding**
Is the failure to file evidence fatal to the defendants' case?	No
Does s. 138.3 apply prospectively?	Yes

The test for leave (s. 138.8)

a. Is the action brought in good faith? Yes
b. Is there a reasonable possibility of success at trial ...

i. Against the Income Fund?	Yes - leave granted

ii. Against Arctic as a "responsible issuer"? No - leave denied

iii. Against Arctic as an "influential person"?	Yes - leave granted
iv. Against trustees as "directors"?	Yes - leave granted

v. Against trustees as influential persons"?	Yes - leave granted
vi. Against McMahon as an "officer"	Yes - leave granted
vii. Against Bailey as an "officer" from Dec. 29, 2006 onwards?	Yes - leave granted
viii. Against Bailey as an "officer" prior to Dec. 29, 2006?	No - leave denied
ix. Against Bailey as an "expert"?	No - leave denied
x. Against Bailey as an "influential person" from Dec. 29, 2006 onwards?	Yes - leave granted
xi. Against Johnson as a "director"?	Yes - leave granted
xii. Against Johnson as an "influential person"?	Yes - leave granted
xiii. Against Larson as an "officer"?	Yes - leave granted
xiv. Against Larson as an "influential person"?	No - leave denied

xv. Against Cooley as an "officer"?	Yes - leave granted
xvi. Against Cooley as an "influential person"?	No - leave denied
xvii. That the Income Fund knew or acquiesced to the anti-competitive conduct from 2002-2004?	Yes - leave granted
xviii. That the Income Fund knew or acquiesced to the anti-competitive conduct from 2004-2008?	Yes - leave granted

Motion for Cerification	**Finding**
Section 5(1)(a): Do the pleadings disclose a cause of action?	Yes
Section 5(1)(b): Is there an identifiable class of two or more persons that would be represented by the representative plaintiffs?	Yes

Section 5(1)(c): Do the claims raise common issues?

The defendants concede all but the following proposed common issues:

a. Common issues #6, #7 and #8?	Yes
b. Common issue #9?	Yes
c. Common issue #14 common?	Yes

Section 5(1)(d): Is a class proceeding the preferable procedure for resolution of the common issues?	Yes
Section 5(1)(e): Is there arepresentative plaintiff who ...	
a. Will fairly and adequately represent the interests of the class?	Yes
b. Has produced a workable litigation and notification plan?	Yes
c. Does not have conflicts of interest with other class members on the common issues	Yes

cp/e/qlrpv/qljzg/qlpxm/qlprp/qljxh/qlana