. . . . .

> In *Giffen, Re*, Justice Iacobucci put the case for *PPSA*, s. 20(b)(i) in fairness terms: when the debtor becomes bankrupt the execution creditor loses the priority it previously had over unperfected security interests but this is offset by giving priority to the trustee instead. However, the justification can by expressed in economic terms. The thinking goes like this: Bankruptcy creates a common pool problem, which bankruptcy law addresses by substituting a mandatory system of collective debt collection for the individual first-come, first-served debt collection system that operates outside bankruptcy. *Creditors' relative entitlements should be the same inside bankruptcy as they are outside bankruptcy because otherwise there will be incentives for individual creditors to use the bankruptcy laws opportunistically.*
>
> [Citations omitted; emphasis added.]

69 The rationale given by Duggan and Ziegel in relation to bankruptcy applies equally whenever "a person who represents the creditors of the debtor" is appointed. When the s. 47 *BIA* receiver was appointed in this case, it was because the Bank was about to enforce its security. At that time, the Bank had a properly perfected security interest. An execution creditor would not have had any priority vis-à-vis the Bank. Because the Appointment Order stayed any actions, the execution creditor would have lost any priority it had over unperfected security interests as of the commencement of the receivership, subject to the stay being lifted by the court. Whether the *BIA* stay is imposed automatically under s. 69.3 or by court order under s. 47, the effects of the stay and the considerations it engages are similar. To prevent insolvency as well as bankruptcy laws from being used opportunistically, creditors' relative entitlements should be the same as they were immediately prior to the time "a person who represents the creditors of the debtor" was appointed.

70 Duggan and Ziegel then address the second question raised in *Giffen, Re*, namely, whether s. 20(1)(b) of the *PPSA* is in conflict with the *BIA* because of the principle of bankruptcy law that a trustee has no greater claim to property than the debtor herself had. Iacobucci J. held that the principle is not an inflexible one and that the provinces are competent to modify it as long as the modifications are not in conflict with the provisions of the *BIA*.

71 In *Giffen, Re*, Iacobucci J. did not directly address the issue of whether a conflict exists between then s. 20(b)(i) of the B.C. *PPSA* and bankruptcy policy that a trustee has no greater claim to property than the debtor had. However, he provided a clue to his thinking at para. 52 of his reasons where he approved a statement from *Donaghy v. CSN Vehicle Leasing*, [1992] 6 W.W.R. 70 (Alta. Q.B.), to the effect that the issue is not ownership of the property but priority to it. Duggan and Ziegel state:

> From a bankruptcy perspective, what matters is not the rights a creditor may have had against the debtor herself to the disputed asset but, rather, the creditor's rights against other creditors at the moment of bankruptcy: "it is a question of priority, not property." In other words, the flaw in TLC's argument was that it focused on the wrong attribute of the property right its security interest gave it. The question is not whether TLC could have enforced its security interest against Giffen just before she went bankrupt but, rather, whether TLC would have had a priority over an execution creditor at the same point. Section 20(1)(a) of the *PPSA* determines the answer to the second question, and *bankruptcy policy dictates that bankruptcy law should preserve the parties' relative entitlements.* If this is the real meaning of the principle at stake, there is no conflict between *PPSA* s. 20(1)(b), and the bankruptcy laws. On the contrary, the provision reinforces bankruptcy policy. [Emphasis added.]

72 I take Duggan and Ziegel's reference to bankruptcy policy and bankruptcy law to be a reference to insolvency policy and law as well. Inasmuch as the purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the parties at the time "a person who represents the debtors of the creditor" is appointed, the Bank's priority status falls to be determined at the time PWC was appointed as receiver under s. 47 of the *BIA*.

73 The purpose of s. 20 of the *PPSA* is to permit a person who takes over control of the assets or business of the debtor to distribute those assets in an orderly fashion in accordance with the existing priorities. It is for this reason that s. 20(2) determines the rights of the representative as of the date from which her status takes effect. Determining priorities at the commencement of the distribution process when the receiver assumes control over the debtor's assets is in keeping with the goals of the legislation.[FN21]

Conclusion on whether PWC is "a person who represents the creditors of the debtor" and the date on which the determination of priorities should be made

74 Giving effect to the unique wording of Ontario's *PPSA*; the history of the section; the opinion of scholars; existing jurisprudence holding that the role of a s. 47 *BIA* receiver is similar to that of a trustee in bankruptcy; and having regard to the section as a whole, to related provisions of the *PPSA*, as well as to the purpose of the section, I conclude that PWC's appointment as a s. 47 *BIA* receiver made it "a person who represents the creditors of the debtor" within s. 20(1)(b). Pursuant to s. 20(2)(b), the time for determination of priorities is thus "the date from which the person's representative status takes effect." PWC's representative status took effect on the date of its appointment under the Appointment Order, namely November 14, 2001. On that date, the Bank had a properly perfected first security interest.

PWC's alternative argument: did the relevant date for determining priorities change when the trustee in bankruptcy was appointed?

75 I must also address PWC's submission that its status as interim receiver under s. 47 of the *BIA* effectively ended when it became trustee in bankruptcy on January 31, 2002 and that the relevant date for the purpose of determining the relative effectiveness of the Bank's security as against PWC is no longer the date on which PWC became the interim receiver, but is now the date on which it became the trustee in bankruptcy. PWC submits that because of the intervening bankruptcy, it is no longer in possession of any of the assets of State in its capacity as receiver and thus it has no interest in the assets that are subject to the Bank's security. Thus, it argues that the Bank's secured interest is no longer effective against it in its capacity as trustee in bankruptcy because that interest became unperfected prior to the assignment into bankruptcy by operation of s. 48(3) of the *PPSA*.[FN22]

76 There are five considerations that lead me to reject PWC's submission that the date for assessing the effectiveness of the Bank's security interest was the date of the assignment into bankruptcy:

(a) the s. 47 *BIA* receivership did not end when the trustee in bankruptcy was appointed;

(b) the date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift;

(c) the date when the respective security interests of the parties come into conflict is the date of the Appointment Order;

(d) the policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security; and

(e) giving effect to PWC's position would undermine the purpose of s. 20 of the *PPSA* and lead to commercial uncertainty.

77 I now discuss each of these factors in turn.

(a) The s. 47 BIA receivership did not end when the trustee in bankruptcy was appointed

78 PWC submits that the s. 47 *BIA* receivership and the bankruptcy of State are two separate judicial proceedings and that when PWC was appointed trustee in bankruptcy on January 31, 2002, the s. 47 *BIA* receivership ended. According to PWC, the Bank's priority status must therefore be reassessed as of January 31, 2002 when it became trustee in bankruptcy.

79 PWC cites no authority for its proposition and, in my view, its position that the receivership ended upon the bankruptcy is not supported by the jurisprudence or by the terms of the Appointment Order. The effect of bankruptcy on the authority of a court-appointed receiver depends on the circumstances. See *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.* (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.). The court's brief endorsement (per Blair, Robins and Krever JJ.A.) states:

> The appellants submitted that on the occurrence of the bankruptcy the court-appointed receiver was deprived of jurisdiction to deal with the property of the bankrupt. We do not accept this argument and agree with Hughes J. who held that the activities of a receiver-manager appointed by order of the court and a trustee in bankruptcy not so appointed can co-exist in the absence of conflict of interest and of jurisdiction.

80 PWC's submission also ignores the wording of the Appointment Order, which is silent as to when PWC's receivership ends. There is no evidence before us that PWC has passed its final accounts as interim receiver thereby bringing its receivership to an end. More importantly, the Appointment Order specifically contemplates that PWC's receivership will continue after assigning State into bankruptcy. The order appointing PWC as interim receiver gave it broad powers, including the power to make an assignment in bankruptcy and to act as trustee.[FN23] Under s. 3 of the Order, PWC had the right to "take possession and control of the Property ... and all receipts ... arising out of or from the Property" of the Debtor. It was also given the power in s. 3(f) "to receive and collect *all monies* and accounts *now owed or hereafter owing* to the Debtor in respect of the Property". [Emphasis added.] The property of the debtor would include receivables such as an income tax refund.

81 Further, s. 3(p) of the Appointment Order gives PWC as interim receiver the power to enter into arrangements with any trustee in bankruptcy, including an occupation agreement, and the power to lend money to the trustee, not exceeding $250,000 unless increased by the court. For the interim receiver to be in a position to lend money to the trustee in bankruptcy as contemplated by the Appointment Order, the s. 47 receiver must necessarily continue to exercise possession and control over the assets. I note that almost a year after the trustee was appointed, on December 19, 2002, the s. 47 BIA receiver transferred the amount of $1,180,243.72 (proceeds from the third asset sale) from its account to the account of the trustee in bankruptcy. The s. 47 BIA receiver then distributed $950,000 to the Bank.

82 Thus, in this case, the role of the s. 47 *BIA* receiver and that of the trustee in bankruptcy were intended to be complimentary.[FN24] The process envisaged was that the interim receiver would realize all of State's assets and take possession of them, and would continue to act in conjunction with the trustee in bankruptcy. Accordingly, the receivership and the bankruptcy were not two separate and distinct procedures.

(b) The date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift

83 PWC submits that the appointment of a s. 47 *BIA* receiver did not "crystallize" the rights of the parties who had a claim against the assets of State.

84 Contrary to PWC's submission, when a secured party acts to realize on its security, that is generally the date

on which to apply priority rules. Richard McLaren in *The 2008 Annotated Ontario Personal Property Security Act*, *supra*, at p. 246, states in reference to s. 30:

> A general issue which may arise through the course of the application of the priority rules is the date upon which the priority dispute will be determined. Generally, this will be the date where a secured party acts to realize upon its security.

This passage was also in an earlier version of McLaren's text and was quoted with approval in *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* (2004), 7 P.P.S.A.C. (3d) 194 (Ont. S.C.J.).

85 PWC relies on the Model Order referred to above (see para. 25), which expressly permits the filing of registrations under provincial personal property regimes, in support of its position that the appointment of a s. 47 *BIA* receiver is not the date that triggers the application of priority rules. However, at the time the events in the case at bar occurred, the practice in Ontario was to interpret the stay of proceedings in receivership orders to include a stay of any action on the part of a secured creditor to reperfect its security through registration of a financing statement.[FN25] A secured creditor whose interest had become unperfected could not reregister its interest without leave of the court. Thus, at the relevant time, the practice was to consider the appointment of a s. 47 *BIA* receiver as a triggering event. The effect of PWC's submission is to suggest that the 2004 procedural change to the standard form template receivership order has retrospective substantive implications.

86 The change in practice does not affect the fact that the appointment of a s. 47 *BIA* receiver continues to result in a court-ordered stay of all actions and that this appointment still affects the enforcement rights of unsecured creditors. In that sense, the date of the appointment of the s. 47 *BIA* receiver is a triggering event and the date of the receiver's appointment can still be used to determine priorities.

(c) The date when the respective security interests of the parties came into conflict was the date of the Appointment Order

87 In *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (Ont. C.A.), aff'g (1982), 40 O.R. (2d) 54 (Ont. H.C.), Morden J.A. dealt with a priority conflict between a bank, whose security interest had become unperfected through a lapse in registration, and an inventory supplier, whose security interest was also unperfected. After resolving the priority issue on the basis of which creditor's interest had attached first, Morden J.A. expressed his view on a different basis for coming to the same conclusion. He stated at para. 35:

> ...I think that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interests came into conflict. This would appear to be March 14, 1980, when the bank sought to enforce its interest against collateral in which Sperry claimed a superior interest. The issue arose at that time — what right did the bank have against Sperry to enforce its security?

The step the bank took on March 14, 1980 to enforce its interest in the collateral was the appointment of a private receiver pursuant to its general security agreement.

88 In this case, the Bank acted to realize upon its security by giving a s. 244 notice and by asking the court to appoint a s. 47 *BIA* receiver pursuant to its general security agreement. The effect of the Bank's act was to have all actions against the debtor stayed by court order. The question of the Bank's right to enforce its security over all of the assets of the debtor arose at that time. The asset sales in November and December merely converted those assets into proceeds which could be distributed according to the priorities over them when the receiver was appointed. I am not aware of any authority that suggests that the date for determining priorities should be the date when funds owing to a debtor are actually received.

(d) The policy of the BIA is not to interfere with the rights of secured creditors in realizing upon their security

89 The policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security. Frank Bennett, in *Bennett on Creditors' and Debtors' Rights and Remedies*, 4th ed. (Toronto: Carswell, 1994) states at p. 703: "The trustee in bankruptcy acquires title to the assets of the bankrupt subject to the rights of secured creditors." Similarly, at p. 416 of *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2006), Lloyd W. Houlden and Geoffrey B. Morawetz state:

> The policy of the *BIA* in the case of bankruptcy is not to interfere with secured creditors except in so far as it may be necessary to protect the estate as to any surplus on the assets covered by the security.
>
> . . . . .
>
> No leave is necessary for a secured creditor to proceed to realize upon its security...

90 The statutory stay of proceedings contained in s. 70(1) of the *BIA* specifically excepts "the rights of a secured creditor", as does s. 71, which vests the property of the bankrupt in the trustee. If the debtor gives notice of his intention to make a proposal, the stay imposed by s. 69(1) does not apply where the secured creditor has given notice of its intention to enforce its security under s. 244(1) more than ten days before the proposal.

91 In light of my earlier comments about the Supreme Court's decision in *Giffen, Re*, it is also important to observe that *Giffen, Re* does not justify using the date of the bankruptcy, rather than the date of the receivership, as the necessary reference date for determining priorities for the significant reason that the wording of the Ontario legislation is different from that considered by the Supreme Court in *Giffen, Re*. The B.C. provision the Supreme Court was asked to interpret read: "A security interest ... in collateral is not effective against ... a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy." The B.C. legislation, unlike Ontario's *PPSA*, does not refer to "a person who represents the creditors of the debtor." Section 20(2)(b) of the Ontario *PPSA* further specifies that the rights of the creditor's representative are to be "determined as of the date from which the person's representative status takes effect" while the B.C. legislation forces an inquiry as to whether the security interest was perfected at the date of the bankruptcy. This different legislative language means that the decision in *Giffen, Re* cannot be applied to set the date of the bankruptcy, rather than the date of the receivership, as the starting point.[FN26]

92 The importance of the wording of the applicable provincial legislation in determining parties' rights in a bankruptcy is highlighted by the decision of *Lefebvre, Re*, [2004] 3 S.C.R. 326 (S.C.C.). In *Lefebvre* [*Lefebvre, Re*, 2001 CarswellQue 2642 (Que. S.C.)], the bankruptcy judge and the majority of the Quebec Court of Appeal [2003 CarswellQue 446 (Que. C.A.)] had applied *Giffen, Re* to two priority disputes, the facts of which were indistinguishable from those considered in *Giffen, Re*. Writing for the court, Lebel J. allowed the appeal and held at para. 40 that the Quebec courts had given *Giffen, Re*:

> ...a significance it did not in fact have, as the court failed to take into account the statutory context established by the provincial legislation of British Columbia, which defined the respective rights of a long-term lessor of a motor vehicle and the trustee in bankruptcy of the lessee. ... [T]he provincial legislation itself defined the nature of the respective rights of lessors and trustees. ... As has already been mentioned, the *Civil Code of Quebec* does not provide for a similar consequence for failure to publish the rights out of a lease. In this context, *Giffen* did not justify the solution adopted by the Court of Appeal.

93 *Lefebvre* thus makes it clear that *Giffen, Re* cannot be applied generally without regard to the statutory context.

94 To interpret s. 20(2)(b) in a manner that shifts the reference point for the determination of priorities from the

date the Bank acted to realize on its security by appointing a s. 47 *BIA* receiver to the date the trustee in bankruptcy was appointed interferes with the enforcement process and is not consonant with bankruptcy policy.

(e) Giving effect to PWC's position would undermine the purpose of s. 20 of the PPSA and lead to commercial uncertainty

95 Finally, to read the reference point for determining priorities between the representative of the creditors and the secured creditor as changing in the way that PWC suggests undermines the purpose of s. 20 which, as I have indicated, is to preserve the priorities as they stood at the time "a person who represents the creditors of the debtor" was appointed. From a practical point of view, changing the date for determining priorities would lead to commercial uncertainty. As noted by Winkler J. in *Sun Life Assurance Co. of Canada v. Royal Bank* (1995), 10 P.P.S.A.C. (2d) 246 (Ont. Gen. Div. [Commercial List])), the purpose of the *PPSA* registration regime is to impart order and certainty to commerce. To reverse priorities in the middle of the distribution process when there has been no change in the receiver's control over the assets is completely contrary to the goals of the legislation.

Conclusion

96 Although the Bank was not exempt from the obligation to file a financing change statement or a fresh financing statement upon learning of State's name change, its failure to do so in this case did not result in a loss of priority. In my opinion, the date for determining the effectiveness of the Bank's security interest is November 14, 2001, when the court appointed PWC as interim receiver. This date for determining priorities did not change with the appointment of PWC as trustee in bankruptcy.

Disposition

97 For the reasons I have given, I would allow the appeal, set aside the order of the motion judge, and in its place provide the following direction to PWC:

> That the security granted by State to the Bank as Agent is fully effective as against PWC with respect to the Estate Funds (as defined in PWC's notice of motion and attached report) and that PWC act in the administration of the Estate accordingly.

98 With respect to costs, I note that no award of costs was made to the Bank or to St Paul at first instance as this was a novel issue and the costs of PWC were ordered to be paid out of the estate. I would make the same order here.

***K. Feldman J.A.*:**

1 When the appellant bank sought the appointment of an interim receiver of the debtor company, it held a perfected security interest over the assets of that company. However, during the receivership the appellant allowed its registration under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "*PPSA*") to lapse. The appellant did not re-perfect its security interest before the interim receiver assigned the debtor into bankruptcy, following which, a significant tax refund came into the debtor's estate.

2 The appellant asserts priority under ss. 20(1)(b) and 20(2)(b) of the *PPSA* over the tax refund and some other undistributed funds, on the basis that the date when the receiver was appointed is the date for determining priority, and on that date, the appellant's security interest was perfected. In contrast, the trustee in bankruptcy says that the relevant date for determining priority is the date of the assignment into bankruptcy. Because on that date the appellant's security interest was unperfected as against the trustee, the appellant ranks as an unsecured creditor, *pari passu* with other unsecured creditors.

3 The motion judge dismissed the appellant's claim. For the reasons that follow, I agree with the motion judge and would dismiss the appeal.

Background

4 The appellant held a first registered general security interest over the personal property of State, the debtor, and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A court order appointing the respondent, Pricewaterhouse-Coopers Inc. ("PWC"), as interim receiver was issued on November 14, 2001. Following its appointment, the interim receiver sold the substantial assets of State in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale on November 14, 2001, the receiver sold State's name triggering s. 48(3) of the *PPSA*, which provides:

> Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

5 On January 31, 2002, in accordance with the terms of the order appointing it as interim receiver, PWC assigned the debtor into bankruptcy and PWC was appointed the trustee in bankruptcy of the debtor's estate. Following the assignment, the trustee in bankruptcy received an income tax refund of $4.325 million from the Canada Revenue Agency.

6 Before the date of the debtor's assignment into bankruptcy (and before the third sale of assets) both the appellant bank and St. Paul Guarantee Insurance Company ("St. Paul"), a subsequent secured creditor, had knowledge of the sale of the debtor's name and failed to register a financing change statement. Therefore, both of their secured debts had become unperfected in accordance with s. 48(3).[FN27]

7 Following the debtor's assignment into bankruptcy, the appellant bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim, which included a secured claim in the amount of $20 million, with PWC as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the appellant bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee.

8 The motion judge reached the following conclusions:

> 1. An interim receiver appointed under s. 47(1) of the *BIA* is not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*.
>
> 2. The order appointing the interim receiver, which contemplated that interested parties could move for a lift of the stay it imposed, did therefore not have the effect of precluding the appellant from maintaining the perfected status of its security interest following the appointment of the interim receiver.
>
> 3. A court has no jurisdiction to override provisions of the *PPSA*, including s. 48(3), and the appellant's security interest became unperfected in accordance with that section.
>
> 4. As an alternative to its argument that the interim receiver is a person who represents the creditors of the

debtor, the appellant argued before the motion judge that it held a perfected security interest in the income tax refund and other amounts on the basis that the interim receiver took possession of those funds "on behalf of" the appellant upon its appointment at the behest of the appellant. The motion judge rejected that argument and held that s. 26(2) of the *PPSA* has no application to the facts of this case, as the interim receiver did not take possession of the income tax refund on behalf of the appellant bank.[FN28]

5. PWC only became a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* upon its appointment as trustee in bankruptcy. Because at that time the security interest of the appellant was unperfected, it was and remains ineffective against the trustee from that date.

Issues

9 My colleague has identified two issues for determination on this appeal:

1. Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the *PPSA*?

2. Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

The resolution of the second issue requires a determination of whether an interim receiver appointed under s. 47(1) of the *BIA*, although not referred to by name in ss. 20(1)(b) and 20(2)(b), is "a person who represents the creditors of the debtor" within the meaning of these provisions. It also requires a determination of the purpose and effect of ss. 20(1)(b) and 20(2)(b).

10 During the applicable period, ss. 20(1) and 20(2) of the *PPSA* read as follows:

20(1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the *Creditors' Relief Act* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has assumed control, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy

(c) in chattel paper, documents of title, securities, instruments or goods is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transfer

that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

20(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1) (a) (i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or

(ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

(b) *under clause (1) (b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect*

(b) .

[Emphasis added.]

11 In his submissions, counsel for the appellant characterized the effect of ss. 20(1)(b) and 20(2)(b) to be that when a representative of creditors is appointed, "the music stops" under the *PPSA*, meaning that the priority rights of all parties are frozen for the purpose of distribution of the estate of the debtor.

12 The appellant's position is that an interim receiver, appointed by the court under s. 47(1) of the *BIA*, is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The appellant submits that upon the appointment of the interim receiver, the priority interests of all creditors of the debtor are frozen and the interim receiver is to distribute the assets or proceeds of the assets of the debtor, no matter when they are realized or distributed, in accordance with the respective priority positions of the creditors as of the date of the receiver's appointment.

13 To the extent that the security interest of a secured creditor may become unperfected under s. 48(3) of the *PPSA* following the appointment of a representative of creditors, submits the appellant, this post-appointment event has no bearing on the secured creditor's priority for the purpose of the distribution of assets of the debtor's estate. Or, put another way, the effect of the order appointing the interim receiver was to exempt the appellant from the requirement of complying with s. 48(3). Consequently, the fact that the appellant failed to file a financing change statement before the date of the debtor's assignment into bankruptcy and the appointment of the trustee in bankruptcy did not affect the appellant's entitlement to continue to be paid from the assets of the estate in accordance with its priority position as it stood on the date of the appointment of the interim receiver, at which time its security interest was perfected.

14 I summarize my reasons for rejecting the appellant's position as follows. First, although an interim receiver may represent the creditors of the debtor for some purposes, it is not "a person who represents the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" should not be read in to these subsections. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not in a priority contest with any creditor on behalf of unsecured creditors. The purpose of these subsections is to allow the representative of creditors to defeat unperfected security interests on behalf of unsecured creditors whose rights to collect outstanding debts from the debtor are statutorily stayed, such as on bankruptcy or assignment for the benefit of creditors. Unlike on a bankruptcy or assignment for the benefit of creditors, creditors' priority rights are not statutorily stayed on a receivership. Although such rights may be stayed by the order appoint-

ing the receiver, a creditor may apply to lift the stay in order to commence or continue proceedings to collect its debt.

15 Second, the effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time, or, in the words of appellant's counsel, to "stop the music". Neither these subsections nor the order appointing the interim receiver had the effect of exempting the appellant from the requirement of complying with s. 48(3). Consequently the appellant's security interest became unperfected by its failure to file a financing change statement within the time period specified by s. 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the appellant's security interest is not effective against the trustee in bankruptcy.

Analysis

Issue 1: Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the PPSA?

16 The motion judge found that the order appointing the receiver did not exempt the appellant from complying with s. 48(3), nor did the stay provisions of the order prevent the appellant from seeking to lift the stay in order to file a financing change statement. My colleague concludes that the motion judge was correct on this issue and I agree. In my view, the consequence of this conclusion is that the appellant's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b).

Issue 2: Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

(i) Subsection 20(1) of the PPSA

17 Subsection 20(1) prescribes the effect of perfection of a security interest in collateral in relation to other claims against the same collateral and defines the rules for determining priority between the holder of an unperfected security interest and others with a claim to, or an interest in, the collateral. Under s. 20(1)(a), an unperfected security interest "is subordinate to" perfected security interests in the same collateral as well to the interests of lienholders and of unsecured creditors who have seized the collateral through legal processes.

18 In contrast, under ss. 20(1)(b), (c) and (d), an unperfected security interest "is not effective" against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy, and against certain transferees of the debtor's property. The different language is used because s. 20(1)(a) orders the priority among secured creditors and other creditors with a realized interest in the collateral, while under ss. 20(1)(b), (c) and (d), an unperfected security interest is treated as an unsecured interest as against the named persons.

19 In order to interpret the meaning and scope of the term "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, one must examine the language of ss. 20(1)(b) and 20(2)(b), since both clauses work together, as well as the purpose of the provisions, which I will discuss later in these reasons.

20 Clause 20(1)(b) states that a security interest in collateral, until perfected, "is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy." Before this provision was amended in 1989, it provided that an unperfected security interest in collateral was ineffective against three named representatives: a trustee in bankruptcy, an assignee for the benefit of creditors and a receiver. See *Personal Property Security Act*, R.S.O. 1980, c. 375, s. 22(1)(a)(iii). While in amending the pro-

vision the legislature specifically removed the reference to a "receiver", it also added the term "including", which now precedes "assignee for the benefit of creditors" and "trustee in bankruptcy". The appellant argues that because the legislature used the word "including", the removal of the reference to a "receiver" does not indicate an intention by the legislature to exclude receivers from the ambit of the provision.[FN29]

21 I disagree. The legislature's removal of a receiver from s. 20(1)(b) means the appellant cannot succeed without showing that an interim receiver is a "person who represents the creditors of the debtor" in the sense that fits the language and purpose of both ss. 20(1)(b) and 20(2)(b). There is no question that, in carrying out its functions and duties, an interim receiver can act in a representative capacity on behalf of some or all of the creditors.[FN30] The issue in this case is whether an interim receiver is the type of representative of creditors that is referred to in these two clauses.

(ii) A receiver does not obtain the debtor's proprietary interest in the collateral

22 The first relevant difference between a receiver and a trustee in bankruptcy or an assignee for the benefit of creditors is that a receiver does not obtain the debtor's proprietary interest in the collateral. In their text *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005), Professors Cuming, Walsh and Wood, at pp. 441-42, begin their discussion of the interface between s. 20 of the *PPSA* and the *BIA* by explaining that the vesting of the debtor's personal property in the trustee in bankruptcy under s. 71(2) of the *BIA* gives the trustee the independent status to defeat unperfected security interests in that property under s. 20:

> The *PPSA* provides that a security interest is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy. The effect of this is to give to the debtor's trustee in bankruptcy an independent status to defeat unperfected security interests in personal property that vests in the trustee as provided by *BIA* [sub]section 71(2). [Citations omitted.]

23 The two creditors' representatives named in s. 20(1)(b) share an important characteristic: by virtue of statute (s. 71 of the *BIA* and ss. 7 and 8 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33), upon their respective appointments, the proprietary rights of the debtor in the collateral vest in these representatives.

24 Section 71 of the *BIA* provides:

> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

25 Sections 7 and 8 of the *Assignments and Preferences Act* provide:

> 7. Every assignment made under this Act for the general benefit of creditors, if the property is described in the words "all my personal property that may be seized and sold under execution and all my real estate, credits and effects", or in words to the like effect, vests in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging to the assignor at the time of the assignment, except such as are by law exempt from seizure or sale under execution, subject, however, as regards land, to the *Registry Act* and the *Land Titles Act*.
>
> 8. Every assignment for the general benefit of creditors, whether it is or is not expressed to be made under or in pursuance of this Act and whether the assignment does or does not include all the real and personal estate of the assignor, vests the estate, whether real or personal or partly real and partly personal, thereby assigned in the as-

> signee therein named for the general benefit of creditors, and the assignment and the property thereby assigned is subject to all the provisions of this Act, and the same applies to the assignee named in the assignment.

26 As a result, these representatives hold the debtor's proprietary interest in the collateral. This is to be contrasted with the role and legal status of a receiver, whether privately or court-appointed. I will discuss court-appointed receivers because in this case, PWC is a court-appointed receiver and a court-appointed receiver has statutory authority.

27 One important difference between a court-appointed receiver and a trustee in bankruptcy (or assignee for the benefit of creditors) is that a receiver obtains its powers from an order of the court. These powers allow the receiver to administer the business and assets of the debtor, and to effect a sale of the debtor's assets pursuant to a vesting order of the court. However, the debtor's property rights in the assets, whether the debtor has full or partial title or merely a right of possession, do not devolve onto the receiver as they do onto a trustee in bankruptcy by statute under s. 71 of the *BIA*. As the motion judge stated at para. 29:

> The appointment of an Interim Receiver does not vest the assets of the debtor in the Interim Receiver, as in the case of a Trustee in Bankruptcy, nor do the liabilities of the debtor become liabilities of the Interim Receiver whereas, in the case of a bankruptcy, the liabilities become liabilities of the bankrupt estate to be administered and, subject to the rights of secured creditors, paid or compromised by the Trustee out of the assets of the bankrupt estate.

28 The receiver is solely an administrator accountable to the court and to all stakeholders in the receivership, appointed to ensure that the debtor's assets are realized in an orderly manner and for the maximum realizable value, and then to distribute the proceeds to creditors and other claimants in accordance with their respective priorities. It is in that way that a receiver may represent creditors. As the motion judge pointed out, a debtor could retain possession and remain in business during a receivership, and, subject to the terms of the order appointing the interim receiver, could borrow additional funds and create additional security that would continue after the termination of the receivership. In some circumstances the debtor could retain the business following the discharge of the receiver. The debtor is not stripped of all of its interest in the collateral upon the appointment of an interim receiver.

29 The fact that ss. 20(1)(b) and 20(2)(b) deal with proprietary rights is reflected in the language and effect of s. 20(2)(b) which states:

> 20(2) The rights of a person,
>
> . . . . .
>
> (b) under clause (1)(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

The effect of s. 20(2) is to define the time from which the rights of statutory lienholders under s. 20(1)(a)(i) and of representatives of creditors under s. 20(1)(b) are to be determined. The effective timing of the other rights under ss. 20(1) (a), (c) and (d) is built into the description of those rights. (See para. 10 above for the relevant provisions.)

30 However, the wording of s. 20(2)(b) also tells us that s. 20(1)(b) has conferred "rights ... in respect of the collateral" on the representative of creditors and that those rights are to be determined "as of" the effective date of the representative's appointment. Although the term "rights", standing alone, is used in s. 60 of the *PPSA* to mean the right to take administrative steps, "rights ... in respect of the collateral" are rights that indicate a proprietary or priority interest in the collateral that entitles the holder of such rights to be paid out of the proceeds of that collateral in accordance with its priority.

(iii) A receiver does not assert the claim of the unsecured creditors against competing security interests

31 A trustee in bankruptcy, unlike a receiver, represents the creditors in another way beyond administering the estate: the trustee holds the debtor's proprietary interest in the assets on behalf of the unsecured creditors. As Iacobucci J. stated in *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) at para. 41 (referring to the Saskatchewan Court of Appeal decision in *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, [1989] 3 W.W.R. 481 (Sask. C.A.), at 490):

> [T]he trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts "the claim of the unsecured creditors to the goods and possessions of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests."

32 Consequently, a trustee occupies a priority position for the purpose of distribution of the proceeds of the debtor's estate. In that sense, a trustee in bankruptcy is in competition with other creditors for its priority position among creditors, and its rights in the collateral are in competition with the rights of other creditors in the collateral. In contrast, a receiver is not in competition with creditors and has no priority position itself because any rights it has in the collateral are administrative but not proprietary. It is merely an administrator who pays out the proceeds to the creditors, both secured and unsecured, if there are sufficient funds, in the order of their priority.

33 In *Giffen, Re*, Iacobucci J. discussed the purpose and effect of s. 20 of the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359-which is the counterpart of s. 20 of the *PPSA* but with slightly different wording. He explained that the reason why the *PPSA* provides that a trustee in bankruptcy defeats an unperfected security interest is because, before bankruptcy, an unsecured creditor can take steps to obtain and enforce a judgment against the debtor through execution proceedings that will rank ahead of an unperfected security interest under s. 20(1)(a)(i). However, once bankruptcy occurs, "all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims." *Giffen, Re*, *supra* at para. 39. As Anthony Duggan and Jacob Ziegel explain when discussing *Giffen, Re* in their article, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 U.T.L.J. 227 at 231: "If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70."

34 In *Giffen, Re*, *supra* at para. 39, Iacobucci J. adopted the following statement by Professor Cuming in his article entitled "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 Can. Bus. L.J. 17 at 27-28:

> In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no longer bring their claims to a "perfected" status under provincial law. As the repository of enforcement rights, the trustee has status under s. 20(b)(i) of the B.C. *PPSA* to attack the unperfected security interest.

And at para. 41, Iacobucci J. agreed with the conclusion of the Saskatchewan Court of Appeal at p.490 of *Paccar* that: "It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest."

35 In their discussion of *Giffen, Re*, Professors Duggan and Ziegel, *supra* at 231-34, explain how bankruptcy law works with the *PPSA* to preserve creditors' relative priority entitlements post-bankruptcy. The authors comment that Iacobucci J.'s decision in *Giffen, Re* confirms "the complementary relationship between the federal bankruptcy statute and the provincial PPSAs": *supra* at 249.

36 It follows from *Giffen, Re* that a receiver is not intended to be included as a "person who represents the creditors of the debtor" for the purpose and therefore within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*. The reasons for this conclusion are: (a) unlike in a bankruptcy, a receiver, including a court-appointed interim receiver,

does not stand in for unsecured creditors in a priority contest with any other creditor; (b) a receiver is not the "repository of enforcement rights" of unsecured creditors with any status to "attack the unperfected security interest" (*Giffen, Re*, *supra*, at para. 39); and (c) in a receivership, unlike in a bankruptcy, there is no statutory stay causing execution creditors to lose their priority and ability to realize on their debt.

(iv) Personal Property Security Acts of other provinces

37 The conclusion that a receiver is not a person who represents the creditors of the debtor under s. 20 is also consistent with the correlative sections of the Personal Property Security Acts of the other common law provinces.[FN31] The comparable provisions in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland do not include a receiver.[FN32] Only the relevant sections of the Manitoba and Ontario Acts formerly referred to a receiver, but both have since been amended to remove this reference.

38 The Manitoba statute contained a provision with language identical to the previous version of the Ontario section, R.S.O. 1980, c. 375, which read:

> 22(1) [A]n unperfected security interest is subordinate to
>
> (a) the interest of a person
>
> . . . . .
>
> (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...
>
> 22(2) The rights of a person under sub-clause 1(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest.

Manitoba's replacement provision does not use the term "includes", but instead lists only two representatives of creditors, neither of which is a receiver.[FN33]

39 The Manitoba courts considered the effect of the former wording of s. 22 in the context of a court-appointed receivership in the case of *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (Man. C.A.). The court had appointed a receiver of the debtor trucking company at the request of a secured creditor, Roynat. Another secured creditor, Paccar, had a prior purchase-money security interest in some of the trucks, but had inadvertently failed to renew its *PPSA* registration and was unperfected on the date of the appointment of the receiver. Paccar sought an extension of time to re-perfect its security under s. 65 of the Manitoba *PPSA*, which provided that when an extension is granted "the rights of other persons accrued up to the time of the registration of the order made under this section are not affected by the order." The receiver opposed Paccar's motion. It took the position that on its appointment as a receiver, by operation of ss. 22(1)(a)(iii) and 22(2), it had accrued the rights referred to in s. 65.

40 In the Court of Queen's Bench, Scollin J. rejected the position of the receiver. He explained that even though a receiver was referred to in s. 22, the rights and interests of a receiver are not the same as those of a trustee in bankruptcy. He concluded at 768 that:

> [T]he provisions of s. 22 can be sensibly reconciled with the provisions of s. 65 by recognizing that the only

> rights of the creditor which should be subordinated to the interest and rights of the receiver are those which necessarily conflict with the due exercise of the rights of the receiver as representative of the creditors in executing the mandate of the court. The status of a receiver does not bring with it a cornucopia of rights.... Beyond his mandate, the receiver has no status. Unless his rights or interests are affected, no issue of subordination even arises. In this case he has demonstrated no diminution of his rights or interest and no prejudice to any creditor. To recognize the substantive security interest of Paccar causes no injustice or prejudice to the receiver or to other creditors and permits full recognition of and harmony between ss. 22 and 65 of the Act. Absent prejudice, the receiver's rights or interest do not extend to defeating an application which, but for his appointment, would be effective to relieve against an inadvertent lapse.

41 The Court of Appeal dismissed the appeal. Twaddle J.A. acknowledged that Scollin J. may have been correct in his view, distinguishing a trustee in bankruptcy from a receiver, that while a trustee in bankruptcy does acquire a priority property right on appointment, a receiver does not. However, he said he was not required to decide the issue because he could dismiss the appeal based on his interpretation that s. 22 did not defeat the remedial effect of s. 65. He stated at p. 615:

> An order made under s. 65 re-perfects the security interest as though it had never lapsed, subject only to the rights of those who have dealt with the debtor in the meantime and who would be prejudiced by permitting the order under s. 65 to have retroactive effect.

42 In my view, Scollin J.'s analysis of the rights of a receiver was correct and consistent with the conclusion reached on the appeal. Furthermore, his understanding was given full effect when s. 22 was repealed and replaced in Manitoba in 1993 with the new provision that excludes a receiver from its ambit. As mentioned above, the equivalent statutory provisions of the other common law provinces do not make reference to a receiver.

(v) The effect of a court-ordered stay

43 Other case law has also considered the issue of re-perfecting a security interest following the appointment of a receiver or of a monitor under s. 11.7 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. This case law arises because when a receiver (or monitor) is appointed, unlike in a bankruptcy, the debtor does not lose all rights and interest in the collateral and the rights of creditors are not statutorily frozen. Although an order appointing a receiver will normally stay all proceedings against the interests of the debtor, the court can always lift the stay to allow a creditor to take certain steps to enforce its rights or perfect its security against the debtor, subject to considering competing rights acquired by other creditors in the interim.

44 Subsection 30(6) of the Ontario *PPSA* provides:

> Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Using s. 30(6), a secured creditor with a security interest that is originally perfected by registration but becomes unperfected, can re-perfect by registration and regain its priority standing as against all other creditors except as against someone who "acquired rights in all or part of the collateral" while the creditor's security interest was unperfected.

45 As was decided in *Roynat*, supra, on appointment, a receiver does not acquire any rights in the collateral that are in competition with the rights of any creditor. In other words, a receiver does not obtain the right to receive any

portion of the proceeds of the estate of the debtor. Consequently, a secured creditor whose security interest had been perfected at some point but was unperfected on the date of the appointment of a receiver may re-perfect under s. 30(6) and retain its priority, regardless of the appointment of a receiver in the interim, by obtaining a lift-stay order from the court, if necessary.

46 For example, in *TRG Services Inc., Re* (2006), 26 C.B.R. (5th) 203 (Ont. S.C.J.) at paras. 53-59, C. Campbell J. held that a monitor under the *CCAA* is not a representative of creditors within s. 20(1)(b) of the *PPSA*. He stated that "[t]he fact that the Initial Order envisaged the Monitor assessing claims as between creditors does not grant it any legal entitlement to or over the assets of the debtor": *TRG Services Inc., Re*, *supra* at para. 57. C. Campbell J. allowed the appeal from the decision of the monitor who had refused to allow a secured creditor to perfect its security after the *CCAA* order. He concluded that there was nothing in the *CCAA* that would permit the exercise of any jurisdiction to disallow registration and that s. 20(1)(b) did not apply for the reasons quoted.

47 Similarly, in *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of)* (2006), 25 C.B.R. (5th) 273 (Alta. Q.B.), Richter was first a monitor of the debtor, Kodiak, under the *CCAA* and subsequently, receiver-manager of Kodiak appointed by the court to carry out a sale of its assets. Brookside was a secured creditor of Kodiak whose registration under the Alberta *PPSA* was defective. Consequently, both before and on the date of the appointment of the receiver, Brookside's security interest was unperfected.

48 Brookside registered a financing change statement on the day the receiver was appointed and sought leave of the court to lift the court-ordered stay and validate that registration *nunc pro tunc*. Richter, as Kodiak's receiver, took the position that Brookside's security interest was ineffective against it. As in this case, the receiver argued that its role was similar to a trustee in bankruptcy and it should therefore have the same tools as those provided to trustees in bankruptcy by the *PPSA*

49 The first issue before the *Brookside* court was "whether a receiver should be seen as entitled to the same priority as is granted to a trustee in bankruptcy by s. 20(a)(i) of the *PPSA*": *supra* at para. 13. The second question was whether the stays under both appointment orders should be lifted to allow Brookside to validate its registration *nunc pro tunc*. The application judge made the important observation that the second issue would not arise if a receiver is the same as a trustee under s. 20(a)(i) because, in that event, Brookside's unperfected security interest would be ineffective against the receiver and "Brookside's attempted correction of its registration after the date of the Receivership Order *could not improve its position*": *supra* at para. 14. [Emphasis added.]

50 The application judge concluded on the first question that because s. 20(a)(i) of the Alberta *PPSA* refers only to a trustee in bankruptcy, it cannot be interpreted to also refer to a receiver.[FN34] He then went on to decide the second question. He concluded that there would be no prejudice to the debtor or any of the other creditors by allowing Brookside to perfect its security as of the date of the receivership, because had the *CCAA* and receivership orders not been made, Brookside could have perfected at any time. Since s. 20(a)(i) did not apply, there was no reason why the secured creditor could not register under the *PPSA*. Nor was there any purpose in precluding the *ex post facto* registration.

51 As these cases demonstrate, in a receivership, because a creditor's right to take steps against the debtor is stayed not by any legislative directive, but rather by virtue of the terms of the order appointing the receiver, such a stay can be lifted by the court to allow a secured or unsecured creditor to pursue its rights against the interests of the debtor in appropriate circumstances, including obtaining judgment or asserting a lien, and to effect relevant registrations. This includes registrations under s. 30(6) of the *PPSA* to regain priority for the purpose of distribution of the debtor's assets by the receiver.

52 In fact, the new Standard Template Receivership Order of the Commercial List — which is to be used when a receiver is appointed by the Superior Court of Justice — clearly excepts registrations under the *PPSA* from the

effect of the stay. Paragraph 9, which contains the stay order, specifically provides that nothing in that paragraph prevents "the filing of any registrations to preserve or perfect a security interest". This paragraph clearly describes the understanding of the bench and bar that the "music" does not stop on the appointment of a receiver because the ongoing need to register and to perfect security is recognized and acknowledged. There would be no cause or purpose in doing so if priorities were frozen on the date of the order.

53 There is nothing in the *PPSA* that says that it stops being applicable at any time. In particular, s. 20 does not prevent ss. 48(3) or 30(6) from continuing to apply and to have effect. It does not freeze priority positions but just states the consequences of non-perfection at a point in time. There is no legislated freezing of priorities, or anything that "stops the music" in a receivership, other than the court order creating it which provides for the ability to seek and obtain a lift-stay order. Consequently, the result the appellant seeks to achieve — the freezing of priority positions — does not occur in a receivership. Nor are the unsecured creditors left in a position where they are necessarily precluded from taking further steps to enforce their rights against the interest of the debtor. Therefore, when a receiver is appointed, the unsecured creditors do not need s. 20(1)(b) to level the playing field for them as against unperfected security interests. A receiver is not a "repository of enforcement rights" like a trustee in bankruptcy; nor do unsecured creditors need to rely on a receiver to attack unperfected security interests

54 In a bankruptcy, not only does the debtor have no further interest in the collateral, but also the priority rights of creditors are "frozen", as stated by Iacobucci J. in Giffen, Re, *supra* at para. 39 by virtue of s. 71 and s. 69.3(1) of the *BIA*,[FN35] the latter of which provides:

> Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

55 Consequently, in a bankruptcy, the effect of ss. 20(1)(b) and 20(2)(b) together with the *BIA* is that a security interest in collateral that is unperfected on the date of bankruptcy is ineffective against the trustee throughout the bankruptcy, and that unperfected status cannot be cured in relation to the trustee. Similarly, a security interest that is perfected on the date of bankruptcy is effective against the trustee and remains effective because the bankrupt estate is frozen and the debtor no longer has any interest in the collateral for the purposes of registration.

(vi) Trustee's alternative argument

56 The trustee in bankruptcy argued on this appeal that even if the receiver is "a person who represents the creditors of the debtor" under s. 20(1)(b), because the appellant bank's security interest was unperfected on the date when the trustee in bankruptcy was appointed, its security interest was ineffective against the trustee under the express words of s. 20(1)(b). The appellant's position was that once priorities were frozen on the appointment of the interim receiver, they remained frozen on the appointment of the trustee. My colleague has concluded that the interim receivership never terminated, that the tax refund came to the interim receiver, and that the sections operate from and relate back to the original date when PWC was first appointed as interim receiver, at which time the appellant's security interest was perfected.

57 In respect of the trustee's position, I agree that the appellant's security interest is ineffective against the trustee. As I have explained, ss. 20(1)(b) and 20(2)(b) should not be read to apply to a receiver for two reasons. Unlike a trustee in bankruptcy and an assignee for the benefit of creditors, a receiver does not obtain the debtor's rights in respect of the collateral and is therefore not in a priority contest with any creditor on behalf of unsecured creditors. Also, in a receivership, the debtor maintains its rights in the collateral. Second, unlike in a bankruptcy, creditors' rights are not frozen on a receivership by statute. Those rights may be stayed by the court order appointing the receiver, but as in the order in this case, the stay can be and often is lifted in order to allow a creditor to register to maintain its perfected status — for example, under s. 48(3) — or to re-perfect under s. 30(6). As already noted, the

new standard form of order for a court-appointed receiver no longer includes any stay of a creditor's right to perfect or re-perfect its security interest. The only purpose for a creditor to perfect or re-perfect after a receiver is appointed is to maintain its priority during the receivership.

58 The motion judge found, in accordance with the record and the position of the trustee, that the tax refund came into the hands of PWC as trustee in bankruptcy. The interim receiver assigned the debtor into bankruptcy in accordance with the order appointing it, at which time the provisions of the *BIA* applied, including s. 71. It was not disputed, either before the motion judge (see para. 59 of his reasons) or on this appeal, that the property of the debtor passed to the trustee on the date of the bankruptcy. Section 20(1)(b) of the *PPSA* says that an unperfected security interest is ineffective against a trustee in bankruptcy. The court is required to give effect to that specific statutory provision.

Conclusion

59 I agree with the motion judge that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* and the term "receiver" should not be read in to the legislation. Because the appellant's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment of the debtor into bankruptcy, it was unperfected on the date of the appointment of the trustee and its security interest is therefore ineffective against the trustee.

60 The unfortunate result for the appellant, and apparent windfall for St. Paul, is that the appellant loses its priority over St. Paul, and even though St. Paul also lost its secured standing, they rank *pari passu* as unsecured creditors in the bankruptcy. This result flows from the fact that both were unperfected on the date of the appointment of the trustee and both their security interests are therefore ineffective against the trustee.

61 I would dismiss the appeal with costs to the trustee and to St. Paul out of the estate. I would fix those costs in the amount of $15,000 each, inclusive of disbursements and G.S.T.

***H.S. LaForme J.A.*:**

I agree.

> (3) Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.
>
> 20 (1) Except as provided in subsection (3), until perfected, a security interest,
>
> > (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
> >
> > . . . . .
>
> (2) The rights of a person,
>
> > . . . . .
> >
> > (b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's

representative status takes effect.

Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.

2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,

i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and

ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.

3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.

4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

I note that s. 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Section 12(2) states explicitly that a debtor has rights in goods leased to the debtor...when he obtains possession of them in accordance with the lease. [Emphasis in original.]

20 (1) ...until perfected, a security interest,

. . . . .

(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security in-

terest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

20. A security interest

. . . . .

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the *Winding-up Act* (Canada) if the security interest is unperfected at the date that the winding-up order is made.

Personal Property Security Act, C.C.S.M. c. P.35.

Appeal dismissed.

FN1 Section 1(1) of the *PPSA* defines "collateral" as "personal property that is subject to a security interest".

FN2 Under s. 11(1) of the *PPSA*, a security interest is not enforceable against a third party unless the requirements of the *PPSA* for "attachment" are met. Attachment occurs when: (1) the creditor takes possession of the collateral or enters into a written security agreement with the debtor; (2) the agreement is signed by the debtor; and (3) the agreement contains a description of the collateral enabling it to be identified. In addition, "value" or consideration for the agreement must be given by the creditor and the debtor must have "rights" in the collateral.

FN3 A security interest in investment property may now be perfected by control of the collateral under subsection 1 (2). *Securities Transfer Act, 2006*, S.O. 2006, c. 8, s. 123(9).

FN4 There are a number of exceptions to the general priority rules contained in s. 30 with which we are not concerned. One exception is a Purchase Money Security Interest (PMSI) in inventory.

FN5 Unless otherwise indicated, where the term "receiver" is used in these reasons, it is used to refer to an interim receiver appointed by the court under s. 47 of the *BIA*.

FN6 The motion judge held that the refund was a receivable that was not capable of being possessed. This aspect of the motion judge's decision is not under appeal. I make no comment as to the correctness of the motion judge's conclusion.

FN7 Section 48(3) reads:

FN8 A financing change statement cannot be used to reperfect a lapsed security interest. A fresh financing statement is required. See s. 52(2) of the *PPSA*.

FN9 The relevant provisions of s. 20 provide:

FN10 Section 30(6) reads:

FN11 The exception in subs. (3) is not relevant on this appeal.

FN12 The most common formulation is: "A security interest... in collateral is not effective against (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or (ii) a liquidator appointed under the *Winding-up Act (Canada)* if the security interest is unperfected at the date that the winding-up order is made..." as found, for example in Manitoba's *Personal Property Security Act*, C.C.S.M. c. P. 35, s. 20(b).

FN13 Subsection (3) deals with purchase-money security interests, and its exception is not relevant here.

FN14 McLaren goes on to comment that the 1992 amendments to the *BIA* brought with them regulation of receivers where a debtor is insolvent. He observes that federal bankruptcy legislation has increased the control and accountability of these privately-appointed receivers. He raises the possibility that in light of these statutory changes, privately-appointed receivers will also be held to be representatives of the creditors within the meaning of s. 20(1)(b) of the Act. Ziegel and Denomme, *supra*, query at p. 163 whether Ontario law would recognize a category of creditors' representatives who do not owe their status to statutory authority. In this case, we are not concerned with a privately-appointed receiver but a court-appointed interim receiver who derived his status from the *BIA*.

FN15 If in fact PWC is acting as a representative of the Bank alone, it seems it would have been under a duty to apply to the court to lift the stay to permit it to register a financing change statement on behalf of the Bank.

FN16 For example, the decision in *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (Man. C.A.), discussed by Feldman J.A., not only deals with differently worded legislation, it is a case decided under the *BIA* prior to the 1992 amendments creating the s. 47 *BIA* interim receiver.

FN17 Section 30(1) reads:

FN18 Iacobucci J. also considered the meaning of the phrase "rights in goods" in s. 12(2) of B.C.'s *PPSA* dealing with leased goods. He concluded that a lessee had a proprietary interest in such goods (at para 36):

FN19 For ease of reference, ss. 20(1)(c) and (d) read:

FN20 Section 30(6) reads:

FN21 The importance of control is emphasized in Ontario's new *Securities Transfer Act, 2006* (*STA*), S.O. 2006, c.8 which came into force on January 1, 2007 together with related *PPSA* amendments. In addition to registration and perfection, a new, third, method of perfecting a security interest is by control of the security which can include an intangible interest. John Cameron, in his article on the *STA*, 22 B.F.L.R. 309-352 at 321, states, "As the Comment notes, obtaining 'control' means a secured party has taken whatever steps are necessary to place itself in a position where it can have the securities sold, without further action by the owner." The secured party need not have exclusive control over the security. Other secured parties can have a concurrent right and a debtor can retain rights in the security.

FN22 I acknowledge that in some cases, a secured creditor's failure to comply with s. 48(3) during a s. 47 *BIA* receivership could result in a loss of that party's priority depending on the nature of the court order appointing the interim receiver. The role of the s. 47 *BIA* receiver is very much defined by the terms of the court order appointing the receiver and the common law describing its role. As Farley J. noted in *Curragh*, *supra*, at para. 6, the regime providing for the appointment of a s. 47 *BIA* receiver is a flexible one and the court is empowered to give directions to the interim receiver that can meet the practical demands of any given case. If then, for example, the court did not order a stay of all actions on the appointment of a s. 47 *BIA* receiver, then this would affect the extent to which the particu-

lar s. 47 *BIA* receiver qualifies as "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). Also, if for some reason the s. 47 receivership ended before there was any priority conflict, then the failure to reregister could well have consequences following the debtor's emergence from receivership. In other words, the significance of a failure to reregister will depend on a number of relevant factors in each case.

FN23 Other powers included the following: to take control of the property to preserve, protect, and liquidate it; to manage and carry on the business; to purchase or lease machinery; to receive and collect all money "now owed or hereafter owing" to the debtor; to execute transfers, conveyances, leases, bills of sale, or other documents respecting the property in the name and on behalf of the debtor; to report to, meet with and discuss with secured and unsecured creditors of the debtor deemed appropriate including offers and expressions of interest received; to apply for any vesting orders in order to convey the property; to register a copy of the Order appointing it and "any other Orders obtained by the Interim Receiver in respect of the Property against title to any or all property comprised in the Property" and; to sell, convey, or mortgage the property out of the ordinary course of business and without compliance with Part V of the *PPSA* (Ontario), or providing any other notice which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, with the approval of the Court.

FN24 I am under the impression that, as here, the same person often acts as a s. 47 *BIA* receiver and trustee in bankruptcy. Based on my interpretation of their roles, namely, that a s. 47 receiver owes a fiduciary duty to the creditors of the debtor and its function is similar to that of a trustee in bankruptcy, a trustee in bankruptcy is not a third party vis-à-vis the s. 47 receiver who also represents those same creditors. Thus, I see no conflict in the same person fulfilling both roles. To hold otherwise and to open the door to a potential for conflict between the role of the s. 47 receiver and a trustee in bankruptcy would result in the same person ordinarily not being able to fulfill both roles with attendant increased expense, duplication of effort, and delay.

FN25 A proceeding is any step that must be taken before a creditor or the creditor's representative can enforce its rights and may include the delivery of a copy of a certificate: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 26.

FN26 McLaren, *supra*, at p. 172, in discussing s. 20(1)(b) and *Giffen*, writes that the wording of the B.C. Act on debtor security interests is very different from Ontario's s. 20(1)(b).

FN27 Nor did either re-perfect under s. 30(6) of the *PPSA*, discussed below.

FN28 Subsection 26(2) of the *PPSA* provides that a "security interest in collateral in the possession of a person, other than the debtor, the debtor's agent or a bailee mentioned in subsection (1), is perfected by, (a) issuance of a document of title in the name of the secured party; (b) possession on behalf of the secured party; or (c) registration." No appeal was taken from this finding.

FN29 Whether a particular representative of creditors, other than a receiver, may be included in s. 20(1)(b) need not be decided in this case.

FN30 Although a court-appointed receiver owes duties to the court and to the creditors in respect of the proper conduct of the receivership (see for example *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.) at paras. 28-30), it is interesting to compare ss. 47(3) and 47.1(3) of the *BIA*. Under the first subsection, an interim receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of the creditor who sought the appointment, while under the second subsection, the receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of one or more creditors or the creditors generally. The difference may impact on the particular receiver's duties as a representative of creditors.

FN31 In Quebec there is a different regime. See *Lefebvre, Re*, [2004] 3 S.C.R. 326 (S.C.C.) at paras. 19-40, where

the Supreme Court of Canada discusses the regime in Quebec.

FN32 See *Personal Property Security Act*, R.S.B.C. 1996, c. 359, s. 20(b); *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 20(a); *Personal Property Security Act*, S.S. 1993, c. P-6.2, s. 20(2)(b); *Personal Property Security Act*, C.C.S.M. c. P35, s. 20(b); *Personal Property Security Act*, S.N.S. 1995-96, c. 13, s. 21(2); *Personal Property Security Act*, S.N.B. 1993, c. P-7.1, s. 20(2); *Personal Property Security Act*, R.S.P.E.I. 1988, c. P-3.1, s. 20(2); *Personal Property Security Act*, S.N.L. 1998, c. P-7.1, s. 21(1).

FN33 The equivalent provision of Manitoba's statute now reads:

FN34 The judge is referring only to ss. 20(a)(i), not 20(a)(ii), which also lists a liquidator under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

FN35 Section 71 of the *BIA* is set out above at para. 24. Section 69.4 of the *BIA* allows the court to declare that sections that freeze rights do not apply to a particular creditor if that creditor is likely to be materially prejudiced by the continued operation of the sections or it is otherwise equitable to make such a declaration. It is unlikely that this section could be used to assist an unperfected secured creditor because such a person is always going to be prejudiced by the operation of s. 20(1)(b) of the *PPSA*. As this court has held in *Ma, Re* (2001), 143 O.A.C. 52 (Ont. C.A.) at paras. 2 and 3, 'The role [of the courts under s. 69.4] is one of ensuring that sound reasons, consistent with the scheme of the [*BIA*] exist for relieving against the otherwise automatic stay.... [L]ifting the automatic stay is far from a routine matter.' [Citations omitted.] In most instances, a lift stay is ordered under s. 69.4 where (a) the proceeding in respect of which the lift is requested is one in relation to which the debtor's liability would not be released by an order of discharge from bankruptcy, or (b) where the bankrupt "is a necessary party for the completed adjudication" of the relevant proceeding: see *Koval, Re* (2003), 48 C.B.R. (4th) 103 (Ont. S.C.J.) at para. 6.

END OF DOCUMENT

TAB I

Indexed as:

Housen v. Nikolaisen

Paul Housen, appellant;
v.
Rural Municipality of Shellbrook No. 493, respondent.

[2002] 2 S.C.R. 235

[2002] S.C.J. No. 31

2002 SCC 33

File No.: 27826.

Supreme Court of Canada

2001: October 2 / 2002: March 28.

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN (176 paras.)

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

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

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

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N [page236] failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

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

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

[page237]

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

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony viva voce. The same degree of deference must be

paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

[page238]

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

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

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising [page239] ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by show-

ing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

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

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves [page240] not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

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

Section 192 of the Rural Municipality Act, 1989, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident [page241]

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

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is [page242] a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

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

the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

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

[page243]

Cases Cited

By Iacobucci and Major JJ.

Applied: Schwartz v. Canada, [1996] 1 S.C.R. 254; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114; Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 2001 SCC 60; Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802; Geffen v. Goodman Estate, [1991] 2 S.C.R. 353; Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2; McCannell v. McLean, [1937] S.C.R. 341; Partridge v. Rural Municipality of Langenburg, [1929] 3 W.W.R. 555; considered: Galaske v. O'Donnell, [1994] 1 S.C.R. 670; referred to: Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574; Underwood v. Ocean City Realty Ltd. (1987), 12 B.C.L.R. (2d) 199; Woods Manufacturing Co. v. The King, [1951] S.C.R. 504; Ingles v. Tutkaluk Construction Ltd., [2000] 1 S.C.R. 298, 2000 SCC 12; Ryan v. Victoria (City), [1999] 1 S.C.R. 201; Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd., [1981] 1 S.C.R. 504; Anderson v. Bessemer City, 470 U.S. 564 (1985); Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78; Palsky v. Humphrey, [1964] S.C.R. 580; Hodgkinson v. Simms, [1994] 3 S.C.R. 377; Dube v. Labar, [1986] 1 S.C.R. 649; C.N.R. v. Muller, [1934] 1 D.L.R. 768; St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15; Rhône (The) v. Peter A.B. Widener (The), [1993] 1 S.C.R. 497; Cork v. Kirby MacLean, Ltd., [1952] 2 All E.R. 402; Matthews v. MacLaren (1969), 4 D.L.R. (3d) 557.

By Bastarache J. (dissenting)

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487; Partridge v. Rural Municipality of Langenburg, [1929] 3 W.W.R. 555; Fafard v. City of Quebec (1917), 39 D.L.R. 717; Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 2001 SCC 60; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445; Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2, rev'g (1980), 112 D.L.R. (3d) 297 (sub nom. Taylor v. The Queen in Right of British Columbia), rev'g (1978), 95 D.L.R. (3d) 82; Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420; Ryan v. Victoria (City), [1999] 1 S.C.R. 201; Schwartz v. Canada, [1996] 1 S.C.R. 254; Joseph Brant Memorial Hospital v. Koziol, [1978] 1 S.C.R. 491; Williams v. Town of North Battleford (1911), 4 Sask. L.R. 75; [page244] Shupe v. Rural Municipality of Pleasantdale, [1932] 1 W.W.R. 627; Galbiati v. City of Regina, [1972] 2 W.W.R. 40; Just v. British Columbia, [1989] 2 S.C.R. 1228; Geffen v. Goodman Estate, [1991] 2 S.C.R. 353; Moge v. Moge, [1992] 3 S.C.R. 813; R. v.

Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984); St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15; Schreiber Products Ltd. v. Currie Brothers Ltd., [1980] 2 S.C.R. 78; Levey v. Rural Municipality of Rodgers, No. 133, [1921] 3 W.W.R. 764; Diebel Estate v. Pinto Creek No. 75 (Rural Municipality) (1996), 149 Sask. R. 68; R. v. Jennings, [1966] S.C.R. 532; County of Parkland No. 31 v. Stetar, [1975] 2 S.C.R. 884; Nelson v. Waverley (Rural Municipality) (1988), 65 Sask. R. 260.

Statutes and Regulations Cited

r Criminal Code, R.S.C. 1985, c. C-46.
Highway Traffic Act, S.S. 1986, c. H-3.1, ss. 33(1), 44(1).
Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192 [am. 1992, c. 63, s. 47; am. 1993, c. T-20.1, s. 7].

Authors Cited

American Bar Association. Judicial Administration Division. Standards Relating to Appellate Courts. Chicago: American Bar Association, 1995.
Cambridge International Dictionary of English. Cambridge: Cambridge University Press, 1996, "palpable".
Gibbens, R. D. "Appellate Review of Findings of Fact" (1991-92), 13 Advocates' Q. 445.
Goodhart, A. L. "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402.
Kerans, Roger P. Standards of Review Employed by Appellate Courts. Edmonton: Juriliber, 1994.
New Oxford Dictionary of English. Edited by Judy Pearsall. Oxford: Clarendon Press, 1998, "palpable".
Random House Dictionary of the English Language, 2nd ed. Edited by Stuart Berg Flexner. New York: Random House, 1987, "palpable".
Wright, Charles Alan. "The Doubtful Omniscience of Appellate Courts" (1957), 41 Minn. L. Rev. 751.

APPEAL from a judgment of the Saskatchewan Court of Appeal, [2000] 4 W.W.R. 173, 189 Sask. R. 51, 9 M.P.L.R. (3d) 126, 50 M.V.R. (3d) 70, [2000] S.J. No. 58 (QL), 2000 SKCA 12, setting aside a decision of the Court of Queen's Bench, [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL). Appeal allowed, Gonthier, Bastarache, Binnie and LeBel JJ. dissenting.

[page245]

Gary D. Young, Q.C., Denis I. Quon and M. Kim Anderson, for the appellant.
Michael Morris and G. L. Gerrand, Q.C., for the respondent.

Solicitors for the appellant: Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.
Solicitors for the respondent: Gerrand Rath Johnson, Regina.

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

IACOBUCCI and MAJOR JJ.:--

I. Introduction

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

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

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

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

[page246]

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

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

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable

and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

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

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant [page247] to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. Standard of Review for Questions of Law

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

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

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

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

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

[page248]

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

B. Standard of Review for Findings of Fact

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

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

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

[para12 With respect to findings of fact in particular, in Gottardo Properties, supra, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

[page249]

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

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

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial... . Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate

> Review of Findings of Fact" (1992), 13 Adv. Q. 445, at pp. 445-48; Fletcher v. Manitoba Public Insurance Co., [1990] 3 S.C.R. 191, at p. 204.

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

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

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate [page250] their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly-erroneous standard -- with its deference to the trier of fact -- is the rule, not the exception.

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

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

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

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

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be [page251] encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does

so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

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

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

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

C. Standard of Review for Inferences of Fact

19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our [page252] view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in Geffen v. Goodman Estate, [1991] 2 S.C.R. 353, this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from Geffen is the following (per Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts ... . Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings... .
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it

> is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing Métivier v. Cadorette, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see Palsky v. Humphrey, [1964] S.C.R. 580, at p. 583; Schwartz, supra, at para. 32; Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at p. 426, per La Forest J.; Toneguzzo-Norvell, supra. The United States Supreme Court has taken a similar position: see Anderson, supra, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

[page253]

> In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles... . While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

[page254]

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in Schwartz, supra. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

[page255]

Recent support for deferring to all factual conclusions of the trial judge is found in Toneguzzo-Norvell, supra. McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> ...
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual

finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

25 Although the trial judge will always be in a distinctly privileged position when it comes to [page256] assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge -- that of palpable and overriding error.

D. Standard of Review for Questions of Mixed Fact and Law

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal [page257] or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3) of the Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the

underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the [page258] decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: Southam, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in Southam, at para. 37:

> ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that [page259] a finding of negligence by the trial judge should be deferred to by appellate courts. In Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpreta-

tion of the evidence as a whole" (see also Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78, at p. 84).

30 This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

(McCannell v. McLean, [1937] S.C.R. 341, at p. 343)

See also Dube v. Labar, [1986] 1 S.C.R. 649, at p. 662, and C.N.R. v. Muller, [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces [page260] the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in Galaske v. O'Donnell, [1994] 1 S.C.R 670, at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, supra, is an illustration of the point made in Southam, supra, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or

not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing [page261] deference to the trial judge's inferences of mixed fact and law.

33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

34 A good example of this subtle principle can be found in Rhône (The) v. Peter A.B. Widener (The), [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an [page262] operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or

similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[page263]

37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

A. The Appropriate Standard of Review

38 We agree with our colleague that the correct statement of the municipality's standard of care is that found in Partridge v. Rural Municipality of Langenburg, [1929] 3 W.W.R. 555 (Sask. C.A.), per Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule [page264] by which to determine another case where the facts are different ... .

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in Southam, supra. The trial judge applied all the

elements of the Partridge standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

B. The Trial Judge Did Not Commit an Error of Law

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of Van de Perre, supra, where Bastarache J. says, at para. 15:

> ... omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in Van Mol (Guardian ad Litem of) v. Ashmore (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[page265]

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

40 The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from Partridge, supra. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the Partridge standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

41 The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is

used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

[page266]

There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the maximum speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be safely negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.

... where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Underlining added; italics in original.]

([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

[page267]

43 With respect to the speed of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a

hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 kilometres an hour road until you are too far into the tight curve to be able to respond".

44 The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be safely negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the ordinary [page268] motorist and it follows that she applied the correct standard of care.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 124). At para. 119, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 125). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with Van de Perre, supra, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the Partridge test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others: [page269] Toneguzzo-Norvell, supra, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that

the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (Van de Perre, supra, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

47 A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the ordinary driver, not the negligent driver.

48 To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from Partridge, supra, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the [page270] ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-42) and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

C. The Trial Judge Did Not Commit A Palpable or Overriding Error

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge ([2000] 4 W.W.R. 173, 2000 SKCA 12, at para. 84). With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than [page271] the speed at which it would be safe to negotiate the curve.

52 As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to

deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

53 In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a de facto speed limit of 80 km/h taken from The Highway Traffic Act, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

> If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

54 Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be [page272] negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner in its entirety. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a de facto speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a de facto speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 129-42) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague, based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 129). However, the trial judge, basing her assessment on other portions of the expert evidence, found that the nature of the road was such that a motorist could be [page273] deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

57 We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal ... that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

58 As noted by McLachlin J. in Toneguzzo-Norvell, supra, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (Toneguzzo-Norvell, at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach [page274] the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

IV. Knowledge of the Municipality

59 We agree with our colleague that s. 192(3) of The Rural Municipality Act, 1989, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

[page275]

61 The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 149). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

62 In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 149). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above, [page276] it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In Ryan, supra, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person in the same circumstances" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.