Court of Appeal File No. C70020
Court File No. 35-2481393

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF SIRIUS CONCRETE INC.

B E T W E E N :

AYERSWOOD DEVELOPMENT CORPORATION

Respondent
(APPELLANT)

and

BDO CANADA LIMITED
as Trustee for the Estate of SIRIUS CONCRETE INC.

Applicant
(RESPONDENT)

RESPONDENT'S BOOK OF AUTHORITIES

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SCHEDULE "A"

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SCHEDULE "A"

Tab 1

DATE: 20050608
DOCKET: C39540

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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., GOUDGE AND BLAIR JJ.A

B E T W E E N :	)	
	)	
METROPOLITAN TORONTO POLICE WIDOWS AND ORPHANS FUND, et al.	)	**Michael Barrack and Mark Polley, for the appellants**
	)	
Appellants)	)	
- and -	)	
	)	
TELUS COMMUNICATIONS INC.	)	**David Stockwood Q.C. and Johanne Braden, for the respondent**
	)	
Respondent	)	
	)	**Heard: December 8, 2004**

On appeal from the judgment of Justice Ground, dated January 21, 2003 cited at (2003), 30 B.L.R. (3d) 288 (Ont. Sup. Ct.), [2003] O.J. No. 128 (Sup. Ct.).

R.A. BLAIR J.A.:

I. OVERVIEW

[1] On December 30, 1997, BC Tel, the predecessor of Telus Communications Inc., redeemed a series of bonds, using $150 million in proceeds from a transaction involving the "securitization" of its accounts receivable. The appellant Bondholders contend that the redemption violated a "no financial advantage covenant" in the Trust Deed under which the Bonds were issued and which prohibited redemption "by the application, directly or indirectly, of funds obtained through borrowings having an interest cost to the company of less than 11.35% per annum".

[2] "Securitization" is a financing mechanism that provides lower cost access to the financial marketplace for corporations seeking to raise capital. In essence, it involves the transformation of a corporation's income-producing assets into negotiable securities that are issued to the public. In substance the concept is relatively straightforward, as I shall explain, although the details and structuring of a securitization transaction are exceedingly complex from a corporate/commercial, tax and accounting perspective. For

purposes of this appeal, the complications arise because securitization, when properly structured, has elements of both a sale and a borrowing. Hence the debate over whether BC Tel redeemed its Bonds using funds obtained directly or indirectly through borrowing.

[3] The central issue on the appeal is whether the redemption of the Bonds by BC Tel using the monies raised through the securitization transaction violates the No Financial Advantage Covenant (the "NFAC") in the Trust Deed because it constitutes a redemption "by the application, directly or indirectly, of funds obtained through borrowings having an interest cost to [BC Tel] of less than 11.35% per annum." This issue, in turn, raises three subsidiary questions:

a) Did the redemption involve the *direct* application of funds obtained through borrowings?

b) If not, did it involve the *indirect* application of funds obtained through borrowings?

c) If the redemption involved the application of funds obtained, directly or indirectly, through borrowings, were the funds obtained at an interest cost to BC Tel of less than 11.35% per annum?

[4] The appellants did not pursue their ground of appeal based upon the oppression remedy.

[5] At trial, the claim of one of the appellants, Sun Life Assurance Co. of Canada, was proceeded with for purposes of determining liability. On the redemption date Sun Life held Bonds in the aggregate amount of $26,845,000. As a result of the early redemption, it, and the other appellants, lost approximately $12.00 per $100.00 principal amount of the bonds.

[6] Justice Ground held that the securitization transaction did not breach the NFAC. Respectfully, while I would not interfere with his finding that the redemption did not involve the direct application of borrowed funds, I believe that he was in error in not finding that BC Tel redeemed the Bonds by applying funds *indirectly* obtained through borrowings at a cost to the company of less than 11.35%. Accordingly, for the reasons that follow, I would allow the appeal.

II. FACTS

Securitization

[7] The type of arrangement entered into between BC Tel and RAC Trust, and which generated the funds used to redeem the Bonds, is known as an "asset securitization transaction", or sometimes simply as "monetization". I shall refer to the process generally in these reasons as "securitization" and to the overall transaction between BC Tel and RAC Trust that generated the funds received by BC Tel as the "Securitization Transaction". As a mechanism for raising capital, securitization has become increasingly popular, involving an aggregate of hundreds of billions of dollars of financing in the United States alone and over $26 billion in Canada.[1]

[8] In their factum, counsel for the respondent succinctly describe securitization as the "process of transforming financial assets into securities".[2] *Black's Law Dictionary*[3] defines it more fully as the process of converting assets into negotiable securities for resale in the financial markets, allowing the issuing financial institution to remove assets from its books and to improve its capital ratio and liquidity while making new loans with the security proceeds. Ground J. outlined the concept, along with its advantages for the corporation, at paras. 15-18 of his reasons, in the following fashion:

> [15] Corporate financing by way of securitization did not become prevalent in the Canadian market until the late 1980s or early 1990s. The basic concept of securitization is that a corporation raises cash by selling certain of its assets to a special purpose vehicle (an "SPV") which, in turn, issues securities, usually commercial paper, in the market to raise the purchase price of the assets purchased from the corporation.
>
> [16] The sale of the assets by the corporation to the SPV is structured in such a manner that it removes, to the extent practical, the assets from the estate of the corporation in the event of the bankruptcy or insolvency of the corporation. The assets are owned by the SPV and the realization or collection

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[1] E.B. Claxton, "Securitizations, Monetization, Royalty Trusts and the Quebec Trust" (1997) Mem. Lect. 358-378 at 360. As for asset securitization generally, see Steven L. Schwarcz, "Structured Finance: The New Way to Securitize Assets" (1990) 11 Cardozo Law Review 607; Steven L. Schwarcz, "The Parts are Greater Than the Whole: How Securitization of Divisible Interests Can Revolutionize Structured Finance and Open the Capital Markets to Middle Market Companies" (1993) 2 Columbia Business Law Review 139 at 140; Alison R. Manzer, "Securitizations and Income Trusts" Canada-U.S. Commercial Law (2003+).

[2] Respondent's factum, para. 11(c).

[3] Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (U.S.A. Thomson West, 2004) at 1384.

of those assets by the SPV services the commercial paper issued by the SPV. The holder of the commercial paper, therefore, looks to the cash flow from the assets and not to the credit of the corporation for repayment. The separation of the corporation from the assets themselves enables the corporation to raise funds less expensively through the commercial paper issued by the SPV, than it would cost the corporation to raise funds through securities issued directly by the corporation. There is also an "off the balance sheet" advantage to the corporation in that the cash that is raised by the sale of the assets will not require an offsetting liability to be shown on the balance sheet of the corporation. The cash from the sale of the assets and the off-setting decrease in accounts receivable are reflected on the asset side of the corporation's balance sheet but there is no offsetting liability in that the commercial paper issued to raise such cash is a liability of the SPV and not of the corporation.

[17] Securitization may have a further advantage to the corporation if it is restricted by trust deed or loan agreement covenants from incurring or securing debt. Securitization may enable the corporation to raise cash without breaching such covenants because the corporation is selling assets and is not incurring or securing debt. . . .

[18] In the case of a sale of accounts receivable, the commercial paper issued by the SPV is not subject to the risk of the bankruptcy and insolvency or other downturn in the fortunes of the corporation selling its accounts receivable and is subject only to the risk of collectibility of the accounts receivable sold by that corporation to the SPV. This risk is covered by a reserve amount of receivables transferred to the SPV of at least 5% of the amount advanced by the SPV to the corporation and, in many cases, is further covered by a backup security and enhancement agreement entered into by the SPV with a financial institution. In the case of the BC Tel–RAC securitization, RAC negotiated a backup security and credit enhancement agreement with a Swiss bank to an amount of a further 10% of the Purchased Receivable sold to RAC.

[9] The parties accept this description of the securitization process and its advantages. Securitization has been said to be "primarily intended to afford a method of financing that insulates credit products from the credit risk of the owner of those products": Edmund M.A. Kwaw, "Structuring Issues in Securitizations: Transfer and Ownership of Assets" (1996) 15 Nat'l Banking L. Rev. 65; 1996 C.N.B.L.R. LEXIS 10. This reduces the risk to the public of investing in the securitized assets and increases the credit rating of the SPV, thus lowering the cost of the monies obtained through the process by the originating company raising the capital.

The Bond Issue

[10] But this appeal is not truly about securitization, although of necessity a determination of the issues entails a consideration of the nature of that process. This appeal is about the use of the proceeds of a securitization transaction to redeem bonds and whether that redemption violated the terms of the Trust Deed pursuant to which the Bonds were issued.

[11] The Series AL Bonds, which are the subject of these proceedings, were issued by BC Tel on October 31, 1985, pursuant to a Trust Deed between BC Tel and Montreal Trust Company. The only provision of the Trust Deed that is pertinent to this appeal is the NFAC, which reads as follows:

> The Company shall not, however, *redeem* any of the Series AL Bonds prior to November 15, 2000 other than for sinking and improvement fund purposes, as a part of any refunding or anticipated refunding operation *by the application, directly or indirectly, of funds obtained through borrowings having an interest cost to the Company of less than 11.35% per annum.* [emphasis added]

[12] Bondholders rely on such a provision to ensure that their bonds are not redeemed by the issuing company with less expensive borrowings before their bonds' contractual redemption date: see *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1993), 9 B.L.R. (2d) 203 (Ont. Ct. Gen. Div.) at 211. On the other hand, it is implicit in the language of the NFAC that BC Tel is permitted to redeem the Bonds prior to their maturity date provided the redemption complies with the terms of that provision: *Shenandoah Life Insurance Co. v. Valero Energy Corp.* A. 2d, 1988 WL 63491 (Del. Ch., 1988), 1998 Del. Ch. LEXIS 84 at 8.

[13] The parties agree that the redemption of the Bonds was achieved through a refunding process and that the redemption was not for sinking and improvement fund

purposes. They also agree that the funds from the Securitization Transaction were deposited into a separate account and used directly for the redemption of the Bonds.

The BC Tel/RAC Securitization Transaction

[14] Although BC Tel nibbled at the idea of utilizing securitization as a means of paying debt in the early 1990's, the regulatory environment existing at the time did not favour such a move. In the late 1990's, however, the environment changed and, in June 1997, the company specifically considered using the proceeds of a securitization transaction to redeem the Bonds.

[15] On October 24, 1997, the RAC Trust securitization proposal was presented to the BC Tel Board of Directors. RAC Trust is a special purpose vehicle established by CIBC Trust Corporation for the purpose of engaging in securitization transactions. It is an arms-length vehicle and has a business and considerable assets of its own.

[16] At that board meeting, BC Tel's Assistant Treasurer, Mr. Dorwart, identified a net saving of $750,000 per year, apart from savings associated with the redemption of the Bonds, if the proposal were accepted.[4] Although there were other potential advantages to the RAC transaction, as the respondent points out, and the Board did not make any decision at the meeting with respect to the use of the funds to be raised, the Board was advised that the most beneficial use of the proceeds would be to redeem the Bonds. The Board approved the transaction and on November 20, 1997, the Securitization Transaction was completed. The $150 million proceeds were deposited in a separate bank account.

[17] Six days later, the BC Tel Board of Directors approved a recommendation that the RAC proceeds be used to redeem the Bonds. The assistant treasurer reported to the meeting that the redemption would produce net savings to the corporation – and, therefore, to its shareholders – of $22.9 million. The Bonds were redeemed on December 30, 1997.

[18] The short-form description of the Securitization Transaction is as follows. BC Tel sold, assigned and transferred to RAC Trust all of BC Tel's right, title and interest in a rolling portfolio of accounts receivable, (known as the "Purchased Receivables") up to a certain value.[5] RAC Trust then issued commercial paper to the capital markets, backed by the security of the Purchased Receivables, to raise the $150 million in funds that were advanced to BC Tel in exchange for the transfer of the Purchased Receivables. RAC

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[4] The savings consisted of capital tax savings of $1,080,000 less $300,000 in program fees, additional commercial paper costs of $30,000 per annum and start up fees.

[5] I shall refer to the specific agreement whereby this transfer was effected as the "Receivables Purchase Agreement" or the "BC Tel/RAC Trust Agreement".

Trust's cost of raising the funds (called the "Purchase Discount") – which was less than 11.35% -- was passed through directly to BC Tel on a monthly basis, and paid by BC Tel. The Purchase Discount was payable as long as there were outstanding amounts still owing to RAC Trust. RAC Trust was protected against the uncollectibility of the Purchased Receivables by a further 5% reserve.

III. THE POSITIONS OF THE PARTIES

[19] On behalf of the appellants, Mr. Barrack makes two basic arguments.

[20] First, he submits that BC Tel redeemed the Bonds using borrowed funds that it obtained *indirectly* – i.e. RAC Trust borrowed the funds from the public and transferred them to BC Tel, which, in turn, used the borrowed funds to redeem the Bonds. The indirect borrowing had an interest cost to BC Tel of less than 11.35% per annum. BC Tel's redemption of the Bonds was, therefore, in breach of the NFAC. This argument does not require a determination of whether the BC Tel/RAC Trust Agreement is a sale or a secured loan.

[21] Secondly, he argues that the redemption of the Bonds was a breach of the NFAC based on the *direct* application of funds obtained through a prohibited borrowing, again, at a rate less than 11.35%, because the BC Tel/RAC Trust Agreement, although labelled a "sale", was in fact and in law a secured lending transaction.

[22] On behalf of the respondent, on the other hand, Mr. Stockwood and Ms. Braden contend that the parties entered into a contractual relationship that is clear in fact and in law. The parties intended to, and did, enter into a sale agreement. The commercial realities were that only a sale agreement would accomplish what each of the parties intended, and required for their respective purposes. RAC Trust could not enter into the securitization transaction and issue the commercial paper to the public unless it had purchased the BC Tel assets. BC Tel could not obtain the benefits of the securitization transaction – the off-balance sheet advantages, the debt-payment savings, and the capital tax savings – unless the agreement involved the legal sale of its accounts receivable. Mr. Stockwood and Ms. Braden argue that the appellants are simply trying to recharacterize the sale as a contract for a secured loan to suit their purposes, contrary to the parties' intentions and the plain wording of the agreement. In summary, they submit that "BC Tel legitimately raised funds by selling assets to an independent, arm's-length, sophisticated commercial party who had its own compelling and legitimate reasons for wanting to purchase BC Tel's assets. BC Tel then decided that the best use of these

proceeds of sale was the redemption of the Bonds. This did not directly or indirectly violate the NFAC."[6]

IV. ANALYSIS

Preliminary Observations

[23] To repeat, the issues to be determined on this appeal are whether BC Tel redeemed the Bonds by the application of funds (i) directly obtained through borrowings or (ii) indirectly obtained through borrowings, and (iii) at an interest cost to BC Tel of less than 11.35%.

[24] It is common ground that the funds used for the redemption were funds obtained from the Securitization Transaction. The issues cannot be determined, therefore, without an examination of the nature and characteristics of that transaction. Does this asset securitization constitute "a borrowing", or does it at least generate funds "directly or indirectly obtained through borrowings", and, in this case, at a prohibited interest cost? Or is this asset securitization a "sale", generating sale proceeds in the hands of BC Tel, which the appellants concede may be used to redeem the Bonds without violating the NFAC?

[25] Much time was spent at trial and on this appeal examining the question whether the Receivables Purchase Agreement was a true sale of accounts receivable or an agreement in the nature of a collateralized loan. This is not the principal issue on the appeal, however. Although characterizing the agreement in law as a loan would be fatal to BC Tel's position – because the Bonds would have been redeemed by the application of funds obtained *directly* through borrowing – a finding that it is a true sale is not the end of the matter. The principal issue on the appeal is whether *the use of the proceeds from the Securitization Transaction* to redeem the Bonds constitutes the application of funds *indirectly* obtained through borrowing (and at an interest cost of less than 11.35%).

[26] What complicates the resolution of these questions is the fact that by its very nature, the securitization transaction is a hybrid phenomenon: it is part sale (the originating company transfers its assets to the SPV) and part borrowing (the SPV borrows money from the public through commercial paper issued on the security of the transferred assets). How, then, should its proceeds be characterized for purposes of their application to redeem the Bonds?

[27] I start the analysis at that point. The focus of the inquiry on this appeal is the application of the funds used to redeem the Bonds – together with the source of those funds – for purposes of determining the ultimate question of whether there has been

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[6] Respondent's factum, para 127.

compliance with the No Financial Advantage Covenant in the Trust Deed pursuant to which the Bonds were issued. The focus is not to determine whether the BC Tel/RAC Trust transaction, or some component of it, meets the requirements of a "true sale" for purposes of preserving the integrity of the securitization process. The latter inquiry is insufficient to answer the ultimate question.

[28] For this reason it is important to be alert to the nature of the securitization process as a whole. A securitization transaction is more than any one of its constituent parts. From the perspective of interpreting the NFAC in the context of a redemption of bonds, securitization may be viewed as, in essence, a capital market financing device whereby monies are raised by a company through borrowings from the public, albeit against the security of assets sold by the company to an intermediary party. The sale of the transferred assets – which may well be a "true sale" in the legal sense – is merely one element of the securitization transaction, a part of the mechanics of effecting the overall purpose.

[29] Here, the trial judge found that the Receivables Purchase Agreement – one element of the Securitization Transaction – was a true sale. I would not interfere with that finding. At the same time, however, I have concluded that the trial judge erred in failing to hold that the funds used by BC Tel to redeem the Bonds were funds "indirectly" obtained through borrowings at an interest cost to BC Tel of less than 11.35%. Before addressing these issues, however, I turn to the standard of review.

The Standard of Review

[30] The standard of review is of some importance in this case.

[31] To the extent that the decision of the trial judge involved questions of law, the standard of review is correctness. On questions of fact or factual inferences, however, the appellant must demonstrate palpable and overriding error. An error that is palpable or unreasonable or unsupported by the evidence is one that is obvious, plain to see, or clear. An "overriding" error is one that is sufficiently significant to vitiate the impugned finding. The appellants must show that the error goes to the root of the finding of fact, or of mixed fact and law, such that the finding cannot safely stand in the face of that error. See *H.L. v. Canada (Attorney General)* [2005] S.C.J. No. 24; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paras. 8-25; *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165 (Ont. C.A.), [2004] O.J. No. 1765 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 291, at paras. 289-309 (O.J.).

[32] Questions of mixed fact and law pose more difficult problems in terms of the applicable standard of review. For the most part, the issues on this appeal involve issues of mixed fact and law.

[33] "Matters of mixed fact and law lie along a spectrum" (*Housen*, at para. 36). The standard to be applied depends upon whether the identified error on the part of the trial judge involves fact finding or the making of factual inferences (calling for deference), or whether it involves the characterization of the proper legal standard to be applied or the failure to consider a required element of a legal test or some similar error in principle (calling for correctness). "Appellate courts must be cautious", however – as the Supreme Court notes in *Housen* at para 36 – because "it is often difficult to extricate the legal questions from the factual" and "[w]here 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 court concluded by saying (at para. 37):

> In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant[7] 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.* [emphasis added]

[34] Here, the issue whether the Receivables Purchase Agreement constituted a true sale or a collateralized loan is a question of mixed fact and law. The trial judge is entitled to considerable deference in this regard, all the more so since this is a complex commercial list case. On the other hand, the issue whether the Securitization Transaction, viewed as a whole, generated funds in the hands of BC Tel that were indirectly obtained through borrowings, at a prohibited low rate, is in my view more a question of law – or, at least, a question of mixed fact and law that is more towards the "legal" end of that spectrum – and the standard to be applied is more towards correctness with less deference to be accorded the trial judge.

Were the Funds Applied by BC Tel to Redeem the Bonds Funds "Directly" Obtained Through Borrowings?

[35] The appellants argue that BC Tel breached the NFAC by redeeming the Bonds with directly borrowed funds costing the company less than 11.35% in interest charges. They say this because they assert that the Receivables Purchase Agreement was, in law, a collateralized loan and not a true sale of assets. The trial judge rejected this argument.

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[7] *Housen v. Nikolaisen* was a case involving negligent street maintenance and repair by a municipality.

[36] In doing so, he observed, correctly, that in interpreting the contract, the court must look to the intention of the parties as expressed by the language of the contract and that it may also look at the factual matrix existing at the time the contract was entered into, as well as the conduct of the parties. He also emphasized that the court must look to the substance of the transaction and not merely its form. See *In re George Inglefield Limited*, [1933] Ch. 1 (C.A.); and *Banque Royale du Canada c. Canada* (1999), 99 D.T.C. 5196 (F.C.A.) at paras. 12-13. At para. 39 of his reasons, the trial judge said:

> It is the function of the court to determine the real nature of the transaction by considering not only the intention of the parties as evidenced by the language of the contract but the evidence as to how the transaction in fact transpired and the conduct of the parties in the performance of the contract. Both the wording of the contract and the conduct of the parties in implementing the contract must be examined. In addition to the intention of the parties, the factors considered by the courts in determining whether a transaction constitutes a true sale are: the transfer of ownership risk and the level of recourse, the ability to identify the assets sold, the ability to calculate the purchase price and whether the return to the purchaser will be more than its initial investment and a calculated yield on such investment. In the case of a sale of receivables, other factors to be considered are the right to retain surplus collections, a right of redemption, the responsibility for collection of the accounts receivable and the ability of the vendor to extinguish the purchaser's rights from sources other than the collection of the receivables.

[37] The appellants concede that in taking these factors and criteria into account, the trial judge applied the correct test for determining the legal character of the transaction. But they submit he failed to apply the test properly. Mr. Barrack argues the trial judge made the following errors in this regard. First, the trial judge placed too much emphasis on the desire of BC Tel and RAC Trust to obtain the benefits of a sale *vis-à-vis* third parties, rather than examining the language of the agreement in light of the conduct of the parties. Secondly, in applying the various factors, he did not ask the proper question, namely whether those factors – individually, and cumulatively as a whole – were more indicative of a loan or a sale; instead, he was content that if a particular factor was not inconsistent with a sale, the parties desire to benefit from a sale should prevail. Thirdly, the trial judge confused the concepts of recourse as to collectibility and economic recourse, and incorrectly concluded that the BC Tel/RAC Trust Agreement provided for recourse as to collectibility (which is not inconsistent with a sale) rather than economic

recourse (which is not consistent with a sale).[8] Finally, the trial judge failed to consider the cumulative weight of the various factors and whether there were a preponderance of factors which more closely resembled a loan than a sale.

[38] Determining whether a contract reflects a true sale or a loan is not simply a mechanical exercise of assessing and tallying up a list of factors and then deciding whether they net out to one or the other. As indicated, the court must look to the substance of the agreement and not merely its form, and give legal effect to the intention of the parties as expressed in the language of the agreement. However, the factors outlined by the trial judge provide useful guideposts for determining the nature of the arrangement, and the respondent does not suggest otherwise.

[39] It is clear from the provisions of the Receivables Purchase Agreement that the parties intended it to be a true sale of BC Tel's accounts receivable to RAC Trust. Indeed, their respective needs in carrying out the securitization transaction required that to be the case. The trial judge did not place too much emphasis on this, in my view, nor did he ignore the language of the agreement or the conduct of the parties in putting it into effect.

[40] Parties are entitled to structure their contractual relationships as they see fit, absent a sham or public policy considerations dictating otherwise (neither of which applies here). That the Receivables Purchase Agreement may share some of the characteristics of a collateralized loan does not necessarily mean that it cannot give rise to a true sale in law. The question is whether in substance the contract constitutes a sale or a loan, having regard to all of the foregoing factors and whether, when weighed individually and taken cumulatively and as a whole, they are more indicative of one or the other.

[41] When the trial judge was examining the various factors he listed, he did not say he was directing his mind specifically to whether the particular aspect of the contract under consideration, individually or taken together with the others, was more or less consistent with or indicative of a sale or a loan. It would have been preferable had he done so, since in my opinion such an approach is appropriate when determining whether an agreement constitutes a true sale. A reading of the trial judge's reasons as a whole satisfies me, however, that he did in fact carry out a similar exercise.

[42] It is not necessary to review the trial judge's analysis of the factors in detail. While I have reservations about some of his findings regarding certain of the factors he

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[8] "Recourse for collectibility" is the term used to denote the equivalent of a warranty that the asset will perform in accordance with its terms. "Economic recourse" is a term used to denote the equivalent of warranting a return to the buyer of the buyer's investment plus an agree-upon yield unrelated to the asset's payment terms. See *Peter v. Pantaleo et al.*, "Rethinking the Role of Recourse in the Sale of Financial Assets" (1996), 52 The Business Lawyer 159 at 163.

assessed, in the end I am satisfied that his characterization of the Receivables Purchase Agreement as a "true sale" of the BC Tel accounts receivable to RAC Trust was correct. Like the trial judge, I find the lack of any right of redemption in the receivables on the part of BC Tel to be particularly compelling. On the authorities cited, he was entitled to conclude that the fact RAC Trust had no right to retain any surplus from the collection of the receivables – if such a surplus could conceivably arise in the circumstances – was not fatal to a determination in favour of a sale: see *In re George Inglefield Limited, supra*, at 19-20; *Welsh Development Agency v. Export Finance Co. Ltd.*, [1992] B.C.L.C. 148 (C.A.). The Receivables Purchase Agreement is exceedingly complex. It can reasonably bear the trial judge's interpretation that the purchase price was ascertainable and the assets sufficiently identifiable to support a sale. Further, although RAC Trust admittedly incurred little, if any, ownership risk with respect to the assets, it was open to the trial judge to interpret the Receivables Purchase Agreement – as he did – to provide for recourse as to collectibility rather than for economic recourse (and thus to favour a sale, as opposed to a loan).

[43] Accordingly, I would not interfere with the trial judge's disposition with respect to the legal nature of the Receivables Purchase Agreement. As mentioned above, however, the trial judge's decision as to the legal nature of the Receivables Purchase Agreement is not dispositive of the appeal. The appeal stands to be determined on the issue of the *indirect* application of funds obtained through borrowing. I turn to that issue now.

Were the Funds Applied by BC Tel to Redeem the Bonds Funds "Indirectly" Obtained Through Borrowings?

[44] The respondent argues that legally and factually the contractual relationship between BC Tel and RAC Trust constituted a true sale, and that BC Tel sold its accounts receivable to RAC Trust and applied the proceeds of that sale to redeem the Bonds. Mr. Stockwood and Ms. Braden point out that the appellants concede the Bonds could properly be redeemed with the proceeds of a sale. Therefore, they submit, there was no breach of the NFAC.

[45] I would not give effect to this argument

[46] In determining whether the proceeds applied to redeem the Bonds were obtained indirectly from borrowings, for purposes of the Trust Deed between BC Tel and its Bondholders, the Securitization Transaction must be looked at as a whole. It cannot be compartmentalized and the conclusions flowing from an analysis of only one aspect of the transaction applied, without more, to the NFAC. As noted at the outset of this analysis, the difficulty arises because of the hybrid nature of a securitization transaction: it is part sale and part borrowing. It is a sale with an economic function – to raise borrowed funds. These characteristics cannot be isolated one from the other in

considering whether the proceeds of the transaction, as applied to redeem the Bonds, constitute funds obtained indirectly through borrowings.

[47] Granted, there are other benefits to the originating corporation, but at its heart, the rationale underlying a securitization transaction is to enable a corporation to raise capital from the public in the financial markets at a lower cost than the corporation would be able to obtain through more conventional methods of financing. What makes a securitization transaction effective for its purposes is the constellation of an number of features, only one of which is the sale by the originating company (in this case, BC Tel) to the SPV (in this case, RAC Trust). The assets do not become "securitized" until they have in effect been transformed by the SPV into negotiable securities and issued to the public in the financial markets. The transaction is not completed until the funds borrowed from the public are transferred to the originating company in payment of the purchase price for the assets. Do such proceeds comprise "funds indirectly obtained through borrowings" for purposes of the NFAC? I have no hesitation in concluding that they do.

[48] Here, the evidence is that the Bonds were redeemed with monies borrowed by RAC Trust from the public through the issuance of commercial paper. The borrowed funds were transferred to BC Tel, segregated by BC Tel, and then used by BC Tel to redeem the Bonds. RAC Trust's carrying charges with respect to the borrowed funds were passed through directly to BC Tel, and paid by BC Tel. In fact, they were paid first out of the proceeds of the accounts receivable.

[49] As the trial judge noted, the NFAC does not specifically require that the borrowing be by BC Tel. The respondent submits, however, that the provision should be interpreted in that fashion and that BC Tel did not borrow anything. Rather, it maintains, the funds were borrowed by RAC Trust. Unless the transaction between BC Tel and RAC Trust is a sham and RAC Trust is simply acting "as the puppet of BC Tel", how RAC Trust raised the money to pay for the assets it purchased from BC Tel is irrelevant. Although RAC Trust borrowed the money to purchase the receivables, BC Tel borrowed nothing, directly or indirectly, and simply used the proceeds of the sale of its assets to redeem the Bonds, the argument concludes.

[50] This argument fails to give sufficient recognition to the fact that what BC Tel entered into was *a securitization transaction* and not simply *a sale of assets* (although the sale of assets was an integral part of the transaction). BC Tel's agreement was to "securitize" its assets and to obtain all of the benefits of such a capital raising mechanism – principally, the lower cost of obtaining funds (estimated by BC Tel to amount to approximately $23 million), but also the capital tax savings (an estimated $750,000 per year) and other balance sheet and off-balance sheet benefits that accompany such a transaction. In my view, it is not open to BC Tel to say now – *vis-à-vis* its Bondholders –

'We only sold our assets to RAC Trust and used the proceeds to redeem your bonds. How RAC Trust raised the monies to pay the purchase price is no concern of ours, or yours.' BC Tel knew that it was engaging in a transaction, with the accompanying benefits outlined above, the ultimate effect of which was that monies raised through commercial paper borrowings from the public would flow into its hands. These are the funds that were applied to redeem the Bonds. They were funds "indirectly" obtained through borrowings, whether those funds were borrowed by BC Tel or not.

[51] The appellants referred us to *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1993), 9 B.L.R. (2d) 203 (Ont. Ct. Gen. Div.), a case involving the redemption of debentures issued under a trust deed containing a 'no financial advantage' covenant similar to the one in question here. At the time of the redemption, Dofasco had drawn down funds under a lower interest rate construction finance contract, but it also had a large cash reserve. Borins J. dismissed the debenture-holders' complaint because he found on the facts that the source of the funds used to redeem was the cash reserve and not the proceeds of the construction finance contract. In the course of his reasons, however, he dealt with the issue of "indirect borrowing" for purposes of these types of 'no financial advantage' covenants. He did so – in the absence of any Canadian authorities considering the subject – with reference to a number of American authorities that had: see *Franklin Life Insurance Co. v. Commonwealth Edison Co.*, 451 F.Supp. 602 (S.D. Ill. 1978), aff'd 598 F.2d 1109 (7th Cir. 1979); *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del. Sup. Ct); *Morgan Stanley & Co. Inc. v. Archer Daniels Midland Co.*, 570 F.Supp. 1529 (S.D.N.Y. 1983); *Shenandoah Life Insurance Co. v. Valero Energy Corp.*, supra. After reviewing these decisions, Borins J. concluded that the court must look at the true source of the funds used in determining whether there has been a breach of a 'no financial advantage' covenant. At para. 30 he said:

> . . . I agree with the approach taken in the *Franklin* and *Morgan Stanley* cases in applying the "source" rule in determining whether a redemption of the debentures violates the refunding provision. This approach requires the court to make a finding of the true source of the funds used for the redemption. Where the facts indicate that the redemption was indirectly funded by the proceeds of actual or anticipated debt borrowed at a prohibited interest rate, the redemption would be barred regardless of the account from which the funds were withdrawn.

[52] Like Borins J., I find the decision of Chancellor Allen in the *Shenandoah Life* case, *supra,* helpful, although not determinative. *Shenandoah Life* involved the reorganization of a debtor company. The reorganization included the acquisition of debt at a lower interest rate than that borne by the debentures in question, as well as the

infusion of new equity into the company. The company used the equity infusion to redeem the debentures, and the loan to repay a bank debt (which was not subject to any refunding restrictions). The case is instructive, however, because the argument was made that the reorganization represented "a single integrated transaction", whereby the sale of equity would not have occurred if the company had not been able to arrange the lower rate of debt. On the facts, Chancellor Allen ruled against the debenture-holders, finding that the use of the non-borrowed equity funds to redeem the debentures as part of the complex reorganization "did not represent simply an indirect means to employ borrowed funds for the purpose of the redemption". All counsel in this case placed some emphasis on the following remarks from his judgment, nonetheless (pp. 8-9):

> . . . Was there an indirect application of borrowed funds to bond redemption as that term is used in Section 4.02? The inclusion of the term "indirectly" in Section 4.02 must be taken as an attempt to proscribe some forms of transactions which, when viewed formally, would not be otherwise proscribed by the provision. For example, Section 4.02 would not be offended by a redemption funded by the proceeds of an asset sale. *But that provision would, I would think, by reason of the "indirectly" term, be violated by the effectuation of a plan to borrow low-cost funds for the acquisition of an asset intended to be sold for purposes of generating funds for use in a redemption. This would qualify as an indirect application of borrowed funds because after the full transaction were (sic) completed, all that would remain is new (cheaper) debt in place of the redeemed bonds. No independent economic function would have been intended or have occurred.* [Chancellor Allen then went on to give another example concerning the creation of a single-purpose borrower subsidiary that would pass less costly borrowed funds to the parent by way of a note or capital contribution, then continued:] The borrowing has no economic purpose or reality other than that substitution.
>
> While it is impossible to generalize perfectly concerning all of the situations in which the "indirectly" language of Section 4.02 might find application, *it does appear that the inclusion of that phrase is intended to reach situations in which the underlying economic reality of the completed transaction is the functional equivalent of a direct loan for purposes of*

> *effectuating a redemption and nothing more.* [emphasis added]

[53] Mr. Stockwood and Ms. Braden submit that neither *Dofasco* nor *Shenandoah Life* assist the appellants, as the redemption of the Bonds was not the sole reason for BC Tel entering into the securitization transaction. There were other potential uses of the funds and benefits from the transaction, although the respondent acknowledges that at the meeting of the BC Tel directors when the securitization plan was presented and approved, the Board was advised of only one use for the funds: the redemption of the Bonds. The respondent relies upon the trial judge's finding that the Securitization Transaction was approved by the Board separately from the approval for the redemption of the Bonds, that the securitization was not approved strictly for that purpose, and that there were other advantages to BC Tel in entering into the transaction whether or not the proceeds were used for the redemption of the Bonds (i.e. a substantial reduction in capital tax paid; a positive impact on the company's balance sheet; and the fact that there were other debts that could have been paid from the proceeds). Finally, the respondent also relies upon the trial judge's ultimate reason for concluding that the securitization transaction did not constitute an indirect borrowing, namely (as he said at para. 35 of his reasons):

> I accept the submission of the Defendant that to find that the transaction was prohibited by the NFAC as being a refunding operation by the indirect application of funds obtained through borrowings, *the transaction would have to have been constructed by BC Tel, specifically and exclusively, for the purpose of redeeming the Bonds and have no independent economic function either from the perspective of BC Tel or of RAC*, neither of which criteria applies to the case at bar. [emphasis added]

[54] On the other hand, Mr. Barrack submits that the ultimate purpose of the transaction is demonstrated by the use to which the funds obtained were actually put: redemption of the Bonds. He says this is exactly the type of case contemplated by *Dofasco* and *Shenandoah Life*, namely one in which "the underlying economic reality of the completed transaction is the functional equivalent of a direct loan for purposes of effectuating a redemption and nothing more".

[55] Neither *Dofasco* nor *Shenandoah Life* was a case where the funds used to redeem the bonds were proceeds of a securitization transaction. I do not see the elements of a securitization transaction as being separate and distinct in the same way that the equity infusion and the debt arrangement in *Shenandoah Life* were separate and distinct. Rather, the central economic function of the "integrated single transaction" here – the securitization arrangement – was to replace the more expensive Bond issue with a less

costly financing facility on which BC Tel paid the flow-through interest charges. Where this is the major economic consequence of a securitization transaction, it is exactly the kind of transaction that the parties to the NFAC intended to prohibit. For the reasons outlined above, I am satisfied that this constitutes a refunding of the Bonds through the application of funds indirectly obtained through borrowings.

[56] I would not read the observations of Chancellor Allen that there must be "no independent economic function" or "no economic purpose or reality" apart from the substitution of cheaper debt for expensive debt, too literally or narrowly. In my opinion, it is sufficient if the principal economic function, purpose or reality of the securitization transaction is to have such an effect. That was the case here.

[57] Respectfully, the trial judge erred in holding that the proceeds of the transaction could not be funds indirectly obtained through borrowings, for purposes of the Trust Deed, unless the transaction was constructed by BC Tel "specifically and exclusively, for the purpose of redeeming the Bonds" and had "no independent economic function either from the perspective of BC Tel or of RAC" (para. 35). I can read no such term into the language of the NFAC. Indeed, as the appellants submit, to do so might well "permit a party to neuter and render ineffective a covenant of this sort merely by including a marginal collateral benefit in a transaction in which the company indirectly obtains cheaper funds." This could not be the intention of the NFAC.

[58] The Bonds were redeemed by the application of funds indirectly obtained by BC Tel through borrowing. The final issue to be determined is whether the borrowing was at an interest cost to the company of less than 11.35%.

At an Interest Cost to the Company of Less than 11.35%

[59] It is not a violation of the NFAC to redeem the Bonds with funds obtained through borrowings – directly or indirectly – if the interest cost to the company is less than 11.35% (the rate on the Bonds). The respondent concedes that the cost of the transaction to BC Tel is less than that amount. Indeed, the respondent anticipated an approximate $23 million saving. The respondent argues, however, that there is no "interest cost" to BC Tel here because, even on the foregoing interpretation of the securitization transaction, there is no borrowing by BC Tel, only by RAC Trust. Therefore, there can be no interest cost to the company.

[60] Again, however, this argument is premised upon the compartmentalized approach to the Securitization Transaction and the view that all that transpired between BC Tel and RAC Trust was a purchase and sale of BC Tel's accounts receivable. The respondent concedes that BC Tel's cost of obtaining the funds through the sale of assets was equivalent to RAC Trust's cost of borrowing funds through the issuance of commercial

paper.[9] It argues, nevertheless, that there is a distinction in law between "interest" and a "purchase discount", and that what BC Tel paid was the latter.

[61] There is a legal distinction between "interest" and a "purchase discount". As Lord Devlin noted, in *Chow Yoong Hong v. Choong Fah Rubber Manufactory*, [1962] A.C. 209 (P.C.) at 217:

> When payment is made before due date at a discount, the amount of the discount is no doubt often calculated by reference to the amount of interest which the payer calculates his money would have earned if he had deferred payment to the due date... Interest postulates the making of a loan and then it runs from day to day until repayment of the loan, its total depending on the length of the loan. Discount is a deduction from the price fixed once and for all at the time of payment.

[62] The trial judge rejected BC Tel's argument in this regard, however, as do I. He concluded that "Purchase Discount" was an inappropriate description for what was contemplated in the Receivables Purchase Agreement by that term, as it was clearly not part of the purchase price. He found as a fact that the Purchase Discount was "strictly a flow through to BC Tel of the interest cost payable by RAC on borrowings made by it through the issuance of commercial paper" and that the obligation to continue to pay this amount continued so long as there remained any outstanding payments to be made as between BC Tel and RAC Trust. I agree with this conclusion and finding.

[63] Given the structure of the Securitization Transaction, it is sophistry to suggest that BC Tel did not bear an "interest cost" in relation to the matter. The NFAC requires that the interest cost be an interest cost "to the Company". The NFAC does not require that it be an interest cost "of the Company". BC Tel paid the interest costs related to the transaction. Everyone agrees those costs were less than 11.35%.

[64] It follows from the foregoing, that BC Tel redeemed the Bonds by applying funds obtained indirectly through borrowing at an interest cost to it of less than 11.35%. This constitutes a violation of the NFAC.

DISPOSITION

[65] Accordingly, the appeal must be allowed, the judgment of Ground J. dated January 21, 2003 set aside, and in its stead an order made in the following terms:

---

[9] See Respondent's factum, paragraph 110.

a) declaring that the redemption by BC Tel, the predecessor of Telus Communications Inc., of the Series AL Bonds on December 30, 1997 was a breach of the No Financial Advantage Covenant contained in a deed of trust and mortgage between BC Tel and Montreal Trust Company dated as of March 1, 1946, pursuant to which the Bonds were issued; and,

b) referring the matter of damages back to the trial judge for assessment.

[66] Counsel agree that costs should follow the event. If they are unable to agree on quantum, brief written submissions may be made in that regard within fifteen days of the release of these reasons.

[67] In conclusion, we wish to thank counsel for their very able and helpful submissions in this complex matter.

"R.A. Blair J.A."
"I agree R.R. McMurtry C.J.O."
"I agree S.T. Goudge J.A."

RELEASED: June 8, 2005

JOP

Tab 2

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

02 260 057

Date: 20020910
Docket: 0201-0143 AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

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

BETWEEN:

NORTHSTONE POWER CORP.

Applicant
(Respondent)

- and -

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

Respondents
(Appellants)

AND BETWEEN:

THE CREDITORS OF NORTHSTONE POWER CORP.

Interested Parties

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

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:

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

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

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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

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

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

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

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

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

votes in the lien holder class, not all of whom were subcontractors to R.J.K., who voted 94.1 per cent to accept Northstone's proposal.

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

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

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

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

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

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

[12] The appeal is dismissed.

APPEAL HEARD on June 24, 2002

MEMORANDUM FILED at Calgary, Alberta,
this 10th day of September, 2002

WITTMANN, J.A.

Tab 3

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corporation,* 2016 BCCA 231

Date: 20160601
Docket: CA42954; CA42958

Docket: CA42954

Between:

Integris Credit Union

Respondent
(Plaintiff)

And

Mercedes-Benz Financial Services Canada Corporation

Appellant
(Defendant)

And

KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd., BHL Capital, a division of Berner Holdings Ltd.

Respondents
(Defendants)

- and -

Docket: CA42958

Between:

Integris Credit Union

Respondent
(Plaintiff)

And

BHL Capital, a division of Berner Holdings Ltd.

Appellant
(Defendant)

And

KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd. and Mercedes-Benz Financial Services Canada Corporation

Respondents
(Defendants)

Before: The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated July 3, 2015 (*Integris Credit Union v. All-Wood Fibre Ltd.*, 2015 BCSC 1146, Vancouver Registry Docket S152310).

Counsel for the Appellant, Mercedes-Benz Financial Services Canada:	G.G. Plottel
Counsel for the Respondent, Integris Credit Union:	C.D. Brousson
Counsel for the Respondent, BHL Capital, a division of Berner Holdings Ltd.:	R.A. Finlay
Counsel for the Respondent, KPMG Inc., as Court-Appointed Receiver of All-Wood Fibre Ltd.:	No Appearance
Place and Date of Hearing:	Vancouver, British Columbia May 9, 2016
Place and Date of Judgment:	Vancouver, British Columbia June 1, 2016

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Madam Justice Bennett

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Summary:

Respondent credit union held general security agreement with debtor. Appellants held priority over certain trucks in possession of debtor. On the respondent's application, the chambers judge granted a receivership order, based on the court's model order, appointing a receiver over the insolvent debtor's "property". The order granted receiver priority to all security interests. Appellants applied to have the trucks excluded from the order. Judge found that the trucks were included as "property" in the order. Held: Appeals allowed. It is not necessary to decide whether "property" under the order included the trucks. Even if "property" included the trucks, the judge erred in not considering whether the trucks should have still been excluded from the order due to the priority interests. Considering those priority interests, the application to exclude the trucks from the receivership order should have been allowed.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

[1] With PD-47 − Model Orders, the Supreme Court has prescribed the use of model forms for certain types of orders. The purpose of the model orders is to encourage parties and the Court to focus on the issues in dispute in a particular proceeding. This appeal concerns an application made under a receivership order based on the Model Receivership Order made pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], and/or s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*].

[2] The Appellant Mercedes-Benz Financial Services Canada Corporation ("MBFS") is a company which finances the acquisition of equipment, including vehicles. The Appellant BHL Capital, a division of Berner Holdings Ltd. ("BHL"), is an equipment lessor. All-Wood Fibre Ltd.'s ("All-Wood") principal line of business was fibre supply for the forestry industry. It financed trucks from MBFS and BHL. All-Wood ceased operations March 9, 2015. Integris Credit Union ("Integris") is a lender with a General Security Agreement with All-Wood. Integris sought and obtained a receivership order. KPMG Inc. ("KPMG") is the receiver. The indebtedness of All-Wood to all of its creditors is now estimated to exceed $8 million.

[3] As a result of the size of an unanticipated CRA liability Integris stands to pay for a significant part of KPMG's fees. The Appellants say that their security over the trucks ranks ahead of the General Security Agreement. They say the receivership order should not cover their trucks and, in any event, their trucks should have been excluded upon application in the court below.

[4] For the reasons that follow, I would allow these appeals.

II. Background

[5] MBFS and BHL supplied four trucks to All-Wood (the "Trucks"):

(a) MBFS provided a 2010 Freightliner CA125DC to All-Wood under a Conditional Sale Contract and Security Agreement dated December 4, 2012. MBFS registered a financing statement for this truck in the British Columbia Personal Property Registry ("PPR") on December 10, 2012.

(b) MBFS provided another 2010 Freightliner CA125DC to All-Wood under a Conditional Sale Contract and Security Agreement dated January 14, 2013. MBFS registered a financing statement for this truck in the PPR on January 16, 2013.

(c) MBFS provided a 2014 Freightliner 122SD to All-Wood under a Lease Agreement dated December 22, 2014. MBFS registered a financing statement for this truck in the PPR on December 29, 2014.

(d) BHL provided a 2015 Freightliner 122SD 48 to All-Wood under a Lease Agreement dated May 23, 2014 (All-Wood was one of several lessees). BHL registered a financing statement for this truck in the PPR on May 23, 2014.

[6] By March 9, 2015, All-Wood had ceased operations. On March 17, 2015, Integris obtained an *ex parte* order appointing KPMG as an interim receiver of All-Wood's "assets, undertakings and properties", pursuant to s. 47(1) of the *BIA* and s. 39 of the *LEA*.

[7] On March 25, 2015, Ehrcke J. appointed KPMG as the receiver (the "Receiver") in respect of "all of the assets, undertakings and properties of [All-Wood], including all proceeds thereof", pursuant to s. 243(1) of the *BIA* and s. 39 of the *LEA*

(the "Receivership Order"). The Receivership Order was based on the court's Model Receivership Order, and includes the following terms:

- Paragraph 2(a) authorizes the Receiver to "take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property".

- Paragraph 2(j) authorizes the Receiver to "market any or all of the Property … as the Receiver in its discretion may deem appropriate".

- Paragraph 16 provides for a receiver's charge (the "Receiver's Charge"), which "shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, … but subject to Sections 14.06(7), 81.4(4), and 81.6(2) of the *BIA*".

- Paragraph 19 provides for a charge not to exceed $100,000 (the "Receiver's Borrowings Charge") as security for funds borrowed by the Receiver, "in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, … but subordinate in priority to the Receiver's Charge and the charges set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the *BIA*".

- Paragraph 29 provides that "[a]ny interested party may apply to this Court to vary or amend this Order …, specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein".

[8] I pause to note here that the Receivership Order at issue here differs from the Model Receivership Order by the addition of the phrase, handwritten in the original, "*specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein"*.

[9] Notably, the business of All-Wood had ceased. The form of receivership order sought did not empower the Receiver to carry on the business of All-Wood.

[10] On May 13, 2015, BHL filed a notice of application seeking the following relief:

> 1. An order that KPMG Inc., receiver of the assets and undertaking of All-Wood Fibre Ltd. pursuant to an order in these proceedings dated March 25, 2015, forthwith deliver up to BHL the following property:
>
> 2015 Freightliner 122SD 48 in. Midroof Tri-Drive Tractor …

[11] On May 25, 2015, MBFS filed a similar notice of application seeking:

> 1. An order that the Equipment [the three trucks], in the possession or control of the Receiver, be delivered by the Receiver to Mercedes-Benz Financial Services Canada Corporation, or its authorized agent.
> 2. A declaration that the Equipment is not subject to the Receivership Order made March 25, 2015, herein.

[12] By order dated June 8, 2015, the Chambers Judge (the "Judge") approved the Receiver's proposed sale of All-Wood's assets by auction but reserved judgment on the issue of whether the Trucks fell "within the scope of the Receivership Order".

[13] By order dated July 3, 2015, the Judge dismissed MBFS and BHL's applications. In addition, he declared that:

> 1. The truck which is subject to the BHL … Lease Agreement dated May 23, 2014, …constitutes "property" within the scope of, and is subject to, the Interim Receivership Order granted March 17, 2015 and the Receivership Order granted March 25, 2015 herein (together the "Receivership Order").
> 2. The three trucks which are subject to the Mercedes-Benz Financial Services Canada Corporation Conditional Sale Contract and Security Agreement dated December 4, 2012, Conditional Sale Contract and Security Agreement dated January 14, 2013 and Lease Agreement dated December 14, 2014, respectively, … constitute "property" within the scope of, and are subject to, the Receivership Order.

[14] There is some dispute concerning the effect of these orders. The Appellants say that the effect of these orders is that the Trucks are subject to a priority charge in favour of the Receiver's costs by paragraphs 16 and 19 of the order. Integris says that there needs to be a further hearing at which the court will make an allocation of the Receiver's costs. Conceivably, no allocation or a minor allocation of those costs could result. The Receiver, who filed a factum, but did not appear, made no submission on this issue.

[15] By virtue of the nature of the Appellants' interests and the timing of the registrations, it is not disputed that the Appellants had duly registered purchase money security interests (PMSI) in the Trucks and serial-number registrations, which establish the Appellants as the highest ranking secured creditors in respect of the Trucks. Integris holds a General Security Agreement in favour of All-Wood, which security is subordinate to that of the PMSI's. Accordingly, Integris is in a subordinate position to the Appellants in respect of the Trucks.

III. Reasons Below

[16] The Judge first considered the meaning of "property" in the Receivership Order. He interpreted this term broadly, with reference to s. 243(1) and the definition of "property" in s. 2 of the *BIA.*

[17] Next, the Judge considered whether the impugned agreements were "financing leases" or "true leases" (apparently in an effort to address the Appellants' submission that All-Wood did not obtain an interest in the title to the Trucks, and therefore the Trucks did not qualify as "property" under the impugned contracts).

[18] At para. 30, he summarized the Receiver's submissions on this issue as follows:

> [30] The position of the Receiver … is that the agreements relating to the subject trucks are "financing leases" as opposed to "true leases". As such, the trucks constitute Property and are subject to the Receivership Order. The Receiver submits that if the agreements are "true leases" then the trucks do not form part of the assets of All-Wood and would not be subject to the Receivership Order.

[19] After reviewing the "test" for a financing lease (i.e., security lease) in *DaimlerChrysler Services Canada Inc. v. Cameron*, 2007 BCCA 144, the Judge concluded that the impugned agreements met this test and were therefore not true leases (paras. 38-39).

[20] At para. 40, he summarized his findings as follows:

> [40] Given my interpretation of the term Property, the trucks fall within the scope of the Receivership Order. Further, the agreements between All-Wood and BHL and MBFS are financing leases; as a result the trucks fall within the scope of the Receivership Order.

IV. Statutory Provisions

[21] Section 243(1) of the *BIA* authorizes a court, upon the application of a secured creditor, to appoint a receiver over an insolvent or bankrupt person's property where it is "just or convenient to do so":

> ***Court may appoint receiver***
>
> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

[22] Section 243(6) of the *BIA* also authorizes a court to "make any order respecting the payment of fees and disbursements of the receiver that it considers proper", and order that the receiver's charge has priority ahead of "any or all… secured creditors" although "other secured creditors who would be materially affected by the order" must receive notice and have the opportunity to make representations:

> ***Orders respecting fees and disbursements***
>
> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that

> the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.
>
> [Emphasis added.]

V. Standard of Review

[23] Generally on appeal, questions of law are reviewable on a standard of correctness. Findings of fact may be reversed on a palpable and overriding error. For true questions of mixed fact and law, where a legal principle is not readily extricable, the matter should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8-12, 36. Failure to give sufficient weight to relevant considerations may justify appellate review: *Bell v. Bell*, 2001 BCCA 148 at para. 11.

VI. Interpretation of the Order

[24] The arguments here and below focused on the interpretation of the Receivership Order, and in particular the meaning of "property".

[25] The principles concerning the interpretation of orders are well settled. In *Yu v. Jordan,* 2012 BCCA 367, this Court said:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
>
> [Emphasis added.]

[26] In *Sutherland v. Reeves*, 2014 BCCA 222, it was argued that the interpretation of an order turned on the meaning of the Model Receivership Order. This Court rejected that approach saying:

> [30] But I do not accept Mr. Sutherland's underlying premise. This appeal does not turn on an interpretation of the Model Order. It turns on the

> interpretation of the specific Order made by Mr. Justice Willcock. This is so for two reasons.
>
> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
> > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
> >
> > [Emphasis added in original.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.
>
> [32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.
>
> [Emphasis added.]

[27] Those principles were recently applied to the interpretation of a Receivership Order by Fitzpatrick J. in *Great Basin Gold Ltd. (Re)*, 2015 BCSC 1199. She found that all of the aspects of the receivership order, based on the factors set out in *Yu*, were interrelated and supported an interpretation of the stay provisions at issue there.

[28] As this Court noted in *Sutherland*, the order to be interpreted is a specific order of the court. It is an error to focus on the Model Order rather than the specific order at issue. It is the pleadings, relevant circumstances and specific wording of the order that governs the interpretation of the Receivership Order.

[29] The pleadings reveal the nature of the receivership was to liquidate the assets over which Integris held priority for their security. Integris' notice of civil claim sought an order, *inter alia*, giving Integris conduct of sale over All-Wood's assets, or alternatively empowering the Receiver to sell the assets. MBFS's response to civil claim expressly opposed this relief. Further, Integris' notice of application and accompanying affidavit established that All-Wood ceased to carry on business. The draft form of receivership order sought by Integris did not empower the Receiver to carry on the business of All-Wood.

[30] Accordingly, realization of Integris' interests, and not operation of All-Wood, was the Receiver's focus. Integris required the Receiver's assistance to realize on the security. Conversely, the Appellants did not want or need the assistance of the Receiver. The pleadings reveal that the Receiver, as Integris' appointee, was intended to be the agency by which Integris would realize on the security it held.

[31] The Receivership Order did not incorporate by reference the statutory definition of "property". The reference to "property" provided in the Order was less expansive:

> 1. Pursuant to Section 243(1) of the BIA and Section 39 of the LEA KPMG Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor, including all proceeds thereof (the "Property").
>
> [Emphasis added.]

[32] In *Sutherland*, the receivership order's definition of "property" differed from that of the Model Order. Bauman C.J.B.C. found the definition used to be "significantly broader" than that of the Model Order:

> [32] Second, and critically, the Order in this case is not identical to the Model Order. This is most apparent in their divergent definitions of "Property", which was not discussed in Mr. Sutherland's factum. As noted, the Model Order defines "Property" as including all the "assets, undertakings and properties of the Debtor, including all proceeds thereof". In contrast, the Order defines "Property" as "the affairs, business, undertaking and assets" of Tangerine. This is a significantly broader definition than that found in the Model Order.

> [33] When the word "Property" is replaced with its definition in the first portion of clause 10 of the Order, that portion provides:
>
> > 10. No Proceeding against or in respect of Tangerine or the [affairs, business, undertaking and assets of Tangerine] shall be commenced or continued except with the written consent of the Receiver or with leave of this Court …

[33] Integris describes the factual circumstances at the time the Receivership Order was made as chaotic. It says All-Wood's equipment was scattered among various locations, some remote; the landlord had distrained; the company's records had been removed; the employees were laid off; the company's management had walked away; the creditors were seizing assets; and CRA had a lien.

[34] Integris submits the definition of "property" should include the Trucks because the Receiver could not have practically considered priorities before needing to step in and take control for the benefit of all creditors. I agree that certain circumstances may justify finding a higher-ranking creditor liable to a receiver appointed by a general creditor. However, such scenarios are an exception to the general rule that a receiver cannot subject secured creditors to liability for disbursements or fees.

[35] Although I have reviewed the circumstances of the Receivership Order and the parties' arguments, I do not think the issue before the court properly turns on the interpretation of "property" in the Receivership Order. Here, the applications before the court were to deliver up to MBFS and BHL the Trucks and exclude them from the receivership. That was something expressly contemplated by paragraph 29 of the Receivership Order and is determinative of these appeals.

VII. Application Before the Court

[36] The Judge did not find, nor did the Receiver or Integris establish in evidence, that the Receiver expended money necessary for the preservation of the Trucks. The Judge ultimately ordered that the Trucks be excluded from the package of assets auctioned by the Receiver because the Appellants "had the ability and resources to market the trucks on their own".

[37] The Appellants could sell the Trucks, with the consent of the Receiver, on the condition that the proceeds be held in trust. The real issue before the court was the Receiver's right to indemnity for the costs of the receivership, and whether the Trucks should be removed from the receivership or be subject to such charges.

[38] It is apparent that there are significant differences between a court-appointed receiver and a trustee in bankruptcy. A receiver does not obtain the debtor's proprietary interest in the collateral: *1231640 Ontario Inc. (Re)*, 2007 ONCA 810 at para. 22, 27-28. On the other hand, a trustee becomes vested with the property of the bankrupt debtor, which may allow the trustee to assert a claim that the bankrupt cannot: *BIA*, s. 71; *Re Giffen* [1998], 1 S.C.R. 91.

[39] A receiver's right to indemnity may exceptionally extend to the security of secured creditors as was discussed in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, 59 D.L.R. (3d) 492 at 496 (Ont. C.A.):

> [13] Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": vol. 1, s. 22, p. 25) in this way:
>
> > When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lien-holder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior

> mortgagees or lienholders without the sanction of such mortgagees or lienholders.
>
> [Emphasis added.]

[40] *Kowal* was approved and applied by this Court in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (C.A.). In *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*, 2005 BCSC 1017, aff'd 2006 BCCA 458, Stromberg-Stein J., as she then was, summarized the exceptions to the general rule provided in *Kowal*:

> [30] Although a secured creditor in a priority position may not be bound by a court order granting priority to another party, as held in *Kowal*, a creditor in a superior priority position may nevertheless forgo that priority position by some other means. For example, three exceptions to the general rule that a receiver has no priority for his expenses over a prior secured creditor were recognized by the Ontario Court of Appeal in *Kowal*, and by the British Columbia Court of Appeal in *Lochson*. The three exceptions as provided in *Kowal* at 496, 497, and 499, respectively, are:
>
> > 1. If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders;
> >
> > 2. If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him; and
> >
> > 3. If the receiver has expended money for the necessary preservation or improvement of the property he may be given priority for such expenditure over secured creditors.

[41] In my view the exceptions provided for in *Kowal* are not engaged here. From the outset of the application, the Appellants took the position that they wanted no part in the receivership. Prior to the court application, BHL engaged in correspondence with KPMG in an attempt to have the Receiver give up the property without a court application. The Receiver also had early notice of MBFS's interest in the Trucks.

[42] The most telling circumstance weighing in favour of excluding the Trucks from the receivership is that the Appellants have priority over Integris with respect to the Trucks pursuant to their PMSI's. To allow the Trucks to remain under the

receivership would grant the Receiver, and indirectly Integris who must indemnify the Receiver's losses, priority over the Appellants.

[43] By virtue of the lease or conditional sale agreements, All-Wood had only possessory interests in the Trucks. The Appellants retained the proprietary rights. All-Wood had only the right to possess and use the Trucks, on certain terms and conditions as set out in the agreements. The Receiver could not acquire a greater interest than All-Wood held.

[44] The court below focused on a "true lease / financing lease" analysis. The true lease / financing lease dichotomy arises in the context of the *Personal Property and Security Act*, R.S.B.C. 1996, c. 359 [*PPSA*]. Section 55 of the *PPSA* exempts Part 5 from transactions referred to in s. 3, which includes a lease for a term of more than one year that does not secure payment or performance of an obligation (i.e., a true lease). However, Part 5 is irrelevant to the application before the court. *DaimlerChrysler*, cited by the Judge, did not involve a receivership but determined whether Part 5 of the *PPSA* applied to a particular lease.

[45] The true lease / financing lease analysis is also relevant in a *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 proceeding in that creditors with a true lease are entitled to continuing payments under s. 11.01(a) while those with a financing lease are not: *Smith Brothers Contracting Ltd. (Re)(Trustee of)* (1998), 53 B.C.L.R. (3d) 264 (S.C.).

[46] In my view the true lease / financing lease dichotomy is not helpful in the analysis here. Section 243(6) of the *BIA* allows a court to direct that a receiver's charges rank ahead of security interests but requires notice to secured creditors. The Appellants applied for orders directing the Receiver to release the Trucks and exclude the property from the Receivership Order (the Receiver's fees and borrowing charges). This type of application was expressly contemplated in paragraph 29 of the Receivership Order, which included these handwritten changes to the Model Receivership Order:

> 29. Any interested party may apply to this Court to vary or amend this Order on not less than seven (7) clear business days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order, *specifically including an application by any Defendant to authorize the Receiver to release to any Defendant any Property in its possession or control, and to exclude such Property from the priorities set out in the paragraphs 16 and 19 herein.*
>
> [Italics denote the handwritten addition to the order.]

[47] The Judge concluded the Trucks fell within the scope of the Receivership Order because the Trucks were "property" and the agreements between All-Wood and the Appellants were financing leases. However, the Judge did not consider whether, pursuant to paragraph 29 of the Order, the Trucks should be excluded from the priorities set out in paragraphs 16 and 19 despite being "property". Effectively that is what the applications sought.

[48] In my opinion, even if the Trucks fell within the definition of "property" in the Receivership Order, the question of whether the Appellants had superior entitlement under the priority rules of the *PPSA* was critical to the applications before the court. The priority rules of the *PPSA* are designed to achieve commercial certainty and predictability. To keep the Trucks within the Receivership, and thus subject to the charges of the Receiver, would circumvent the priority rules of the *PPSA*.

[49] Groberman J.A. summarized the goal of the *PPSA* and its application to third parties in *KBA Canada, Inc. v. Supreme Graphics Limited,* 2014 BCCA 117:

> [20] It is well-established that the overriding goal of the *PPSA* is to provide commercial certainty and predictability to personal property financing. The statute includes clear rules for registration of financing statements in respect of security interests and for priorities among secured creditors. Courts have been very reluctant to circumvent or modify the explicit statutory provisions through the use of extra-statutory principles of common law or equity. The general approach to the statute is well-described in the first chapter of Ronald C.C. Cuming, Catherine Walsh & Roderick Wood, *Personal Property Security Law*, 2d ed. (Toronto: Irwin Law, 2012) at 51:
>
> > The PPSA is founded on certain legislative policies that generally inform its interpretation. The most prominent of these is the advancement of commercial certainty and predictability. This is a primary value in commercial law generally. Its principal application in the PPSA context takes the form of an appropriate reluctance to

> countenance judicial glosses on the statutory rules, especially those dealing with priority.
>
> …
>
> [27] It is difficult to conceive of a situation in which principles of common law, equity, or the law merchant will be applicable to a priorities dispute, because the *PPSA* deals with priorities comprehensively. In discussing similar Saskatchewan legislation in *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, the Supreme Court of Canada said this of the priorities scheme:
>
> > [22] The *PPSA* provides a detailed set of rules for resolving priority disputes between competing security interests; perfection and various temporal priority rules generally serve as the default priority rules where there is no more specific rule that governs in a particular circumstance: s. 35(1). While having a security interest gives the secured creditor an interest which is enforceable both as against the debtor and against third parties, the *PPSA* recognizes other stakeholders' interests in collateral by subordinating secured creditors' interests to third parties' interests in various circumstances. For example, unperfected secured interests are subordinated to the interests of a trustee in bankruptcy and in certain circumstances to transferees for value without notice: ss. 20(2) and (3) [ss. 20(b) and (c) of the B.C. Act]. Thus, within the domain of application of the Act, the *PPSA* provides a complete set of priority rules for ranking the interests of both creditors and third parties in particular property.
>
> [Emphasis added.]

[50] The clear rules of the *PPSA* should not be circumvented by the appointment of a receiver, when the exceptions outlined in *Kowal* are not met.

[51] Integris submits that in the appropriate circumstances a court may appoint a receiver and grant it priority over other pre-existing charges, such as occurred in *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809.

[52] *Caisse* was an application for the appointment of a receiver over the assets of a debtor. Certain mortgagees argued that the real property over which they hold security by way of first and second mortgages respectively should be carved out of any receivership order because "a receiver would do no more than add a layer of expense and procedure to the handling of the real property, resulting in increased expense but adding nothing of convenience" (para. 17). The mortgagees ranked in

priority to Caisse, the general creditor who sought the appointment. The judge rejected the mortgagees' argument and found that it was just and convenient that a receiver should be appointed over both the receivables of the corporate debtors and the real property of the individual debtors.

[53] In my view, *Caisse* does not assist Integris. There the judge applied the analytical framework of *Kowal* and found an exception was made out. The particular circumstances of that case justified the order, most notably that (1) the mortgagees would receive a full return on their interests and (2) the realization of the mortgagees' security would not be subjected to the costs arising from the other interests:

> [22] I see no injustice or prejudice to the mortgagees under such an arrangement: there is no evidence before me that the real property is worth any less than the $13.5 million put forth by Hubert Belanger. I cannot conceive of any scenario wherein the receivers' costs or disbursements would compromise a full return on the mortgagees' interest. The proposed order contains a limit on the right of the receiver to borrow in order to fund the receivership (see paragraph 24 of Appendix "A"). To the extent that the receiver conducts itself in a manner similar to a mortgagee in possession, one must assume that some of its costs in that regard would simply be incurred in the stead of the costs that a mortgagee in possession would incur or charge. This assurance can be enhanced by a clause in the order which would serve to ensure that the priority of a receiver's charge or borrowing charge should rank ahead of the three conventional mortgages only to the extent that those charges relate exclusively to the preservation, maintenance, upkeep or condition of the real property. The proposed order put forward by the Caisse contains such a clause at paragraph 28. In my view, it is just and convenient that the costs of the receiver as they pertain to the real property be allocated amongst all creditors. Moreover, this arrangement ensures that the realization of the mortgagees' security will not be subjected to the operation of the business, matters which are of no concern to them as mortgagees. On the other hand, it is only reasonable and fair that the receiver be given priority for expenditures incurred for the necessary preservation and improvement of the property. Where a receiver is appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no good reason why the mortgagee should not have to pay its proportionate share of the receivership costs [see: *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp* (2006), 25 C.B.R. (5th) 156 (ONSC) at para. 45.
>
> [Emphasis added.]

[54] In the present case, we are advised that there are insufficient funds from the Receivership to pay the secured creditors and the Receiver's costs and disbursements. The situation described in *Caisse* does not arise.

[55] Nor is it appropriate, as Integris argues, to reserve the issues here to a future allocation hearing. As the Appellant's PMSIs take priority over Integris' GSA, and the Appellants wanted no part of the receivership, in the circumstances here the Trucks should have been released to the secured creditors at the earliest opportunity.

VIII. Conclusion

[56] In my opinion the Trucks should have been excluded from the Receivership in response to the Appellants' applications. The Trucks should not be subject to the Receiver's charges. It follows that I would allow the appeals.

"The Honourable Mr. Justice Savage"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Bennett"

Tab 4

27826

Supreme Court of Canada | Cour suprême du Canada

PAUL HOUSEN

- v. -

RURAL MUNICIPALITY OF SHELLBROOK NO. 493 (Sask.) (27826)

02 092 017

CORAM:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Madame Justice L'Heureux-Dubé
The Honourable Mr. Justice Gonthier
The Honourable Mr. Justice Iacobucci
The Honourable Mr. Justice Major
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Madam Justice Arbour
The Honourable Mr. Justice LeBel

Appeal heard:
October 2, 2001

Judgment rendered:
March 28, 2002

Joint reasons for judgment by:
The Honourable Mr. Justice Iacobucci
The Honourable Mr. Justice Major

Concurred in by:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Madame Justice L'Heureux-Dubé
The Honourable Madam Justice Arbour

Dissenting reasons by:
The Honourable Mr. Justice Bastarache

Concurred in by:
The Honourable Mr. Justice Gonthier
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel

PAUL HOUSEN

- c. -

MUNICIPALITÉ RURALE DE SHELLBROOK nº 493 (Sask.) (27826)

CORAM :
La très honorable Beverley McLachlin, c.p.
L'honorable juge L'Heureux-Dubé
L'honorable juge Gonthier
L'honorable juge Iacobucci
L'honorable juge Major
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge Arbour
L'honorable juge LeBel

Appel entendu :
Le 2 octobre 2001

Jugement rendu :
Le 28 mars 2002

Motifs de jugement conjoints :
L'honorable juge Iacobucci
L'honorable juge Major

Souscrivent à l'avis de l'honorable juge Iacobucci et de l'honorable juge Major :
La très honorable Beverley McLachlin, c.p.
L'honorable juge L'Heureux-Dubé
L'honorable juge Arbour

Motifs dissidents :
L'honorable juge Bastarache

Souscrivent à l'avis de l'honorable juge Bastarache :
L'honorable juge Gonthier
L'honorable juge Binnie
L'honorable juge LeBel

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Michael Morris

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Pour l'appelant :
Gary D. Young, c.r.
Denis I. Quon
Kim Anderson

Pour l'intimée :
G. L. Gerrand, c.r.
Michael Morris

Citations

Sask. C.A. : [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.

Sask. Q.B. : [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL).

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B.R. Sask. : [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation : *Housen v. Nikolaisen*, 2002 SCC 33. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation : *Housen v. Nikolaisen*, [2002] x S.C.R. xxx, 2002 SCC 33.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *Housen c. Nikolaisen*, 2002 CSC 33. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *Housen c. Nikolaisen*, [2002] x R.C.S. xxx, 2002 CSC 33.

housen *v.* nikolaisen

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

Indexed as: Housen *v.* Nikolaisen

Neutral citation : 2002 SCC 33.

File No. : 27826.

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

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 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.

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.

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 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 showing 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 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* 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 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 super-elevation 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 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 eighteen to twenty 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.

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By Iacobucci and Major JJ.

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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. Quebec (City)* (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; *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. 75 491; *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 SCC 15; *Schreiber Brothers 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 No. 44 (Rural Municipality)* (1988), 65 Sask. R. 260.

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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.

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.

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Solicitors for the respondent : Gerrand Rath Johnson, Regina.

SUPREME COURT OF CANADA

PAUL HOUSEN

v.

RURAL MUNICIPALITY OF SHELLBROOK NO. 493

CORAM: The Chief Justice and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

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.

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). *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 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.

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.

12 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):

> 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 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" (1992), 13 *Adv. 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 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 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:

> 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.

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.]

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 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 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), 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 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, supra*, 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 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 interpretation of the evidence as a whole" (see also *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78).

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 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 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 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 p. 515. 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 (p. 516). 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 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.

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 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 ref'd [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.

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.
>
> 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. [Italics in original; underlining added.]
>
> ([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, exercising ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

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 km/h road until you are too far into the tight curve to 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 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. 47). At para. 42, 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. 48). 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: *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 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. 122-142) 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. 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 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 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. 52-65) 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. 52). 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 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*, *supra*, 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 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*, S.S. 1989-90, c. R-26.1, 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.

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. 72). 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. 72). 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, 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.

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was

on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

65 Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had knowledge of the particular hazard in question, in the view of the trial judge, they should have caused the municipality to investigate Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1988 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

66 We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality on this issue. Once the trial judge found that there was a

permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "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" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of *The Rural Municipality Act, 1989*. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although under s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying

the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the municipality knew or ought to have known of the disrepair.

68 Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and 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 in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

69 To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding

that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

V. Causation

70 We agree with our colleague's statement at para. 82 that the trial judge's conclusions on the cause of the accident was a finding of fact: *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.), at p. 407, quoted with approval in *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

71 The trial judge based her findings on causation on three points (at para. 101):

> (1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
>
> (2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
>
> (3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments

before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "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" (*Van de Perre*, *supra*, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings on this review. This presumption, absent sufficient evidence of misapprehension or neglect is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain

witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: *Toneguzzo-Norvell*, *supra*, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: *Van de Perre*, *supra*, at para.15.

73 For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses *de novo*. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

74 As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the motorist; an experienced drinker, although dangerous, will probably

perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

VI. Common Law Duty of Care

76 As we conclude that the municipality is liable under *The Rural Municipality*

Act, 1989, we find it unnecessary to consider the existence of a common law duty in this case.

VII. Disposition

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

SUPREME COURT OF CANADA

PAUL HOUSEN

v.

RURAL MUNICIPALITY OF SHELLBROOK NO. 493

CORAM: The Chief Justice and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

BASTARACHE J. —

I - Introduction

78 This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The

respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

II - Factual Background

80 The sequence of events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately 10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

81 A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr.

Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

82 When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in *The Highway Traffic Act, 1989*, S.S. 1986, c. H-3.1, and the *Criminal Code*, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then

curved more distinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The province of Saskatchewan has some 45,000 kilometres of bladed trails.

85 According to the provincial scheme of road classification, both bladed trails and local access roads are "non designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A

fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

III - Relevant Statutory Provisions

86 *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-261

> **192.**(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.
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> . . .
>
> (2) Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to *The Contributory Negligence Act*, civilly liable for all damages sustained by any person by reason of the failure.
>
> (3) Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

The Highway Traffic Act, 1986, S.S., c. H-3.1

> **33.** (1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:
>
> (*a*) at a speed greater than 80 kilometres per hour; or

(*b*) at a speed greater than the maximum speed indicated by any signs that are erected on a highway.

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44. (1) No person shall drive a vehicle on a highway without due care and attention.

IV - Judicial History

A. *Saskatchewan Court of Queen's Bench*, [1998] 5 W.W.R. 523

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of *The Rural Municipality Act, 1989* imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in s. 192 and the jurisprudence interpreting that section. She referred specifically to *Partridge v. Rural Municipality of Langenberg*, [1929] 3 W.W.R. 555

(Sask. C.A.), in which it was stated at p. 558 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". She also cited *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality. . . the situation of the road therein, whether required to be used by many or by few; . . . to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40 (Sask. Q.B), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

89 Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

> 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. [Emphasis in original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent 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).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para.90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

> Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded

> a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

92 Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that *Just v. British Columbia*, [1989] 2 S.C.R. 1228, and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

B. *Saskatchewan Court of Appeal*, [2000] 4 W.W.R. 173, 2000 SK CA 12

93 On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

94 Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of

the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the 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 and error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

> 1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.

> 2. To assess the issue of whether persons requiring to use the road, exercising ordinary car [sic], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.
>
> 3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

96 According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in *Southam, supra.* In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it".

97 Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A.

found that the evidence of both experts was based on the fundamental premise that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had that trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

V - Issues

100 A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?

C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

D. Does a common law duty of care coexist alongside the statutory duty of care?

VI - Analysis

A. *Did the Court of Appeal Properly Interfere with the Decision at Trial?*

(1) The Standard of Review

101 Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Southam*, *supra*, at para. 35).

102 Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (*Southam, supra*, at para. 60; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 26). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (*Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353). 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. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.)(1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J.

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. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). 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.

104 My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

105 By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 833; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 647; R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at p. 90). The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

106 In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily 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 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. As stated by Kerans, *supra*, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that *every* new attempt to apply a legal rule to a set of facts involves some measure of interpretation of that rule, and thus more law-making"(emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this

determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, *supra*, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485 (1984), at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact.

108 My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case 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 (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In

addition, while some questions of mixed fact and law may not have "any great precedential value" (*Southam*, *supra*, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

109 Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having occurred fulfills the applicable knowledge requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing *Southam*, *supra*, at para. 37 (para. 28). I disagree, however, that the dicta in *Southam* establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in *St-Jean v. Mercier*, 2002 SCC 15, a medical negligence case, distinguished *Southam* on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated 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. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (*Southam*, *supra*, at para. 45; and *Nova Scotia Pharmaceutical Society*, *supra*, at p. 647).

111 I also disagree with my colleagues that *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, is authority for the proposition that when the question of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done

(*Taylor v. The Queen in Right of British Columbia* (1978), 95 D.L.R. (3d) 82). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (*Taylor (Guardian ad litem of) v. British Columbia* (1980), 112 D.L.R. (3d) 297). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident". On the issue of causation, a question of fact, Sexton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiff's claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

112 This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78), for the general proposition 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 [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that *Jaegli* establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in *Jaegli* merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

(2) Error of Law in the Reasons of the Court of Queen's Bench

114 The standard of care set out in s. 192 of *The Rural Municipality Act, 1989*, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (*Southam*, *supra*, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

115 The long line of jurisprudence interpreting s. 192 of *The Rural Municipality Act* and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (*Partridge, supra*, at p. 558; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (*R. v. Jennings*, [1966] S.C.R. 532, at p. 537; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884, at p. 892; *Fafard v. Quebec (City)* (1917), 39 D.L.R. 717, at p. 718). This Court, in *Jennings, supra*, interpreting a similar provision under the Ontario *Highway Improvement Act*, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety."

116 There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in *Fafard, supra*, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety." Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a

danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in *Williams v. Town of North Battleford* (1911), 4 Sask. L. R. 75 (Court en banc), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact . . . I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient . . . [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the

ordinary driver expects a dirt road to become slippery when wet. By contrast, paved bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

118 The appellant in this case argued, at paras. 26-27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> 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 . . .
>
> . . . where the existence of . . . 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. [Emphasis added.]

119 The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not

travel through it safely. 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. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In *Nelson v. Waverley No. 44 (Rural Municipality)* (1988), 65 Sask. R. 260 (Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate look-out considering the maintenance that was being performed on the road. In *Diebel Estate*, *supra*, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

> His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour. [Emphasis added.]

121 The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

122 In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

123 The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on . . . " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> 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.

125 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. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is

perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

126 Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would

be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

127 While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

128 Again, I would not reject the trial judge's factual finding that the curve presented motorists with an inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, and where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution [Respondent's Record, Vol. II, at pp. 373-76]. The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> . . . if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

131 The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

132 Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. . . . You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?

A. As in regards to travelling through the curves, yes, that's right, yeah.

Q. Yes. And you did not know what was coming as you approached the curve, that is correct?

A. That's correct, yes.

Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?

A. Or a tractor or a cultivator or something, that's right.

Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?

A. That's right, yeah, that is correct.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must

be considered when determining whether the reasonable driver would be able to navigate it safely.

134 Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

> Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?
>
> A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.
>
> Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see – you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?
>
> A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.
>
> Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?
>
> A. Yes, it changed, yes.
>
> Q. Now you were faced with something other than a straight road?
>
> A. M'hm. Yes.
>
> Q. Now you were on – and at some point along there the surface of the road changed, did it not?

A. Yes.

Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?

A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.

Q. Yes. And all those differences were obvious, were they not?

A. Well, I – they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note 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. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

137 I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

138 Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did

in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

139 In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues 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" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on

inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65) They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge only to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (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.

141 My colleagues refer to the decision of *Van de Perre v. Edwards*, 2001 SCC 60, in which I stated that "an omission [in the trial judge's reasons] 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" (para. 15). This case is however distinguishable from *Van de Perre*, *supra*. In *Van de Perre*, the appellate court improperly substituted its own findings of fact for the trial judge's clear

factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

142 Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

B. *Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?*

143 Pursuant to s. 192(3) of the *The Rural Municipality Act, 1989*, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

> Breach of the statutory duty of care imposed by section 192 of *The Rural Municipality Act, 1989, supra*, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous – where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> 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. [Emphasis added.]
>
> I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular.

145 Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. 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 (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

146 I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent 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 Snake Hill Road.

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the

standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It 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 trees and vegetation which grew up along the sides of the road.

149 In addition, the question of the respondent's knowledge is linked inextricably 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 a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

150 The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491, at pp. 503-4:

> . . . "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system. The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that

was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the Act was deficient. The evidence shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

154 The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this

accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

155 Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look

out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked: "Cst. Forbes does not recall any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. Forbes and Healy are only two of nine members of the RCMP Detachment at Shellbrook" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the R.C.M.P. members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such

a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

C. Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?

158 The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

> I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (*Toneguzzo-Norvell*, *supra*, at p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in *Toneguzzo-Norvell*. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evidence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the road three times in the 18 to 20 hours preceding the accident.

161 I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the R.C.M.P, supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by

misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

162 Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

> Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties that are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> . . . At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver. . . . if an impaired person is an experienced drinker there – it won't be that high. However, there will be an increased risk compared to a sober state. . . . But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

164 In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence. It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion

from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> . . . No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the Criminal Code process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

166 At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

167 In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding 24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

168 I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when

he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court 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. The logic of this approach was aptly explained by Kerans, *supra*, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other evidence" is to turn one's back on review for reasonableness.

D. Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of the Act?

170 The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of *The Rural Municipality Act, 1989.* According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

171 The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

172 I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in *Kamloops (City of) v.*

Nielsen, [1984] 2 S.C.R. 2, simply has no application where the legislature has defined a statutory duty. As was stated by this Court in *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, at p. 424:

> . . . if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in *Anns v. Merton London Borough Council*, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (*Just*, *supra*; *Brown*, *supra*; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Ryan*, *supra*).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in *The Rural Municipality Act, 1989*, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in *Ryan*, *supra*, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one

cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, 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.

175 The Courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. 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. Accordingly, it is a change that I would not be prepared to make.

VII - Disposition

176 In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

Tab 5

COURT FILE NO.: 31-OR-325795
DATE: 2003/10/01

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ONTARIO

SUPERIOR COURT OF JUSTICE

IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF BEETOWN HONEY PRODUCTS INC., incorporated under the laws of the Province of Ontario, carrying on business in the Town of Beeton, Township of New Tecumseth, County of Simcoe, Province of Ontario

Peter J. Cavanagh, for the Trustee in Bankruptcy

Rachel Moses, for the Creditors

HEARD: September 10, 2003

SACHS J.

INTRODUCTION

[1] There were two motions before me. The first, brought by the Trustee in Bankruptcy, was a motion for an order dismissing the appeal of two Creditors from the disallowance by the Trustee of their claim. The grounds for the motion were that the Creditors were in contempt of a consent order that required one of them, and an expert they had retained, to attend to be cross-examined on affidavits filed by the Creditors in support of their appeal. The second motion before me was brought by the Creditors. In their motion, the Creditors sought an order requiring the Trustee to produce a report of an investigation conducted by Price Waterhouse into the affairs of the bankrupt company. They also sought an order varying the order they had originally consented to, such that their expert was not required to attend for cross-examination on his affidavit until he had had the opportunity to review, consider and reply to the Price Waterhouse report.

[2] The Trustee submitted that I should not consider the Creditors' motion because of their alleged contempt and further, they resisted production of the report on two grounds:

(a) The request for production was premature; and

(b) The report was subject to a claim of litigation privilege.

THE FACTS

[3] On January 29, 1997, Beetown Honey Products Inc. ("Beetown") filed an Assignment in Bankruptcy and a Trustee in Bankruptcy was appointed ("the Trustee"). A claim was made by Donald Couture and Beverly Couture ("the Creditors") in the bankruptcy of Beetown as secured creditors. The claim was disallowed by the Trustee on September 2, 1998.

[4] On November 9, 1998 a motion was brought by the Creditors by way of appeal from the disallowance of their claim. The motion was supported by an affidavit from Donald Couture. An affidavit in response was delivered on behalf of the Trustee. Thereafter, the solicitor for the Creditors advised that he intended to deliver reply material. In April of 1999, the Trustee began pressing for that material. For a variety of reasons, that material was not delivered until May of 2000. The material included an affidavit from David Pawlett, which contained a financial analysis of the business of Beetown – an analysis directed at challenging the basis for the disallowance of the Creditors' claim. The reply material also included a supplementary affidavit from Donald Couture.

[5] In November of 2001, the Trustee filed a responding affidavit and their counsel contacted the Creditors' counsel to arrange for dates to cross-examine Mr. Couture and Mr. Pawlett on their affidavits. In June of 2002, when no dates were forthcoming, the Trustee served Notices of Examination to cross-examine the deponents in question in July of 2002. Counsel for the Creditors advised the Trustees solicitor that the deponents would not attend and certificates of non-attendance were obtained. Subsequently, attempts were made to arrange further dates. These attempts were suspended when the Creditors decided to retain new solicitors to represent them. There was a gap of some months between the time that the Creditors original solicitors ceased to be solicitors of record and the new solicitors were retained.

[6] In June of 2003, before the new solicitors were retained, the Trustee served a motion seeking an order dismissing the Creditors' appeal for delay. That motion was returnable on June 19, 2003. On June 6, 2003 the Creditors' current solicitors received the file and went on record. The file consisted of four boxes of material.

[7] A request was made by the new solicitors to withdraw the June 19, 2003 motion. The Trustee's solicitors were not prepared to withdraw their motion without an order that scheduled the cross-examinations on the affidavits delivered by the Creditors in support of their appeal. Specific dates were agreed to, and a consent order was obtained from the Registrar in Bankruptcy that Donald Couture was to attend to be cross-examined on July 17, 2003 and David Pawlett was to be cross-examined on July 18, 2003.

[8] According to the material before me, these dates were agreed to before the Creditors' counsel had had an opportunity to complete his review of the file. After the order, counsel completed his review, met with Mr. Couture and Mr. Pawlett, and learned that the Trustee had obtained an audit report from Price Waterhouse that contained information that was relevant to the issues on the appeal.

[9] Counsel for the Creditors immediately wrote to the Trustee's counsel to request production of the report, and indicated that he would not be producing Mr. Pawlett for cross-examination until Mr. Pawlett had had the opportunity to review the report and file a supplementary affidavit in relation to it. Counsel for the Trustee refused to produce the report and was adamant that the terms of the court order be complied with. Counsel for the Creditors indicated that he would produce Mr. Couture as ordered, but intended to bring a motion seeking production of the report. In the result, neither cross-examination took place. Shortly thereafter the two motions before me were brought.

MOTION TO DISMISS

[10] In the submission of the Trustee, the conduct of the Creditors in refusing to comply with the terms of the Registrar's order of June 16, 2003 was "egregious, calculated and amounted to the flagrant and intentional disregard of a valid and binding order of this Court to which they had given their consent". The Trustee argued that the contempt could not be remedied by setting another date for Mr. Pawlett's cross-examination as to do so would give the Creditors the delay they were seeking in the first place.

[11] The Trustee did not dispute that I had the discretion to vary the consent order. However, they argued, based on the decision of *Chitel v. Rothbart* [1984] O.J. No. 2238, that a consent order can only be set aside or varied by "subsequent consent, or upon the grounds of a common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract". They further argued that none of these grounds were present in this case. The decision in *Chitel v. Rothbart* was a decision of Master Sandler. It was upheld both by the Divisional Court and by the Court of Appeal. However, neither of the upper courts dealt specifically with the question of whether a court's discretion to intervene with respect to a consent court order was limited in the way articulated in paragraph 25 of Master Sandler's decision.

[12] In the case before me, there is uncontradicted evidence that the circumstances changed subsequent to the consent. As soon as these circumstances came to the attention of counsel who entered into the consent, he advised counsel for the other side, and indicated that he would be taking steps to get the matter back before the court. In fact, while these steps were not taken before the examinations that were scheduled to be held took place, they were taken very shortly thereafter. In these circumstances, is it appropriate to dismiss the Creditors' appeal, thereby, in effect, refusing them the right to be heard?

[13] The general rule concerning hearing from parties in contempt is stated by Brooke J.A. in *Ontario (Attorney General) v. Paul Magder Furs Ltd.* 6 O.R. (3d) 188, [1991] O.J. No. 2025:

> In my opinion, it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey the order of the court so long as it remains in force.... It is a general rule that a party in contempt will not be heard in the proceedings until the contempt is purged: *Hadkinson v. Hadkinson*, [1952] 2 All E.R. 567, [1952] 2 T.L.R. 416 (C.A.), at p. 569 All E.R.; *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees* (1986), *59 Nfld. & P.E.I.R. 93* (Nfld. C.A.), at p. 95.

However, while there is a general rule, courts have also emphasized the seriousness of refusing to hear from parties to a dispute, and have held that disobeying a court order is not necessarily a bar to being heard.

In *Apple Computer, Inc. v. Macintosh Computers Ltd.*[1988] 1 F.C. 191, [1987] F.C.J. No. 516 Urie J. referred to the reasons of Denning J. in *Hadkinson v. Hadkinson*, [1952] P. 285 (C.A.) at 298:

> It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel M.R. said in a similar connexion in *In re Clements v. Erlanger* ((1877) 46 L.J.Ch. 375, 383): "I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction." Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by [page205] making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

Urie J. held at para. 34:

> ...the preferable rule is that, in the exercise of its discretion to permit an appeal to proceed or to refuse to do so, a court must have regard, inter alia, to the particular circumstances of the contempt and its effect on the proper administration of justice, i.e. whether it constitutes an impediment to the course of justice. Whether or not it will, of course, will be dependent upon the facts of the contempt and the Court's view of their effect. It should thus be borne in mind that, in this case, the contempt arose out of a single incident. Whether there were other incidents of a similar kind we do not know. We must presume that there will not be and ought not to speculate that there will be additional acts of contempt committed. The situation thus differs from the factual situation in *Hadkinson* and other cases like it where the contempt continued and where, unlike here, there were no other remedies available to enforce the Court's order. To paraphrase Denning L.J., the course of justice is not continuing to be impeded. I would, therefore, refuse the application for a stay.

In *Skipper Fisheries Ltd. v. Thorbourne* [1997] N.S.J. No. 56 (N.S. Court of Appeal), Hallett J.A. held at para. 93,

> The sanction of dismissing a plaintiff's action is as serious a sanction as can be imposed for contempt for disobedience of a court order. Accordingly, such a sanction should be imposed only if the court order has been clearly disobeyed.

Hallett J.A. referred at para. 89 to *Harwood v. Wilkinson*, [1930] 2 D.L.R. 199 (Ont. C.A.), rev'g [1929] 4 D.L.R. 734 (Ont. H.C.), aff'd [1931] 2 D.L.R. 479 (S.C.C.), where the Ontario Supreme Court, Appeal Division dealt with an appeal from an action which was dismissed partly because of the Plaintiff's alleged contempt in refusing to answer questions at a discovery examination. The Appeal Division allowed the appeal and overturned the dismissal of the action. Riddell, J.A. stated at p. 201:

> The dismissal of the action is only to be ordered in the case of a wilfully disobedient party, not of one who has made a mistake on the advice of counsel or otherwise – and it is done only in the last resort. *Twycross v. Grant*, [1875] W.N. 201, 229; *Fisher v. Hughes* (1875), 25 W.R. 528; *Pike v. Keene* (1876), 35 L.T. 34.1. In general, another opportunity is given to act properly and answer the questions, even after an order has been made and disobeyed: *Denham v. Gooch* (1890), 13 P.R. (Ont.) 344.

In *Harwood v. Wilkinson*, the Supreme Court of Canada affirmed the judgment of the Appeal Division.

[14] In this case, the record does not disclose a reason to believe that if discretion is not exercised the Court's ability to enforce its own orders may be undermined. The alleged contempt arose out of a single incident, in the context of what appears to me to be a legitimate dispute between counsel. While I can understand Trustees counsel's frustration with the delays that have occurred in this case, I do not accept that in this situation, Creditors' counsel was motivated by a desire to further delay these proceedings. In my view, the negative impact on the administration of justice would be greater if the Creditors were denied their right to have their appeal heard than if I exercised my discretion to grant another opportunity for cross-examinations to take place.

MOTION FOR PRODUCTION

[15] The Trustee's first position on the Creditors' motion for production was that I should not hear it because of the moving parties' contempt. For the reasons given above, that submission is rejected.

[16] The Trustee then argued that the motion was premature and improperly brought. An appeal from the disallowance of a Creditor's claim in a bankruptcy is a hearing de novo (Re: *Eskasoni Fisheries Ltd.* (2000), 16 C.B.R. (4th) 173 (N.S.S.C.)). The Creditors submit that the report is relevant and thus, should be subject to production at the earliest possible opportunity. The Trustee did not make any argument before me that the report was not relevant. Their submission was that is was subject to litigation privilege. I agree with the Creditors that if the report has a semblance of relevance it should be produced sooner rather than later, unless production is inappropriate for reasons such as privilege.

[17] The material filed by the Trustee with respect to the claim of litigation privilege was limited. However, for the purposes of determining this point, I am prepared to assume that the report was prepared for the Trustee after the Creditors filed their appeal and further, that it was prepared in order to assist the Trustee in dealing with that appeal. The question is whether, given the role of the Trustee in bankruptcy proceedings, and the rationale behind litigation privilege, it is appropriate for a Trustee to assert that privilege in these circumstances.

[18] In *General Accident Assurance Company et al. v. Chrusz et al.*, (1999), 45 O.R. (3d) 321 the Court of Appeal discussed the rationale for litigation privilege. In doing so, they quoted from a lecture given by R.J. Sharpe, prior to his judicial appointment, where he stated …

> "Litigation privilege … is geared directly to the process of litigation. Its process is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> RATIONALE FOR LITIGATION PRIVILEGE
>
> Relating litigation privilege to the needs of the adversarial process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect – the adversary process – among other things, attempts to get at the truth. There are then, competing interests to be considered when a claim of privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial". (*General Accident* at p. 3).

[19] The Court of Appeal then went on to set out the two-fold test for litigation privilege. First, the party claiming the privilege must show that the document's dominant purpose was in contemplation of litigation. Second, a "competing interests approach" must be applied to determine whether "the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest resisting production".

[20] In this case, even if I accept that the dominant purpose of the report in question was in contemplation of litigation, it is my view that claiming litigation privilege over this type of report would run contrary to the general duties and responsibilities of Trustees in Bankruptcy. As such, the harm of recognizing the privilege would outweigh the benefits.

[21] I say this because, unlike other parties to litigation, a Trustee is an officer of the court and must represent all Creditors impartially and even-handedly. Claiming litigation privilege in this

case would call into question the Trustee's impartiality, particularly in this instance where the claim by the Creditors is that the report demonstrates that there had been no improprieties.

[22] In their text, *Bankruptcy and Insolvency Law of Canada*, Morowetz and Houlden state the following at pages 1-62/3:

> A trustee in bankruptcy is an officer of the court. This flows from s.16(4) which provides that the trustee shall in relation to and for the purpose of acquiring possession of the property of the bankrupt be in the same position as if he or she were a receiver of the property of the debtor appointed by the court. A court-appointed receiver is an officer of the court....

In *Re Confederation Treasury Services Ltd.*, [1995] O.J. 3993, Farley J. of this Court further noted:

> The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

Citing *P.E.I. v. Bank of Nova Scotia* (1988), 70 C.B.R. (N.S.) 209 (P.E.I.S.C.) with approval, Farley J. adopted McQuaid J.'s words:

> It is the duty of the trustee, who *is an officer of the court*, to represent impartially the interest of all creditors; he is obligated to hold an even hand as between competing classes of creditors; he must act for the benefit of the general body of creditors; he is not an agent of the creditors, but an administrative official required by law to gather in and realize on the assets of the bankrupt and to divide the proceeds in accordance with the scheme of the *Bankruptcy Act* among those entitled. And perhaps most importantly, he must conduct himself in such a manner as to avoid any conflict, real or perceived, between his interest and his duty.

Morowetz & Houlden state that:

> The trustee has an obligation to be neutral and evenhanded in its dealings with all classes or creditors and with the bankrupt. The court must ensure that the trustee has been transparent and evenhanded in meeting these obligations: *Engles v. Richard Killen & Associates Ltd.* (2002), 35 C.B.R. (4th) 77, 2002 Carswell Ont. 2435 (Ont. S.C.J.)

[23] Trustees are expected to be dispassionate and non-adversarial. This expectation has been underlined in relation to Trustees giving evidence. While the motion before me does not involve the giving of evidence, the claim of litigation privilege is a claim that is meant to reinforce a process that is fundamentally adversarial in nature.

In *Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.* (1983), 48 C.B.R. (N.S.) 83, Smith J. criticized the hostile nature of the trustee during his testimony.

Morawetz & Houlden state:

> In bringing proceedings such as an application to set aside a fraudulent preference, the trustee in giving evidence should not adopt an adversarial or hostile role...Rather, he should present the relevant facts to the court in a dispassionate, non-adversarial manner, and leave the mater to the court for decision.

Thus, I find that the report in question should not be shielded from production by a claim of litigation privilege.

CONCLUSION

[24] For these reasons, the motion to dismiss the appeal is dismissed. The motion for an order requiring production of the Audit Report is allowed. The Report shall be produced on or before the 15th of October 2003. Any further material to be relied upon by the Creditors shall be delivered on or before the 15th of November 2003 and cross-examinations of Mr. Couture and Mr. Pawlett shall take place prior to December 15, 2003. If counsel cannot agree on a particular date, I may be spoken to. The parties may make submissions to me in writing on the question of costs within 10 days of the release of these reasons.

SACHS J.

Released:

COURT FILE NO.: 31-OR-325795
DATE: 2003/10/01

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

IN THE MATTER OF THE BANKRUPTCY OF BEETOWN HONEY PRODUCTS INC., incorporated under the laws of the Province of Ontario, carrying on business in the Town of Beeton, Township of New Tecumseth, County of Simcoe, Province of Ontario

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REASONS FOR JUDGMENT

SACHS J.

Released: October 1, 2003

QP

Tab 6

06 212 002

Industrial Wood & Allied Workers of Canada, Local 700

- v. -

GMAC Commercial Credit Corporation - Canada

- and -

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., and TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd. (Ont.) (30391)

CORAM:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Major*
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Madam Justice Deschamps
The Honourable Mr. Justice Fish
The Honourable Madam Justice Abella
The Honourable Madam Justice Charron

Appeal heard:
November 16, 2005

* Major J. took no part in the judgment.

Syndicat des travailleurs de l'industrie du bois et leurs alliés, section locale 700

- c. -

Société de Crédit Commercial GMAC-Canada

- et -

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., séquestre intérimaire et syndic de faillite de T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc., et TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (successeur de Tri-Line Expressways Ltd. et de TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. et 606966 British Columbia Ltd.(Ont.) (30391)

CORAM :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Major*
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Deschamps
L'honorable juge Fish
L'honorable juge Abella
L'honorable juge Charron

Appel entendu :
Le 16 novembre 2005

* Le juge Major n'a pas pris part au jugement.

Judgment rendered:
July 27, 2006

Reasons for judgment by:
The Honourable Madam Justice Abella

Concurred in by:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Bastarache
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Mr. Justice Fish
The Honourable Madam Justice Charron

Dissenting reasons by:
The Honourable Madam Justice Deschamps

Counsel at hearing:

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Andrew J. Hatnay
Stephen Wahl

For the respondent GMAC Commercial Credit Corporation of Canada:
Orestes Pasparakis
Susan E. Rothfels

For the respondent KPMG Inc.:
Benjamin Zarnett
Frederick L. Myers

Jugement rendu :
Le 27 juillet 2006

Motifs de jugement :
L'honorable juge Abella

Souscrivent à l'avis de l'honorable juge Abella :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Bastarache
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Fish
L'honorable juge Charron

Motifs dissidents de jugement :
L'honorable juge Deschamps

Avocats à l'audience :

Pour l'appelant :
Andrew J. Hatnay
Stephen Wahl

Pour l'intimée Société de Crédit Commercial GMAC - Canada :
Orestes Pasparakis
Susan E. Rothfels

Pour l'intimée KPMG Inc. :
Benjamin Zarnett
Frederick L. Myers

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Ont. S.C.J.: [2003] O.T.C. 365, 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL).	C.S.J. Ont. : [2003] O.T.C. 365, 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *GMAC Commercial Credit Corporation — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *GMAC Commercial Credit Corporation — Canada v. T.C.T. Logistics Inc.*, [2006] x S.C.R. xxx, 2006 SCC 35.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *Société de Crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *Société de Crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, [2006] x R.C.S. xxx, 2006 CSC 35.

gmac *v.* t.c.t. logistics inc.

Industrial Wood & Allied Workers of Canada, Local 700 *Appellant/Respondent on cross-appeal*

v.

GMAC Commercial Credit Corporation — Canada *Respondent/Appellant on cross-appeal*

and

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., and TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd. *Respondents*

Indexed as: GMAC Commercial Credit Corporation — Canada *v.* T.C.T. Logistics Inc.

Neutral citation: 2006 SCC 35.

File No.: 30391.

2005: November 16; 2006: July 27.

Present: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for ontario

Bankruptcy and insolvency — Bankruptcy court — Jurisdiction — Whether bankruptcy judge lacks jurisdiction to determine whether interim receiver is successor employer under provincial labour relations legislation — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 47, 72(1).

Bankruptcy and Insolvency — Procedure — Action against interim receiver — Bankruptcy legislation precluding proceedings against interim receiver without leave of court – Union seeking leave to bring "successor employer" application against interim receiver — Whether Mancini test applicable — Whether test different when dispute relates to receiver's obligations to debtors' employees represented by union — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 215.

The company TCT became insolvent and its largest secured creditor applied for an order appointing an interim receiver. The order appointing KPMG states that the receiver's employment-related actions could not be considered those of a "successor employer", and prohibits proceedings being taken against the interim receiver unless the court grants leave. After TCT was assigned in bankruptcy, KPMG sold most of the assets of the warehousing business to a new company. All unionized employees at the Ontario warehouse were terminated by KPMG, but some of them were later hired by the new company. Except for a change in location, the only major difference between TCT's

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* Major J. took no part in the judgment.

operations and those of the new company was the absence of the union as representative of TCT's former employees.

The union applied to the Ontario Labour Relations Board seeking, in particular, a declaration that, as a successor employer to TCT or KPMG, the new company was bound by the collective agreement pursuant to s. 69 of the *Labour Relations Act, 1995* ("*LRA*"). After a stay was granted on the basis that s. 215 of the *Bankruptcy and Insolvency Act* ("*BIA*") precludes proceedings against an interim receiver or trustee without leave of the court, the union sought the necessary court approval. The bankruptcy judge amended the paragraph relating to the "successor employer" protection in the order appointing the interim receiver, but denied leave. The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer, but divided over the test under s. 215 for granting leave to bring successor employer applications. The majority was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications, and that other factors should be considered to take account to a greater extent of the impact of such litigation on the bankruptcy process. Accordingly, the majority set aside the bankruptcy judge's refusal to grant leave and remitted the leave application back to him for reconsideration based on the enhanced enumerated factors. The union appealed the Court of Appeal's order denying leave, and the secured creditor cross-appealed on the issue of the bankruptcy judge's jurisdiction.

Held (Deschamps J. dissenting on the appeal): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, **Abella**, Fish and Charron JJ.: The bankruptcy court does not have jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *LRA*. The powers given to the bankruptcy court under s. 47(2) *BIA* are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes. Further, s. 72(1) *BIA* declares that unless there is a conflict, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the Act. The right to seek a successor employer declaration pursuant to the *LRA* does not conflict with the bankruptcy court's authority under s. 47(2). If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all rights. Explicit language would be required before such a sweeping power could be attached to s. 47. [4] [43-51]

The bankruptcy judge erred in not granting leave to the union to bring a successor employer application against the interim receiver. Under the *Mancini* test, the threshold for granting leave under s. 215 *BIA* is not a high one. The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. If the evidence discloses a *prima facie* case, leave should be granted. The focus of the inquiry is not a determination of the merits. The threshold of the *Mancini* test strikes the appropriate balance between the protection of trustees and receivers from frivolous suits, while preserving to the maximum extent possible the rights of creditors and others as against a trustee or receiver. As a result, *Mancini* is consistent with the requirement that there be explicit statutory language before the *BIA* is interpreted so as to deprive persons of rights conferred under provincial law. Where

Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly. In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers. There is no reason to create a more stringent test to be applied only to claims by employees represented by unions. To impose a higher s. 215 threshold in a case involving a labour board issue is to read into the *BIA* a lower tolerance for the rights of employees represented by unions than for other creditors. Nothing in the Act suggests this dichotomy. Finally, the *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. In this case, since it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed. [7] [55-61] [67-72] [80]

Per **Deschamps** J. (dissenting on the appeal): A judge who must decide whether to grant leave to bring proceedings against a trustee under s. 215 *BIA* must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law and the judge must therefore deny leave to bring them. [155]

The decision to continue operating the business is central to the trustee's role under the *BIA* and, in principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. The provisions of the *BIA* that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the

flexibility they need to discharge the duties imposed on them by the *BIA*. The successor employer declaration is not free of pitfalls when it applies to a trustee. The effect of such a declaration is that the trustee becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. Although it is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the OLRB, the *LRA* cannot frustrate the purpose of the *BIA*. It is therefore important to strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government. Where conflict is unavoidable, however, the federal statute is paramount to the provincial statute. Hence the importance of the screening mechanism of s. 215 *BIA*, which serves the purpose of ensuring that provincial and federal statutes do not conflict with each other. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts. [91] [101] [103] [112-113] [117-118] [124] [128-129]

Although the criteria established in *Mancini* for applying s. 215 are easy to apply to a simple action in damages based on wrongdoing by the trustee, they must, in other cases, be tailored to the specific nature of each application for leave. The judge must assess the nature and scope of the proceeding in light of the evidence. This review does not have the effect of giving special or different treatment to successor employer declarations. When reviewing the seriousness of the cause of action, the bankruptcy

judge must be vigilant and make provision for conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously. A judge who denies leave to bring proceedings merely avoids a conflict by relying on the paramountcy doctrine in a preventive manner. However, the bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits. The judge's first task is to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy. The judge will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*, which makes express provision for the application of provincial legislation that is compatible with the federal statute. [136] [144-154]

In the instant case, the unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. [163] [167]

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By Deschamps J.

Ex parte James, In re Condon (1874), L.R. 9 Ch. App. 609; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160; *Re L'Heureux (syndic de)*, [1999] R.J.Q. 945; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417; *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392; *Re Reed* (1980), 34 C.B.R. (N.S.) 83; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397; *Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683; *Man of Aran* (1974), 6 L.A.C. (2d) 238; *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96; *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126; *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138; *Radio CJYQ-930 Ltd.* (1978), 34 di 617; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52; *Tranchemontagne v. Ontario (Director, Disability Support*

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Cronk JJ.A.) (2004), 71 O.R. (3d) 54, 238 D.L.R. (4th) 677, 185 O.A.C. 138, 48 C.B.R. (4th) 256, [2004] O.J. No. 1353 (QL),

setting aside a decision of Ground J., [2003] O.T.C. 365, 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL). Appeal allowed and cross-appeal dismissed.

Stephen Wahl and *Andrew J. Hatnay*, for the appellant/respondent on cross-appeal.

Orestes Pasparakis and *Susan E. Rothfels*, for the respondent/appellant on cross-appeal.

Benjamin Zarnett and *Frederick L. Myers*, for the respondent KPMG Inc.

Solicitors for the appellant/respondent on cross-appeal: Koskie Minsky, Toronto.

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Solicitors for the respondent KPMG Inc.: Goodmans LLP, Toronto.

(Bankrupt) v. Falconi (1993), 61 O.A.C. 332, to determinations under s. 215 of the *Bankruptcy and Insolvency Act* granting or withholding permission to sue a receiver or trustee.

7 For over a decade, the reigning test for mediating between the protection from litigation for those administering a bankrupt estate, and the right to sue them for this very administration, has been the one set out in *Mancini*. In essence, the three principles summarized in *Mancini* preclude frivolous, vexatious or manifestly unmeritorious claims from proceeding. For the reasons that follow, unlike the majority in the Court of Appeal, I see no reason to dethrone it and create a higher test to be applied only to claims by employees represented by unions.

BACKGROUND

8 The bankrupt, T.C.T. Logistics Inc., was one of a number of related companies (collectively "TCT") operating a trucking, freight brokerage and warehousing business of high-tech goods in Canada and the United States. TCT operated its warehouse business from several sites, one of which was in Toronto.

9 Forty-two employees at the Toronto warehouse were represented by the Industrial Wood and Allied Workers of Canada, Local 700 ("Union"). On their behalf, the Union entered into a collective agreement with TCT. The term of the agreement was from May 1, 2000 until April 30, 2004.

10 During the course of the collective agreement, TCT became insolvent. GMAC Commercial Credit Corporation – Canada ("GMAC"), TCT's largest secured

creditor, applied under s. 47 of the *Bankruptcy and Insolvency Act* for an order appointing KPMG Inc. ("KPMG") as interim receiver. The Union was not given notice of this application.

11 The order was made on January 24, 2002. It provides for the termination of all employees "effective immediately", but it also gives KPMG authority to hire or fire any of TCT's employees.

12 The order explicitly states that KPMG's employment-related actions could not be considered those of a "successor employer". The order also prohibits proceedings being taken against the interim receiver unless the court grants leave, and then only if KPMG's solicitor/client costs in such proceedings are secured by court order.

13 The provision at the heart of this litigation is para. 15 of the order, the central provision insulating KPMG from a successor employer designation and more elaborately protecting it from employment obligations arising under either provincial or federal legislation. It states:

> EMPLOYEES
>
> 15. THIS COURT ORDERS that the employment of employees of the Debtors, including employees on maternity leave, disability leave and all other forms of approved absence is hereby terminated effective immediately prior to the appointment of the Receiver. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the Receiver is not and shall not be deemed or considered to be a successor employer, related employer, sponsor or payer with respect to any of the employees of any of the Debtors or any former employees with the meaning of the *Labour*

> *Relations Act* (Ontario), the *Employment Standards Act* (Ontario), the *Pension Benefits Act* (Ontario), *Canada Labour Code*, *Pension Benefits Standards Act* (Canada) or any other provincial, federal or municipal legislation or common law governing employment or labour standards, (the "Labour Laws") or any other statue [*sic*], regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between any of the Debtors and any of their present or former employees, or otherwise. In particular, the Receiver shall not be liable to any of the employees of any of the Debtors for any wages (as "wages" are defined in the *Employment Standards Act* (Ontario)), including severance pay, termination pay and vacation pay, except for such wages as the Receiver may specifically agree to pay. The Receiver shall not be liable for an [*sic*] contribution or other payment to any pension or benefit fund.

14 Paragraph 14 of the order is also relevant:

> THIS COURT ORDERS AND DECLARES that nothing in this Order shall constitute the Receiver as the employer of the employees of any of the Debtors and further orders and declares that the appointment of the Receiver will not constitute a sale of the business of any of the Debtors.

15 Pursuant to a further order, KPMG was directed to file an assignment in bankruptcy on behalf of TCT and the related companies. The assignment was filed on February 25, 2002. KPMG was appointed trustee in bankruptcy.

16 KPMG did not give notice to TCT's employees before it had obtained the January 24 order permitting it to terminate their employment. The Union, upon learning about the order, wrote to TCT and KPMG on February 1, 2002 advising them that, in its view, any collective bargaining rights under the Ontario *Labour Relations Act, 1995* remained "operative and in full force and effect".

17 KPMG met with the employees on February 25, advising them that the business would be continuing in order to evaluate potential sales of the warehousing

business. KPMG asked the employees for their loyalty and support "to allow us to maximize the enterprise value for all stakeholders".

18 Subsequently, because of the rapid deterioration of the warehousing business, KPMG sought to sell it as a going concern as quickly as possible. On April 12, KPMG agreed to sell most of the assets of the warehousing business to Spectrum Supply Chain Solutions Inc., a newly formed company.

19 On April 16, KPMG informed the employees about the Spectrum deal and of its intention to seek court approval two days later. An order approving the transaction was obtained on April 18. The closing was scheduled to take place on April 19, 2002.

20 The leasehold interest in the Toronto warehouse was not one of the assets Spectrum purchased. As a result, KPMG decided to wind down its operations and disclaim the lease. It asked Spectrum to manage this process from April 19 until May 23, the date by which KPMG was obliged to vacate the Toronto premises. The resulting management agreement between Spectrum and KPMG entitled Spectrum to any revenues earned during that period in exchange for incurring the costs of winding down the Toronto operation.

21 All unionized employees at the Toronto warehouse were terminated by KPMG on May 9. Some of them were later hired by Spectrum. These hirings were not in accordance with the Union's seniority list.

24 Relying primarily on s. 215 of the *Bankruptcy and Insolvency Act* which prevents proceedings against an interim receiver or trustee in bankruptcy without leave of the court, KPMG obtained a stay of the Union's application from the Ontario Labour Relations Board.

25 The Union accordingly sought the necessary court approval. In its motion to the bankruptcy judge, it asked for the deletion of those portions of the January 24 order which had declared KPMG's conduct incapable of scrutiny under federal or provincial labour and employment legislation. It also sought to strike the security for costs provision.

26 The bankruptcy judge agreed that the costs requirement was unduly onerous and deleted it ((2003), 42 C.B.R. (4th) 221). He declined, however, to delete that part of the order declaring that the interim receiver could not be found to be a "successor employer" under the *Labour Relations Act, 1995*.

27 In the course of his analysis, the bankruptcy judge made a number of observations. Since interim receivership orders are designed to enhance the value of the bankrupt estate as much as possible, and since this objective may sometimes best be realized by continuing the operation of a debtor's business pending a sale, the court was entitled to consider the policy implications of exposing interim receivers or trustees to the risk of being successor employers. Moreover, eliminating the risk of an obligation that might otherwise accrue from continuing a business as a going concern offers employees the possibility of employment with a subsequent purchaser.

28 The bankruptcy judge concluded that it would be unduly burdensome on an interim receiver, and incompatible with its duties, to impose the requirements flowing from a successor employer designation on a receiver engaged in such temporary and limited employment relationships.

29 However, applying the "ancillary" or "necessarily incidental" doctrine crafted by Dickson C.J.C. in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (refined by Iacobucci J. in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, and by LeBel J. in *Kitkatla Band v. British Columbia (Ministry of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31), the bankruptcy judge concluded that the "successor provisions" of the order were only "sufficiently integrated" with the legislative scheme of the *Bankruptcy and Insolvency Act* if the interim receiver was carrying on the bankrupt's business for the purpose of an orderly liquidation of the bankrupt's assets or of effecting a sale of the bankrupt's business as a going concern. He relied on Farley J.'s distinction in *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146 (Ont. S.C.J.), between a receiver (or trustee) acting "*qua* realizer" of the assets and acting "*qua* employer". When acting "*qua* realizer", the receiver was entitled to immunity from successor employer provisions.

30 The bankruptcy judge accordingly amended para. 15 of the order by adding language clarifying that the "successor employer" protection was only valid if KPMG was acting "*qua* realizer" and its conduct was for the purpose of preserving, protecting or liquidating the debtor's assets. The specific language added to the second sentence of para. 15 was:

> for the purpose of preserving, protecting and realizing upon the assets of the Debtors by effecting a sale or sales of the assets or of the business of the Debtors as a going concern or otherwise or for the purpose of effecting an orderly liquidation of the assets of the Debtors.

Since in his view KPMG was carrying on the business as a going concern for these very purposes and acting "*qua* realizer", it was therefore entitled to the protection stipulated in the January 24 order.

31 Turning to s. 215 of the Act, the bankruptcy judge denied the Union leave to bring proceedings against KPMG at the Ontario Labour Relations Board. Since he had concluded that the provisions of the order in relation to KMPG's status as a successor employer were valid as amended, he saw no basis on which leave should be granted to bring a proceeding seeking relief contrary to the terms of the order.

32 On appeal by the Union to the Court of Appeal, there were two issues:

- Did the bankruptcy judge have jurisdiction under s. 47(2) of the *Bankruptcy and Insolvency Act* to make declarations about successorship?
- Did he err in the exercise of his discretion by denying leave under s. 215 of the Act?

33 The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer ((2004), 71 O.R. (3d) 54). Section 47(2) of the *Bankruptcy and Insolvency Act* did not confer on the bankruptcy judge the jurisdiction to make declarations on this issue or to otherwise immunize KPMG from such potential declarations by the labour board. Writing for the court on

this issue, Feldman J.A. observed that the federal *Bankruptcy and Insolvency Act* itself explicitly states in s. 72(1) that only provincial laws which conflict with the *Bankruptcy and Insolvency Act* can be abrogated. She did not find in s. 47(2) the authority to declare whether actions taken by KPMG make it a successor employer. Accordingly, she saw no conflict between the authority given to the bankruptcy court under s. 47(2) to supervise an interim receiver, and the successor rights provisions in s. 69(12) of the *Labour Relations Act, 1995*, making a paramountcy analysis unnecessary. As a result, in her view the provincial laws conferring this exclusive jurisdiction on the labour board were unaffected by the *Bankruptcy and Insolvency Act*.

34 Since the bankruptcy judge had no jurisdiction to make *any* determination relating to successor employer status, the distinction he drew in para. 15 of his January 24 order protecting the interim receiver only when it was acting "*qua* realizer" and not "*qua* employer" of the assets was immaterial.

35 On this basis, the Court of Appeal further amended para. 15 deleting the bankruptcy judge's "*qua* realizer" addition, and adding the following two passages:

> unless and until an order is made by the Ontario Labour Relations Board, upon leave of this court under s. 215 of the *Bankruptcy and Insolvency Act*, declaring the interim receiver a successor employer to the debtors, and subject to the specific terms of any such order, the interim receiver is not obliged to make any payment as a successor employer . . .
>
> For clarification, the parties have agreed that if any such amounts become payable by the interim receiver as a successor employer, in no event is the interim receiver to be liable for any amount that either became due or accrued prior to the date of its appointment.

36 The court divided, however, on the bankruptcy judge's approach to and resolution of the Union's application for leave to bring labour board proceedings. The disagreement was over the test under s. 215 of the *Bankruptcy and Insolvency Act* for granting leave to bring successor employer applications. Feldman J.A., whose analysis was endorsed in separate concurring reasons by Cronk J.A., was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications. In her view, an approach was required that took more account of the impact of such litigation on the bankruptcy process.

37 The revised test proposed by Feldman J.A. added factors such as the complexity of the receivership; the availability of suitable purchasers; the potential duration of the receiver's operation of the business pending a sale; any arrangements the receiver has made with the Union to accommodate the employees; the likelihood that a subsequent purchaser will be declared a successor employer bound by the obligations under the collective agreement; and the timeliness of the labour board hearing relative to the receiver's temporary operation and ultimate sale of the business.

38 Feldman J.A. concluded that the bankruptcy judge was obliged not to determine the issue itself, but to determine whether a *prima facie* case of successor employer status had been made out, and, based on the factors she enumerated, to decide whether to grant leave. She accordingly set aside his refusal to grant leave and remitted the leave application back to him for reconsideration based on her enumerated factors.

39 In dissent, MacPherson J.A. saw no basis for erecting a higher threshold for granting leave when the application was for successor employer applications.

Other creditors' applications for leave to bring proceedings under s. 215 are usually determined in accordance with the *Mancini* test, the applicability of which had been consistently upheld by the Ontario Court of Appeal, most recently in *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126. In his view, by formulating what he characterized as a "more vague and more elaborate" (para. 111) test uniquely for successor employer leave applications, the majority was inviting a bankruptcy court to do indirectly through s. 215 what it had decided, correctly in his view, could not be done under s. 47(2), namely, insulate the receiver from successor employer determinations.

40 Applying the test in *Mancini*, MacPherson J.A. concluded that the bankruptcy judge had erred in refusing to grant leave to the Union to bring successor employer and unfair labour practice proceedings against KPMG. His remedy, accordingly, would have been to grant leave to the Union to proceed with its application before the labour board.

41 The Union appealed the Court of Appeal's order denying leave to bring its successorship proceedings before the labour board, and disputed the majority's conclusion that the *Mancini* test set too low a bar for granting leave to bring proceedings before the labour board. The Union also sought to have the Court of Appeal's amended version of para. 15 set aside to the extent that it continues to make declarations with respect to successorship rights.

42 GMAC cross-appealed the Court of Appeal's amendments to para. 15, taking issue with the court's unanimous conclusion that a bankruptcy judge lacks

jurisdiction to declare whether a receiver is a successor employer under the *Labour Relations Act, 1995*.

ANALYSIS

A. *Can a Bankruptcy Court Judge Determine Successor Rights Issues?*

43 The first issue decided by the Court of Appeal, and raised in the cross-appeal, relates to whether the bankruptcy court has jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *Labour Relations Act, 1995*. The unanimous conclusion of the Court of Appeal was that it had no such jurisdiction. I agree.

44 The bankruptcy court's authority to supervise the interim receiver is found in s. 47(2) of the *Bankruptcy and Insolvency Act*, which states:

> **47. ...**
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (*a*) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (*c*) take such other action as the court considers advisable.

45 These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under

s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

46 Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the *Bankruptcy and Insolvency Act*, which states:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

47 The effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in s. 69 of the Ontario *Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:

> . . . the first half of [s. 72] clearly states that the *Bankruptcy and Insolvency Act* will not abrogate or supercede any provincial law unless that law is in conflict with the *Bankruptcy and Insolvency Act*. The language of s. 47(2) of the *Bankruptcy and Insolvency Act* does not conflict with the successor employer sections of the *LRA* and therefore does not abrogate or supercede that Act. [para. 30]

48 Section 114(1) of the *Labour Relations Act, 1995* states:

> The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that

> arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

49 This means the Labour Board has exclusive jurisdiction to make a successor employer determination. It is difficult to see how the right to seek such a declaration conflicts in any way with the bankruptcy court's authority under s. 47(2) to direct and supervise the interim receiver's effective management of the debtor's assets.

50 Trustees, receivers and the specialized courts by which they are supervised, are entitled to a measure of deference consistent with their undisputed expertise in the effective management of a bankruptcy. Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the *Bankruptcy and Insolvency Act*.

51 If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72. As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3:

> . . . explicit statutory language is required to divest persons of rights they otherwise enjoy at law . . . [s]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy

> and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the *Bankruptcy and Insolvency Act* is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour board.

52 Accordingly, the Court of Appeal was correct to conclude that the bankruptcy judge had no jurisdiction to make a declaration about or immunize the receiver from successor employer liability. To the extent that any provision of the order does so, including the amendments added by the Court of Appeal, they should be set aside.

B. *Is a Unique Test Required Under Section 215 for Leave to Bring Successor Rights Applications?*

53 Having concluded that the bankruptcy judge has no jurisdiction either to make a determination as to the receiver's status as a successor employer, or to immunize it from such a determination by the labour board, the remaining issue is whether to set aside the bankruptcy judge's refusal to permit the Union remedial access to the Ontario Labour Relations Board.

54 The debate between the parties is over the extent of the bankruptcy court's discretion when leave is sought by a union to bring a successor employer application against the receiver or trustee. This shifts the focus to s. 215 of the *Bankruptcy and Insolvency Act*, which states:

> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact. As L. W. Houlden, G. B. Morawetz and J. Sarra stated in *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 3, at p. 7-118.2:

> The court will not refuse leave unless there is no foundation for the claim or the claim is frivolous and vexatious . . .

56 Essentially, unless the claim is without merit, the gate to a litigated determination has usually been opened under s. 215 and its statutory predecessors: see *Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075, at p. 1077, *per* Turner L.J. (". . . it is not, as I apprehend, according to the course of the Court, to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim"); *In re Diehl v. Carritt* (1907), 15 O.L.R. 202 (H.C.J.), at p. 204; *Danny's Cabaret Ltd. v. Horner*, [1980] B.C.J. No. 1293 (QL) (C.A.); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84 (Man. Q.B.), at p. 90; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113 (Ont. C.A.); *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165 (Q.B.); *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233 (B.C.S.C.); *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (Ont. Ct. (Gen. Div.)), at para. 7; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32 (Ont. Ct. (Gen. Div.)), at paras. 13-15; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.), at para. 13; *Society of*

Composers, Authors & Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688 (C.A.), at para. 2; *Vanderwoude v. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195, at para. 22; *Bennett on Bankruptcy* (8th ed. 2005), at pp. 416-17; *Bennett on Receiverships* (2nd ed. 1999), at p. 223; and Houlden, Morawetz and Sarra, at p. 7-118.2.

57 In the leading case of *Mancini*, the court summarized the accepted principles as being the following:

> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

58 The court in *Mancini* explained that the duty of the trustee is to protect both the creditors and the public interest in the proper administration of the bankrupt estate. The gatekeeping purpose of the leave requirement, therefore, in light of this duty, is to prevent the trustee or receiver "from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action" (para. 17) so that the bankruptcy process is not made unworkable. On the other hand, it ensures that legitimate claims can be advanced.

59 The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. As Blair J. observed in *Nicholas*:

> The question . . . is whether, in the circumstances of this case, the facts in support of the proposed claim have been disclosed by sufficient affidavit evidence to ensure the claim's proper factual foundation, having regard to the policy of requiring leave in order to protect a trustee from claims which have no basis in fact. [para. 16]

In other words, the evidence must disclose a *prima facie* case.

60 Although the *Mancini* test calls for an investigation into whether the proposed litigation discloses a cause of action, the focus of that inquiry is not a determination of the merits. This is a particularly important observation in circumstances where exclusive jurisdiction to decide the legal questions raised in the proceedings resides elsewhere. As the court said in *Mancini*, at para. 16 "[o]n a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under [the predecessor of s. 215] must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action". See also *Society of Composers, Authors and Music Publishers of Canada*, at para. 2.

61 This threshold strikes the appropriate balance between the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver. In this way, *Mancini* is consistent with *Crystalline*'s requirement that there be "explicit statutory language" (para. 43) before the *Bankruptcy and Insolvency Act* is interpreted so as to deprive persons of rights conferred under provincial law.

62 The approach proposed by the majority in the Court of Appeal would require that courts consider the effect of the proposed proceeding on, among other considerations, the potential for interference with the maximization of stakeholder value. With respect, the result of the application of this higher threshold would necessarily bar some meritorious cases on the basis that other stakeholders would be better off. To allow bankruptcy courts to use the leave requirement in s. 215 to pick and choose between stakeholders' claims on the basis of a standard which, as MacPherson J.A. noted, at para. 111, is both "more vague and more elaborate" than that set out in *Mancini*, would be a profound departure from the principles in *Crystalline*. The integrity and efficiency of the bankruptcy process are sufficiently advanced by directing bankruptcy courts to deny leave to frivolous and merely tactical suits.

63 A more interventionist approach is premised on the "single control" theory of bankruptcy litigation. In *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92, a case dealing with the enforceability of bankruptcy court orders across Canada, Binnie J. described the goal of a single court controlling all aspects of a bankruptcy, including litigation, as being "the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (para. 27). The benefits of avoiding multiple proceedings in multiple provinces underlay the decision. But, as Binnie J. also observed, "[s]ingle control is not necessarily inconsistent with transferring particular disputes elsewhere" (para. 76).

64 "Transferring particular disputes elsewhere" is all that is done when leave under s. 215 is granted. Moreover, I note that the "transfer" in the instant case consists only of permitting the tribunal vested with exclusive jurisdiction over the matter to

ultimately decide it. It is one thing to avoid permitting provincial enforcement schemes to defeat legitimate bankruptcy orders, as was held in *Sam Lévy*, it is another to use the bankruptcy process to defeat legitimate assertions of provincially granted rights, including labour and employment rights over which the bankruptcy court has no jurisdiction. The *Mancini* test is not, in short, inconsistent with "single control".

65 Ultimately, the appropriate test under s. 215 of the *Bankruptcy and Insolvency Act* remains a question of statutory interpretation, and the Act itself provides important context for the resolution of that question. I think it is instructive that s. 37 of the *Bankruptcy and Insolvency Act* provides that when the bankrupt, any creditor, or any other person is aggrieved by an act or decision of a trustee or receiver in the administration of the bankrupt estate, he or she may apply to the bankruptcy court. The court may then reverse, modify or confirm the act or decision complained of, making such order as it thinks just. No leave is required under s. 37.

66 Sections 37 and 215 have been called alternative means of proceeding against a trustee or receiver: see *Virden Credit Union*, at pp. 89-90. The difference, of course, is that under s. 215, permission can be sought to seek a remedy elsewhere than in the bankruptcy court, and certain claims will be beyond the jurisdiction of the bankruptcy court under s. 37. Nevertheless, many actions that may be brought with leave under s. 215 may also be heard in the bankruptcy court on a s. 37 application. What is instructive about s. 37, however, is that it demonstrates that Parliament did not consider it appropriate to immunize court-appointed officers from litigation.

67 On the other hand, where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly, as in s. 14.06(1.2)

(trustee immune from certain liabilities arising from continuing the debtor's business or the employment of the debtor's employees); s. 14.06(4) (trustee immune in certain circumstances from environmental liabilities); s. 41(8) (discharge of liability of trustee upon discharge of trustee); ss. 50(9) and 50.4(5) (trustee not liable for detrimental reliance on cash-flow statements if the trustee reviews the statements reasonably and in good faith); s. 80 (trustee not liable for losses resulting from seizure of property); s. 148(3) (no action for a dividend lies against a trustee); s. 171(6) (trustee not liable for reasonable and good faith statement of opinion as to the probable cause of the bankruptcy); s. 197(3) (trustee not liable for costs of a proceeding); s. 251 (no action against a receiver for loss resulting from notice of the receiver's appointment); and s. 252 (no action against a receiver for failure to comply with the Act where the receiver reasonably believed the debtor was not insolvent).

68 In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers.

69 The issue then becomes whether there is some reason why the long-standing principles governing the granting of leave should be different when the dispute relates to the receiver's obligations to the debtors' employees represented by a union.

70 The argument for a higher, more elaborate threshold advanced by the majority in the Court of Appeal is to enhance the receiver's ability to decide how and when to sell the assets, free from the fear of subsequent scrutiny for labour relations violations. The *Mancini* test does not in any way interfere with the protections that

Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. If the argument is that the receiver should be protected from the threat of litigation by the Union because of its inevitable cost, delay and inconvenience, then no creditor should ever be granted leave to sue. No litigation is without delay, cost and inconvenience. But Parliament has nonetheless decided, through s. 215, that the bankruptcy court should, in its discretion, permit litigation against court-appointed officers. It has made no distinction between unions and other creditors in granting this discretionary authority and none should be imputed.

71 To impose a higher s. 215 threshold when it is a labour board issue is to read into the *Bankruptcy and Insolvency Act* a lower tolerance for the rights of employees represented by unions than for other creditors. I see nothing in the Act that suggests this dichotomy.

72 A hierarchical approach to s. 215 which makes it significantly more difficult for a successorship case to obtain leave would unduly give trustees and receivers more protection from being answerable to the court for possible misconduct related to potential breaches of labour relations, and offers unique and enhanced protection for trustees who violate labour rights. It is, moreover, an approach that undermines the protection of rights endorsed by this Court in *Crystalline*. As Borins J.A. of the Ontario Court of Appeal observed in *Royal Crest*:

> While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. [para. 70]

73 The Court of Appeal unanimously – and correctly – reached the conclusion that the bankruptcy court cannot make declarations about, or immunize court-appointed officers from accountability for contraventions of applicable labour relations laws. Yet, the majority's proposed threshold for leave under s. 215 would not only upset the balance in the Act between the gate-keeper function of the bankruptcy court and protected property and civil rights, it would create a real risk that s. 215 would become a *de facto* means by which the bankruptcy court could make such declarations, and, contrary to *Mancini*, effectively decide the issue on its merits. That is what happened at first instance in this case. As MacPherson J.A. observed in his dissent:

> In short, and with respect, my colleague introduces through the side door of s. 215 (a leave provision, not a provision conferring authority on the receiver) precisely what she correctly does not permit the receiver to do through the front door of s. 47(2). [para. 115]

74 Section 215 is not designed to protect the trustee from well-founded litigation. It is designed to afford protection from claims for which there is no factual foundation. All major stakeholders, on a plain reading of the statute, have been given similar access for remedying alleged grievances against the trustee under ss. 37 and 215. Absent a statutory intention to the contrary, this symmetry should continue, whatever the identity of the stakeholder. There is no reason to depart from it when what is sought is relief from the labour board rather than from a bankruptcy judge.

75 That brings us to the proposed action in this case, namely a successor rights application before the labour board. Various provincial statutes provide that the successor employer is bound by the collective agreement and required to recognize the exclusive representation of the employees by their union. The statutes declare that the

collective agreement is binding if the business has been sold or otherwise transferred to the successor until the tribunal otherwise declares.

76 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, Wilson J., in her dissenting reasons, explained that the purpose of the "successor rights" provisions in labour legislation is "to prevent the loss of union protection by employees whose company's business is sold or transferred" (p. 652). A successor employer is defined in s. 69(2) of the Ontario labour legislation as someone who acquires a business by sale or transfer from an employer and is bound by any existing collective agreements until the Ontario Labour Relations Board rules otherwise.

77 To be found to be a successor employer, as McLachlin J. noted for the majority in *Lester*, a labour board must first determine whether a discernable part of the business was disposed of. This requires an examination of "the nature of the predecessor business, and the nature of the successor business" (p. 676) to determine whether the business of the predecessor is being performed by the successor. Relevant factors include the work covered by the terms of the collective agreement, the type of assets transferred, whether employees are transferred, and whether there is continuity of management or of the work performed. In each case, as McLachlin J. pointed out, the labour relations board must determine "if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor" (p. 677).

78 KPMG and GMAC make a number of arguments directed specifically at the obstacles to the Union's successorship claim, including a constitutional paramountcy argument relating to the effect of a successor employer declaration on the priority scheme in the *Bankruptcy and Insolvency Act*. These are matters for the labour board's consideration. They are not germane to whether leave should be granted. And I appreciate the majority of the Court of Appeal's concern that the possibility of subsequent labour relations scrutiny may have an impact on a receiver's decision about how best to maximize stakeholder value. But again, this goes not to whether leave should be granted, but is a consideration in deciding the merits of the successor rights application. Issues of successorship are within the exclusive jurisdiction of the labour relations board. The labour board has been given exclusive responsibility for deciding these issues because the provincial legislature has confidence in its ability to do so in the public interest, based not only on the expectations of employees, but on those of employers as well.

79 In this case, the Union sought to argue before the Ontario Labour Relations Board that the interim receiver became the employer of the employees after its appointment when it decided to employ them in order to continue operating the warehouse. As an employer, it would be obliged to abide by the collective agreement and applicable labour and employment statutes. The Union alleged it failed to do so by, among other acts, manipulating the sale agreement so that the Union was ousted from the purchaser's workforce.

80 It is by no means clear how the Board will deal with a particular successorship issue, since the outcome will be determined by the facts. But where, as

here, it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed.

81 A postscript: No notice of the motion appointing an interim receiver was given to the Union, the exclusive bargaining agent of the employees. I appreciate that what happened in this case is not uncommon: receivers routinely seek an *ex parte* order from the bankruptcy judge with a draft order agreed upon by the debtor corporation and major creditors. Unions, as in this case, receive no notice, thereby losing the opportunity at the earliest possible stage to participate in the formulation of the plan for dealing with the debtor's assets. Notice is no guarantee either of cooperation or resolution, but, arguably, a union shut out of the process early will eventually, like any major creditor, likely seek to protect its interests. As Iacobucci J. observed in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result . . . . [para. 95]

82 While advance negotiations with unions on important decisions may not eliminate a subsequent claim for successor employer liability, they could potentially yield a greater possibility for resolution than ignoring them would. Optimally, advance discussions about the impact on employees if the business is continued will lead to compromise rather than litigation.

83 This would have resulted, in this case, in the immediate integration of a significantly affected party into the development and supervision of the orderly, fair and effective management of the insolvency process. It would not, of course,

necessarily have avoided a multiplicity of proceedings. Nor would it have guaranteed the Union's blessing of the proposed methodology for preserving and realizing the assets. But it would have, at the very least, ensured that its legitimate concerns were factored into the planning at an early enough stage, thereby possibly avoiding later proceedings such as those which arose in this case.

DISPOSITION

84 I would allow the appeal with costs throughout, grant leave to the Union to bring its proceeding before the labour board, and set aside those parts of the order that make a declaration about, or immunize the receiver from, successor employer liability. I would dismiss the cross-appeal with costs.

Translation

SUPREME COURT OF CANADA

INDUSTRIAL WOOD AND ALLIED WORKERS OF CANADA, LOCAL 700

- v. -

GMAC COMMERCIAL CREDIT CORPORATION — CANADA

- and -

T.C.T. LOGISTICS INC., T.C.T. WAREHOUSING LOGISTICS INC., KPMG INC., interim receiver and trustee in bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., *et al.*

CORAM: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

DESCHAMPS J. —

85 What factors guide a bankruptcy judge when hearing an application for leave to bring proceedings against a trustee? That is the main issue in this case. To resolve it, however, the Court must consider the limits on the application of provincial law in bankruptcy matters. For the reasons that follow, I am of the view that a judge who decides an application under s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), must do so in a manner consistent with federal and provincial heads of

* Major J. took no part in the judgment.

power so as to avoid any constitutional conflicts. I would therefore affirm the Court of Appeal's judgment ((2004), 71 O.R. (3d) 54) remitting the case to the Superior Court of Justice for reconsideration in light of the principles set out below.

86 I have read the reasons of Abella J. She concludes (at para. 78) that it is the Ontario Labour Relations Board ("OLRB") that must decide the constitutional question. In my view, the *BIA* provides for a step that is specifically designed to avoid any constitutional conflicts, and the administrative tribunal should not be allowed to make an unconstitutional declaration. Thus, we disagree as to the forum that should hear and determine the conflict issue. A superior court judge presiding over a bankruptcy case acts as a specialized tribunal. He or she is very familiar with the duties and responsibilities of trustees and serves as the initial jurisdiction to which someone wanting to bring proceedings against a trustee must apply. I propose that the application for leave to bring proceedings pursuant to s. 215 *BIA* be analysed based on the actual effect of the proceedings on the duties and responsibilities of the trustee as set out in the *BIA*. Such an analysis is the only way to guarantee compliance with the principles of constitutional law.

87 In order to assess the areas of conflict between the *BIA* and the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ("*LRA*"), concerning successor employers, it will be helpful to begin by briefly reviewing the trustee's role in the context of the 1992 reform of the bankruptcy scheme. I will then discuss the effect of successor employer declarations made by the OLRB before turning to the constitutional principles applicable in the event of conflict. I will conclude by identifying the specific criteria for avoiding conflicts and then making a few comments on the case before the Court.

1. Powers and Responsibilities of the Trustee

1.1 *Role of the Trustee*

88 Viewed generally, the administration of a bankruptcy is straightforward. The trustee receives the assets in one hand, then settles any claims with the other using the proceeds of realization of the assets. In concrete terms, the trustee, in performing these functions, plays an active role in the liquidation of the bankrupt's estate. The trustee's duties and responsibilities are explicitly governed by the *BIA*. The bankrupt's property vests in the trustee (s. 71). The trustee's powers with respect to the property are set out in the *BIA* (ss. 30 and 31). Subject to the rights of secured creditors and certain other exceptions, the remedies of all the creditors are stayed (s. 69.1). The *BIA* also governs the nature of provable claims and the claims procedure (s. 121). A trustee who carries on the bankrupt's business or continues the employment of the bankrupt's employees is not personally liable for any claims arising before the bankruptcy (s. 14.06(1.2)). However, trustees are authorized to settle such claims out of the assets vested in them (s. 67) by distributing the proceeds of realization of the assets in accordance with the *BIA*, based on the priority of payment for which that Act provides (ss. 136 to 147).

89 The trustee is, first and foremost, an officer of the court:

> . . . and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors.
>
> (*Ex parte James, In re Condon* (1874), L.R. 9 Ch. App. 609, at p. 614)

90 The basis for the trustee's long-recognized role as an officer of the court is found in s. 16(4) *BIA*; under the *BIA*, the trustee has the same status as the interim

receiver: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (H.L.), at p. 167; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (3d ed. (looseleaf)), vol. 1, at C§10 and C§44. This status obliges the trustee to act equitably and prudently, to cooperate with the court and, in a more general manner, to contribute to the proper administration of justice (*Re L'Heureux (syndic de)*, [1999] R.J.Q. 945 (C.A.), at p. 949; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417 (C.A.); *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392 (C.A.); *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.); J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2002), 37 *R.J.T.* 57, at pp. 99-100).

91 The *BIA* protects trustees while they are acting as officers of the court and exercising the powers conferred upon them by law. A trustee is not personally bound by the bankrupt's obligations. In addition to being protected by the provisions that confer immunity upon them (ss. 14.06(1.2), (2) and (4), 50(9) and 50.4(5)), trustees benefit from the screening of the proceedings provided for in s. 215, which is central to the litigation in the case at bar. The provisions that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the *BIA*.

92 It is also interesting to note that similar protections exist for monitors appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11.7(4) and 11.8(1), (3) and (5), and liquidators acting pursuant to the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, ss. 35.1 and 76(2).

1.2 *1992 Reform*

93 The rules governing bankruptcy changed considerably with the coming into force of the 1992 reform. The most striking change was the priority given to the reorganization of companies, as opposed to the interruption of business. D. C. A. Tay comments as follows on the significance of the *BIA*'s new thrust:

> The main impact of the BIA is to change the thrust of Canada's bankruptcy legislation from liquidation to rehabilitation. Whereas the old Act dealt primarily with who gets what from the remains of the bankrupt's estate, the BIA tries to provide more ways for an insolvent debtor to stay alive and to restructure and reorganize its affairs.
>
> (*Implications of the New Bankruptcy and Insolvency Act* (1993), article VI,"The *Bankruptcy and Insolvency Act*: Striking a Balance Between the Rights of the Debtor and its Creditors", at p. 2)

94 This change is fundamental, and it unquestionably constitutes one of the main objectives behind the reform. Its effect, in concrete terms, in the case at bar is that the trustee was obliged to facilitate the sale of a going concern rather than to cease operations and liquidate the assets. The objective of continuing operations is a factor that must be incorporated into the constitutional analysis when considering whether a provincial statute frustrates the purpose of the *BIA*.

95 The trustee's duties and responsibilities as a public officer permeate these new functions. The trustee has been transformed from a mere liquidator into an agent of financial restructuring. If trustees are responsible for ensuring that businesses survive and that jobs are preserved, then it follows that they must manage the businesses until purchasers can be found. The trustee's management role is essentially a temporary one. Although the length of the trustee's administration may vary depending on the nature of

the business and the economic conditions at the time, the trustee serves essentially as a bridge in maintaining or reorganizing the business before handing it over to a purchaser.

96 It is clear from this crucial role of the trustee that bankruptcy inevitably has consequences for labour relations, which is why it is important to review the interrelationship of the rules of bankruptcy and those of labour relations, more specifically those applicable to the successor employer declaration.

2. Purpose and Effect of the Successor Employer Declaration

2.1 *Purpose of the Declaration*

97 Every Canadian legislature has enacted a provision pursuant to which employees' union protection remains in effect should the business they work for be transferred. The Ontario provision that is relevant to the instant case reads as follows:

> **69.** . . .
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

98 Without this protection, employees could, although still working at the same jobs, albeit for a new employer, be stripped of the rights their union had negotiated on their behalf.

99 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, McLachlin J., as she then was, explained the purpose of the successor employer declaration as follows:

> The basic aim of such provisions is to prevent employees from losing union protection when a business is sold or transferred or when changes are made to the corporate structure of a business. . . . [p. 671]

100 Numerous factors are taken into consideration when establishing whether the purchaser of a business has succeeded to the vendor as employer. To determine whether the business has been transferred, the usual practice is to ask whether sufficient significant elements of its assets have been sold to the purchaser and assess the degree of continuity in the business's operations. Each case turns on its own facts, and no single factor is determinative. The decision maker may compare both the human aspects (employee know-how, management system, licences, patents, goodwill) and physical aspects (tangible assets of the business, equipment, land, location) of the assigned business with those of the new one to decide whether there has been a sale. The decision maker also determines whether the constituent parts of the business have been transferred as a whole that is sufficiently coherent for the transfer to be equivalent to the sale of the business as a "functional economic vehicle" and for the survival of the rights arising out of collective bargaining to be justified (*Lester*, at p. 676; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197 (Ont.), at p. 208; *Lincoln Hydro Electric Commission*,

[1999] O.L.R.B. Rep. May/June 397, at pp. 415-16; G. W. Adams, *Canadian Labour Law* (2d ed. (looseleaf)), at pp. 8-4 to 8-23).

2.2 *Effect of the Declaration*

101 The effect of a declaration by the OLRB that an entity has succeeded to another as an employer is that the entity in respect of which the declaration is made becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. The new employer becomes personally liable for the predecessor employer's debts, as well as for any violations of the collective agreement occurring before the sale. For example, the successor may be bound by an arbitration award against the predecessor and be forced to assume responsibility for unfair labour practices. Generally speaking, the successor is personally liable to perform the predecessor's obligations (*Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683, at pp. 694-95; *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Ont.); *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96 (Ont.); *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126 (B.C.); *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138 (Ont. H.C.J.); *Radio CJYQ-930 Ltd.* (1978), 34 di 617; Adams, at pp. 8-38.2 to 8-39; D. D. Carter, G. England, B. Etherington and G. Trudeau, *Labour Law in Canada* (5th ed. 2002), at pp. 280-81).

102 Although protecting employees upon the sale of a business is straightforward in the context of the transfer of obligations to the purchaser, a number of questions are raised when the issue arises in a situation involving a trustee. The difficulties faced by trustees are exacerbated by a lack of uniformity both in labour relations legislation across

Canada and in the case law relating to that legislation (Adams, at pp. 8-4 *et seq.* and 8-39 *et seq.*).

103 It is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the OLRB. However, since the Ontario statute cannot frustrate the purpose of the *BIA*, it is necessary to determine to what extent a declaration that a trustee is a successor employer is compatible with the *BIA*.

3. Conflicts Between the *BIA* and the *LRA*

104 I have already discussed the effect of a successor employer declaration made under the *LRA*. Section 69(2) *LRA* provides that the purchaser of the business is bound by the obligations of the employer-vendor who signed the collective agreement as if the purchaser had been a party to that agreement. I also mentioned above that a declaration that a trustee is an employer within the meaning of the *LRA* would raise a number of questions. Even a cursory review brings a number of conflicts to light.

105 The most obvious conflict results from claims for unpaid wages. The effect of a successor employer declaration is that the person to whom it applies is liable for the obligations of the employer who signed the collective agreement. The new "employer", the trustee in the case at bar, would be liable for all wages left unpaid by the bankrupt. This obligation is in direct conflict with two provisions of the *BIA*.

106 The first is s. 14.06(1.2), which explicitly provides as follows:

> (1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

As the declaration binds the trustee to perform all the obligations of the employer who signed the collective agreement, its effect is to impose on this officer of the court a personal liability from which he or she is explicitly exempted by s. 14.06(1.2).

107 The second incompatible provision is s. 136(1)(*d*), which gives priority to claims of the bankrupt's employees for up to six months' back pay, to a maximum of $2,000 per employee. Any claims in excess of this amount are treated as ordinary claims and paid rateably (s. 141). If the trustee is considered to be an employer, he or she must pay the employees' claims in full, which is inconsistent with the *BIA*. This is another situation in which there is a direct conflict because it is impossible to comply with both the *BIA* and the *LRA*. Although not all bankrupt employers accumulate debts for back pay in excess of the limits provided for in the *BIA*, when one does, the bankruptcy court cannot unconditionally allow a union to request that the trustee be declared the bankrupt's successor.

108 Another conflict may arise in situations similar to the one in *Adam v. Daniel Roy Ltée*. In that case, the new employer was ordered to reinstate and indemnify an employee who had been dismissed by the predecessor employer because of her union activities. Such a decision, if applied to a trustee, would require the trustee to reinstate

an employee even though the bankruptcy had, in principle, terminated his or her employment (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

109 Other conflict situations are more subtle. One example is where a trustee must continue operating a business with only a few remaining employees. Procedures relating to lay-offs or to relocation may impose constraints that are incompatible with reorganization for bankruptcy purposes.

110 A final conflict results from the fact that the successor employer declaration is not time-limited. In the case of an actual purchaser, this poses no problems. In principle, the transfer of the business, like the declaration, is final. The same is not true in the case of a trustee, since the trustee, as an officer of the court, is entitled to be discharged once the administration of the assets has been completed (s. 41(2) *BIA*). An unconditional declaration would make the trustee an employer even though the reorganization has been completed and the trustee has been discharged by the bankruptcy court.

111 The above examples clearly illustrate that the successor employer declaration is not free of pitfalls when it applies to a trustee who must discharge his or her duties in accordance with the *BIA*. If in my first example it is clearly impossible to apply the two statutes concurrently, a situation in which the trustee could be held personally liable for debts of the bankrupt connected with the collective agreement would just as obviously frustrate the purpose of the *BIA*. As Feldman J.A. stated in the instant case:

> These bankruptcy considerations are critically important where an interim receiver could be declared a successor employer of the debtor if it carries on the debtor's business in order to sell it as a going concern. Whether to carry on the business is one of the most significant decisions that the receiver must

> make. That decision affects the entire direction of the bankruptcy and its outcome and, importantly, the ability of the receiver to maximize the value of the bankrupt's estate for the benefit of the affected stakeholders. [para. 53]

112 The decision to continue operating the business is central to the trustee's role under the *BIA*. This role cannot be disregarded. The parties must strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. A brief review of the relevant doctrines is therefore in order.

4. Double Aspect and Paramountcy Doctrines

113 Conflicts of legislative powers are not tolerated in constitutional law. A number of doctrines have been developed to ensure that federal and provincial powers are respected. Two of them are relevant here: double aspect and paramountcy. The doctrine of paramountcy has been considered in a number of this Court's decisions dealing specifically with bankruptcy, and it would be helpful to summarize those decisions.

4.1 *Double Aspect Doctrine*

114 Provincial legislatures have jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867* (the "Constitution"). The regulation of conditions of employment falls under this head of power. No one is questioning the constitutionality either of the *LRA* as a whole or of s. 69(2). As for Parliament, it has jurisdiction over bankruptcy and insolvency under s. 91(21) of the Constitution, and neither its jurisdiction nor the provisions granting powers and immunities to trustees are

being contested. Thus, each of these statutes, in its own field, is within the jurisdiction of the level of government that enacted it.

115 When effect is given to federal and provincial statutes, they can often be applied concurrently. The Privy Council recognized this possibility at a very early stage:

> . . . subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.
>
> (*Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130)

Thus, when trustees manage businesses while searching for a buyer, they derive their powers from the *BIA*, which is within federal jurisdiction. However, they are not exempt from the application of all provincial legislation. The *BIA* even makes express provision for the application of compatible provincial legislation relating to property and civil rights. Section 72(1) reaffirms the applicability of laws that are not in conflict with the *BIA*:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

A trustee who operates a business must satisfy a large number of requirements. For example, he or she may neither fail to collect source deductions from employees' pay nor violate minimum labour standards.

116 As a result, because of the division of legislative powers between the levels of government, trustees are subject to a large number of provincial statutes. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government: *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56. Where conflict is unavoidable, another doctrine may apply, namely, paramountcy.

4.2 *Paramountcy Doctrine*

117 The paramountcy of federal laws over provincial laws in the event of conflict is a doctrine that was established long ago: W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 *McGill L.J.* 185. Conflicts that will trigger recourse to this doctrine may occur where it is impossible to apply a federal statute and a provincial statute simultaneously (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191), but may also occur where the application of a provincial statute frustrates the legislative purpose of a federal one: *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, and *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12.

118 While this principle is easily stated, it is not always easy to apply, as can he seen from the numerous cases on this subject.

4.3 Specific Context of Bankruptcy

119 The *BIA* and the *LRA* are not necessarily incompatible. While it is important to acknowledge potential conflicts, it is just as important to ensure that the paramountcy doctrine is not interpreted in a way that makes it impossible to apply provincial provisions in respect of aspects that are compatible with the federal statute. The double aspect doctrine is as important as the doctrine of paramountcy. Courts must ensure that the balance struck by the Constitution is respected and that each level of government can exercise its jurisdiction fully when this can be done without impeding action by the other level.

120 In several important judgments on the subject of bankruptcy, this Court has considered the relationship between bankruptcy legislation and various aspects of provincial property law: *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, and *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52.

121 In *Husky Oil*, Gonthier J., writing for the majority, summarized the principles that can serve as a basis for a "consistent and general philosophy as to the purposes of

the federal system of bankruptcy and its relation to provincial property arrangements" (at para. 31). He not only noted that provinces may not *directly* affect priorities under the *Bankruptcy Act*, but also stated propositions that permit the paramountcy doctrine to be applied where provincial legislation *indirectly* conflicts with the *BIA* (paras. 32 (quoting A. J. Roman and M. J. Sweatman, "The Conflict Between Canadian Provincial Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at pp. 78-79) and 39):

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
>
> (4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act;
>
> . . .
>
> (5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the *effect* of provincial legislation is to do so. [Emphasis in original.]

122 Although the propositions enunciated in *Husky Oil* relate more specifically to conflicts between provincial statutes and the scheme of distribution established in the *BIA*, they have a scope that extends beyond that specific context, and they demonstrate how the paramountcy doctrine applies in the context of bankruptcy.

123 In principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. However, all the conflicts to which I have alluded will not occur every time the OLRB makes a successor employer declaration. On the one hand, it may be that in the particular circumstances of a case, the trustee's conduct is inconsistent with the role entrusted to him or her by the *BIA*; on the other hand, the OLRB may make a partial declaration if the union does not require the transfer of all the former employer's obligations. The case at bar is a good example of the latter situation. The union argues that it is not seeking a declaration of liability for debts owed before the appointment of the receiver. While this clarification is helpful, it does not avert every potential conflict.

124 The Superior Court plays a decisive role in identifying potential conflicts and must not authorize proceedings that could give rise to a conflict. A judge who denies leave to bring proceedings does not declare the provincial provision to be of no force or effect; he or she merely avoids the conflict by relying on the paramountcy doctrine in a preventive manner, hence the importance of the screening mechanism of s. 215 *BIA*.

5. Section 215 *BIA*

5.1 *Purpose of s. 215 BIA*

125 As I mentioned earlier, Parliament's intent to give trustees flexibility in administering bankruptcies is evident in the immunities provided for in the *BIA*. Section 215 plays an important role in protecting trustees, because a superior court must, in applying it, screen proceedings that could be brought against them. It reads as follows:

> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

126 My colleague Abella J. objects to incorporating factors related to the special nature of a declaration that a trustee is an employer into the criteria for applying s. 215 *BIA*. To do so would in her view be to create a special and exceptional test for such a declaration. I myself see it as an incorporation of constitutional principles and an adjustment to new dimensions of the remedies that may be authorized against trustees.

127 Like Feldman and Cronk JJ.A., I am of the opinion that s. 215 acts as a screening mechanism for the purpose of ensuring that provincial and federal statutes do not conflict with each other. The bankruptcy judge acts as a specialized tribunal. Not only is the bankruptcy judge responsible for applying the federal statute, which must take precedence over provincial legislation in the event of conflict, but he or she is also the first person before whom the issue of the potential conflict is raised and the only one in

a position to assess all the interests at stake. It is the bankruptcy judge who must decide all issues relating to the application of the *BIA*.

128 In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, the Court recognized the central role of the first court or tribunal to which a claimant applies. That case required a decision as to which of two administrative tribunals should decide an issue relating to human rights. In the case at bar, the choice is between the Superior Court and an administrative tribunal, the OLRB, and, what is more, it involves a constitutional question. In light of the Superior Court's expertise in bankruptcy matters and in matters relating to the Constitution, there is all the more reason to choose the Superior Court instead of the administrative tribunal. The bankruptcy court must be permitted to play its central role in full before the tribunal external to the bankruptcy considers the application against the trustee: *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92. In contrast, the OLRB specializes in labour relations, and its mission is to apply the *LRA* and, more specifically in the case at bar, s. 69(2), the purpose of which is to protect employees. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts.

129 I agree with my colleague Abella J. that the trustee is not immunized by the *BIA*. There are two sections that provide for supervision of the trustee's activities: ss. 37 and 215. Section 37 allows any interested person to apply to the bankruptcy court to have it confirm, reverse or modify an act or decision of a trustee that is the subject of a complaint. This remedy is not conditional on first obtaining leave and it sometimes constitutes an alternative remedy to s. 215 *BIA*. What distinguishes s. 37 from s. 215 is

that the latter allows proceedings to be brought in a court or tribunal *other* than the bankruptcy court and that it requires leave. Leave is required here because Parliament intended that the bankruptcy court have control over the proceedings. The other court or tribunal is not one that specializes in bankruptcy matters.

130 The vast majority of the decisions based on s. 215 are from cases involving alleged wrongdoing by a trustee: *Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38 (Ont. Prov. Ct.); *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636 (Gen. Div.); *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115 (B.C.S.C.); *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208 (Q.B.); *McKyes, Re*, 1996 CarswellQue 2575 (Sup. Ct.); *Nicholas v. Anderson* (1998), 5 C.B.R. (4th) 256 (Ont. C.A.); *Gallo v. Beber* (1998), 7 C.B.R. (4th) 170 (Ont. C.A.); *Kearney v. Feldman*, [1998] O.J. No. 5109 (QL) (Gen. Div.); *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.); *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160 (Ont. C.A.); *Mann v. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127 (Ont. C.A.); *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77 (Ont. S.C.J.); *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL) (S.C.J.); *MacLean v. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani v. Devgan*, [2005] O.J. No. 2868 (QL) (S.C.J.); *105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122 (Ont. S.C.J.); and *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430.

131 The courts have hesitated to grant leave to bring proceedings against a trustee for the purpose of obtaining a declaration that the trustee is a successor employer. The instant case exemplifies this, but the Court of Appeal is not alone in this respect: *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (Ont. Ct. (Gen. Div.)).

132 With the evolution of administrative law and the growing number of specialized tribunals, s. 215 is now used for a much wider variety of purposes than before. I agree with what Feldman J.A. said on this subject (para. 54):

> In cases to date dealing with leave under s. 215 of the *BIA*, such as *Mancini*, where the issue has been trustee wrongdoing, factors relating to the bankruptcy court's control over the process have not arisen. In such cases, if leave is granted, the trustee will hire a lawyer to defend it in court, and the trustee will proceed to carry out its duties conducting the receivership or bankruptcy.

133 Applications for leave based on grounds other than negligence or refusal by the trustee to discharge his or her duties are thus a fairly recent occurrence. It is quite clear from the few reported cases that bankruptcy judges are desirous of preserving the trustee's flexibility and that they ensure that proceedings brought before the other court or tribunal do not impede action by the trustee. For instance, in *Royal Crest Lifecare Group Inc., Re* (2003), 40 C.B.R. (4th) 146, the Ontario Superior Court dismissed a union's motion for leave to apply to the OLRB on the following basis (para. 29):

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.

On an appeal from that judgment ((2004), 46 C.B.R. (4th) 126, at para. 27), the Ontario Court of Appeal explicitly approved the Superior Court's approach, although it noted the constraints inherent in the bankruptcy context (paras. 21, 22, 31 and 32):

> A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.
>
> The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.
>
> . . .
>
> The trustee has many responsibilities — to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.
>
> Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly "business as usual" for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard.

134 Thus, the purpose of ss. 37 and 215 is not to immunize the trustee against legitimate proceedings, but to permit the trustee's administration to be supervised without impeding it. Facilitating a form of supervision by the bankruptcy court supports the trustee's role. The *BIA* establishes a scheme under which the effectiveness of the

trustee's administration can be taken into account without shielding the trustee from the courts' power of supervision. Section 215 does not indicate what criteria must be met. The flexibility afforded by Parliament permits the bankruptcy court to adapt to new realities, including successor employer declarations.

5.2 *Criteria for Granting Leave*

135 *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332, is often cited as the source of the analysis that the judge must conduct. Although the criteria established in that case are easy to apply to a simple claim against a trustee for breach of his or her duties, they must be tailored to the specific nature of each application for leave.

5.2.1 *Mancini* and the Sufficiency of the Evidence

136 There is a need to demystify the analysis developed in *Mancini*. In that case, the moving parties applied for leave to commence an action by way of counterclaim for damages against a trustee. They alleged that the trustee's proceeding constituted an abuse of process and that the trustee had organized a criminal prosecution. The moving parties thus accused the trustee of wrongdoing and asked for an award of damages against the trustee personally. This was not a proceeding likely to impair the application of the *BIA*. The judge did not need to consider the effect the proceeding might have in this regard. However, the Court of Appeal clearly differentiated between two matters a judge must consider on an application for leave under s. 215: the seriousness of the cause of action and the sufficiency of the evidence. On the seriousness of the cause of action,

the Court of Appeal in *Mancini* did not set out the applicable analysis, but simply summarized the case law.

137 In my view, the most interesting aspect of that case was the court's discussion about the standard of proof. Moreover, that was the main issue in the case. The Court of Appeal wrote the following:

> In considering whether leave should be granted under s. 186 [now 215] of the *Bankruptcy Act* to commence an action against the trustee, the motions court judge was required to consider the evidence, very generally reviewed above, in the context of the counterclaim sought to be made against the trustee. The issue is not whether the evidence on the s. 186 motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for the cause of action sought to be asserted by way of the appellants' counterclaim. Thus, it is necessary to examine the claims that the appellants sought to make against the trustee.
>
> . . .
>
> The appellants submit that the motions court judge erred in holding that the evidence filed in support of their motion under s. 186 of the *Bankruptcy Act* must be sufficient to establish a factual foundation for the claim that the appellants propose to make against the trustee. The appellants submit that the test under s. 186 requires no more than some evidence providing a factual foundation for the claim they seek to assert. In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.
>
> The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186. [Emphasis added; paras. 12, 16 and 17.]

138 In saying this, the Court of Appeal was affirming the decision of the trial judge ((1989), 76 C.B.R. (N.S.) 90), who had adopted a clear formulation of what evidence would be sufficient for leave to be granted to bring proceedings against a trustee:

> Because the decision requires an exercise of discretion, the Court must make a more thorough enquiry than when considering whether or not a claim, *as a matter of law*, discloses a cause of action. In considering whether a claim discloses *a cause of action*, the Court presumes the allegations in the claim to be true to determine whether those allegations can provide the basis for a remedy. On a section 186 application, the Court must consider whether there is *evidence* of a factual basis for the proposed claim. The policy of section 186 is to protect the Trustee from claims which have no basis in fact. Ensuring a proper factual foundation for a proposed claim requires that the alleged facts must be disclosed by sufficient affidavit evidence. Facts are not allegations merely to be accepted at face value.

139 If *Mancini* can be considered to have laid down a threshold or test of some sort, I would say that the test relates to the standard of proof required for the bankruptcy court to grant leave to bring proceedings.

140 With regard to the sufficiency of the evidence, *Mancini* thus makes it clear that the judge to whom an application for leave is made under s. 215 cannot accept vague allegations. The allegations must be supported by the evidence. The judge does not have to be convinced that the action is well founded, since he or she is not the trier of fact. However, the judge must ensure that there is sufficient factual evidence, whether in the form of affidavits or exhibits, to support the allegations. To do this, the judge must review the evidence. In ordinary usage, the standard of proof in civil proceedings is often characterized as requiring either proof on the balance of probabilities or *prima facie*

evidence. The threshold under s. 215 is not the trial judge's threshold of proof on the balance of probabilities, but *prima facie* evidence.

141 Unlike in *Mancini*, what is in issue in the case at bar is not the question *of fact* of the sufficiency of the evidence, but the question *of law* that is considered at the stage of the review of the seriousness of the cause of action.

5.2.2 Seriousness of the Cause of Action

142 The review of the seriousness of the cause of action must be adapted to the nature of the proceedings the applicant intends to bring. If, as in *Mancini* and the majority of the cases submitted to the courts until quite recently, a monetary award is all that is sought, the proceedings do not prevent the trustee from carrying out his or her duties or impose a burden on the trustee that is incompatible with the *BIA*.

143 However, bankruptcy judges clearly cannot grant leave to bring proceedings that are incompatible with the *BIA*. Thus, a bankruptcy judge could not authorize proceedings aimed at holding a trustee liable where the *BIA* immunizes trustees against the liability in question, as in the case of environmental damage. Since a full defence is available to the trustee pursuant to s. 14.06(2) and (4), such proceedings could not be characterized as serious or, in the words used in *Mancini*, "not frivolous". When a proceeding is not a simple action in damages based on wrongdoing by the trustee, the judge must therefore assess the nature and scope of the proceeding in light of the evidence.

144 Thus, in proceedings in which the OLRB is asked to declare that a trustee has succeeded to the bankrupt as employer, the review by the bankruptcy judge enables the judge to identify the union's actual objective in making this request. This makes it possible for the bankruptcy judge to reconcile the employees' interests with those of anyone else who has interests in the bankruptcy.

145 The judge's review does not have the effect of giving special or different treatment to successor employer declarations. Regardless of the reason the judge gives for granting leave to bring proceedings, the general context of the bankruptcy remains relevant. The judge must play an active role, anticipate the consequences of the proceedings, and limit their scope if need be. Screening the proceedings in this way is in fact what the trial judge did when he amended the order appointing the receiver so as to limit the protection of the receiver to acts it carried out in the context of the liquidation of the property. This limitation should be qualified if, for example, the issue concerns the rate of wages paid by the trustee. The process engaged in by the trial judge is nevertheless an example of what bankruptcy judges can be required to do on a regular basis in the course of their interactions with the parties. They can tailor the leave they grant to the specific needs of each case. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and must deal with conflicts that could impair the application of the *BIA*.

146 In the case at bar, Feldman J.A. concluded that an operational conflict results each time a bankruptcy judge denies leave to bring proceedings under s. 69(2) *LRA*:

> Because the denial of leave under s. 215 of the *BIA* can be used by the bankruptcy court in appropriate circumstances to preclude the OLRB from exercising its exclusive jurisdiction to declare a person a successor employer, it is in operational conflict with s. 69 of *LRA* when such leave is

> denied. When that occurs, s. 72(1) of the *BIA* is engaged, with the result that s. 69(12) of the *LRA* is superceded [*sic*] by s. 215 of the *BIA*. [para. 69]

147 I myself would present this idea from a positive perspective. Judges who exercise their jurisdiction under s. 215 are in a position to avoid operational conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously.

148 If the union seeks only to maintain wage rates, the proceedings can be limited to that purpose. Similarly, the problem of the period during which the declaration will be effective can be resolved by specifying that the trustee's liability will terminate when the business is transferred to the purchaser.

149 Some cases, such as those involving seniority, may be difficult to evaluate. The issues in such cases will turn on the specific facts of each bankruptcy situation and will sometimes require an assessment of the overall impact of the proceedings.

150 Feldman J.A. mentioned the following factors (para. 58):

> The factors that the bankruptcy court applies on a s. 215 application will relate to both procedural and substantive aspects of the process. Some important factors will include: the timing of the application, the complexity of the receivership and the demands on the receiver as it carries out its obligations, the potential duration of the period that the receiver intends to operate the business before it can be sold (normally as brief as possible), the availability of potential purchasers and their financial strength, and the likelihood that a purchaser will be declared a successor employer and assume all of the obligations under the collective agreement. This latter factor may be particularly important because it will give practical assurance to the union that all of the terms of the collective agreement will be

> honoured and the employees protected. Another key factor is the practicality of proceeding before the OLRB and the timeliness of a hearing before that tribunal in the context of the proposed temporary operation of the business and its sale.

These factors could be applied incorrectly. They inevitably overlap with those that will determine the decision on the merits. The bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits.

151 Using the factors proposed by Feldman J.A. entails a second risk. These factors do not expressly mention the employees' rights. The trustee represents the interests of all the creditors, including the employees. The proposed factors must therefore be resituated in the context of the exercise of a remedy that necessarily implies constraints relating to the rights of all the creditors. They cannot serve to allow the trustee to evade the application of a statute that, although it may create a constraint, does not hinder the trustee's work. Judges must therefore bear in mind that they will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. The judge's first task is therefore to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy.

152 Employees' wage rates are one example of a constraint related to the application of the collective agreement that does not ordinarily hinder the trustee's work. Trustees who retain employees' services do not necessarily have the right to reduce their wages. Consequently, if a union seeks a declaration that a trustee is the bankrupt's successor for the sole purpose of maintaining wage rates, and if the interests of the parties cannot be reconciled at the hearing before the bankruptcy court, then leave should normally be granted. An order that a monitor pay recalled employees in accordance with

the terms of the collective agreement has been made in the context of the *Companies' Creditors Arrangement Act*. Such an order does not generally lead to conflict with the duties of a liquidator or a trustee: *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] Q.J. No. 264 (QL) (C.A.).

153 Moreover, the review before the bankruptcy judge of the consequences of a declaration is likely to make the parties aware of their respective interests and create an atmosphere conducive to the respect of everyone's rights. When considering the application, the judge must therefore bear in mind all the interests at stake and accept that every constraint does not necessarily hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*.

154 To sum up, a judge who must decide whether to grant leave to bring proceedings against a trustee must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Determining the scope of the remedy is part of the review of the cause of action. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law. The judge must tailor the leave. If the conflict cannot be avoided in this way, then leave to bring the proceedings must be denied.

6. Application to the Case at Bar

155 My colleague Abella J. concludes that leave to bring proceedings should be granted. I myself believe that the case should be reconsidered by the Superior Court. The union has not stated its objective other than to say that the proceedings do not concern debts incurred prior to the trustee's appointment, but this is insufficient to eliminate every potential conflict of jurisdiction, and it is also insufficient for us to substitute our assessment for that of the trial judge.

156 To appreciate the nature of the analysis the bankruptcy judge must carry out, it will be helpful to set out the facts of the case.

157 On January 18, 2002, the respondent GMAC Commercial Credit Corporation — Canada ("GMAC"), the principal creditor of the respondents T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc. ("T.C.T."), was informed that T.C.T. had artificially inflated its accounts receivable and had obtained advances from GMAC that exceeded the value of its security by $21 million. On January 24, 2002, at GMAC's request, the Ontario Superior Court appointed KPMG Inc. as interim receiver of T.C.T.'s property. The appointment order provided that no proceedings could be commenced against KPMG without leave of the Superior Court. The order also stated that KPMG would not be considered to have succeeded to T.C.T. as employer. On February 25, 2002, T.C.T. made an assignment in bankruptcy. KPMG was appointed trustee in bankruptcy. As of the date of the bankruptcy, T.C.T. was operating a brokerage, logistics, trucking and warehousing business in Canada and the United States. The sale of the business was considered urgent (refusal by GMAC to advance additional

funds, trucks located across Canada and the U.S., perishable goods still in transit or in warehouses, storage of property at risk, etc.).

158 T.C.T. had 1,357 employees across Canada, including unionized employees represented by 13 different unions. There were 225 employees in the warehousing division, which included warehouses located in Edmonton, Calgary and Toronto. The operation of these warehouses was subject to collective agreements covering 78 employees, including the 42 employees in the Toronto warehouse, who were represented by the appellant, Industrial Wood & Allied Workers of Canada, Local 700 (the "union"). On April 12, 2002, KPMG reached an agreement with Spectrum Supply Chain Solutions Inc. ("Spectrum") under which Spectrum would buy certain specified assets of T.C.T.'s warehouses. The letter of intent initially signed by Spectrum and KPMG provided that Spectrum would operate the warehouses and continue to employ most of the employees. After evaluating the assets, however, Spectrum decided that two of the warehouses were of no interest to it, including the one in Toronto, which was considered to be in disrepair. The final agreement provided that the employees would be terminated and that the lease of the Toronto warehouse would not be assigned to Spectrum. On April 16, 2002, the Toronto employees were informed of the agreement with Spectrum and were also informed that KPMG would be applying to the Superior Court for approval of the agreement on April 18, 2002. The Toronto warehouse was closed on May 23, 2002.

159 On May 13, 2002, the union filed two applications with the OLRB in which KPMG was named as a responding party. The purpose of the first was to have Spectrum declared to be the successor employer to T.C.T. and KPMG under s. 69(2) of the *LRA*. The second was a complaint of unfair labour practices. KPMG contested the

applications, submitting that all proceedings were stayed pursuant to the appointment order and the *BIA* and that the union had not applied to the Superior Court for leave, as required by the appointment order and by s. 215 *BIA*. On August 27, 2002, the OLRB ruled in the trustee's favour and stayed the hearing of the applications.

160 The proceedings in the Superior Court concerned only KPMG. The union's application to have Spectrum recognized as the successor to T.C.T. with respect to its obligations as an employer was not in issue.

161 The reasons given by Ground J. of the Superior Court on the merits of the remedy the union sought to exercise were clear ((2003), 42 C.B.R. (4th) 221). Ground J. concluded that the trustee had merely acted as a liquidator and should not, as such, be declared the bankrupt's successor. He did not consider the actual objective being pursued by the union or the possibility of limiting the scope of the proceedings that could be brought before the OLRB. Moreover, it is impossible to determine whether he considered these proceedings to be frivolous or to have no chance of succeeding or whether he felt that the evidence did not *prima facie* support the union's cause of action. In any event, the judge analysed the merits of the case as if he himself was the trier of fact.

162 One observation is necessary here. The unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The union and GMAC do not agree on the scope of the successor employer declaration sought by the union in the instant case. The union does not seek to place a time limit on the declaration

that the receiver and trustee is a successor employer. Nor has it stated if it is seeking a monetary award or the reinstatement of all unionized employees in the context of the unfair labour practices complaint. Does the dispute concern only wages or does it also relate to transfers and terminations of staff? Other issues could be raised by the parties, who are familiar with all aspects of the case. Not only is it necessary to assess the sufficiency of the evidence, but the uncertainty surrounding the scope of the proceedings and the union's actual objective prevents the Court, incontrovertibly in my view, from granting the union the leave it seeks and that was denied by the judge of the Superior Court.

7. Conclusion

163 The analytical approaches of the Court of Appeal and the Superior Court had the effect of avoiding a constitutional conflict, but they could block legitimate actions. Even in their role as liquidators, trustees are often required to conform to obligations imposed on them by provincial legislation. Not every constraint inherent in a proceeding for a successor employer declaration is liable to hinder the administration of the bankruptcy. The criteria proposed by the Superior Court and the Court of Appeal are therefore too demanding.

164 I propose instead to incorporate into s. 215 a review designed to prevent constitutional conflicts. Under this approach, the paramountcy doctrine would apply only where the third party's proposed action would hinder the application of the *BIA*.

165 Furthermore, I believe that this Court should not supplant the Superior Court to assess the cause of action and the sufficiency of the evidence. In the review required

by s. 215, the trier of fact has an active role to play. It is the trier of fact who must conduct the review.

166 The Court of Appeal ordered that the case be remitted to the Superior Court. That was a sound decision. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. The Superior Court did not conduct this more complete review. The Court of Appeal's disposition should accordingly be confirmed.

167 For these reasons, I would dismiss the appeal and the cross-appeal.

gmac *c.* t.c.t. logistics inc.

Syndicat des travailleurs de l'industrie du bois et leurs alliés, section locale 700 *Appelant/Intimé au pourvoi incident*

c.

Société de Crédit commercial GMAC — Canada *Intimée/Appelante au pourvoi incident*

et

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., séquestre intérimaire et syndic de faillite de T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc., et TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (successeur de Tri-Line Expressways Ltd. et de TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. et 606966 British Columbia Ltd. *Intimées*

Répertorié : Société de Crédit commercial GMAC — Canada *c.* T.C.T. Logistics Inc.

Référence neutre : 2006 CSC 35.

N° du greffe : 30391.

2005 : 16 novembre; 2006 : 27 juillet.

Présents : La juge en chef McLachlin et les juges Major*, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

en appel de la cour d'appel de l'ontario

Faillite et insolvabilité — Tribunal de faillite — Compétence — Les juges de faillite sont-ils incompétents pour décider si un séquestre intérimaire est un employeur successeur pour l'application des lois provinciales sur les relations de travail? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 47, 72(1).

Faillite et insolvabilité — Procédure — Action contre un séquestre intérimaire — Disposition législative sur la faillite interdisant l'engagement de procédures contre les séquestres intérimaires sans autorisation judiciaire préalable — Permission demandée par un syndicat en vue d'être autorisé à déposer contre un séquestre intérimaire une requête touchant le statut d'« employeur successeur » — Le critère énoncé dans l'arrêt Mancini est-il applicable? — Un critère différent s'applique-t-il lorsque le litige a trait aux obligations du séquestre envers les employés syndiqués du débiteur? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 215.

La société TCT est devenue insolvable et le principal créancier garanti de celle-ci a demandé la nomination d'un séquestre intérimaire. L'ordonnance portant nomination de KPMG précisait que les mesures prises par le séquestre intérimaire en matière d'emploi ne pouvaient être considérées comme celles d'un « employeur successeur » et interdisait l'enaggement de procédures contre le séquestre intérimaire,

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* Le juge Major n'a pas pris part au jugement.

sauf avec l'autorisation de la cour. Après cession des biens de TCT au profit des créanciers, KPMG a vendu la plupart des éléments d'actif de l'entreprise d'entreposage à une société nouvellement formée. KPMG a mis fin à l'emploi de tous les employés syndiqués de l'entrepôt de Toronto, mais certains d'entre eux ont été réembauchés subséquemment par la nouvelle société. Exception faite du nouvel emplacement des activités, la seule différence importante dans l'exploitation de l'entreprise par TCT et par la nouvelle société était l'absence du syndicat comme représentant des anciens employés de TCT.

Le syndicat a présenté à la Commission des relations de travail de l'Ontario une requête dans laquelle il sollicitait notamment une déclaration portant que, en tant qu'employeur succédant à TCT ou KPMG, la nouvelle société était liée par la convention collective conformément à l'art. 69 de la *Loi de 1995 sur les relations de travail* (« *LRT* »). Après que sa requête eût été suspendue pour le motif que l'art. 215 de la *Loi sur la faillite et l'insolvabilité* (« *LFI* ») interdit l'introduction d'actions contre un séquestre intérimaire ou un syndic de faillite sans la permission du tribunal, le syndicat a demandé cette permission. Le juge a modifié le paragraphe relatif à la protection touchant le statut d'« employeur successeur » dans l'ordonnance nommant le séquestre intérimaire, mais il a refusé la permission demandée. La Cour d'appel a conclu à l'unanimité que seule la Commission avait compétence pour se prononcer sur le statut d'employeur successeur, mais elle s'est divisée sur le critère applicable pour décider, en vertu de l'art. 215 de la *LFI*, s'il y a lieu d'accorder ou non la permission de présenter une demande concernant le statut d'employeur successeur. La majorité a estimé que le critère traditionnel formulé dans *Mancini* n'était pas assez exigeant lorsqu'il s'agissait d'instances relatives au statut d'employeur successeur et qu'il fallait considérer d'autres facteurs pour tenir davantage compte des conséquences de telles

demandes en justice sur le processus de faillite. La majorité a en conséquence annulé le refus du juge d'accorder la permission et lui a renvoyé la demande pour qu'il la réexamine en fonction des facteurs additionnels énumérés. Le syndicat se pourvoit contre l'ordonnance de la Cour d'appel qui lui a refusé la permission d'engager des procédures, et le créancier garanti a formé un appel incident sur la question de la compétence du juge de faillite.

Arrêt (la juge Deschamps est dissidente quant au pourvoi principal) : Le pourvoi principal est accueilli et le pourvoi incident est rejeté.

La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, **Abella**, Fish et Charron : Le tribunal de faillite n'a pas le pouvoir de décider si un séquestre intérimaire est un employeur successeur au sens de la *LRT*. Le paragraphe 47(2) de la *LFI* accorde au tribunal de faillite le pouvoir d'enjoindre au séquestre intérimaire de faire certaines choses. Cette disposition n'a pas pour effet d'habiliter — ni explicitement ni implicitement — le tribunal de faillite à rendre des jugements déclaratoires unilatéraux sur les droits de tiers en fonction d'autres régimes législatifs. En outre, le par. 72(1) de la *LFI* énonce que celle-ci n'a pas pour effet d'abroger des dispositions législatives non incompatibles avec elle se rapportant à la propriété et aux droits civils, ces dispositions étant réputées s'y ajouter. Le droit de demander une déclaration touchant le statut d'employeur successeur conformément à la *LRT*, n'est pas incompatible avec le pouvoir que le par. 47(2) accorde au tribunal de faillite. Si l'article 47 pouvait recevoir une interprétation assez large pour permettre de porter atteinte à tous les droits qui, bien que protégés par la loi, gênent le processus de faillite, il pourrait être invoqué pour éteindre tout droit. Il faudrait un texte explicite pour que l'art. 47 confère un pouvoir aussi étendu. [4] [43-51]

Le juge de faillite a fait erreur en refusant d'accorder au syndicat la permission de présenter contre le séquestre intérimaire une demande relative la qualité d'employeur successeur. Le critère énoncé dans *Mancini* à l'égard des demandes de permission fondées sur l'art. 215 de la *LFI* n'est pas très exigeant. Pour l'application de cette disposition, il s'agit de déterminer si la preuve étaye la cause d'action invoquée. S'il existe une preuve *prima facie*, la permission demandée doit être accordée. Cet examen n'a pas pour objet de trancher la question au fond. Le critère énoncé dans *Mancini* établit un juste équilibre entre, d'une part, la protection des syndics et des séquestres contre les poursuites frivoles, et, d'autre part, la protection — dans la plus large mesure possible — des droits des créanciers et autres intéressés contre les décisions et les actes des syndics et des séquestres. En ce sens, l'arrêt *Mancini* est compatible avec l'exigence selon laquelle il faut une disposition législative explicite pour que la *LFI* puisse être interprétée de manière à priver une personne de droits conférés par une province. Lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement. En l'absence de dispositions expresses de ce genre, le tribunal de faillite ne devrait pas convertir la procédure d'autorisation établie à l'art. 215 en mesure de protection générale en faveur des auxiliaires de justice désignés par les tribunaux. Il n'existe aucune raison de créer un critère plus exigeant, qui s'appliquerait uniquement aux recours des employés syndiqués. Resserrer le critère d'application de l'art. 215 lorsque le litige porte sur une question relevant d'une commission des relations de travail équivaut à reconnaître à la *LFI*, par interprétation, une sensibilité moins grande envers les droits des employés syndiqués qu'envers ceux des autres créanciers. Rien dans cette loi ne suggère une telle distinction. Enfin, le critère de l'arrêt *Mancini* ne restreint nullement les mesures de protection que le législateur a jugé nécessaires d'établir pour préserver la capacité des syndics et des séquestres de s'acquitter de leurs

fonctions avec souplesse et efficacité. En l'espèce, comme il est impossible d'affirmer que la demande du syndicat est frivole ou n'est appuyée d'aucune preuve, celui-ci doit être autorisé à la présenter. [7] [55-61] [67-72] [80]

La juge **Deschamps** (dissidente quant au pourvoi principal) : Le juge appelé à décider s'il y a lieu d'accorder la permission de poursuivre un syndic en vertu de l'art. 215 *LFI* doit évaluer concrètement la portée du recours recherché, identifier les conflits potentiels et moduler l'autorisation de façon à éviter qu'une poursuite fondée sur le droit provincial n'ait pour effet d'entraver l'exécution des devoirs et responsabilités imposés au syndic par la *LFI*. Comme le droit constitutionnel ne tolère pas les conflits de compétence, une poursuite entraînant un conflit constitutionnel n'a pas de fondement juridique et le juge doit alors refuser la permission demandée. [155]

La décision de continuer les activités de l'entreprise est au coeur de la mission confiée au syndic par la *LFI* et, en principe, le syndic ne doit pas être assujetti à des obligations qui entravent le règlement de la faillite. Les dispositions de la *LFI* protégeant le syndic contre les poursuites indiquent clairement l'intention du Parlement de lui accorder la marge de manoeuvre dont il a besoin pour accomplir les devoirs que lui impose la *LFI*. La déclaration attribuant la qualité d'employeur n'est pas sans créer d'embûches lorsqu'elle vise un syndic. Une telle déclaration a pour effet de faire du syndic une partie liée par la convention collective et de le rendre responsable de toutes les obligations y afférentes, y compris celles qui incombaient à l'ancien employeur avant le transfert de l'entreprise. Bien qu'il soit admis que la *LRT* confère à la Commission des relations de travail de l'Ontario le pouvoir exclusif de décider qui est « employeur successeur », la LRT ne saurait entraver la réalisation de l'objet de la *LFI*. Il est donc important d'identifier le point d'équilibre entre les devoirs et immunités du

syndic en vertu de la *LFI* et les droits reconnus aux employés par la *LRT*. En cas de conflit, les parties doivent se reporter aux règles constitutionnelles. Les tribunaux saisis de contestations portant sur la difficulté d'appliquer concurremment des lois fédérales et provinciales doivent tenter de concilier l'application de ces lois de façon à respecter les champs de compétence respectifs des deux ordres de gouvernement. Cependant, lorsque le conflit est inévitable, la loi fédérale a prépondérance sur la loi provinciale. De là l'importance du mécanisme de filtrage de l'art. 215 *LFI* qui sert de mesure de contrôle permettant d'éviter que des lois provinciale et fédérale n'entrent en conflit l'une avec l'autre. Comme la faillite d'une entreprise met en cause les intérêts de tous les créanciers et non pas seulement ceux des employés, le juge de la cour de faillite est dans une meilleure position pour évaluer les intérêts en cause et prévenir les conflits. [91] [101] [103] [112-113] [117-118] [124] [128-129]

D'application facile lorsqu'il s'agit d'une simple poursuite en dommages-intérêts fondée sur la faute du syndic, les critères d'application de l'art. 215 énoncés dans l'arrêt *Mancini* doivent, dans les autres cas, être adaptés à la nature particulière de chaque demande. Le juge doit évaluer la nature et la portée du recours à la lumière de la preuve. Cet examen n'a pas pour effet d'accorder un traitement particulier ou différent aux déclarations attribuant la qualité de successeur. Dans l'examen du sérieux de la cause d'action, le juge de faillite doit être vigilant et prévoir les conflits. En s'assurant que les conclusions recherchées n'entravent pas l'application de la *LFI* et, au besoin, en limitant la portée d'une poursuite fondée sur une loi provinciale, le juge de faillite permet l'application simultanée de la loi fédérale et des lois provinciales. Le juge qui refuse d'autoriser une poursuite ne fait qu'éviter le conflit en recourant de façon préventive à la doctrine de la prépondérance. Le juge de faillite doit toutefois prendre garde de ne pas se substituer au tribunal qui statuera

sur le fond. La tâche première du juge consiste à s'interroger sur l'effet concret de la demande et non sur quelque effet diffus de celle-ci sur l'administration de la faillite. Seule une entrave réelle au travail du syndic justifie de limiter la portée du recours ou de refuser la permission d'intenter celui-ci. Une approche trop axée sur la flexibilité requise par le syndic dans sa gestion risquerait d'amener trop facilement à conclure à l'existence d'un conflit et serait peu respectueuse de l'art. 72 de la *LFI* qui prévoit expressément l'application des lois provinciales compatibles avec la loi fédérale. [136] [144-154]

Dans la présente affaire, les conclusions sans réserve sollicitées par le syndicat sont susceptibles d'entraîner des conflits directs avec l'application de la *LFI*. Ni les faits consignés au dossier ni les positions avancées par les parties ne permettent à notre Cour de procéder à l'examen auquel la Cour supérieure doit se livrer. Le renvoi du dossier s'impose donc non seulement pour l'évaluation du dossier sous l'angle constitutionnel, mais aussi pour l'examen du sérieux de la cause d'action et du caractère suffisant de la preuve. [163] [167]

Jurisprudence

Citée par la juge Abella

Arrêt appliqué : *Mancini (Bankrupt) c. Falconi* (1993), 61 O.A.C. 332; **arrêts mentionnés :** *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21; *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et*

de la Culture), [2002] 2 R.C.S. 146, 2002 CSC 31; *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, conf. par (2004), 46 C.B.R. (4th) 126; *Crystalline Investments Ltd. c. Domgroup Ltd.*, [2004] 1 R.C.S. 60, 2004 CSC 3; *Randfield c. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075; *In re Diehl c. Carritt* (1907), 15 O.L.R. 202; *Danny's Cabaret Ltd. c. Horner*, [1980] B.C.J. No. 1293 (QL); *Virden Credit Union Ltd. c. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113; *RoyNat Inc. c. Allan* (1988), 61 Alta. L.R. (2d) 165; *B.N.R. Holdings Ltd. c. Royal Bank* (1992), 14 C.B.R. (3d) 233; *Toronto Dominion Bank c. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6; *Nicholas c. Anderson* (1996), 40 C.B.R. (3d) 32; *Burton c. Kideckel* (1999), 13 C.B.R. (4th) 9; *Society of Composers, Authors & Music Publishers of Canada c. Armitage* (2000), 50 O.R. (3d) 688; *Vanderwoude c. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 95; *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92; *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701.

Citée par la juge Deschamps

Ex parte James, In re Condon (1874), L.R. 9 Ch. App. 609; *Parsons c. Sovereign Bank of Canada*, [1913] A.C. 160; *Re L'Heureux (syndic de)*, [1999] R.J.Q. 945; *Caisse populaire de Pontbriand c. Domaine St-Martin Ltée*, [1992] R.D.I. 417; *Azco Mining Inc. c. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392; *Re Reed* (1980), 34 C.B.R. (N.S.) 83; *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644; *Metropolitan Parking Inc.*, [1980] 1 Can.

L.R.B.R. 197; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. Mai/Juin 397; *Adam c. Daniel Roy Ltée*, [1983] 1 R.C.S. 683; *Man of Aran* (1974), 6 L.A.C. (2d) 238; *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96; *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126; *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138; *Radio CJYQ-930 Ltd.* (1978), 34 di 617; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Hodge c. La Reine* (1883), 9 App. Cas. 117; *Renvoi relatif à la Loi sur l'assurance-emploi (Can.), art. 22 et 23*, [2005] 2 R.C.S. 669, 2005 CSC 56; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Law Society of British Columbia c. Mangat*, [2001] 3 R.C.S. 113, 2001 CSC 67; *Rothmans, Benson & Hedges Inc. c. Saskatchewan*, [2005] 1 R.C.S. 188, 2005 CSC 13; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, [2005] 2 R.C.S. 564, 2005 CSC 52; *Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées)*, [2006] 1 R.C.S. 513, 2006 CSC 14; *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92; *Alamo Linen Rentals Ltd. c. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38; *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636; *Chastan Ventures Ltd., (Re)* (1993), 23 C.B.R. (3d) 115; *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208; *McKyes, Re*, 1996 CarswellQue 2575; *Nicholas c. Anderson* (1998), 5 C.B.R. (4th) 256; *Gallo c. Beber* (1998), 7 C.B.R. (4th) 170; *Kearney c. Feldman*, [1998] O.J. No. 5109 (QL); *Burton c. Kideckel* (1999), 13 C.B.R. (4th) 9; *Society of*

Composers, Authors & Music Publishers of Canada c. Armitage (2000), 20 C.B.R. (4th) 160; *Mann c. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude c. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127; *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77; *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL); *MacLean c. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani c. Devgan*, [2005] O.J. No. 2868 (QL); *105497 Ontario Inc. c. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122; *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430; *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28; *Royal Crest Lifecare Group Inc., Re* (2003), 40 C.B.R. (4th) 146, conf. par (2004), 46 C.B.R. (4th) 126; *Mancini (Bankrupt) c. Falconi* (1989), 76 C.B.R. (N.S.) 90, conf. par (1993), 61 O.A.C. 332; *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*, [2003] R.J.Q. 420.

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Stephen Wahl et *Andrew J. Hatnay*, pour l'appelant/intimé au pourvoi incident.

Orestes Pasparakis et *Susan E. Rothfels*, pour l'intimée/appelante au pourvoi incident.

Benjamin Zarnett et *Frederick L. Myers*, pour l'intimée KPMG Inc.

Procureurs de l'appelant/intimé au pourvoi incident : Koskie Minsky, Toronto.

Procureurs de l'intimée/appelante au pourvoi incident : Ogilvy Renault, Toronto.

Procureurs de l'intimée KPMG Inc. : Goodmans LLP, Toronto.

Traduction

COUR SUPRÊME DU CANADA

SYNDICAT DES TRAVAILLEURS DE L'INDUSTRIE DU BOIS ET LEURS ALLIÉS, SECTION LOCALE 700

- c. -

SOCIÉTÉ DE CRÉDIT COMMERCIAL GMAC-CANADA

- et -

T.C.T. LOGISTICS INC., T.C.T. WAREHOUSING LOGISTICS INC., KPMG INC., séquestre intérimaire et syndic de faillite de T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc., et autres

CORAM: La Juge en chef et les juges Major*, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron

LA JUGE ABELLA —

1 La faillite suspend l'indépendance financière d'une entreprise ou d'un particulier. Le propriétaire d'une entreprise ne peut plus prendre de décisions touchant l'exploitation de celle-ci. Ces décisions deviennent alors la responsabilité du séquestre ou du syndic, lequel est nommé par le tribunal pour sauver tout ce qu'il peut des restes de l'entreprise au profit des créanciers.

* Le juge Major n'a pas pris part au jugement.

2 Ces créanciers peuvent comprendre des employés syndiqués. Le présent pourvoi soulève la question de savoir dans quelle mesure les droits de ces employés doivent céder le pas devant l'objectif global du processus de faillite, à savoir maximiser la capacité des créanciers de réduire leurs pertes au minimum. Plus particulièrement, la Cour doit décider si ces employés disposent du même droit de recours que les autres intéressés pour contester la conduite du séquestre ou du syndic.

3 Cette analyse fait intervenir tant la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3, que la loi ontarienne intitulée *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A.

4 Les faits en cause nécessitent l'examen de trois dispositions de la *Loi sur la faillite et l'insolvabilité* : l'art. 47, qui autorise un juge à nommer un séquestre intérimaire et à lui enjoindre de prendre possession des biens du débiteur, d'exercer un contrôle sur eux et de prendre toute autre mesure indiquée; l'art. 215, qui met les séquestres et syndics à l'abri de poursuites intentées sans autorisation judiciaire préalable; le par. 72(1), qui énonce que la *Loi sur la faillite et l'insolvabilité* n'a pas pour effet d'abroger des dispositions législatives non incompatibles avec elle se rapportant à la propriété et aux droits civils, lesquelles sont réputées s'y ajouter.

5 Les dispositions pertinentes de la *Loi de 1995 sur les relations de travail* sont les par. 69(2), 69(12) et 114(1) et l'art. 116 qui, ensemble, ont pour effet de conférer à la Commission des relations de travail de l'Ontario (la « Commission ») le pouvoir exclusif de rendre une décision ayant force de chose jugée sur la question de savoir si une opération constitue la vente d'une entreprise, imposant à l'acquéreur, en

tant qu'« employeur successeur » l'obligation de respecter les conventions collectives liant l'entreprise qu'il a acquise.

6 Il s'agit, par l'interprétation de ces dispositions interreliées, d'établir s'il y a lieu d'entériner la position jurisprudentielle actuelle, exposée dans l'arrêt *Mancini (Bankrupt) c. Falconi* (1993), 61 O.A.C. 332, à l'égard des décisions rendues sous le régime de l'art. 215 de la *Loi sur la faillite et l'insolvabilité* en matière d'autorisation de poursuivre un séquestre ou un syndic.

7 Pendant plus d'une décennie, c'est le critère établi dans *Mancini* qui a présidé à la conciliation, d'une part, de la protection des personnes chargées d'administrer l'actif des faillis contre les poursuites, et, d'autre part, du droit de poursuivre ces personnes relativement à cette même administration. Essentiellement, les trois principes résumés dans *Mancini* empêchent les instances frivoles, vexatoires ou manifestement non fondées d'aller de l'avant. Contrairement à la majorité de la Cour d'appel, et pour les motifs exposés ci-après, je ne vois aucune raison d'écarter ce critère et d'en créer un autre plus exigeant, qui s'appliquerait uniquement aux recours des employés syndiqués.

CONTEXTE

8 La faillie, T.C.T. Logistics Inc., faisait partie d'un groupe de sociétés liées (collectivement « TCT ») qui exploitait une entreprise de camionnage, de courtage, de fret et d'entreposage en rapport avec des marchandises de haute technologie au Canada et aux États-Unis. TCT exploitait plusieurs entrepôts, dont un à Toronto.

9 La Section locale 700 du Syndicat des travailleurs de l'industrie du bois et leurs alliés (le « Syndicat ») représentait 42 employés de l'entrepôt de Toronto. Le Syndicat avait conclu en leur nom une convention collective avec TCT pour la période allant du 1er mai 2000 au 30 avril 2004.

10 TCT est devenue insolvable pendant cette période. La Société de crédit commercial GMAC — Canada (« GMAC »), principale créancière garantie de TCT, a demandé en vertu de l'art. 47 de la *Loi sur la faillite et l'insolvabilité* une ordonnance portant nomination de KPMG Inc. (« KPMG ») comme séquestre intérimaire. Le Syndicat n'a pas été avisé de cette demande.

11 L'ordonnance, qui a été rendue le 24 janvier 2002, précisait que l'emploi de tous les employés prenait fin [TRADUCTION] « immédiatement », mais donnait également à KPMG le pouvoir d'embaucher ou de congédier tout employé de TCT.

12 L'ordonnance indiquait expressément que les mesures prises par KPMG en matière d'emploi ne pouvaient être considérées comme celles d'un « employeur successeur ». Elle interdisait aussi que soit engagée contre le séquestre intérimaire quelque procédure que ce soit, sauf avec l'autorisation de la cour et, même là, uniquement à la condition que le paiement des dépens procureur-client de KPMG dans le cadre d'une telle procédure soit garanti au moyen d'une ordonnance judiciaire.

13 La mesure formant le noeud du présent litige est le par. 15 de l'ordonnance. Il s'agit de la principale disposition protégeant KPMG contre toute désignation à titre d'« employeur successeur » et, de manière plus précise, contre les obligations en

matière d'emploi découlant de lois fédérales ou provinciales. Cette disposition prévoit ce qui suit :

> [TRADUCTION]
>
> EMPLOYÉS
>
> 15 LA COUR ORDONNE que l'emploi des employés des débiteurs, y compris des employés absents en congé de maternité, en congé d'invalidité ou pour toute autre cause d'absence approuvée, prenne fin immédiatement avant la nomination du séquestre. Malgré la nomination du séquestre ou l'exercice de l'un quelconque des pouvoirs et attributions prévus par la présente ordonnance ou encore l'embauche ou le recours aux services de toute personne par le séquestre en rapport avec sa nomination et l'exercice de ses pouvoirs et attributions, le séquestre n'est pas et ne saurait être réputé ou considéré employeur successeur, employeur lié, promoteur d'un régime de retraite ou payeur à l'égard d'un employé ou ancien employé des débiteurs, au sens de la *Loi sur les relations de travail* (Ontario), de la *Loi sur les normes d'emploi* (Ontario), de la *Loi sur les régimes de retraite* (Ontario), du *Code canadien du travail*, de la *Loi sur les normes de prestation de pension* (Canada), de toute autre mesure législative fédérale, provinciale ou municipale ou règles de common law régissant l'emploi ou les normes de travail (les « lois sur le travail ») ou de toute autre mesure législative ou réglementaire ou règle de droit ou d'equity, ou de quelque convention collective ou autre contrat liant l'un ou l'autre des débiteurs et l'un quelconque de leurs employés, anciens ou actuels. Plus particulièrement, le séquestre n'assume aucune responsabilité envers les employés des débiteurs pour les salaires (au sens de la *Loi sur les normes d'emploi* (Ontario)), ce qui comprend l'indemnité de cessation d'emploi, l'indemnité de licenciement et l'indemnité de vacances, exception faite des salaires que le séquestre peut expressément consentir à verser. Le séquestre n'assume aucune responsabilité relativement à quelque contribution ou autre paiement à un fonds de retraite ou une caisse de retraite.

14 Le paragraphe 14 de l'ordonnance est pertinent lui aussi :

> [TRADUCTION] LA COUR ORDONNE ET DÉCLARE que la présente ordonnance n'a pas pour effet de faire du séquestre l'employeur des employés de l'un ou l'autre des débiteurs, et que la nomination du séquestre ne constitue pas la vente de l'entreprise de l'un ou l'autre des débiteurs.

15 Une ordonnance subséquente a enjoint à KPMG de procéder à une cession de biens au nom de TCT et des sociétés liées. La cession a été déposée le 25 février 2002. KPMG a été nommée syndic de faillite.

16 KPMG n'a donné aucun avis aux employés de TCT avant d'avoir obtenu l'ordonnance du 24 janvier l'autorisant à mettre fin aux emplois. En apprenant l'existence de l'ordonnance, le Syndicat a écrit à TCT et à KPMG le 1er février 2002, leur disant qu'à son avis tous les droits de négociation collective prévus par la *Loi de 1995 sur les relations de travail* de l'Ontario demeuraient [TRADUCTION] « en vigueur et continuaient de produire tous leurs effets ».

17 KPMG a rencontré les employés le 25 février et les a informés qu'elle continuerait l'exploitation de l'entreprise afin d'évaluer les possibilités de vente du secteur de l'entreposage. Elle a fait appel à leur loyauté et à leur appui pour lui [TRADUCTION] « permettre de maximiser la valeur de l'entreprise pour le bénéfice de tous les intéressés ».

18 Par la suite, comme l'entreprise d'entreposage se dégradait rapidement, KPMG a cherché à la vendre le plus promptement possible comme entreprise en exploitation. Le 12 avril, KPMG a accepté de vendre la plupart des éléments d'actif de l'entreprise d'entreposage à Spectrum Supply Chain Solutions Inc., société nouvellement formée.

19 Le 16 avril, KPMG a informé les employés de l'entente avec Spectrum et de son intention de demander l'approbation du tribunal deux jours plus tard. Une

ordonnance approuvant la transaction a été rendue le 18 avril. L'entente devait être signée le 19 avril 2002.

20 Le droit de tenure à bail afférent à l'entrepôt de Toronto ne faisait pas partie des éléments d'actif acquis par Spectrum. KPMG a donc décidé de liquider les opérations et de renoncer au bail. Elle a demandé à Spectrum de gérer ce processus du 19 avril au 23 mai, date à laquelle KPMG était tenue de quitter les locaux de Toronto. L'accord de gestion conclu en ce sens par Spectrum et KPMG accordait à Spectrum les revenus réalisés pendant cette période en contrepartie des frais faits par cette dernière pour liquider l'entreprise de Toronto.

21 KPMG a mis fin à l'emploi de tous les employés syndiqués de Toronto le 9 mai. Spectrum a subséquemment réembauché certains d'entre eux, mais sans suivre la liste d'ancienneté établie par le Syndicat.

22 Le 13 mai, le Syndicat a en conséquence présenté à la Commission une requête fondée sur la *Loi de 1995 sur les relations de travail* provinciale afin d'obtenir :

- une déclaration portant que Spectrum avait succédé comme employeur à TCT ou KPMG et qu'elle était donc liée par la convention collective conclue avec TCT (art. 69 de la Loi);
- une déclaration portant que TCT et Spectrum constituaient un seul employeur relativement aux relations de travail (par. 1(4) de la Loi);
- une déclaration portant que TCT ou KPMG et Spectrum s'étaient livrées à des pratiques déloyales de travail en concluant une entente

discriminatoire à l'endroit des employés syndiqués et en éliminant le Syndicat de la main-d'oeuvre de Spectrum (art. 96 de la Loi);

- une ordonnance accréditant le Syndicat à titre d'agent négociateur exclusif des employés de Spectrum.

23 Dans sa requête à la Commission, le Syndicat prétend fondamentalement que Spectrum a été constituée en personne morale à seule fin d'acquérir l'entreprise d'entreposage de TCT et a conclu avec KPMG un arrangement collusoire en vue d'exploiter l'entreprise de TCT à un autre endroit mais substantiellement sous la même direction. Exception faite du nouvel emplacement, la seule différence importante dans l'exploitation de l'entreprise par TCT et par Spectrum était l'absence du Syndicat. Le président de Spectrum était l'ancien vice-président à l'entreposage et à la logistique de TCT, plusieurs des gestionnaires d'entrepôt de TCT étaient devenus gestionnaires pour Spectrum et l'entreprise d'entreposage installée dans de nouveaux locaux à Toronto par Spectrum desservait essentiellement les mêmes clients que TCT.

24 Invoquant principalement l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, lequel interdit l'introduction d'actions contre un séquestre intérimaire ou un syndic de faillite sans la permission du tribunal, KPMG a obtenu de la Commission la suspension de la requête présentée par le Syndicat.

25 Le Syndicat s'est donc adressé aux tribunaux pour obtenir la permission nécessaire. Dans sa requête au juge de faillite, il a demandé la radiation des dispositions de l'ordonnance du 24 janvier qui mettaient la conduite de KPMG à l'abri de tout examen sous le régime des lois fédérales ou provinciales en matière de travail

et d'emploi. Il a de plus sollicité la radiation de la disposition relative au cautionnement pour dépens.

26 Le juge de faillite a reconnu que l'exigence relative au cautionnement était indûment onéreuse et l'a supprimée ((2003), 42 C.B.R. (4th) 221). Il a toutefois refusé de radier la disposition de l'ordonnance portant que le séquestre intérimaire ne pouvait être considéré comme « employeur successeur » pour l'application de la *Loi de 1995 sur les relations de travail*.

27 Dans son analyse, le juge a fait certaines observations. Comme les ordonnances désignant un séquestre intérimaire visent à accroître le plus possible la valeur de l'actif du failli, et que la réalisation de cet objectif peut parfois exiger la poursuite de l'exploitation de l'entreprise du débiteur jusqu'à sa vente, le tribunal était admis à prendre en compte les conséquences que pourrait avoir le fait d'exposer les séquestres intérimaires ou les syndics au risque qu'ils soient considérés comme des employeurs successeurs. Il a en outre souligné que le fait d'écarter le risque pour le syndic ou le séquestre d'avoir à assumer des obligations qu'entraînerait autrement la poursuite des activités d'une entreprise offre aux employés la possibilité de travailler pour un acquéreur subséquent.

28 Le juge de faillite a conclu que, vu la nature temporaire et limitée des relations d'emploi, il serait trop onéreux pour le séquestre intérimaire — et de surcroît incompatible avec ses fonctions — de lui imposer les exigences accompagnant l'attribution de la qualité d'employeur.

29 Toutefois, appliquant la doctrine de la « compétence accessoire » ou de l'effet « nécessairement accessoire » formulée par le juge en chef Dickson dans *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641 (puis précisée par le juge Iacobucci dans *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, et par le juge LeBel dans *Bande Kitkatla c. Colombie-Britannique (Ministre des Petites et moyennes entreprises, du Tourisme et de la Culture)*, [2002] 2 R.C.S. 146), 2002 CSC 31), le juge de faillite a statué que les [TRADUCTION] « dispositions relatives à l'employeur successeur » de l'ordonnance n'étaient « suffisamment intégrées » au régime législatif de la *Loi sur la faillite et l'insolvabilité* que si le séquestre intérimaire exploitait l'entreprise du failli afin de procéder à la liquidation ordonnée des éléments d'actif de celui-ci ou de vendre l'entreprise comme entreprise en exploitation. Il s'est appuyé sur la distinction établie par le juge Farley dans *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146 (C.S.J. Ont.), entre un séquestre (ou syndic) qui agit « en tant que liquidateur » et un séquestre (ou syndic) qui agit « en tant qu'employeur ». Le premier a le droit d'être soustrait à l'application des dispositions relatives à l'employeur successeur.

30 Le juge de faillite a donc modifié le par. 15 de l'ordonnance en précisant que la protection accordée à KPMG contre la désignation d'« employeur successeur » n'était valide que si cette dernière agissait « en tant que liquidateur » et que les mesures qu'elle prenait tendaient à sauvegarder, protéger ou liquider l'actif du débiteur. Le passage qu'il a ajouté à la deuxième phrase du par. 15 est rédigé comme suit :

> [TRADUCTION] dans le but de sauvegarder, de protéger et de réaliser l'actif des débiteurs au moyen de la vente des éléments d'actif ou de l'entreprise

> des débiteurs comme entreprise en exploitation ou autrement, ou dans le but de procéder à la liquidation ordonnée de l'actif des débiteurs.

Étant d'avis que KPMG exploitait l'entreprise précisément dans ce but et qu'elle agissait « en tant que liquidateur », le juge de faillite a statué qu'elle avait droit à la protection prévue par l'ordonnance du 24 janvier.

31 Le juge de faillite a refusé au Syndicat, en vertu de l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, la permission d'intenter des procédures contre KPMG devant la Commission. Comme il avait conclu que, telles qu'elles avaient été modifiées, les dispositions de l'ordonnance se rapportant à la qualité de KMPG en tant qu'employeur successeur étaient valides, il a estimé que rien ne justifiait d'autoriser un recours allant à l'encontre des modalités de l'ordonnance.

32 L'appel formé par le Syndicat devant la Cour d'appel soulevait les deux questions suivantes :

- Le juge de faillite avait-il compétence, en vertu du par. 47(2) de la *Loi sur la faillite et l'insolvabilité*, pour se prononcer sur le statut d'employeur successeur?
- A-t-il exercé son pouvoir discrétionnaire de façon erronée en refusant la permission visée à l'art. 215 de la Loi?

33 La Cour d'appel a conclu à l'unanimité que seule la Commission avait compétence pour se prononcer sur le statut d'employeur successeur ((2004), 71 O.R. (3d) 54). Le paragraphe 47(2) de la *Loi sur la faillite et l'insolvabilité* n'habilitait pas le juge de faillite à rendre un jugement déclaratoire sur ce point ou à

mettre KPMG à l'abri d'une possible déclaration de la Commission portant que KPMG avait ce statut. Rendant jugement pour la Cour sur ce point, la juge Feldman a fait remarquer que la *Loi sur la faillite et l'insolvabilité* elle-même énonce expressément, au par. 72(1), que seules les dispositions provinciales incompatibles peuvent être abrogées. Elle n'a rien vu au par. 47(2) qui habilite à déclarer que des mesures prises par KPMG puissent faire de celle-ci un employeur successeur. Par conséquent, elle n'a relevé aucun conflit entre, d'une part, le pouvoir reconnu au juge de faillite par le par. 47(2) de contrôler les actes du séquestre intérimaire et, d'autre part, les dispositions relatives au statut de successeur visées au par. 69(12) de la *Loi de 1995 sur les relations de travail*, ce qui éliminait la nécessité de procéder l'analyse fondée sur la doctrine de la prépondérance. Elle a donc conclu que la *Loi sur la faillite et l'insolvabilité* était sans effet sur les dispositions législatives provinciales attribuant compétence exclusive à la Commission.

34 Comme le juge de faillite n'avait pas compétence pour prononcer quelque décision que ce soit concernant le statut d'employeur successeur, la distinction qu'il avait établie au par. 15 de l'ordonnance du 24 janvier et qui ne protégeait le séquestre intérimaire que dans la mesure où il agissait « en tant que liquidateur » et non quand il agissait « en tant qu'employeur » devenait sans objet.

35 Sur ce fondement, la Cour d'appel a modifié à son tour le par. 15 de l'ordonnance, supprimant le passage ajouté par le juge de faillite relativement aux mesures prises en vue de la réalisation de l'actif et ajoutant les deux passages suivants :

> [TRADUCTION] tant que la Commission des relations de travail de l'Ontario n'aura pas rendu d'ordonnance, dans le cadre d'un recours

> permis par notre cour sous le régime de l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, déclarant que le séquestre intérimaire succède aux débiteurs à titre d'employeur et, sous réserve des modalités précises d'une telle ordonnance, le séquestre intérimaire n'est pas obligé d'effectuer quelque paiement que ce soit en tant qu'employeur successeur . . .
>
> Pour plus de clarté, les parties sont convenues que si le séquestre intérimaire doit effectuer de tels paiements à titre de successeur de l'employeur, il ne peut en aucun cas être tenu responsable à l'égard d'une somme due ou exigible avant la date de sa nomination.

36 Toutefois, la Cour d'appel s'est divisée quant à l'analyse et à la solution du juge de faillite relativement à la demande présentée par le Syndicat en vue d'être autorisé à intenter des procédures devant la Commission. Les juges ont différé d'avis sur le critère applicable pour accorder ou non, en vertu de l'art. 215 de la *Loi sur la faillite et l'insolvabilité,* la permission de présenter des demandes concernant le statut d'employeur successeur. La juge Feldman, à l'analyse de laquelle a souscrit la juge Cronk dans des motifs concourants, a estimé que le critère traditionnel formulé dans *Mancini* n'était pas assez exigeant lorsqu'il s'agissait d'instances relatives au statut d'employeur successeur. À son avis, il fallait un critère tenant davantage compte des conséquences de telles demandes en justice sur le processus de faillite.

37 Le nouveau critère proposé par la juge Feldman ajoutait des facteurs comme la complexité du mandat du séquestre, l'existence d'acquéreurs acceptables, la durée possible de l'exploitation de l'entreprise par le séquestre en attendant une vente, tout arrangement pris par le séquestre avec le syndicat pour prendre en compte la situation des employés, la probabilité qu'un acquéreur soit déclaré employeur successeur lié par les obligations découlant de la convention collective et la possibilité que l'audience de la Commission ait lieu en temps utile vu la nature provisoire de l'administration du séquestre et la vente de l'entreprise.

38 La juge Feldman a conclu que le juge de faillite avait l'obligation, non pas de trancher la question comme telle, mais plutôt de déterminer si le statut d'employeur successeur avait été établi *prima facie* et, eu égard aux facteurs susmentionnés, de décider s'il y avait lieu d'accorder la permission demandée. Elle a donc annulé le refus du juge d'accorder la permission et lui a renvoyé l'affaire pour qu'il la réexamine en fonction des facteurs qu'elle avait énumérés.

39 Dans sa dissidence, le juge Macpherson a indiqué qu'il ne voyait aucune raison de resserrer le critère lorsque l'autorisation demandée visait des procédures portant sur le statut d'employeur successeur. Les demandes d'autorisation fondées sur l'art. 215 présentées par d'autres créanciers sont généralement tranchées par application du critère de l'arrêt *Mancini*, dont la Cour d'appel de l'Ontario a invariablement reconnu l'applicabilité, la décision la plus récente à cet égard étant *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126. À son avis, en formulant — uniquement à l'égard des autorisations de recours portant sur le statut d'employeur successeur — un critère qu'il a qualifié de [TRADUCTION] « plus vague et plus poussé » (par. 111), les juges majoritaires invitaient le tribunal de faillite à faire indirectement, en vertu de l'art. 215, la chose même que, suivant ce qu'ils avaient par ailleurs décidé, et ce, à juste titre selon lui, le par. 47(2) interdisait de le faire, c'est-à-dire mettre le séquestre à l'abri de décisions portant sur le statut d'employeur successeur.

40 Le juge Macpherson a appliqué le critère de l'arrêt *Mancini* et, concluant que le juge de faillite avait à tort refusé d'autoriser le Syndicat à poursuivre KPMG sur le fondement du statut d'employeur successeur et de pratiques déloyales de travail, il

a indiqué qu'il aurait donné au Syndicat la permission de présenter sa requête à la Commission.

41 Le Syndicat se pourvoit contre l'ordonnance de la Cour d'appel qui lui a refusé l'autorisation de saisir la Commission d'un recours portant sur le statut d'employeur successeur et il conteste la conclusion des juges majoritaires selon laquelle le critère de l'arrêt *Mancini* n'était pas assez rigoureux lorsqu'il s'agissait de décider d'accorder ou non l'autorisation d'engager des instances devant la Commission. Il a également demandé la radiation du par. 15 modifié par la Cour d'appel, dans la mesure où celui-ci comporte encore des déclarations relatives au statut d'employeur successeur.

42 GMAC a formé un appel incident relativement à la modification du par. 15 par la Cour d'appel, contestant la conclusion unanime de celle-ci selon laquelle les juges de faillite n'ont pas compétence pour décider si un séquestre intérimaire est un employeur successeur pour l'application de la *Loi de 1995 sur les relations de travail.*

ANALYSE

A. *Le juge de faillite peut-il trancher des questions touchant le statut d'employeur successeur?*

43 La première question qu'a tranchée la Cour d'appel et qui est soulevée dans l'appel incident concerne le pouvoir du tribunal de faillite de décider si un séquestre intérimaire est un employeur successeur au sens de la *Loi de 1995 sur les relations de*

travail. La Cour d'appel a conclu à l'unanimité que le tribunal de faillite ne possède pas ce pouvoir. Je suis du même avis.

44 Le pouvoir du tribunal de faillite de contrôler l'action du séquestre intérimaire est prévu au par. 47(2) de la *Loi sur la faillite et l'insolvabilité*, qui est rédigé ainsi :

> **47.** . . .
>
> (2) Le tribunal peut enjoindre au séquestre intérimaire :
>
> *a*) de prendre possession de tout ou partie des biens du débiteur mentionnés dans la nomination;
>
> *b*) d'exercer sur ces biens ainsi que sur les affaires du débiteur le degré de contrôle que le tribunal estime indiqué;
>
> *c*) de prendre toute autre mesure qu'il estime indiquée.

45 Bien qu'ils soient assez souples pour permettre une vaste gamme de mesures en rapport avec la prise en charge, la gestion et l'aliénation éventuelle des biens du débiteur, ces paramètres législatifs n'ont pas une portée illimitée. Le paragraphe 47(2) accorde au tribunal de faillite le pouvoir d'enjoindre au séquestre intérimaire de faire certaines choses. Cette disposition n'a pas pour effet d'habiliter — ni explicitement ni implicitement — le tribunal de faillite à rendre des jugements déclaratoires unilatéraux sur les droits de tiers en fonction d'autres régimes législatifs.

46 Enfin, s'il subsiste encore quelque doute que le par. 47(2) pourrait avoir eu pour but d'attribuer des pouvoirs aussi larges, ce doute est dissipé lorsqu'on lit cette

disposition en corrélation avec le par. 72(1) de la *Loi sur la faillite et l'insolvabilité*, lequel prévoit ce qui suit :

> **72.**(1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

47 Suivant cette disposition, la *Loi sur la faillite et l'insolvabilité* n'a pas pour effet d'éteindre des droits garantis par la loi, sauf si ces droits sont incompatibles avec la *Loi sur la faillite et l'insolvabilité*. En l'espèce, il s'agit du droit de demander, en vertu de l'art. 114 de la *Loi de 1995 sur les relations de travail* de l'Ontario, un jugement déclarant qu'un employeur subséquent est lié par les obligations en matière d'emploi prévues par les conventions collectives signées par son prédécesseur. Je souscris à la conclusion suivante de la juge Feldman :

> [TRADUCTION] . . . la première moitié de l'article [72] énonce clairement que la *Loi sur la faillite et l'insolvabilité* n'a pas pour effet d'abroger ou de remplacer une règle de droit provinciale sauf si celle-ci est incompatible avec la *Loi sur la faillite et l'insolvabilité*. Il n'y a pas d'incompatibilité entre le libellé du par. 47(2) de la *Loi sur la faillite et l'insolvabilité* et les dispositions de la *LRT* concernant le successeur de l'employeur, et, par conséquent, ce paragraphe n'a pas pour effet d'abroger ou de remplacer cette dernière Loi. [par. 50]

48 Le paragraphe 114(1) de la *Loi de 1995 sur les relations de travail* dispose ainsi :

> La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée.

> Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations.

49 Cela signifie que la Commission a compétence exclusive pour se prononcer sur le statut d'employeur successeur. Il est difficile de voir en quoi le droit de demander une déclaration sur cette question serait incompatible avec le pouvoir que le par. 47(2) accorde au tribunal de faillite de diriger et superviser l'administration efficace de l'actif du débiteur par le séquestre intérimaire.

50 Il convient de faire preuve, envers les syndics et les séquestres ainsi qu'envers les tribunaux spécialisés qui les supervisent, du degré de déférence correspondant à leur expertise incontestée en matière de gestion efficace des faillites. Il va de soi que la souplesse est indispensable pour solutionner les problèmes que pose une faillite donnée. Toutefois, la protection de cette souplesse au moyen de dispositions standard immunisant ces intervenants contre l'engagement de procédures les visant dépasse le pouvoir thérapeutique de la *Loi sur la faillite et l'insolvabilité*.

51 Si l'article 47 pouvait recevoir une interprétation assez large pour permettre de porter atteinte à tous les droits qui, bien que protégés par la loi, gênent le processus de faillite, il pourrait être invoqué pour éteindre tous les droits en matière d'emploi si le tribunal de faillite estimait qu'il s'agit d'une mesure « indiquée » aux termes de l'al. 47(2)*c*). Pour que l'article 47 confère un pouvoir aussi étendu, en dépit de l'existence de l'art. 72 protégeant les droits civils d'origine provinciale, il faudrait un texte explicite. Comme l'a indiqué le juge Major dans l'arrêt *Crystalline Investments Ltd. c. Domgroup Ltd.*, [2004] 1 R.C.S. 60 :

> . . . il faut une disposition législative explicite pour priver une personne de droits dont elle jouit par ailleurs en droit [. . .] [T]ant que la doctrine de la primauté des lois fédérales n'entre pas en jeu, on ne saurait utiliser des procédures en matière de faillite et d'insolvabilité régies par le droit fédéral pour écarter des droits de propriété et autres droits civils régis par le droit provincial. [par. 43]

Le texte du par. 47(2) est loin de satisfaire à cette condition. Le tribunal de faillite peut indubitablement donner au séquestre des instructions en matière d'emploi, mais, compte tenu du libellé actuel du par. 47(2) de la *Loi sur la faillite et l'insolvabilité*, le tribunal n'est pas habilité à abroger de son propre chef le droit de présenter une demande à une commission des relations de travail.

52 Par conséquent, la Cour d'appel a eu raison de conclure que le juge de faillite n'avait pas compétence pour statuer sur la responsabilité du séquestre en tant qu'employeur successeur ni pour le mettre à l'abri de cette responsabilité. Dans la mesure où quelque élément de l'ordonnance, y compris les modifications apportées par la Cour d'appel, a cet effet, il y a lieu de supprimer cet élément.

B. *L'application de l'article 215 requiert-elle un critère particulier pour les demandes d'autorisation touchant au statut d'employeur successeur?*

53 Vu la conclusion que le juge de faillite n'a compétence ni pour décider si le séquestre a le statut d'employeur successeur ni pour le protéger contre une décision de cette nature de la Commission, il reste à se demander s'il faut infirmer la décision du juge de faillite de refuser au Syndicat la permission de s'adresser à la Commission.

54 La question en litige concerne la portée du pouvoir discrétionnaire du tribunal de faillite lorsqu'un syndicat requiert la permission de présenter contre le séquestre ou le syndic une demande relative à la qualité d'employeur successeur. La

disposition pertinente de la *Loi sur la faillite et l'insolvabilité* est alors l'art. 215, qui énonce ce qui suit :

> **215.** Sauf avec la permission du tribunal, aucune action n'est recevable contre le surintendant, un séquestre officiel, un séquestre intérimaire ou un syndic relativement à tout rapport fait ou toute mesure prise conformément à la présente loi.

55 Depuis près des 150 ans, la jurisprudence et la doctrine considèrent unanimement que le critère applicable en matière d'autorisation de poursuivre un séquestre ou un syndic n'est pas très exigeant et qu'il vise à protéger ceux-ci seulement contre les actions frivoles, vexatoires ou dépourvues de fondement factuel. Comme l'ont affirmé L. W. Houlden, G. B. Morawetz et J. Sarra dans *Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), à la p. 7-118.2 :

> [TRADUCTION] Le tribunal ne refusera pas la permission demandée à moins que l'action soit sans fondement ou qu'elle soit frivole ou vexatoire . . .

56 Essentiellement, sauf si l'action était sans fondement, celle-ci a généralement été autorisée en vertu de l'art. 215 et des dispositions qui l'ont précédé : (voir *Randfield c. Randfield* (1861), 45 E.R. 1075, p. 1077, le lord juge Turner ([TRADUCTION] « . . . il n'appartient selon moi, pas au tribunal de refuser la liberté de faire valoir un droit à l'encontre d'un séquestre, à moins que l'action n'ait manifestement aucun fondement »); *In re Diehl c. Carritt* (1907), 15 O.L.R. 202 (H.C.J. Ont.), p. 204; *Danny's Cabaret Ltd. c. Horner*, [1980] B.C.J. No. 1293 (QL) (C.A.); *Virden Credit Union Ltd. c. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84 (C.B.R. Man.), p. 90; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113 (C.A. Ont.); *RoyNat Inc. c. Allan* (1988),

61 Alta.L.R. (2d) 165 (C.B.R. Alb.); *B.N.R. Holdings c. Royal Bank* (1992), 14 C.B.R. (3d) 233 (C.S. C.-B.); *Toronto Dominion Bank c. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (Div. gén. Ont.), par. 7; *Nicholas c. Anderson* (1996), 40 C.B.R. (3d) 32 (Div. gén. Ont.), par. 13-15; *Wenzel c. Cougar Tool Inc.*, (1996) Alta. L.R. (3d) 364 (C.A. Alb.), par. 4-6; *Burton c. Kideckel* (1999), 13 C.B.R. (4th) 9 (C.S.J. Ont.), par. 13; *Society of Composers, Authors & Music Publishers of Canada c. Armitage* (2000), 50 O.R. (3d) 688 (C.A. Ont.), par. 2; *Vanderwoude c. Scott and Pichelli Ltd.*,(2001), 143 O.A.C. 195, par. 22; F. Bennett, *Bennett on Bankruptcy* (8e éd., 2005), p. 416-417; F. Bennett, *Bennett on Receiverships* (2e éd., 1999), p. 223 et Houlden, Morawetz et Sarra, p. 7-118.2.

57 Dans *Mancini*, l'arrêt-clé sur la question, la Cour d'appel a résumé ainsi les principes reconnus :

> [TRADUCTION]
>
> 1. La permission de poursuivre un syndic ne devrait pas être accordée si l'action est frivole ou vexatoire. Des actions manifestement non fondées ne devraient pas être autorisées.
>
> 2. Il ne faudrait pas permettre la poursuite d'une instance si la preuve soumise à l'appui de la requête, y compris la version préliminaire de la déclaration envisagée, ne révèle pas de cause d'action opposable au syndic. La preuve, qui est habituellement présentée par affidavit, doit faire état des faits allégués à l'appui des conclusions recherchées.
>
> 3. Le tribunal n'a pas à se prononcer sur le bien-fondé de l'action avant d'accorder la permission demandée. [Références omises; par. 7]

58 Dans *Mancini*, la Cour d'appel a expliqué que le syndic a le mandat de protéger à la fois les créanciers et l'intérêt du public dans l'administration ordonnée de l'actif du failli. Compte tenu de ce mandat, l'obligation d'obtenir une permission a donc pour but d'éviter au syndic ou au séquestre d'avoir [TRADUCTION] « à se

défendre contre des actions qui sont frivoles ou vexatoires, ou qui ne révèlent aucune cause d'action » (par. 17), de façon que le processus de faillite ne soit pas paralysé. En revanche, cette obligation garantit que les actions légitimes peuvent être intentées.

59 Pour l'application de l'art. 215, il faut déterminer si la preuve étaye la cause d'action invoquée. Comme l'a fait remarquer le juge Blair dans *Nicholas* :

> [TRADUCTION] La question [. . .] consiste à déterminer si, dans les circonstances en cause, une preuve par affidavit suffisante étaye les faits allégués au soutien de l'action envisagée, afin de s'assurer du bien-fondé factuel de l'action, vu la règle qui requiert l'obtention d'une autorisation dans le but de protéger le syndic contre les demandes dépourvues de fondement factuel. [par. 16]

Autrement dit, il doit exister une preuve *prima facie*.

60 Bien que le critère établi dans *Mancini* exige que le tribunal se demande si la poursuite envisagée révèle une cause d'action, cet examen n'a pas pour objet de trancher la question au fond. Cette observation est particulièrement importante lorsqu'un autre tribunal a compétence exclusive pour statuer sur les questions juridiques soulevées par l'instance. Comme l'a signalé la Cour d'appel dans *Mancini*, au par. 16, [TRADUCTION] « [s]ur une échelle qui va de l'absence totale de preuve à une preuve qui est concluante, la preuve nécessaire pour fonder une ordonnance sous le régime de [la disposition antérieure à l'art. 215] doit être suffisante pour établir l'existence d'un fondement factuel à l'égard de l'action envisagée, et pour établir que cette action révèle une cause d'action ». Voir aussi l'arrêt *Society of Composers, Authors and Music Publishers of Canada*, au par. 2.

61 Ce critère établit un juste équilibre entre, d'une part, la protection des syndics et des séquestres contre les dérangements et délais inhérents aux poursuites frivoles ou intentées pour des raisons purement tactiques, et, d'autre part, la protection — dans la plus large mesure possible — des droits des créanciers et autres intéressés contre les décisions et les actes des syndics et des séquestres. En ce sens, l'arrêt *Mancini* est compatible avec l'exigence énoncée dans *Crystalline* selon laquelle il faut « une disposition législative explicite » pour que la *Loi sur la faillite et l'insolvabilité* puisse être interprétée de manière à priver une personne de droits conférés par une province.

62 L'analyse suggérée par les juges majoritaires de la Cour d'appel obligerait les tribunaux à examiner l'effet de l'instance proposée au regard de diverses considérations, notamment la possibilité qu'elle entrave la maximisation de la valeur de l'actif au profit des divers intéressés. En toute déférence, l'application de ce critère plus exigeant aurait nécessairement pour conséquence d'empêcher l'introduction d'actions qui méritent d'être instruites, au motif qu'une telle décision serait plus avantageuse pour certains intéressés. Permettre aux tribunaux de faillite d'utiliser l'obligation d'obtenir une permission prévue à l'art. 215 pour choisir entre les réclamations des personnes intéressées en se fondant sur une norme qui, comme l'a souligné le juge MacPherson de la Cour d'appel, est à la fois [TRADUCTION] « plus vague et plus poussée » que celle énoncée dans *Mancini* constituerait une importante dérogation aux principes formulés dans l'arrêt *Crystalline*. Il suffit, pour assurer l'intégrité et l'efficacité du processus de faillite, que l'on demande aux tribunaux de faillite de ne pas autoriser les poursuites frivoles ou intentées pour des raisons purement tactiques.

63 Le recours à une démarche plus interventionniste repose sur la théorie du « contrôle unique » des litiges en matière de faillite. Dans *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92, où il était question du caractère exécutoire, partout au Canada, des ordonnances du tribunal de faillite, le juge Binnie a signalé que le recours à un tribunal unique qui contrôle tous les aspects d'une faillite, y compris les litiges, a pour objectif « la gestion expéditive, efficace et économique des retombées d'un effondrement financier » (par. 27). La décision repose sur les avantages qui découlent du fait d'éviter l'instruction de multiples procédures dans plusieurs provinces. Or, comme l'a fait remarquer le juge Binnie, « [l]e contrôle unique n'est pas nécessairement incompatible avec le renvoi de litiges particuliers à d'autres ressorts » (par. 76).

64 « Le renvoi de litiges particuliers à d'autres ressorts » est tout ce qui est accompli lorsque la permission visée à l'art. 215 est accordée. De plus, je souligne qu'en l'espèce le « renvoi » revient uniquement à autoriser le tribunal à trancher, en bout de ligne, une affaire sur laquelle il a par ailleurs compétence exclusive. C'est une chose d'éviter que les régimes d'exécution provinciaux permettent de déroger aux ordonnances légitimes rendues en matière de faillite, comme il a été décidé dans *Sam Lévy*. Par contre, c'en est une autre d'utiliser le processus de faillite pour faire obstacle à la revendication légitime de droits reconnus par une province, y compris des droits en matière de travail et d'emploi qui ne sont pas du ressort du tribunal de faillite. Bref, le critère énoncé dans *Mancini* n'est pas incompatible avec celui du « contrôle unique ».

65 En définitive, le critère approprié pour l'application de l'art. 215 de la *Loi sur la faillite et l'insolvabilité* demeure une question d'interprétation législative, et la

Loi elle-même fournit un contexte important pour résoudre cette question. Je trouve révélateur que la *Loi sur la faillite et l'insolvabilité* prévoie, à l'art. 37, que lorsqu'un acte ou une décision d'un syndic ou d'un séquestre relativement à l'administration de l'actif du failli lèse ce dernier, un créancier ou toute autre personne, l'intéressé peut s'adresser au tribunal de faillite. Ce tribunal peut alors infirmer, modifier ou confirmer l'acte ou la décision qui fait l'objet de la plainte et rendre l'ordonnance qu'il juge équitable. L'article 37 n'exige aucune permission.

66 Les articles 37 et 215 ont été considérés comme deux façons différentes de contester les décisions d'un syndic ou d'un séquestre : voir *Virden Credit Union*, aux p. 89-90. La différence réside bien sûr dans le fait qu'il est possible, en vertu de l'art. 215, de demander la permission d'engager un recours devant un tribunal autre que le tribunal de faillite, et que certaines actions échapperont à la compétence accordée au tribunal de faillite par l'art. 37. Néanmoins, de nombreux recours pouvant être intentés sur autorisation en vertu de l'art. 215 peuvent également être soumis au tribunal de faillite en application de l'art. 37. Toutefois, l'intérêt de cette dernière disposition est qu'elle démontre que le législateur n'a pas jugé indiqué de mettre à l'abri des poursuites les auxiliaires de justice nommés par les tribunaux.

67 En revanche, lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement, par exemple : par. 14.06(1.2) (immunité à l'égard de certaines réclamations conférées au syndic qui continue l'exploitation de l'entreprise du débiteur ou lui succède comme employeur); par. 14.06(4) (protection du syndic dans certaines circonstances contre les ordonnances en matière environnementale); par. 41(8) (exonération de responsabilité par suite de la libération); par. 50(9) et 50.4(5) (protection du syndic contre la

responsabilité pour préjudice subi par un tiers qui s'est fié à l'état de l'évolution de l'encaisse, lorsque l'état a été examiné avec soin et bonne foi); art. 80 (exonération de responsabilité du syndic à l'égard de pertes découlant de la saisie de biens); par. 148(3) (aucun droit d'action en recouvrement de dividende); par. 171(6) (protection du syndic contre la responsabilité découlant d'une déclaration raisonnable faite de bonne foi sur la cause probable de la faillite); par. 197(3) (exclusion de responsabilité personnelle en matière de frais de justice); art. 251 (protection du séquestre contre les actions fondées sur un préjudice découlant de l'envoi de l'avis de sa nomination); art. 252 (moyen de défense accordé au séquestre qui aurait contrevenu à la loi s'il avait des motifs raisonnables de croire que le débiteur n'était pas insolvable).

68 En l'absence de dispositions expresses de ce genre, le tribunal de faillite ne devrait pas convertir la procédure d'autorisation établie à l'art. 215 en mesure de protection générale des auxiliaires de justice désignés par les tribunaux.

69 Il faut alors se demander pour quelle raison les principes établis de longue date qui régissent l'obtention de la permission devraient différer lorsque le litige a trait aux obligations du séquestre envers les employés syndiqués du débiteur.

70 Les juges majoritaires de la Cour d'appel ont estimé qu'il fallait appliquer un critère plus exigeant et plus poussé afin d'accroître la capacité du séquestre de décider quand et comment il entend vendre l'actif du débiteur, sans craindre qu'on lui reproche plus tard d'avoir contrevenu aux règles en matière de relations de travail. Le critère de l'arrêt *Mancini* ne restreint nullement les mesures de protection que le législateur a jugé nécessaires d'établir pour préserver la capacité des syndics et des séquestres de s'acquitter de leurs fonctions avec souplesse et efficacité. Si l'on prétend

qu'il y a lieu de protéger le séquestre contre les risques de poursuites par le Syndicat en raison des coûts, délais et inconvénients inévitables qu'elles occasionnent, il faudrait alors refuser à tout créancier la permission d'intenter des poursuites. Toute action en justice engendre des coûts, des délais et des inconvénients. Le législateur a tout de même décidé, en édictant l'art. 215, que le tribunal de faillite devait posséder le pouvoir discrétionnaire de permettre l'engagement de poursuites contre des auxiliaires de justice nommés par les tribunaux. En accordant ce pouvoir discrétionnaire, il n'a pas fait de distinction entre les syndicats et d'autres créanciers, et il n'y a pas lieu de présumer qu'une telle distinction existe.

71 Resserrer le critère d'application de l'art. 215 lorsque le litige porte sur une question relevant d'une commission des relations de travail équivaut à reconnaître à la *Loi sur la faillite et l'insolvabilité*, par interprétation, une sensibilité moins grande envers les droits des employés syndiqués qu'envers ceux des autres créanciers. Je ne vois rien dans la Loi qui suggère une telle distinction.

72 La fait d'appliquer l'article 215 d'une manière hiérarchique, qui rendrait considérablement plus difficile l'obtention de la permission pour les demandes touchant le statut d'employeur successeur, aurait pour effet d'accorder indûment aux syndics et aux séquestres une protection accrue contre les poursuites fondées sur de possibles fautes reliées à la violation des règles touchant les relations de travail et offrirait aux syndics qui contreviennent aux lois en la matière une protection supplémentaire exceptionnelle. Une telle conception irait de plus à l'encontre de la protection des droits reconnus par notre Cour dans l'arrêt *Crystalline*. Comme l'a signalé le juge Borins de la Cour d'appel de l'Ontario dans l'arrêt *Royal Crest*,

> [TRADUCTION] Bien que le rôle important que jouent les syndics mérite d'être protégé, le droit des syndicats de défendre les intérêts légitimes de leurs membres doit lui aussi être respecté. [par. 70]

73 La Cour d'appel a à l'unanimité — et à juste titre — conclu que le tribunal de faillite n'est pas habilité à rendre de jugement déclaratoire sur la responsabilité des auxiliaires de la justice désignés par les tribunaux à l'égard de contraventions aux lois applicables en matière de relations de travail, ni à protéger ceux-ci contre une telle responsabilité. Pourtant, le critère proposé par la majorité à l'égard des demandes de permission fondées sur l'art. 215 aurait non seulement pour effet de rompre l'équilibre établi par la Loi entre le rôle de gardien du tribunal de faillite et la protection de la propriété et des droits civils, mais aussi de faire naître le risque réel que l'art. 215 permette *de facto* au tribunal de faillite de rendre de tels jugements déclaratoires et, contrairement au principe formulé dans l'arrêt *Mancini*, de trancher concrètement la question au fond. C'est ce qui s'est produit en première instance dans la présente affaire. Comme l'a indiqué le juge MacPherson dans ses motifs dissidents :

> [TRADUCTION] Bref, et cela dit en toute déférence, par l'art. 215 (qui est une disposition d'autorisation, et non une disposition conférant quelque pouvoir au séquestre), ma collègue permet indirectement à ce dernier de faire exactement ce qu'elle lui refuse, à juste titre d'ailleurs, de faire en vertu du par. 47(2). [par. 115]

74 L'article 215 n'a pas pour objet de protéger le syndic contre des actions en justice légitimes, mais bien contre les poursuites qui ne reposent sur aucun fondement factuel. Une simple lecture du texte de loi montre que les art. 37 et 215 offrent à tous les principaux intéressés la même possibilité de faire valoir un grief contre le syndic. En l'absence de toute intention contraire du législateur dans la loi, il faut maintenir cette symétrie, quel que soit l'intéressé. Rien ne justifie que l'on y déroge lorsque la

réparation recherchée est du ressort d'une commission des relations de travail plutôt que d'un juge de faillite.

75 Cela nous amène à l'action envisagée en l'espèce, à savoir la présentation d'une requête à la Commission touchant le statut d'employeur successeur. Diverses lois provinciales disposent que l'employeur successeur est lié par les conventions collectives et tenu de reconnaître le syndicat comme représentant exclusif des employés. Ces lois déclarent que la convention collective continue de s'appliquer si l'entreprise a été vendue ou autrement transférée au successeur, jusqu'à déclaration contraire du tribunal compétent.

76 Dans *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990] 3 R.C.S. 644, la juge Wilson a expliqué, dans ses motifs dissidents, que les dispositions des lois sur le travail relatives au « statut d'employeur successeur » visaient à « empêcher la perte de l[a] protection syndicale par les employés d'une société dont l'entreprise est vendue ou transférée » (p. 652). Un employeur successeur est défini au par. 69(2) de la *Loi de 1995 sur les relations de travail* comme étant une personne qui acquiert une entreprise par suite de sa vente ou de son transfert par un employeur et qui est liée par les conventions collectives existantes jusqu'à déclaration contraire de la Commission.

77 S'exprimant au nom de la majorité de la Cour dans l'arrêt *Lester*, la juge McLachlin a indiqué que, pour conclure qu'une personne est employeur successeur, une commission des relations de travail doit d'abord déterminer si une partie identifiable de l'entreprise a été aliénée, ce qui exige un examen de « la nature

de l'entreprise du prédécesseur ainsi que [de] la nature de l'entreprise du successeur » (p. 676) afin d'établir si l'entreprise du prédécesseur est exploitée par le successeur. Les facteurs pertinents à l'égard de cet examen sont notamment la nature des travaux visés par la convention collective, la sorte d'actif qui a été transféré, la question de savoir si des employés ont été transférés et s'il y a continuité dans la direction ou les travaux accomplis. Dans chaque cas, comme l'a signalé la juge McLachlin, la commission doit déterminer « si, dans le contexte commercial où s'est produit l'opération, on peut raisonnablement affirmer, compte tenu des facteurs en jeu, que l'entreprise ou une partie de l'entreprise a été transférée du prédécesseur au successeur » (p. 677).

78 KPMG et GMAC ont invoqué un certain nombre d'arguments portant expressément sur les obstacles à la requête du Syndicat relative à la qualité de successeur, notamment un argument constitutionnel fondé sur la doctrine de la prépondérance et concernant l'effet, sur l'ordre de priorité prévu dans la *Loi sur la faillite et l'insolvabilité*, d'une déclaration reconnaissant la qualité d'employeur successeur. Il s'agit là de questions que la Commission doit examiner. Elles ne sont pas pertinentes à l'égard de la décision d'accorder ou non la permission d'intenter une action. Je comprends que les juges majoritaires de la Cour d'appel aient craint que la possibilité d'une instance devant la Commission influe sur la décision du séquestre quant à la meilleure façon de maximiser la valeur de l'actif au profit des intéressés. Une fois encore cependant, cette considération n'intervient pas dans la décision d'accorder ou non la permission demandée, mais plutôt dans l'examen au fond de la requête relative à la qualité d'employeur successeur. Ces questions relèvent de la compétence exclusive de la Commission. Le législateur provincial lui a conféré la responsabilité exclusive de trancher ces questions, parce qu'il l'a jugée apte à statuer

sur ces questions dans l'intérêt public, eu égard non seulement aux attentes des employés mais également à celles des employeurs.

79 En l'espèce, le Syndicat a voulu faire valoir devant la Commission que le séquestre intérimaire était devenu l'employeur, après sa nomination, lorsqu'il a décidé d'avoir recours aux employés pour continuer à exploiter l'entrepôt. En sa qualité d'employeur, il serait tenu de respecter la convention collective et les dispositions législatives applicables en matière d'emploi et de travail. Selon le Syndicat, il s'est soustrait à cette obligation, notamment en manipulant l'acte de vente de telle sorte que le Syndicat soit exclu de la main-d'oeuvre de l'acquéreur.

80 Il est difficile de prévoir la décision de la Commission sur une question donnée touchant la qualité d'employeur successeur, car chaque situation dépendra des faits qui lui sont propres. Toutefois, comme en l'espèce il est impossible d'affirmer que la demande du Syndicat est frivole ou n'est appuyée d'aucune preuve, celui-ci doit être autorisé à la présenter.

81 Un dernier point : aucun avis de la requête sollicitant la nomination d'un séquestre intérimaire n'a été donné au Syndicat, l'agent négociateur exclusif des employés. Je suis consciente que cette façon de faire n'est pas rare : les séquestres présentent couramment aux juges de faillite une demande d'ordonnance *ex parte* accompagnée d'un projet d'ordonnance sur lequel l'entreprise débitrice et les principaux créanciers se sont entendus. Comme ce fut le cas en l'espèce, les syndicats ne reçoivent aucun avis, perdant ainsi dès le départ la possibilité de participer à l'établissement du plan de gestion de l'actif du débiteur. Bien que l'avis ne garantisse ni la coopération ni une solution, il est néanmoins possible de soutenir qu'un syndicat

exclu dès le départ du processus cherchera tôt ou tard, comme tout autre créancier important, à protéger ses intérêts. Comme l'a fait remarquer le juge Iacobucci dans l'arrêt *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701 :

> Le moment où il y a rupture de la relation entre l'employeur et l'employé est celui où l'employé est le plus vulnérable et a donc le plus besoin de protection. Pour reconnaître ce besoin, le droit devrait encourager les comportements qui réduisent au minimum le préjudice et le bouleversement (tant économique que personnel) qui résultent. . . . [par. 95]

82 Même si la tenue de négociations préalables avec un syndicat sur des décisions importantes n'empêche pas nécessairement la présentation subséquente d'un recours fondé sur la responsabilité du successeur de l'employeur, de telles négociations peuvent quand même offrir plus de chance de parvenir à une solution que si le syndicat est maintenu à l'écart. Idéalement, des discussions préalables au sujet des effets de la poursuite des activités de l'entreprise sur les employés entraîneront un compromis plutôt qu'un litige.

83 En l'espèce, une telle mesure aurait eu pour effet d'associer d'entrée de jeu au déroulement et à la supervision de l'administration ordonnée, équitable et efficace du processus de faillite une partie nettement concernée par ce processus. Bien sûr, cela n'aurait pas nécessairement permis d'éviter une multiplicité de procédures. Cela n'aurait pas non plus assuré l'approbation par le Syndicat de la méthode proposée pour préserver et réaliser l'actif. Mais, à tout le moins, une telle démarche aurait fait en sorte que les préoccupations légitimes du Syndicat soient prises en compte

suffisamment tôt dans le processus, évitant possiblement de ce fait des recours ultérieurs, comme ceux intentés dans la présente affaire.

DISPOSITIF

84 Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'accorder au syndicat la permission de soumettre sa requête à la Commission et d'annuler les éléments de l'ordonnance concernant la responsabilité du séquestre en tant que successeur de l'employeur ou lui accordant l'immunité contre cette responsabilité. Je suis d'avis de rejeter le pourvoi incident avec dépens.

COUR SUPRÊME DU CANADA

SYNDICAT DES TRAVAILLEURS DE L'INDUSTRIE DU BOIS ET LEURS ALLIÉS, SECTION LOCALE 700

- c. -

SOCIÉTÉ DE CRÉDIT COMMERCIAL GMAC – CANADA

- et -

T.C.T. LOGISTICS INC., T.C.T. WAREHOUSING LOGISTICS INC., KPMG INC., séquestre intérimaire et syndic de faillite de T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc., et autres

CORAM : La Juge en chef et les juges Major*, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron

LA JUGE DESCHAMPS —

85 Quels facteurs guident le juge de faillite saisi d'une requête sollicitant la permission de poursuivre un syndic? Telle est la principale question en litige. Cette question amène cependant la Cour à se pencher sur les limites de l'application du droit provincial dans le contexte d'une faillite. Pour les motifs qui suivent, je suis d'avis que le juge appelé à statuer sur une requête fondée sur l'art. 215 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), doit assurer le respect des compétences législatives fédérales et provinciales, de façon à éviter tout conflit constitutionnel. Je confirmerais donc le jugement de la Cour d'appel ((2004), 71 O.R. (3d) 54) qui renvoie le dossier à la Cour supérieure de justice pour réexamen à la lumière des principes exposés ci-dessous.

* Le juge Major n'a pas pris part au jugement.

86 J'ai pris connaissance de l'opinion de la juge Abella. Elle conclut (par. 78) que c'est la Commission des relations de travail de l'Ontario (« CRTO ») qui doit trancher la question constitutionnelle. Pour ma part, j'estime que la *LFI* prévoit une étape qui permet justement d'éviter tout conflit constitutionnel et que le tribunal administratif ne peut être autorisé à prononcer une déclaration inconstitutionnelle. Nous sommes donc divisées sur l'identité de la juridiction devant laquelle la question du conflit doit être débattue. Les juges des cours supérieures qui siègent en faillite agissent comme tribunal spécialisé. Ils connaissent les devoirs et responsabilités du syndic. Ils constituent le premier guichet auquel doit s'adresser la personne qui veut poursuivre le syndic. Je propose une analyse des demandes de permission de poursuivre fondées sur l'art. 215 *LFI* qui s'attache à l'effet concret des poursuites sur les devoirs et responsabilités du syndic aux termes de la *LFI*. Seule une telle analyse garantit le respect des règles du droit constitutionnel.

87 Afin de pouvoir évaluer les zones de conflit entre la *LFI* et les dispositions de la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A (« *LRT* »), concernant la succession à titre d'employeur, il est utile, d'abord, de faire un survol du rôle du syndic dans le contexte de la réforme de 1992 du régime de la faillite. J'examinerai ensuite l'effet de la déclaration de successeur par la CRTO, puis les règles constitutionnelles applicables en cas de conflit. Enfin, je terminerai en dégageant les critères propres à éviter les conflits et en formulant quelques commentaires sur le dossier dont la Cour est saisie.

1. Pouvoirs et responsabilités du syndic

1.1 *Rôle du syndic*

88 Considérée globalement, l'administration d'une faillite se fait selon une règle simple. Le syndic reçoit les actifs d'une main, puis de l'autre il règle les réclamations au moyen du produit de la réalisation de ces actifs. De façon concrète, ces fonctions se traduisent par un rôle actif du syndic dans la liquidation du patrimoine du failli. Les devoirs et responsabilités du syndic sont régis explicitement par la *LFI*. Les biens du failli lui sont dévolus (art. 71). Ses pouvoirs à l'égard de ces biens sont prévus par la *LFI* (art. 30 et 31). Sous réserve des droits des créanciers garantis et de quelques exceptions, les recours de tous les créanciers sont suspendus (art. 69.1). La *LFI* régit aussi la nature des réclamations prouvables de même que la procédure de réclamation (art. 121). Le syndic qui continue l'exploitation de l'entreprise du failli ou lui succède comme employeur n'est personnellement responsable d'aucune réclamation antérieure à la faillite (par. 14.06(1.2)). Il est cependant autorisé à les régler sur les actifs qui lui sont dévolus (art. 67), en répartissant le produit de leur réalisation conformément à la *LFI* et en suivant l'ordre de priorité établi par celle-ci (art. 136 à 147).

89 Le syndic est, avant tout, un auxiliaire de justice :

> [TRADUCTION]
> . . . et le tribunal le considère comme son auxiliaire, chargé de conserver l'argent qui lui est confié afin qu'il puisse être réparti équitablement entre les créanciers.
>
> (*Ex parte James, In re Condon* (1874), L.R. 9 Ch. App. 609, p. 614)

90 Le rôle d'auxiliaire de justice, qui est depuis longtemps reconnu par la jurisprudence, prend sa source dans le par. 16(4) *LFI*; la *LFI* confère au syndic un statut identique à celui du séquestre intérimaire : *Parsons c. Sovereign Bank of Canada*, [1913] A.C. 160 (H.L.), p. 167; L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), vol. 1, C§10 et C§44. Ce statut impose au syndic d'agir avec équité et prudence, de collaborer avec le tribunal et, plus

généralement, de concourir à la saine administration de la justice (*Re L'Heureux (syndic de)*, [1999] R.J.Q. 945 (C.A.), p. 949; *Caisse populaire de Pontbriand c. Domaine St-Martin Ltée*, [1992] R.D.I. 417 (C.A.); *Azco Mining Inc. c. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392 (C.A.); *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (C.A. Ont.); J. Auger et A. Bohémier, « The Status of the Trustee in Bankruptcy » (2002), 37 *R.J.T.* 57, p. 99-100).

91 La *LFI* protège le syndic lorsqu'il agit comme auxiliaire de justice et qu'il exerce les pouvoirs qui lui sont conférés par la loi. Il n'est pas tenu personnellement aux obligations du failli. En plus d'être protégé par les dispositions lui conférant une immunité (par. 14.06(1.2), (2) et (4), 50(9) et 50.4(5)), le syndic bénéficie du mécanisme de filtrage des poursuites que prévoit l'art. 215 et sur lequel repose tout le litige dans la présente affaire. Les dispositions protégeant le syndic contre les poursuites indiquent clairement l'intention du Parlement d'accorder au syndic la marge de manoeuvre dont il a besoin pour accomplir les devoirs que lui impose la *LFI*.

92 Il est d'ailleurs intéressant de constater que le contrôleur d'un arrangement nommé en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, par. 11.7(4) et 11.8(1), (3) et (5), ainsi que le liquidateur agissant aux termes de la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, ch. W-11, art. 35.1 et par. 76(2), bénéficient de protections similaires.

1.2 *Réforme de 1992*

93 Les règles régissant la faillite ont été considérablement modifiées par l'entrée en vigueur de la réforme de 1992. Le changement le plus marquant est la priorité donnée

à la réorganisation des entreprises plutôt qu'à l'interruption des affaires. L'auteur D. C. A. Tay signale l'importance de la nouvelle orientation imprimée par la loi :

> [TRADUCTION]
> La LFI a pour principale conséquence que la législation canadienne en matière de faillite est désormais axée non plus sur la liquidation, mais sur la réhabilitation. Alors que l'ancienne loi régissait essentiellement la détermination du partage des biens du failli entre les créanciers, la LFI tend à offrir au débiteur insolvable un plus grand nombre de moyens d'éviter la faillite et de restructurer et réorganiser ses affaires.
>
> (*Implications of the New Bankruptcy and Insolvency Act* (1993), article VI, « The *Bankruptcy and Insolvency Act*: Striking a Balance Between the Rights of the Debtor and its Creditors », p. 2)

94 Il s'agit d'un changement fondamental, qui constitue sans nul doute l'un des principaux objectifs ayant motivé la réforme. Dans le présent dossier, cela signifie concrètement que le syndic devait favoriser la vente d'une entreprise en exploitation plutôt que l'interruption des activités et la liquidation de l'actif démembré. L'objectif de maintien des activités est un élément qui doit être intégré à l'analyse constitutionnelle lorsqu'il s'agit de déterminer si une loi provinciale fait obstacle à la réalisation de l'objet de la *LFI*.

95 Les devoirs et responsabilités du syndic à titre d'auxiliaire de justice imprègnent ses nouvelles fonctions. De simple liquidateur, le syndic est devenu réorganisateur financier. S'il doit voir à la survie de l'entreprise et préserver les emplois, il s'ensuit qu'il doit la gérer, le temps de trouver un acquéreur. La gestion du syndic est essentiellement temporaire. Bien que la durée de son administration puisse varier selon la nature de l'entreprise et les conditions économiques du moment, le syndic sert essentiellement de pont lorsqu'il maintient ou réorganise l'entreprise avant de la remettre à un acquéreur.

96 À la lumière de ce rôle crucial du syndic, on comprend qu'une faillite entraîne inévitablement des conséquences sur les relations de travail au sein de l'entreprise, d'où l'importance d'examiner l'interrelation entre les règles de la faillite et les relations de travail, plus spécifiquement la déclaration attribuant la qualité de successeur.

2. But et effet de la déclaration attribuant la qualité de successeur

2.1 *But de la déclaration*

97 Tous les législateurs canadiens ont adopté une disposition permettant aux employés de conserver la protection syndicale en cas de transfert de l'entreprise pour laquelle ils travaillent. La disposition ontarienne pertinente en l'espèce est rédigée ainsi :

> **69.** . . .
>
> (2) Si l'employeur qui est lié par une convention collective ou qui y est partie vend son entreprise, la personne à qui l'entreprise a été vendue est, jusqu'à déclaration contraire de la Commission, également lié (*sic*) par la convention collective comme s'il (*sic*) en était partie. Si l'employeur vend son entreprise alors qu'il est partie à une requête en accréditation ou en révocation du droit de négocier en cours devant la Commission, la personne à qui l'entreprise a été vendue est, jusqu'à déclaration contraire de la Commission, également l'employeur aux fins de la requête.

98 Sans cette protection, les employés pourraient dans les faits continuer à occuper le même emploi chez un nouvel employeur, mais en étant privés des droits que leur syndicat avait négociés en leur faveur.

99 Dans *Lester (W.W.) (1978) Ltd. c. Association unie des compagnons et apprentis de l'industrie de la plomberie et de la tuyauterie, section locale 740*, [1990]

3 R.C.S. 644, la juge McLachlin, maintenant Juge en chef, met en relief le but de la déclaration de successeur à titre d'employeur :

> Le but fondamental de ces dispositions est d'empêcher que des employés ne perdent leur protection syndicale lorsqu'une entreprise est vendue ou transférée ou lorsque des modifications sont apportées à la structure d'une entreprise. . . [p. 671]

100 De nombreux critères sont utilisés pour déterminer si l'acquéreur à qui l'entreprise a été transférée succède à son vendeur à titre d'employeur. Afin de décider s'il y a eu transfert de l'entreprise, on se demande généralement si suffisamment d'éléments importants de l'actif de cette entreprise ont été vendus à l'acquéreur et on évalue le degré de continuité des activités associées à cette entreprise. Chaque situation est un cas d'espèce et aucun critère n'est déterminant. Le décideur peut considérer autant l'aspect humain (savoir-faire des employés, système de gestion, licences, brevets, achalandage) que l'aspect physique (actif matériel de l'entreprise, équipement, terrain, emplacement) de l'entreprise cédée et de la nouvelle entreprise afin de conclure ou non à une vente. Le décideur vérifie aussi si les éléments composant l'entreprise sont transmis comme un tout suffisamment cohérent pour équivaloir à la vente de l'entreprise en tant que « véhicule économique fonctionnel » et justifier la survie des droits découlant de la négociation collective (*Lester*, p. 676; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197 (Ont.), p. 208; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. Mai/Juin 397, p. 415-416; G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), p. 8-4 à 8-23).

2.2 *Effet de la déclaration*

101 Une déclaration par la CRTO qu'une entité succède à une autre à titre d'employeur a pour effet de faire de l'entité visée par cette déclaration une partie liée par

la convention collective et de la rendre responsable de toutes les obligations y afférentes, y compris celles qui incombaient à l'ancien employeur avant le transfert de l'entreprise. Le nouvel employeur devient personnellement responsable tant des dettes de l'employeur précédent que des violations de la convention collective survenues avant la vente. Il peut, par exemple, être lié par une sentence arbitrale prononcée contre l'employeur précédent et devoir assumer la responsabilité découlant de pratiques de travail déloyales. De façon générale, il est personnellement tenu de respecter les obligations de l'employeur précédent (*Adam c. Daniel Roy Ltée*, [1983] 1 R.C.S. 683, p. 694-695; *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Ont.); *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96 (Ont.); *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126 (C.-B.); *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138 (H.C.J. Ont.); *Radio CJYQ-930 Ltd.* (1978), 34 di 617; Adams, p. 8-38.2 à 8-39; D. D. Carter, G. England, B. Etherington et G. Trudeau, *Labour Law in Canada* (5e éd. 2002), p. 280-281).

102 Si la protection des employés, lors de la vente d'une entreprise, se conçoit facilement dans le contexte du transfert des obligations à l'acquéreur, cela ne va pas toutefois sans soulever plusieurs questions lorsqu'il s'agit d'appliquer cette notion à la situation du syndic. Les difficultés avec lesquelles le syndic doit composer sont accrues du fait que les lois sur les relations de travail ne sont pas uniformes à travers le Canada, pas plus d'ailleurs que la jurisprudence sur celles-ci (Adams, p. 8-4 et suiv.; p. 8-39 et suiv.).

103 Il est admis que la *LRT* confère à la CRTO le pouvoir exclusif de décider qui est « employeur successeur ». Cependant, comme la loi ontarienne ne saurait entraver la réalisation de l'objet de la *LFI*, il est nécessaire de déterminer dans quelle mesure une

déclaration attribuant à un syndic la qualité d'employeur successeur est compatible avec la *LFI*.

3. Conflits entre la *LFI* et la *LRT*

104 J'ai déjà souligné l'effet d'une déclaration attribuant la qualité d'employeur prononcée en vertu de la *LRT*. Selon le par. 69(2) *LRT*, l'acquéreur de l'entreprise est lié par les obligations de l'employeur-vendeur qui avait signé la convention collective, comme s'il était partie à celle-ci. J'ai aussi mentionné plus haut que, si un syndic est déclaré employeur au sens de la *LRT*, cette déclaration n'est pas sans soulever plusieurs questions. En fait, un examen, même sommaire, permet de faire ressortir plusieurs conflits.

105 Le conflit le plus flagrant résulte des réclamations pour salaire impayé. Une déclaration attribuant la qualité d'employeur rend la personne qui en fait l'objet responsable des obligations de l'employeur qui a signé la convention collective. Le nouvel « employeur », ici le syndic, serait responsable de tous les salaires impayés par le failli. Cette obligation entre en conflit direct avec deux dispositions de la *LFI*.

106 La première est le par. 14.06(1.2), qui énonce explicitement ce qui suit :

> (1.2) Par dérogation au droit fédéral et provincial, le syndic qui, ès qualités, continue l'exploitation de l'entreprise du débiteur ou succède à celui-ci comme employeur est dégagé de toute responsabilité personnelle découlant de toute réclamation contre le débiteur ou liée à l'obligation de celui-ci de payer une somme si la réclamation est antérieure à sa nomination ou découle de celle-ci.

La déclaration assujettissant le syndic à toutes les obligations de l'employeur qui a signé la convention collective a pour effet d'imposer à cet auxiliaire de justice une responsabilité personnelle dont il est explicitement dégagé par le par. 14.06(1.2).

107 La deuxième disposition incompatible est l'al. 136(1)*d*), qui donne priorité aux créances des employés du failli pour les arriérés de salaire d'au plus six mois, jusqu'à concurrence de 2 000 $ par employé. Toute créance excédentaire est traitée comme une réclamation ordinaire et acquittée au prorata des réclamations (art. 141). Si le syndic est considéré comme un employeur, il doit alors payer la réclamation des employés au complet, ce qui est incompatible avec la *LFI*. Il s'agit ici aussi d'un conflit direct résultant d'une impossibilité de se conformer à la fois à la *LFI* et à la *LRT*. Toutefois, tous les employeurs faillis n'accumulent pas des arriérés excédant les limites prévues par la *LFI*. Lorsqu'ils accumulent de tels arriérés, la cour de faillite ne peut, sans réserve, autoriser un syndicat à demander que le syndic soit déclaré successeur du failli.

108 Un autre conflit peut résulter d'une situation analogue à celle qui s'est produite dans l'arrêt *Adam c. Daniel Roy Ltée*. Dans cette affaire, le nouvel employeur a été condamné à réintégrer et à indemniser une employée congédiée pour activités syndicales par l'employeur précédent. Appliquée au syndic, une telle décision signifierait que celui-ci devrait réintégrer une employée, alors que la faillite a, en principe, mis fin à l'emploi de celle-ci (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27).

109 D'autres situations conflictuelles sont plus subtiles. C'est le cas par exemple lorsque le syndic doit assurer la continuité de l'entreprise en ne recourant qu'à quelques employés seulement. La procédure de mise à pied ou de déplacement peut imposer des contraintes incompatibles avec la réorganisation pour les besoins de la faillite.

110 Enfin, un autre conflit résulte du fait que la déclaration attribuant la qualité d'employeur n'est pas limitée dans le temps. Lorsqu'il s'agit du véritable acquéreur, l'absence de délai ne présente pas de difficultés. Le transfert de l'entreprise, comme la déclaration, ont en principe un caractère définitif. Il en va autrement dans le cas du syndic, puisque, en tant qu'auxiliaire de justice, il a le droit d'être libéré lorsque l'administration de l'actif est terminée (par. 41(2) *LFI*). Une déclaration non assortie de réserves fera du syndic un employeur, et ce, malgré la fin de la réorganisation et sa libération comme syndic par la cour de faillite.

111 Ces exemples illustrent clairement que la déclaration attribuant la qualité d'employeur n'est pas sans créer d'embûches lorsqu'elle vise un syndic qui doit exercer ses fonctions conformément à la *LFI*. Si mon premier exemple constitue un cas patent d'impossibilité d'application concurrente des deux lois, l'hypothèse de la responsabilité personnelle pour les dettes du failli se rapportant à la convention collective est un cas tout aussi évident d'entrave à la réalisation de l'objet de la *LFI*. Comme le dit la juge Feldman de la Cour d'appel dans la présente affaire :

> [TRADUCTION]
> Ces considérations relatives à la faillite sont de toute première importance lorsqu'un séquestre intérimaire pourrait être déclaré employeur successeur du débiteur, s'il exploite l'entreprise du débiteur en vue de la vendre à titre d'entreprise en activité. La décision d'exploiter ou non l'entreprise est une des plus importantes que doit prendre le séquestre. Elle a des incidences sur l'ensemble du déroulement de la faillite et sur l'issue de celle-ci, et, chose importante, sur la capacité du séquestre de maximiser la valeur de l'actif du failli au bénéfice de tous les intéressés. [par. 53]

112 La décision de continuer les activités de l'entreprise est au coeur de la mission confiée au syndic par la *LFI*. Cette mission ne peut être occultée. Les parties doivent identifier le point d'équilibre entre les devoirs et immunités du syndic en vertu de la *LFI* et les droits reconnus aux employés par la *LRT*. En cas de conflit, les parties

doivent se reporter aux règles constitutionnelles. Il est donc opportun de faire un bref rappel des doctrines pertinentes.

4. Doctrines du double aspect et de la prépondérance

113 Le droit constitutionnel ne tolère pas le conflit de compétences législatives. Plusieurs doctrines ont été élaborées pour assurer le respect des compétences fédérales et provinciales. Deux d'entre elles sont pertinentes en l'espèce, le double aspect et la prépondérance. Cette dernière a fait l'objet de plusieurs arrêts de la Cour dans le contexte particulier de la faillite et il sera utile d'en rappeler les grandes lignes.

4.1 *La théorie du double aspect*

114 Les législateurs provinciaux ont compétence sur la propriété et les droits civils en vertu du par. 92(13) de la *Loi constitutionnelle de 1867* (la « Constitution »). La réglementation des conditions de travail relève de ce pouvoir. Ni la validité constitutionnelle de l'ensemble de la *LRT* ni celle du par. 69(2) ne sont remises en question. Par ailleurs, la compétence du Parlement à l'égard de la faillite et de l'insolvabilité repose sur le par. 91(21) de la Constitution et n'est pas non plus contestée, pas plus du reste que les dispositions conférant des pouvoirs ou immunités au syndic. Il s'agit donc de deux lois relevant, chacune dans son domaine, de la compétence du niveau de gouvernement qui l'a adoptée.

115 Lorsque des lois fédérales et provinciales sont mises en œuvre, elles peuvent souvent être appliquées concurremment. Le Conseil privé a très tôt reconnu cette possibilité :

> [TRADUCTION] des matières qui, sous un aspect donné et pour un objet précis, relèvent de l'art. 92 peuvent, sous un autre aspect et pour un objet différent, relever de l'art. 91.
>
> (*Hodge c. La Reine* (1883), 9 App. Cas. 117, p. 130)

Ainsi, lorsque le syndic gère une entreprise le temps de trouver un acheteur, il tire ses pouvoirs de la *LFI*, qui est de compétence fédérale. Il n'est toutefois pas exempté de l'application de l'ensemble des lois provinciales. La *LFI* prévoit même explicitement l'application des règles provinciales compatibles concernant la propriété et les droits civils. Le paragraphe 72(1) réaffirme le maintien des lois non incompatibles :

> **72.** (1) La présente loi n'a pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

Le syndic qui exploite une entreprise est assujetti à un grand nombre d'exigences à cet égard. Par exemple, il ne pourrait omettre de prélever les retenues à la source des salaires des employés ou déroger aux normes minimales du travail.

116 En raison du partage des pouvoirs législatifs entre les niveaux de gouvernement, le syndic est donc assujetti à un grand nombre de lois provinciales. Les tribunaux saisis de contestations portant sur la difficulté d'appliquer concurremment des lois fédérales et provinciales doivent tenter de concilier l'application de ces lois de façon à respecter les champs de compétence respectifs des deux ordres de gouvernement : *Renvoi relatif à la Loi sur l'assurance-emploi (Can.), art. 22 et 23*, [2005] 2 R.C.S. 669, 2005 CSC 56. Lorsque le conflit est inévitable, une autre doctrine peut être pertinente, celle de la prépondérance.

4.2 *La doctrine de la prépondérance*

117 La prépondérance des lois fédérales sur les lois provinciales en cas de conflit est une doctrine établie de longue date : W. R. Lederman, « The Concurrent Operation of Federal and Provincial Laws in Canada » (1963), 9 *McGill L.J.* 185. Un conflit propre à déclencher le recours à cette doctrine peut résulter de l'impossibilité d'appliquer simultanément une loi fédérale et une loi provinciale : *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191, mais peut aussi naître du fait que l'application de la loi provinciale entrave la réalisation de l'objet de la loi fédérale : *Law Society of British Columbia c. Mangat*, [2001] 3 R.C.S. 113, 2001 CSC 67, et *Rothmans, Benson & Hedges Inc. c. Saskatchewan*, [2005] 1 R.C.S. 188, 2005 CSC 13, par. 12.

118 S'il est facile d'énoncer ce principe, son application n'est pas toujours aisée, comme en font foi les nombreux litiges sur la question.

4.3 *Contexte particulier de la faillite*

119 La *LFI* et la *LRT* ne sont pas d'emblée incompatibles. S'il est important de reconnaître les conflits potentiels, il est tout aussi important de faire en sorte que la doctrine de la prépondérance ne soit pas interprétée de façon à empêcher l'application des dispositions provinciales pour les aspects qui sont compatibles avec la loi fédérale. La théorie du double aspect revêt une importance toute aussi grande que celle de la prépondérance. Les tribunaux doivent s'assurer que l'équilibre prévu par la Constitution est respecté et que chaque niveau de gouvernement peut exercer pleinement ses compétences lorsque cela peut se faire sans entraver l'action de l'autre niveau.

120 En matière de faillite, plusieurs arrêts importants de la Cour étudient les rapports entre la législation relative à la faillite et divers aspects du droit provincial régissant la propriété : *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, et *D.I.M.S. Construction inc. (Syndic de) c. Québec (Procureur général)*, [2005] 2 R.C.S. 564, 2005 CSC 52.

121 Dans *Husky Oil*, le juge Gonthier, qui s'exprimait pour la majorité, résume les principes permettant de formuler une « philosophie cohérente et générale quant aux objets du régime fédéral de la faillite et au lien qu'il a avec les dispositions provinciales en matière de droit des biens » (par. 31). Non seulement rappelle-t-il que les provinces ne peuvent modifier *directement* l'ordre de priorité établi par la *Loi sur la faillite*, mais il énonce aussi les propositions qui permettent d'appliquer la théorie de la prépondérance là où une loi provinciale entre en conflit *indirectement* avec la *LFI* (par. 32 (citant A. J. Roman et M. J. Sweatman, « The Conflict Between Canadian Provincial Property Security Acts and the Federal Bankruptcy Act: The War is Over » (1992), 71 *R. du B. Can.* 77, p. 78-79) et 39) :

> (1) les provinces ne peuvent ni créer des priorités entre les créanciers ni modifier le plan de répartition en matière de faillite, prévu au par. 136(1) de la Loi sur la faillite;
>
> (2) bien qu'une loi provinciale puisse validement modifier l'ordre de priorité dans un contexte autre que celui d'une faillite, dès qu'il y a faillite, c'est le par. 136(1) de la Loi sur la faillite qui détermine le statut et l'ordre de priorité des réclamations qui y sont visées expressément;
>
> (3) si les provinces pouvaient créer leur propre ordre de priorité ou modifier celui établi en vertu de la Loi sur la faillite, cela aurait pour effet

d'inciter à l'établissement, en matière de faillite, d'un plan de répartition différent d'une province à l'autre, ce qui est inacceptable;

(4) en matière de faillite, des expressions comme « créancier garanti », lorsqu'elles sont définies dans la Loi sur la faillite, doivent être interprétées selon la définition que leur donne le législateur fédéral et non celle que leur donnent les législatures provinciales. Les provinces ne peuvent modifier la façon dont ces expressions sont définies aux fins de la Loi sur la faillite;

. . .

(5) pour déterminer le lien qui existe entre une loi provinciale et la *Loi sur la faillite*, il ne faut pas que la forme du droit créé par la province l'emporte sur le fond. Les provinces n'ont pas le droit de faire indirectement ce qui leur est interdit de faire directement;

(6) pour que la loi provinciale soit inapplicable, il n'est pas nécessaire que la province ait eu l'intention d'empiéter sur la compétence fédérale exclusive en matière de faillite et d'être en conflit avec la *Loi sur la faillite*. Il suffit que la loi provinciale ait cet *effet*. [Souligné dans l'original.]

122 Même si les propositions énoncées dans *Husky Oil* traitent plus particulièrement des conflits entre les lois provinciales et le plan de répartition établi par la *LFI*, elles ont une portée qui déborde ce cadre spécifique et servent à démontrer comment la doctrine de la prépondérance s'applique dans le contexte de la faillite.

123 En principe, le syndic ne doit pas être assujetti à des obligations qui entravent le règlement de la faillite. Tous les conflits auxquels j'ai fait allusion ne se produiront cependant pas à chaque fois que la CRTO prononce une déclaration attribuant la qualité d'employeur successeur. D'une part, les circonstances particulières d'une affaire peuvent révéler une conduite du syndic qui se démarque du rôle qui lui est confié par la *LFI* et, d'autre part, la CRTO peut prononcer une déclaration partielle lorsque le syndicat ne requiert pas le transfert de toutes les obligations de l'ancien employeur. La présente affaire est un bon exemple de ce dernier cas. Le syndicat plaide qu'il ne cherche pas à

obtenir une déclaration de responsabilité pour les dettes dues avant la nomination du séquestre. Cette précision est utile, mais elle n'écarte pas tous les conflits potentiels.

124 La Cour supérieure joue un rôle déterminant dans l'identification des conflits potentiels et elle ne doit pas autoriser une poursuite qui risque de créer un conflit. Le juge qui refuse d'autoriser une poursuite ne déclare pas nulle ou inopérante la disposition provinciale, il ne fait qu'éviter le conflit en recourant de façon préventive à la doctrine de la prépondérance. De là l'importance du mécanisme de filtrage de l'art. 215 *LFI*.

5. L'article 215 *LFI*

5.1 *Le but de l'art. 215 LFI*

125 J'ai dit plus tôt que l'intention du Parlement de faire bénéficier le syndic d'une marge de manœuvre dans l'administration de la faillite ressort des immunités prévues par la *LFI*. L'article 215 joue un rôle important dans la protection accordée au syndic, parce qu'en application de celui-ci une cour supérieure doit filtrer les poursuites susceptibles d'être intentées contre lui. Cette disposition est rédigée ainsi :

> **215.** Sauf avec la permission du tribunal, aucune action n'est recevable contre le surintendant, un séquestre officiel, un séquestre intérimaire ou un syndic relativement à tout rapport fait ou toute mesure prise conformément à la présente loi.

126 Ma collègue la juge Abella s'oppose à l'intégration, dans les critères d'application de l'art. 215 *LFI*, de facteurs qui prendraient en considération la nature particulière d'une déclaration attribuant au syndic la qualité d'employeur. Elle y voit la création d'un test particulier et exceptionnel à l'égard de cette déclaration. J'y vois plutôt

l'incorporation des règles constitutionnelles et une adaptation aux nouvelles dimensions des recours pouvant être autorisés contre un syndic.

127 À l'instar des juges Feldman et Cronk, je suis d'avis que l'art. 215 agit comme mécanisme de contrôle permettant d'éviter que des lois provinciale et fédérale n'entrent en conflit l'une avec l'autre. Le juge de faillite agit à titre de tribunal spécialisé. Non seulement est-il chargé d'appliquer la loi fédérale, laquelle doit primer sur les lois provinciales en cas de conflit, mais il est aussi le premier à être saisi de la question du conflit potentiel et est le seul qui soit en mesure d'évaluer l'ensemble des intérêts en jeu. Il est celui qui sera chargé de tous les aspects de l'application de la *LFI*.

128 Dans *Tranchemontagne c. Ontario (Directeur du Programme ontarien de soutien aux personnes handicapées)*, [2006] 1 R.C.S. 513, 2006 CSC 14, la Cour a reconnu le rôle central du premier tribunal auquel un réclamant s'adresse. Dans cette affaire, il s'agissait de décider lequel de deux organismes administratifs devait décider d'une question touchant les droits de la personne. En l'espèce, le choix oppose la Cour supérieure et un tribunal administratif, la CRTO, et concerne de surcroît une question constitutionnelle. Vu l'expertise de la Cour supérieure en matière de faillite et en matière constitutionnelle, le choix doit, à plus forte raison, s'arrêter sur celle-ci plutôt que sur le tribunal administratif. Il faut laisser la cour de faillite jouer pleinement son rôle central avant que le tribunal externe à la faillite soit saisi de la demande contre le syndic : *Sam Lévy & Associés Inc. c. Azco Mining Inc.*, [2001] 3 R.C.S. 978, 2001 CSC 92. Par contraste, la CRTO est spécialisée dans les relations de travail et a comme mission d'appliquer la *LRT* et, plus particulièrement ici, le par. 69(2), qui a pour but de protéger les employés. Comme la faillite d'une entreprise met en cause les intérêts de tous les créanciers et non pas seulement ceux des employés, le juge de faillite est dans une meilleure position pour évaluer les intérêts en cause et prévenir les conflits.

129 D'ailleurs, je suis d'accord avec ma collègue la juge Abella lorsqu'elle dit que le syndic n'est pas immunisé par la *LFI*. Deux dispositions pourvoient au contrôle de l'activité du syndic : les art. 37 et 215. L'article 37 permet à tout intéressé de s'adresser à la cour de faillite pour lui demander de confirmer, d'infirmer ou de modifier un acte ou une décision du syndic qui fait l'objet d'une plainte. Ce recours ne requiert pas de permission préalable et constitue parfois un recours alternatif à l'art. 215 *LFI*. Ce qui distingue l'art. 37 de l'art. 215 est que cette dernière disposition permet d'intenter un recours devant un tribunal *autre* que la cour de faillite et qu'une permission est requise. Cette permission est requise parce que le Parlement a voulu que la cour de faillite exerce un contrôle sur les poursuites qui sont intentées. L'autre tribunal n'est pas un tribunal spécialisé en matière de faillite.

130 La vaste majorité des décisions fondées sur l'art. 215 concernent des cas où une faute est reprochée au syndic : *Alamo Linen Rentals Ltd. c. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38 (C. prov. Ont.); *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636 (Div. gén.); *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115 (C.S.C.-B.); *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208 (B.R.); *McKyes, Re*, 1996 CarswellQue 2575 (C.S.); *Nicholas c. Anderson* (1998), 5 C.B.R. (4th) 256 (C.A. Ont.); *Gallo c. Beber* (1998), 7 C.B.R. (4th) 170 (C.A. Ont.); *Kearney c. Feldman*, [1998] O.J. No. 5109 (QL) (Div. gén.); *Burton c. Kideckel* (1999), 13 C.B.R. (4th) 9 (C.S.J. Ont.); *Society of Composers, Authors & Music Publishers of Canada c. Armitage* (2000), 20 C.B.R. (4th) 160 (C.A. Ont.); *Mann c. KPMG Inc.* (2000), 197 Sask R. 181, 2000 SKQB 460; *Vanderwoude c. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127 (C.A. Ont.); *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77 (C.S.J. Ont.); *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL) (C.S.J.); *MacLean c.*

Morash (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani c. Devgan*, [2005] O.J. No. 2868 (QL) (C.S.J.); *105497 Ontario Inc. c. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122 (C.S.J. Ont.), et *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430.

131 Par ailleurs, le tribunal se montre réticent à accorder une permission lorsqu'il s'agit de poursuivre le syndic pour faire déclarer qu'il succède à titre d'employeur. La présente affaire l'illustre, mais la Cour d'appel ne faisait pas cavalier seul : *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (C. Ont. (Div. gén.)).

132 Avec le développement du droit administratif et la multiplication des tribunaux spécialisés, l'art. 215 est maintenant utilisé à des fins beaucoup plus variées qu'auparavant. J'approuve à ce sujet ce que dit la juge Feldman de la Cour d'appel (par. 54) :

> [TRADUCTION]
> Dans les décisions rendues jusqu'ici au sujet de la permission exigée à l'art. 215 de la LFI, par exemple Mancini, et où le litige portait sur une faute du syndic, il n'était pas question de facteurs touchant au contrôle exercé par le tribunal de faillite sur le processus. Dans de tels cas, si la permission est accordée, le syndic retient les services d'un avocat pour se défendre devant le tribunal, et il peut continuer à accomplir ses fonctions relatives à la mise sous séquestre ou à la faillite.

133 Les demandes de permission fondées sur des moyens autres que la négligence ou le refus du syndic de remplir les devoirs de sa charge sont donc une réalité assez récente. Les quelques cas répertoriés montrent bien que les juges de faillite sont soucieux de préserver la marge de manoeuvre du syndic et s'assurent que les poursuites intentées devant l'autre tribunal n'entravent pas l'action du syndic. Ainsi, dans *Royal Crest Lifecare Group Inc., Re* (2003), 40 C.B.R. (4th) 146, la Cour supérieure de

l'Ontario a rejeté, pour les motifs suivants, la requête du syndicat demandant la permission de s'adresser à la CRTO (par. 29) :

> [TRADUCTION] Il n'a pas été allégué – et encore moins prouvé – qu'en l'espèce le syndic (même si E&Y était considéré en sa qualité de séquestre intérimaire) a traîné les pieds ou le fera. La requête incidente de permission présentée par le SCFP est rejetée, sans préjudice de la possibilité que soit soumise ultérieurement une requête semblable sur une base factuelle appropriée, laquelle devrait à mon avis démontrer que le syndic a cessé d'agir avec diligence en tant que liquidateur pour jouer principalement le rôle d'employeur.

En appel de ce jugement ((2004), 46 C.B.R. (4th) 126, par. 27), la Cour d'appel de l'Ontario appuie explicitement l'approche adoptée par la Cour supérieure, tout en rappelant les contraintes inhérentes au contexte de la faillite (par. 21, 22, 31 et 32) :

> [TRADUCTION]
>
> Une faillite est une catastrophe. Une entreprise a échoué; dans biens des cas, elle ne survivra pas. Les créanciers, qui de bonne foi lui ont fourni des biens et des services, risquent de perdre des sommes importantes. Les employés de la société en faillite perdent immédiatement leur emploi.
>
> Le juge siégeant en matière de faillite est plongé au coeur de cette catastrophe. Il lui faudra prendre des décisions importantes qui auront une incidence sur l'avenir de la société, de ses créanciers et de ses employés. Les qualités d'un bon juge de faillite sont par conséquent l'expertise, la sensibilité et la rapidité.
>
> . . .
>
> Le syndic a de nombreuses obligations – envers le patrimoine qu'il a pour mission de gérer, envers les créanciers et envers le tribunal. Lorsque, comme en l'espèce, un syndic de faillite souhaite engager d'anciens employés de la société faillie, il a également une obligation envers ces employés. La décision du syndic de présenter, le jour même où il a commencé à exercer sa fonction, une requête demandant au tribunal de déclarer qu'il ne devait pas être considéré, [TRADUCTION] « pour quelque fin que ce soit », comme un employeur successeur était, de l'avis du juge de faillite, prématurée. Ce dernier a donc rejeté cette requête. Le syndic n'interjette pas appel de ce volet de la décision.
>
> De même, la requête incidente des appelants, compréhensible sans doute vu la requête du syndic, était dans un sens elle aussi mal fondée. La première journée d'une faillite ne constitue certainement pas une « journée comme les autres » pour quiconque, y compris les employés. La relation entre le syndic

> et les employés de la société en faillite ne peut être résolue instantanément. Il faudra de l'attention, de la sensibilité, de la négociation et au moins un certain temps pour qu'une relation appropriée puisse s'établir. Le juge de faillite a estimé que la requête incidente du syndicat était elle aussi prématurée. Il l'a par conséquent rejetée, mais sans exclure la possibilité qu'une telle requête puisse être accueillie une fois que les parties auraient, à tout le moins, exploré l'établissement d'une relation d'emploi appropriée. Là encore, il n'existe selon moi aucune raison d'intervenir à l'encontre de l'exercice par le juge de son pouvoir discrétionnaire à ce sujet.

134 Le but des art. 37 et 215 n'est donc pas d'immuniser le syndic contre des poursuites légitimes, mais de permettre la supervision de son administration sans toutefois l'entraver. Favoriser l'exercice d'un contrôle par la cour de faillite appuie le rôle du syndic. La *LFI* met en place un régime qui permet de tenir compte de l'efficacité de l'administration du syndic tout en ne soustrayant pas le syndic au pouvoir de surveillance des tribunaux. L'article 215 n'énonce pas les critères d'application. La flexibilité laissée par le Parlement permet à la cour de faillite de s'adapter aux nouvelles réalités, y compris une déclaration attribuant la qualité de successeur.

5.2 *Les critères d'autorisation*

135 L'affaire *Mancini (Brankrupt) c. Falconi* (1993), 61 O.A.C. 332, est souvent citée comme étant celle qui a établi l'analyse qui s'impose au juge. D'application facile lorsqu'il s'agit d'une simple réclamation contre un syndic pour contravention à ses devoirs, les critères qui y sont énoncés doivent cependant être adaptés à la nature particulière de chaque demande.

5.2.1 L'affaire *Mancini* et la suffisance de la preuve

136 Il y a lieu de démythifier l'analyse élaborée dans l'arrêt *Mancini*. Dans cette affaire, les parties requérantes demandaient la permission d'intenter contre un syndic une

action incidente en dommages-intérêts. Elles prétendaient que le syndic avait commis un abus de procédures et organisé une poursuite criminelle. Les requérants reprochaient donc au syndic des actes qu'ils estimaient fautifs et réclamaient une condamnation pécuniaire personnelle contre celui-ci. Il ne s'agissait pas d'une poursuite susceptible d'entraver l'application de la *LFI*. Le juge n'avait pas à s'interroger sur l'effet que la poursuite pouvait avoir à cet égard. La Cour d'appel a cependant distingué clairement deux questions auxquelles doit répondre le juge saisi d'une demande d'autorisation présentée en vertu de l'art. 215 : le sérieux de la cause d'action et la suffisance de la preuve. Relativement au sérieux de la cause d'action, la Cour d'appel n'a pas établi l'analyse applicable dans *Mancini*, mais a simplement résumé l'état de la jurisprudence.

137 L'aspect le plus intéressant de cette affaire est, à mon avis, l'examen de la norme de preuve qui y est fait. Il s'agissait d'ailleurs de la principale question en litige. La Cour d'appel a écrit :

> [TRADUCTION]
> Pour décider s'il y avait lieu de permettre, en vertu de l'art. 186 [maintenant 215] de la Loi sur la faillite, qu'une action soit engagée contre le syndic, le juge des requêtes devait tenir compte de la preuve, décrite à très grands traits ci-dessus, dans le contexte de la demande reconventionnelle qu'on voulait déposer contre le syndic. Il s'agit de déterminer, non pas si la preuve produite à l'appui de la requête fondée sur l'art. 186 révèle l'existence d'une cause d'action contre le syndic, mais si la preuve étaye suffisamment la cause d'action invoquée dans la demande reconventionnelle des appelants. Il est par conséquent nécessaire d'examiner les prétentions que les appelants souhaitent formuler contre le syndic.
>
> . . .
>
> Les appelants soutiennent que le juge des requêtes a fait erreur en statuant que la preuve produite à l'appui de leur requête fondée sur l'art. 186 de la Loi sur la faillite doit être suffisante pour établir un fondement factuel à l'action qu'ils entendent intenter contre le syndic. Les appelants soutiennent que le critère prévu par l'art. 186 exige seulement la présentation de quelques éléments de preuve donnant un fondement factuel à l'action qu'ils souhaitent intenter. Selon moi, le juge des requêtes a eu raison de conclure comme il l'a fait. Sur une échelle qui va de l'absence totale de preuve à une preuve qui est concluante, la preuve nécessaire pour fonder une ordonnance en vertu de l'art. 186 doit être suffisante pour établir l'existence

d'un fondement factuel à l'égard de l'action envisagée, et pour établir que cette action révèle une cause d'action.

C'est dans le contexte de l'objectif visé par l'art. 186 qu'il faut déterminer si la preuve est suffisante. Cet objectif, comme nous l'avons vu, consiste à éviter que le syndic ait à se défendre contre des actions qui sont frivoles ou vexatoires, ou qui ne révèlent aucune cause d'action. Comme je l'ai souligné plus tôt, il n'est pas nécessaire que la preuve à l'appui d'une requête fondées sur l'art. 186 soit suffisante pour permettre au juge des requêtes de statuer de façon définitive sur le fond de l'action qu'on veut intenter; cependant, elle doit être suffisante pour qu'il soit possible de répondre aux questions que j'ai signalées, en ayant à l'esprit les objectifs de l'art. 186. [Je souligne; par. 12, 16 et 17.]

138 La Cour d'appel confirmait par là la décision du juge de première instance ((1989), 76 C.B.R. (N.S.) 90), qui avait adopté une formulation claire de ce qu'est une preuve suffisante pour qu'une poursuite contre un syndic soit autorisée :

[TRADUCTION] Comme la décision suppose l'exercice d'un pouvoir discrétionnaire, le tribunal doit effectuer un examen plus approfondi que lorsqu'il s'agit de déterminer si une déclaration, en droit, révèle une cause d'action. Lorsqu'il doit décider si, oui ou non, une déclaration révèle une cause d'action, le tribunal tient pour avérées les allégations faites dans la déclaration afin de déterminer si elles peuvent constituer le fondement d'un recours. Dans le cas d'une requête fondée sur l'art. 186, le tribunal doit se demander s'il existe dans la preuve un fondement factuel pour l'action envisagée. L'article 186 vise à protéger le syndic contre des actions sans fondement factuel. Si on veut s'assurer que l'action envisagée repose sur un fondement factuel approprié, il faut que les faits allégués soient révélés par une preuve par affidavit suffisante. Les faits ne sont pas des allégations qu'il faut tout bonnement accepter telles quelles.

139 Si l'affaire *Mancini* peut être considérée comme ayant formulé un quelconque seuil ou critère, je dirais que c'est à l'égard de la norme de preuve requise pour que la cour de faillite accorde la permission de poursuivre.

140 Pour ce qui est de la suffisance de la preuve, cet arrêt précise donc que le juge à qui une demande de permission est présentée en vertu de l'art. 215 ne peut pas se contenter de vagues allégations. La preuve doit justifier les allégations. Le juge n'a pas

besoin d'être convaincu du bien-fondé de la poursuite, puisqu'il n'est pas lui-même juge du fond. Il doit cependant s'assurer qu'une preuve factuelle suffisante soutient les allégations, soit par des affirmations sous serment, soit par la production de pièces. Pour ce faire, le juge doit examiner la preuve. Dans le langage usuel, l'intensité de la norme de preuve au civil est souvent qualifiée soit de prépondérante, soit de *prima facie*. Le seuil requis par l'art. 215 n'est pas celui auquel est tenu le juge du fond, à savoir la prépondérance de la preuve, mais la preuve *prima facie*.

141 À la différence de l'affaire *Mancini*, le débat ne porte pas en l'espèce sur la question *de fait* qu'est la suffisance de la preuve, mais plutôt sur la question *de droit* qui est étudiée à l'étape de l'examen du sérieux de la cause d'action.

5.2.2 Le sérieux de la cause d'action

142 L'examen du sérieux de la cause d'action doit être modulé suivant la nature de la poursuite que le demandeur cherche à intenter. S'il s'agit d'une simple réclamation pécuniaire, comme dans *Mancini* ou dans la majorité des affaires soumises aux tribunaux jusqu'à tout récemment, la poursuite n'empêche pas le syndic d'accomplir ses devoirs et ne lui impose pas un fardeau incompatible avec la *LFI*.

143 Il est cependant clair que le juge de faillite ne peut accorder la permission d'intenter un recours incompatible avec la *LFI*. Il ne pourrait autoriser une poursuite ayant pour but d'imposer au syndic une responsabilité contre laquelle celui-ci est immunisé par la *LFI*, en matière de dommages environnementaux par exemple. Comme le syndic bénéficie, en vertu des par. 14.06(2) et (4) d'une défense complète, une telle poursuite ne saurait être qualifiée de sérieuse ou, selon l'expression utilisée dans *Mancini*, de [TRADUCTION] « non frivole ». Lorsque le recours n'est pas une simple

poursuite en dommages-intérêts fondée sur une faute du syndic, le juge doit en conséquence évaluer la nature et la portée du recours à la lumière de la preuve.

144 Ainsi, dans le cas d'une poursuite demandant à la CRTO de déclarer qu'un syndic succède au failli comme employeur, l'examen que fait le juge de faillite lui permet de déterminer l'objectif réel que poursuit le syndicat en présentant cette demande. Ce faisant, le juge de faillite peut concilier les intérêts des employés avec ceux des autres intéressés dans la faillite.

145 L'examen fait par le juge n'a pas pour effet d'accorder un traitement particulier ou différent aux déclarations attribuant la qualité de successeur. Quel que soit le motif pour lequel un juge autorise une poursuite, le contexte général de la faillite demeure pertinent. Le juge doit jouer un rôle dynamique, anticiper les conséquences de la poursuite et en limiter la portée, au besoin. Ce filtrage des recours est d'ailleurs l'exercice auquel s'est livré le juge de première instance lorsqu'il a modifié l'ordonnance de nomination du séquestre pour limiter la protection dont jouit le séquestre aux gestes que pose celui-ci dans le contexte de la liquidation des biens. Cette limitation mérite d'être nuancée, par exemple si le débat touche au taux des salaires payés par le syndic. L'exercice auquel s'est livré le juge de première instance constitue cependant un exemple de ce que les juges de faillite peuvent être appelés à accomplir de façon routinière dans leur interaction avec les parties. Ils peuvent ajuster leur autorisation en fonction des besoins spécifiques de chaque dossier. Dans l'examen du sérieux de la cause d'action, le juge de faillite doit être vigilant et parer aux conflits qui seraient susceptibles d'entraver l'application de la *LFI*.

146 Dans la présente affaire, la juge Feldman de la Cour d'appel conclut qu'il y a conflit d'application chaque fois que le juge de faillite refuse la permission d'intenter le recours visé au par. 69(2) *LRT* :

> [TRADUCTION]
> Étant donné que le tribunal de faillite peut, lorsque les circonstances le justifient, refuser une demande de permission fondée sur l'art. 215 de la LFI et ainsi empêcher la CRTO de déclarer, en vertu de sa compétence exclusive en la matière, qu'une personne est employeur successeur, il y a en conséquence incompatibilité d'application entre cette disposition et l'art. 69 de la LRT en cas de refus de la permission demandée. En pareil cas, le par. 72(1) de la LFI entre alors en jeu, avec pour conséquence que l'art. 215 de la LFI l'emporte sur le par. 69(1). [par. 69]

147 Je présenterais plutôt cette idée sous une perspective positive. Le juge qui exerce sa compétence en vertu de l'art. 215 est en mesure d'éviter le conflit d'application. En s'assurant que les conclusions recherchées n'entravent pas l'application de la *LFI* et, au besoin, en limitant la portée d'une poursuite fondée sur une loi provinciale, les juges de faillite permettent l'application simultanée de la loi fédérale et des lois provinciales.

148 Si le syndicat ne cherche qu'à assurer le maintien du taux de salaire, la poursuite peut être limitée à cet objet. De même, le problème de la période de validité de la déclaration peut être résolu en précisant que la responsabilité du syndic prend fin lors de la transmission de l'entreprise à l'acquéreur.

149 Plusieurs cas peuvent être difficiles à évaluer, par exemple le respect de l'ancienneté. De telles questions dépendront des faits propres à chaque faillite et exigeront parfois une évaluation globale de l'incidente de la poursuite.

150 La juge Feldman de la Cour d'appel mentionne les critères suivants (par. 58) :

> [TRADUCTION]
> Les facteurs appliqués par le tribunal de faillite pour statuer sur une demande présentée en vertu de l'art. 215 concernent tant des aspects procéduraux que des aspects substantiels du processus. Parmi les facteurs importants, mentionnons : le moment où la requête est présentée, la complexité de la mise sous séquestre et les contraintes auxquelles fait face le séquestre dans l'exécution de ses obligations, la durée possible de la période pendant laquelle le séquestre a l'intention d'exploiter l'entreprise avant qu'elle puisse être vendue (cette période est normalement la plus brève possible), l'existence d'acquéreurs possibles et leur solidité financière et la probabilité qu'un acquéreur soit déclaré employeur successeur et assume la totalité des obligations découlant de la convention collective. Ce dernier facteur peut s'avérer particulièrement important, parce qu'il donnera au syndicat l'assurance concrète que toutes les clauses de la convention collective seront respectées et que les salariés seront protégés. Un autre facteur clé est l'utilité de la procédure devant la CRTO et la possibilité que l'audience devant ce tribunal administratif puisse avoir lieu en temps opportun dans le contexte de l'exploitation temporaire de l'entreprise et de la vente proposées.

Ces critères risquent d'être mal appliqués. Ils chevauchent inévitablement ceux qui dicteront la décision sur le fond. Le juge de faillite doit prendre garde de ne pas se substituer au tribunal qui statuera sur le fond.

151 L'utilisation des critères suggérés par la juge Feldman comporte un deuxième danger. Les critères ne font pas mention explicitement des droits des employés. Or, le syndic représente les intérêts de tous les créanciers, y compris les employés. Les critères suggérés doivent donc être replacés dans le contexte de l'exercice d'un recours qui implique nécessairement des contraintes concernant les droits de tous les créanciers. Ils ne peuvent pas être utilisés pour permettre au syndic d'esquiver l'application d'une loi qui crée peut-être une contrainte, mais ne constitue pas une entrave à son travail. Le juge doit donc conserver à l'esprit que seule une entrave réelle justifie de limiter la portée du recours ou de refuser la permission d'intenter celui-ci. Sa tâche première consiste donc

à s'interroger sur l'effet concret de la demande et non sur quelque effet diffus de celle-ci sur l'administration de la faillite.

152 Le taux des salaires versés aux employés est un exemple de contrainte liée à l'application de la convention collective qui ne constitue pas habituellement une entrave au travail du syndic. Lorsqu'un syndic retient les services d'employés, il n'a pas nécessairement le droit de réduire leur salaire. En conséquence, si un syndicat veut faire déclarer un syndic successeur du failli dans le seul but de maintenir le taux des salaires et que l'audience devant la cour de faillite ne permet pas de concilier les intérêts des parties, la permission devrait normalement être accordée. Une ordonnance obligeant le contrôleur à payer les employés rappelés selon les termes prévus à la convention collective a été prononcée dans le contexte de la *Loi sur les arrangements avec les créanciers des compagnies*. Une telle ordonnance n'entraîne généralement pas de conflit avec les devoirs d'un liquidateur ou d'un syndic : *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.).

153 L'examen des conséquences d'une déclaration devant le juge de faillite est d'ailleurs de nature à sensibiliser les parties à leurs intérêts respectifs et à créer une atmosphère propice au respect des droits de tous. Le juge doit donc aborder la demande en ayant à l'esprit tous les intérêts en jeu et en acceptant que toute contrainte ne constitue pas nécessairement une entrave au travail du syndic. Une approche trop axée sur la flexibilité requise par le syndic dans sa gestion risquerait d'amener trop facilement à conclure à l'existence d'un conflit et serait peu respectueuse de l'art. 72 *LFI*.

154 En résumé, le juge appelé à décider s'il y a lieu d'accorder la permission de poursuivre un syndic doit évaluer concrètement la portée du recours recherché, identifier les conflits potentiels et moduler l'autorisation de façon à éviter qu'une poursuite fondée

sur le droit provincial n'ait pour effet d'entraver l'exécution des devoirs et responsabilités imposés au syndic par la *LFI*. La détermination de la portée du recours fait partie de l'évaluation de la cause d'action. Comme le droit constitutionnel ne tolère pas les conflits de compétence, une poursuite entraînant un conflit constitutionnel n'a pas de fondement juridique. Le juge doit moduler la permission de poursuivre. Si une telle modulation ne permet pas d'éviter le conflit, il doit alors refuser la permission demandée.

6. Application à l'espèce

155 Ma collègue la juge Abella conclut que la permission de poursuivre doit être accordée. J'estime pour ma part que le dossier doit être réévalué par la Cour supérieure. L'objectif poursuivi par le syndicat n'est pas précisé, sinon pour dire que la poursuite ne vise pas les dettes antérieures à la nomination. Cette information ne permet pas d'éliminer tous les conflits de compétence potentiels et ne saurait nous autoriser à substituer notre appréciation à celle du juge de première instance.

156 Pour apprécier la nature de l'analyse que le juge de faillite doit faire, il est utile d'exposer les faits de l'affaire.

157 Le 18 janvier 2002, l'intimée Société de Crédit commercial GMAC – Canada (« GMAC »), principale créancière des intimées T.C.T. Logistics Inc. et T.C.T. Warehousing Logistics Inc. (« T.C.T. »), est informée que T.C.T. a gonflé artificiellement ses comptes à recevoir et a obtenu de GMAC des avances dépassant de 21 millions de dollars la valeur des garanties. Le 24 janvier 2002, à la demande de GMAC, la Cour supérieure de l'Ontario nomme l'intimée KPMG Inc. à titre de séquestre intérimaire aux biens de T.C.T. L'ordonnance de nomination prévoit qu'aucune procédure ne peut être intentée contre KPMG sans la permission de la Cour supérieure. L'ordonnance précise

aussi que KPMG ne sera pas considérée comme ayant succédé à T.C.T. à titre d'employeur. Le 25 février 2002, T.C.T. fait cession de ses biens. KPMG est nommée syndic à la faillite. Au moment de la faillite, T.C.T. exploite au Canada et aux États-Unis une entreprise de courtage, logistique, transport et entreposage. La vente de l'entreprise est considérée urgente (refus de GMAC d'avancer des fonds additionnels, camions dispersés à travers le Canada et les États-Unis, biens périssables en transit ou en entreposage, garde des biens à risque, etc.).

158 T.C.T. emploie 1 357 employés à travers le Canada, y compris des employés syndiqués représentés par 13 syndicats différents. 225 employés travaillent dans la division de l'entreposage qui comprend des entrepôts situés à Edmonton, Calgary et Toronto. Les activités de ces entrepôts sont encadrées par des conventions collectives visant 78 employés, dont les 42 employés de l'entrepôt de Toronto, qui sont représentés par l'appelant, Industrial Woods & Allied Workers of Canada, Local 700 (le « syndicat »). Le 12 avril 2002, KPMG conclut avec Spectrum Supply Chain Solutions Inc. (« Spectrum ») une entente suivant laquelle Spectrum achète certains actifs spécifiques des entrepôts de T.C.T. La lettre d'entente initialement signée par Spectrum et KPMG prévoit que Spectrum exploitera les entrepôts et maintiendra la plupart des emplois. Toutefois, à la suite de l'examen des actifs, Spectrum estime que deux des entrepôts ne présentent aucun intérêt, dont celui de Toronto, qui est jugé délabré. L'entente finale prévoit que les employés sont licenciés et que Spectrum ne se porte pas cessionnaire du bail de l'entrepôt de Toronto. Le 16 avril 2002, les employés de Toronto sont informés de l'entente avec Spectrum et du fait que, le 18 avril 2002, KPMG demandera à la Cour supérieure de l'approuver. L'entrepôt de Toronto est fermé le 23 mai 2002.

159 Le 13 mai 2002, le syndicat présente à la CRTO deux requêtes dans lesquelles KPMG est désignée comme intimée. La première vise à faire déclarer Spectrum employeur succédant à T.C.T. et à KPMG suivant le par. 69(2) de la *LRT*. La deuxième est une plainte pour pratiques de travail déloyales. KPMG conteste les requêtes, plaidant que toute procédure est suspendue en vertu de l'ordonnance de nomination et de la *LFI* et que le syndicat n'a pas demandé la permission de la Cour supérieure comme l'exigent l'ordonnance de nomination et l'art. 215 *LFI*. Le 27 août 2002, la CRTO donne raison au syndic et suspend l'audition des requêtes.

160 Devant la Cour supérieure, le débat ne concerne que KPMG. La requête du syndicat visant à faire reconnaître Spectrum comme employeur succédant aux obligations de T.C.T. n'est aucunement en cause.

161 Le juge Ground, de la Cour supérieure, livre clairement son opinion sur le fond du recours que le syndicat veut exercer ((2003), 42 C.B.R. (4th) 221). Il conclut que le syndic n'a agi que comme liquidateur et que, en tant que tel, il ne doit pas être déclaré successeur du failli. Il ne s'interroge pas sur l'objectif concret recherché par le syndicat ou sur la possibilité de réduire la portée du recours qui pourrait être exercé devant la CRTO. De plus, il est impossible de déterminer s'il considère être en présence d'un cas de recours frivole ou n'ayant aucune chance de succès, ou s'il estime que la preuve ne soutient pas *prima facie* la cause d'action du syndicat. Quoiqu'il en soit, le juge analyse le fond du dossier comme s'il en était lui-même saisi.

162 Un constat s'impose. Les conclusions sans réserve sollicitées par le syndicat sont susceptibles d'entraîner des conflits directs avec l'application de la *LFI*. Ni les faits consignés au dossier ni les positions avancées par les parties ne permettent à la Cour de procéder à l'examen auquel la Cour supérieure doit se livrer. Le syndicat et GMAC ne

s'entendent pas sur la portée de la déclaration attribuant la qualité d'employeur recherchée en l'espèce par le syndicat. Le syndicat ne cherche pas à limiter dans le temps la déclaration attribuant au séquestre et au syndic la qualité de successeur. Il ne précise pas s'il sollicite une condamnation pécuniaire ou le réengagement de tous les syndiqués dans le contexte de la poursuite pour pratiques de travail déloyales. Le litige porte-t-il seulement sur les salaires ou aussi sur les déplacements de personnel et les licenciements? D'autres questions pourraient être soulevées par les parties, qui connaissent le dossier sous tous ses aspects. Non seulement y a-t-il lieu de vérifier la suffisance de la preuve, mais l'incertitude quant à la portée des recours et à l'objectif réel poursuivi par le syndicat empêche, péremptoirement selon moi, la Cour d'accorder au syndicat la permission qu'il demande et que le juge de la Cour supérieure a refusée.

7. Conclusion

163 Les analyses faites par la Cour d'appel et la Cour supérieure avaient pour effet d'éviter le conflit constitutionnel, mais pouvaient bloquer des recours légitimes. Même dans son rôle de liquidateur, le syndic est souvent tenu de se conformer à des obligations qui lui sont imposées par des lois provinciales. Toutes les contraintes inhérentes à une poursuite en vue d'obtenir une déclaration attribuant la qualité de successeur à titre d'employeur ne sont pas susceptibles d'entraver l'administration de la faillite. Les critères suggérés par la Cour supérieure et par la Cour d'appel sont en conséquence trop exigeants.

164 Je préconise plutôt d'incorporer à l'art. 215 un examen visant à prévenir les conflits constitutionnels. Cette approche limiterait l'application de la doctrine de la prépondérance aux seuls cas où le recours que le tiers veut exercer entrave la mise en œuvre de la *LFI*.

165 Par ailleurs, je crois que notre Cour ne devrait pas se substituer à la Cour supérieure dans l'évaluation de la cause d'action et de la suffisance de la preuve. L'évaluation requise par l'art. 215 amène le juge des faits à jouer un rôle actif. C'est à lui qu'il revient d'évaluer le dossier.

166 La Cour d'appel a ordonné le renvoi du dossier à la Cour supérieure. Cette décision était judicieuse. Le renvoi du dossier s'impose donc non seulement pour l'évaluation du dossier sous l'angle constitutionnel, mais aussi pour l'examen du sérieux de la cause d'action et de la suffisance de la preuve. Cet exercice plus complet n'a pas été fait par la Cour supérieure. Le dispositif de la Cour d'appel devrait donc être confirmé.

167 Pour ces motifs, je suis d'avis de rejeter les appels principal et incident.

79P.

Tab 7

COURT FILE NO.: 02-CL-4553
DATE: 20031030

03 323 062

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF BELL CANADA INTERNATIONAL INC.

AND IN THE MATTER OF AN APPLICATION BY BELL CANADA INTERNATIONAL INC. UNDER SECTION 192 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, as amended (the "CBCA")

BEFORE: FARLEY J.

COUNSEL: *John T. Porter*, *Derrick C. Tay* and *Alan B. Merskey*, for BCI

Christine Snow, for Directors of BCI

James H. Grout, for the Monitor

W. Grant Worden, for BCE

J.L. McDougall, Q.C. and *Michael D. Schafler*, for Peter Legault

Frederick L. Myers, for Horizon

Robert Staley, for Hicks, Muse, Tate & Furst, Inc. and Davivo International Ltd.

HEARD: October 29, 2003

ENDORSEMENT

[1] This was a motion by Bell Canada International Inc. ("BCI") for an order:

> (b) authorizing and approving the entry of BCI into a voting agreement (the "Voting Agreement") with Horizon, Cablevision do Brazil, SA ("Horizon") to vote its 75.6 percent interest in the common shares of Canbras Communications Ltd. ("Canbras") in favour of a sale agreement between Canbras and Horizon (the "Sale Agreement") pursuant to which Horizon proposes to acquire substantially all of Canbras' assets (the "Canbras Sale Transaction").

[2] It appears to me that all interested persons have been duly served, including Peter Legault ("L"), a minority shareholder of Canbras. L had originally been favourably disposed towards a bid by Elicio which was to acquire only BCI's shares in Canbras as this would allow him to continue as a shareholder of Canbras, a CBCA public corporation. It appears that the two bidders who were selected for further negotiations (Horizon and Hicks) were advised in early

June 2003 by Canbras that the Board of Canbras would meet on June 23, 2003 to make a final decision on which of the two bids to pursue, and wanted both Horizon and Hicks to submit final bids. Horizon's final bid was for the CPAR shares (the holding company subsidiary of Canbras) while Hicks bid for all the shares of Canbras. Apparently, the two bids were compared after adjustment on an apples for apples, oranges for oranges basis, and the Horizon bid was determined to be substantially higher than the Hicks bid (which was determined to be subject to significant closing conditions that had a high risk of not being met).

[3] No one has submitted any further bid or proposal of any nature or sort. However, L contacted the BCI Monitor on October 14, 2003, indicating that he had a party that was interested in submitting a bid at a price higher than the proposed Horizon transaction (the salient terms of which, including price, had been publicly disclosed on October 8, 2003). L advised the interested party was a combination of Hicks and Elicio who would make a joint offer for all the shares of Canbras. (There appears to be some possible discrepancy here as a bid for all shares of Canbras would in fact negate L's desire to remain a shareholder of Canbras). On October 20, 2003, L contacted the Monitor and advised that the Monitor would likely receive a letter with details of the offer by October 24, 2003. No such offer has yet been received.

[4] According to L, Hicks advised with respect to a continuation of bidding in the spring of 2003 that Hicks would not unilaterally increase its bid, but would be prepared to top another bid (which assumes that this was part of the process – which it appears it was not – and that Hicks would be advised of the price and other terms of the other bid; this presumes that the other bidder would be similarly advised of Hick's bid, but this type of process is certainly belied by the very significant bid jump by Horizon).

[5] At paragraph 28 of its report, the Monitor stated:

> 28. Based on its procedures as outlined above, the Monitor is satisfied that the Canbras sale process was conducted fairly and openly, that all interested parties were given a commercially reasonable opportunity to submit offers to Canbras and that a "level playing field" was maintained at all times.

[6] L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

> A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" – suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.

> Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

[7] Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

> Officers of the court [such as court appointed receivers) (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

[8] L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Re Bakemates International Inc.*, [2002] O.J. No. 3569 (C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 5; *Re Anvil Range Mining Corp.*, [2001] O.J. No. 1125 (Ont. S.C.J. [Comm. List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:
>
> > As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs

> of the Commercial List – cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.
>
> The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines – The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

[9] L raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same (the exigencies of the situation may require otherwise if there is urgency). The provision of an affidavit is not of course a mandatory invitation to cross examine in the sense of delaying what must be accomplished on a timely basis, if it is to be accomplished at all (in other words, inappropriate delay should not be allowed to kill an otherwise meritorious motion). The Commercial List is well populated by counsel who have warmly embraced the 3Cs of communication, cooperation (at least in procedural matters) and common sense; I know there will be no problem with this question of unwarranted delay if the 3Cs continue to be observed.

[10] Here there was only the Monitor's report; in my view it would have been preferable to have had an affidavit (possibly, for instance, from Mr. Hendricks or from a representative of Credit Swiss First Boston, advisor to Canbras). However, given the limited nature of the relief requested by this motion – and the limited nature of the order which in fact can be granted, I do not see that the failure to provide such an affidavit is fatal.

[11] At para. 30 of its report, the Monitor has advised the Court and the parties:

> 30. Based on the above procedures, the Monitor is satisfied that the proceeds to be realized from the Canbras Sale Transaction maximize amounts available for distribution to the BCI Stakeholders. (emphasis added)

As a side note, I would observe that the Monitor here correctly proceeded by providing a "main" report which was circulated with enough time to allow reflection and a "follow up" report to advise as to any intervening matters on an up to date basis.

[12] There has been no prior request to this Court to deal with anything at the Canbras (or lower) level and certainly nothing with respect to the marketing process. The Canbras transaction is proceeding as an "ordinary" sale transaction as governed by s. 189(3) specifically of the CBCA and s. 189 generally. This will involve a right to dissent under s. 190. One may observe that consideration will also have to be given to s. 192(1) and (3). I also stressed that aside from the other concerns in this paragraph, nothing that this Court does in respect of this motion should be taken as authorizing, approving, sanctioning or otherwise dealing with the activities of the board and management of BCI, Canbras or any other lower tier subsidiary; in other words, any order I may grant in respect of this motion will not, nor is it intended, to create either a shield or a sword with respect to any oppression or other claim.

[13] I observed that the voting agreement which was handed up was ambiguous as to the quality of the court approval sought and that it needed to be revised. The Court does not have a copy of the Sale Agreement; it was withheld from the parties as being confidential and sensitive. The Court in no way is to be taken as approving the terms of the Sale Agreement. It is up to the board and the management to determine if it is in the best interests of BCI to vote in favour (I assume they have made that decision). Given the Monitor's conclusion in para. 30 of its report, I see no reason to prevent that vote from taking place.

[14] In conclusion, the Court orders that BCI (if authorized by its Board) may enter into a voting agreement with Horizon which obligates it to vote in favour of the Sale Agreement in respect of a vote pursuant to s. 189(3) of the CBCA (including any terms which are reasonably ancillary to that).

J.M. Farley

Released: October 30, 2003

Tab 8

Court File No. 52941/90
B38/92

ONTARIO COURT (GENERAL DIVISION)
(COMMERCIAL LIST)

95 023 042

B E T W E E N:

THE MORTGAGE INSURANCE COMPANY OF CANADA Plaintiff - and - INNISFIL LANDFILL CORPORATION Defendant	J.L. McDougall, Q.C. and N.J. Emblem for Price Waterhouse Limited, Receiver and Manager of the Innisfil Landfill Corporation R. Lindgren for the Hodgsons Linda McCaffrey, Q.C. for the Attorney General M. Green for the County of Simcoe C. Findlay for the Town of Innisfil K. Thomson for the Mortgage Insurance Company of Canada J. Coop for the Ministry of Environment and Energy Heard: November 16, 1994

ENDORSEMENT ON CROSS MOTION AND MOTION

ENDORSEMENT ON CROSS-MOTION BY MINISTRY OF THE ATTORNEY GENERAL

Ms. McCaffrey says that she does not know the nature of the relief being sought - and that, in failing to specify, the Receiver has breached the Rules and the Practice Direction. Over and above that she complains that there is no sworn affidavit from the Receiver.

Mr. Thomson, for Mortgage Insurance Company of Canada, ("MICC"), characterized the relief sought as being as plain as the nose on one's face. I agree - but then perhaps the difficulty with that metaphor is that it requires one to take a look in the mirror. The objecting parties would have a difficult time in attempting to peer into the looking glass when they are doing an imitation of an ostrich. Alice in Wonderland in comparison looks like a normal regime.

The question in issue was put squarely and fairly in Mr. McDougall's letter of September 23, 1994 to Ms. McCaffrey, a copy of which other counsel have in the Compendium relating to Price Waterhouse Limited's ("PWL") obligations as Receiver and Manager ("R/M")relating to the forcemain and pumping station required by the Director's (Wilfred Ng) letter of September 16, 1994 in light

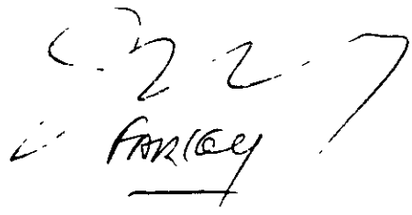
of PWL's lack of funds in this receivership and what the Ministry of Energy and Environment's ("MOEE") position was towards that problem.

As to the Practice Direction, I am puzzled by counsel's reluctance to sign the Request Form since the time was cleared for what they understood would be a directions question. I am afraid that the litigation system would be badly served if, as a regular matter, opposing parties had to be served with a complete record before agreeing to dates.

As to the question of there not being any affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the

Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross)examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

Motion by the Ministry of the Attorney General ("AG") to quash is dismissed.



MOTION OF RECEIVER ("PWL") FOR DIRECTIONS

As Mr. McDougall said this morning, he put the R/M's request for advice and directions into as plain English as he was capable. This is as follows:

(a) Whether, having in mind the settlement reached on July 26, 1994, it is sufficient for Price Waterhouse Limited, ("PWL"), to install the Leachate Collection System alone before applying to the Court for a discharge and termination of the receivership;

(b) If it is the Court's view that PWL is obliged to install a pumping station and forcemain system, how is such an installation to be financed?

I do not think that I had any difficulty in understanding this request for directions (of course the proof of that pudding will be in the eating and how the R/M reacts to my advice and directions herein). I must say, however, that I was more than somewhat dismayed to hear the reaction of those truly opposing the R/M since either they did not understand the request or they refused to try to understand it. The "answers" they came back with did not fit or even resemble the "questions". Perhaps it is that these parties have been fighting each other for too long. In this regard, I must

reiterate my concern for the sake of public health and safety. People like the Hodgsons should not have become pawns in this game of chess. I share the Joint Board's concern (see Joint Board's May 14, 1994 clarification):

> Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation.

Allow me to note several items:

(a) The Settlement Agreement of July 26, 1994 provides:

> 1. PWL will remain as Receiver and Manager until the Leachate Collection System as described in the Development and Operations Report dated September, 1991 by Henderson, Paddon & Associates Limited is installed and operational.
>
> 2. PWL will cause the Leachate Collection System to be installed as soon as possible, the cost of such installation to be billed to the MOEE for payment out of the balance of the security fund established for the site.
>
> 3. [PWL also agreed to do capping measures as agreed on April 25, 1994 meeting].

Thus the Settlement Agreement requires PWL to complete the Leachate Collection System and the capping. Not to do so would be a breach of the settlement by PWL (unless it had just legal cause). During the period of installing the Leachate Collection System to the stage of it being operational, PWL has also agreed to remain as Receiver and Manager. One however could see PWL as the operational

phase neared reality obtaining a court date for a discharge and termination of the receivership. Under the wording of the Settlement Agreement it would appear that this motion would be heard at the same time as the adjourned MOEE motion and the Hodgsons' motion given the reference in paragraph 5 of the Settlement Agreement to a (singular) date to be agreed upon and fixed by the Registrar of this List.

(b) I was also referred to the Joint Board's decision of April 5, 1994, its clarification of May 13, 1994 and the Director's decision of September 16, 1994 (and attachments). I understand the draft decision of July 4, 1994 circulated amongst the parties to have been materially the same for all intents. I thought it quite helpful for Mr. Coop to give me a "precis" of the immediate history and jurisdiction.

I further understand that PWL's position is that there are no "funds" in the receivership, at least monies of the magnitude needed to carry out the subject work - neither the Leachate Collection System which I recall is in the neighbourhood of $800,000 nor a fortiori the forcemain and pumping station, estimated at some $2.5 million. While apparently the AG and the MOEE dispute this impecuniosity of the receivership and reserve under the settlement the right to inspect the R/M's accounts on

reasonable notice, it is also clear that the MOEE agreed because of the alleged impecuniosity that the Leachate Collection System would be billed to the security fund (but subject to a motion for reimbursement). Thus, it would appear to be reasonable to assume that the same funding problem still exists in the receivership absent any new information which has thus far not been forthcoming.

APRIL 5, 1994 ORDER

(a) p. 36 - If [PWL as R/M] cannot or will not comply with such an order then it can approach the Court and seek a termination of the receivership.

(b) p. 48 (i) Given the proximity of private property and significant natural features, [PWL as R/M] and/or the Ministry should implement proper leachate mitigation immediately.
(ii) Duplicate of p. 36 cited above.

(c) p. 49 - The Director has a legislated mandate to uphold the purpose and provisions of the EPA (Environmental Protection Act) and the OWRA (Ontario Water Resources Act). If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed.

(d) p. 50 - The Joint Board "deferred" (this apparently means "delegated") the obligation to the Director to determine detailed requirements for a leachate collection and management system. Under 1d [PWL as R/M] and the MOEE were to report back to the Joint Board within 90 days as to progress on condition 1a, b and c. [This would imply that this report should have been by early July which would in turn imply that the Director would have given his decision prior to that time].

MAY 13, 1994 CLARIFICATION

(e) The Board's [April 4, 1994] Order requires the implementation of a leachate management system and creates responsibility on the part of the Receiver and Manager of the Innisfil Landfill (Price Waterhouse Limited) to comply with this Order. The Board draws the attention of the parties to the following passage of Section A (4) of its April 5, 1994 Reasons for Rulings and Order:

> A(4) The [PWL as R/M] responsibility to comply with the relevant regulations, environment and legislation is confirmed by the cited authorities and paragraph 19 of the Court Order. Given the context of the receivership and the Certificates regulating the operation of the site, other responsibilities also exist. These responsibilities involve the development, approval and timely introduction of proper leachate management and the prompt

> pursuit of an EPA hearing for the expanded use of the site. In the Board's opinion, the proponent's responsibilities should be viewed within this context. After considering paragraphs 3 and 19 of the Court Order, the Board believes it is reasonable and appropriate to issue an Order that is consistent with the goals and provisions of the relevant legislation and regulatory regime (e.g. EPA s. 2 and 39, OWRA s. 26(1)). If the proponent cannot or will not comply with such an order then it can approach the Court and seek the termination of the receivership.

Price Waterhouse Limited, in its role as Receiver and Manager of the Innisfil Landfill, is required to implement the Board's April 5, 1994 Order. However, the Board believes that better leachate management should be promptly implemented even if Price Waterhouse Limited discontinues its involvement with the site. The Board's Reasons for Rulings contained the following relevant comment:

> ... If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed. Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation ... .

DIRECTOR'S DECISION SEPTEMBER 16, 1994

(f) p. 7 - PWL will require a s.53 OWRA approval to construct the forcemain. It should apply to receive that approval and whatever further and other approvals may be required (e.g. Planning Act, etc.). In the interim, there may be a need to dispose of the collected leachate through alternative means. [trucked leachate to the Barrie WPCP agreed as acceptable interim solution].

(g) [Regarding PWL's counsel's inquiry of July 5, 1994 concerning the Ministry's responsibilities in this matter and the effect of the receivership order], the Director repeats his July 15, 1994 letter. This includes:

> again, as to the extent of, and reasons for, PWL's alleged financial inability to perform the work ordered by the Joint Board, those allegations did not prevent the Board from imposing liability upon PWL. Nor do I have a discretion to change the Board's Order based on these allegations. I suggest that the issue of financial liability is one which will be addressed on the motion to Commercial Court, and you should make your submissions there. [The reference to this motion would appear to be the (adjourned by settlement of July 26, 1994) motion of PWL.]

COMMENTS

In discussing this advice and direction I would wish to stress that I do not consider this to be an appeal of the Board's Order (including the deferred portion to the Director which apparently forms part of the Board's Order) nor a judicial review thereof. Nothing which I say herein should be taken or interpreted as such. I wish merely to provide PWL with its requested advice and directions as it is entitled to receive from this Court. To the extent that PWL has inside or outside the receivership incurred liability by virtue of operation of the environmental legislation or a decision of the Joint Board, I make no comment save the following. Some of the Board's language in its Order is so clear that it would be difficult to imagine that there could be other than a straight forward ordinary interpretation; in certain other areas there may be some question of precise intent (in this I mean no disrespect to the Board, as I am sympathetic enough as to the question of how to interpret [court] decisions including my own).

Given the various "invitations" contained in the foregoing, it would not appear that the Board was advancing the proposition that PWL could not apply to the Court for a discharge and termination of the receivership until any fixed time (either calendar of fulfilment of condition - eg. completion and operation of the

collection system or of the forcemain and pumping station). Thus, it would appear that the Settlement Agreement obligations are the only barriers to such a court application. This would appear to answer Mr. McDougall's question (a).

As to (b), as I have answered (a) in the way which I have I do not see that if PWL were successful in its discharge and termination motion that it would be obliged to install the forcemain and pumping station in the direct physical or physical supervisory sense. The Board would appear to have concluded that if PWL cannot or will not comply with the Board's Order, it should approach the Court and seek a termination of the receivership. It would seem a necessary implication of a successful motion in Court that PWL after termination of the receivership would not be required to directly or supervisorily physically install the forcemain and pumping station.

Rather if PWL does not so install the system (apparently with or without a termination of the receivership) the Board expects the MOEE to install (directly or supervisorily physical) the system.

That leaves the question of funding to be answered. We have seen the funding arrangement for the collection system under the Settlement Agreement. What of the rest? It would seem that if PWL

continues as R/M it would be obliged to not only physically install but also to fund the work because of the Order of the Board. If the MOEE installed physically the work, then one would assume that the MOEE would initially fund it but it may well pursue PWL for reimbursement (either because it feels there are "excess" receivership funds which should have been available or because PWL has a continuing obligation under the environmental legislation or the Board Order notwithstanding the termination of the receivership).

That last aspect would appear to be a somewhat open question. There are parts of the Board's Order which impose an obligation on PWL but it is to me at least somewhat unclear as to whether this liability affixes to PWL (i) in its general entity capacity (and is thereby ongoing no matter what happens to the receivership) or (ii) in its R/M capacity. In this latter position, there also seem to be two paths - (A) that a termination of the receivership and a discharge of PWL as R/M would relieve it from any ongoing responsibility not then accrued or (B) responsibility is to be fixed upon it as a result of it having been R/M at the time of the Board Order, which responsibility is not in the Board's view (and within what it sees as its jurisdiction) terminated by a Court termination of the receivership and a discharge of PWL as R/M.

While it appears clear that the Court Order appointing PWL as R/M contemplated in paragraph 11 that PWL's liability as R/M would be limited to net cash proceeds of the receivership, it may be that the Board in the proper exercise of its jurisdiction or the environmental (or other) legislation affecting the situation may impose a greater liability upon PWL. It would seem to me that PWL may find it helpful to ask for a further clarification from the Joint Board. It may be that once my endorsement has been typed up it would be of some assistance in pinpointing the areas of concern.

As discussed in the hearing one should clearly differentiate between the liability to do something and the liability to provide funding for it. Then there is the difference between a primary responsibility and a secondary one which comes into play if the person with the primary fails to do something on a timely basis. This later aspect also carries with it the principle of reimbursement.

I believe the Board is as concerned as I am that the squabbling between the MOEE/AG and PWL continues at a faster and greater rate than the physical implementation of the required systems needed for public health and safety. Cooperate efforts are far more productive; non-cooperative efforts merely raise the suspicions of the innocent party as to all future dealings (but

then some always claim to be innocent and the other side non-innocent notwithstanding the overwhelming objective evidence to the contrary). I am, however, delighted to hear that notwithstanding this blowup both the MOEE/AG and PWL report that implementation of the Settlement Agreement is proceeding in a bona fide way with due dispatch.

In conclusion, I would merely observe that it is most helpful if the obligations of receiver/managers are spelled out (so that they can be easily known by the receiver/manager) in order that there be no unpleasant surprises of unexpected liabilities, especially if there is no realistic way to fund same. While that may be the hard result in a particular case, no doubt the law of economics (as well as fair play) will take over and there will be an absence of willing potential receiver/managers available to go into situations where they are needed. Who then will be available? Who then will be appropriately qualified? It is, of course, one thing to have a system or regime which works well - but only on paper and another which works well in practice.

It should be remembered that "once bitten, infinitely shy".

Costs: PWL awarded $1500.00 payable forthwith by MOEE/AG. I see no reason why Ms. McCaffrey could not have more cooperatively

attempted to discuss and answer to the extent feasible and reasonable the aspects of Mr. McDougall's letter of September 23, 1994.

J.M. FARLEY

Postscript: The Board referred to paragraphs 3 and 19 of the Court Order. I presume this is the Order of Granger J. dated August 13, 1990. If so, I have some difficulty in relating paragraph 3 which appears to deal with PWL being able to examine persons under oath to be linked with PWL's responsibility under the Board's Order but I may be missing something quite obvious. As to paragraph 19, at first blush this would appear to relate directly to the Court Order being a non-impedance of the MOEE in carrying out its duties and not directly impose liability or responsibility upon PWL although I note that of course PWL as Receiver and Manager may well have some liability by virtue of its activities and the legislation referred to of the EPA and the OWRA. Again, I note that I may be missing something obvious.

J.M. FARLEY

Released: January 12, 1995

Court File No. 52941/90
B38/92

ONTARIO COURT (GENERAL DIVISION)
(COMMERCIAL LIST)

B E T W E E N:

THE MORTGAGE INSURANCE COMPANY
OF CANADA

Plaintiff

- and -

INNISFIL LANDFILL CORPORATION

E N D O R S E M E N T

FARLEY J.

RELEASED: JANUARY 12, 1995

18p

Tab 9

CITATION: Farber v. Goldfinger, 2011 ONSC 2044
COURT FILE NO.: 10-8629-00CL
DATE: 20110331

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: A. FARBER & PARTNERS INC., the trustee of the bankruptcy estates of Montor Business Corporation, Annopol Holdings Limited and Summit Glen Brantford Holdings Inc., on its own behalf and on behalf of all the creditors of Summit Glen Brantford Holdings Inc., Annopol Holdings Limited and Summit Glen Waterloo/2000 Developments Inc., Applicant

A N D:

MORRIS GOLDFINGER, GOLDFINGER JAZRAWY DIAGNOSTIC SERVICES LTD., ANNOPOL HOLDINGS LIMITED, SUMMIT GLEN BRANTFORD HOLDINGS INC., SUMMIT GLEN WATERLOO/2000 DEVELOPMENTS INC., SUMMIT GLEN BRIDGE STREET INC., MAHVASH LECHCIER-KIMEL AND JACK LECHCIER-KIMEL, Respondents

APPLICATION pursuant to the *Business Corporations Act,* R.S.O. 1990, c. B.16, the *Fraudulent Preferences Act,* R.S.O. 1990, c. F.29 and the *Assignments and Preferences Act,* R.S.O. 1990, c. A.33

BEFORE: MESBUR J.

COUNSEL: Milton A. Davis and Ben Hanuka for the moving parties Morris Goldfinger and Goldfinger Jazrawy Diagnostic Services Ltd.

Melvyn L. Solmon for the moving party Jack Lechcier-Kimel

P. Shea for the responding party, A. Farber & Partners Inc.

HEARD: March 28, 2011

E N D O R S E M E N T

Background to this motion to expunge a Trustee's report:

[1] This is a motion to strike or expunge a Trustee's report to prevent its use on a pending motion to removal the Trustee. A. Farber & Partners Inc. (Farbers) is the Trustee in bankruptcy of the estates of various corporate entities listed as applicants in

the title to these proceedings. In its capacity as Trustee, Farbers has brought this application to set aside various transactions involving the respondents Dr. Morris Goldfinger, his corporation Goldfinger Jazrawy Diagnostic Services Ltd. and the respondent Mr. Lechcier-Kimel as improper conveyances and preferences. The application also seeks relief under the oppression provisions of the OBCA. In support of the application, the Trustee filed an affidavit.

[2] In the context of this application, Dr. Goldfinger and Mr. Lechcier-Kimel have brought a motion to remove Farbers as Trustee for the various corporations. Although the removal motion is not brought in the individual bankrupt estates, but rather in this application, it is founded on s. 14.04 of the *Bankruptcy and Insolvency Act* which is the section that governs the removal and replacement of trustees.

[3] Section 14.04 permits the court, on the application of any "interested person" to remove a trustee "for cause", and appoint another trustee in that trustee's place. The issues on the removal motion, therefore, are first, whether the moving parties are "interested persons", and second, in the context of this case, whether Farbers is in a position of conflict that constitutes "cause" under the provision of the section.

[4] Farbers responded to the removal motion by filing a report. The moving parties objected, suggesting the proper course was to file an affidavit in response. They complained about their inability to cross-examine on a report, as opposed to an affidavit.

[5] Newbould J made an order permitting cross-examination, but only on the issues of Farbers' alleged conflict and the issue of whether the moving parties are "interested parties" in the context of a removal motion under section 14.04.

[6] For various reasons, the moving parties chose not to exercise their right to cross-examine. They did not seek leave to appeal Newbould J's order, nor did they apply to amend or expand any of its terms. Instead, they have launched this motion to expunge or strike out the Farbers report. They say the report does not constitute admissible evidence on their motion to remove Farbers as trustee of the various estates.

Discussion:

[7] Counsel tell me there is no reported case directly on point. That is to say, they could not refer me to any case in which a Trustee responded to a motion for its removal with an affidavit and the court commented on the use of the affidavit. They also could not refer me to any case in which a Trustee responded to a motion for its removal with a report, and the court commented on the use of a report. They could point to no case in which the court determined which procedure is appropriate. I suspect this is because no one has objected before to the form in which an impugned trustee has responded to

a removal motion. I must therefore approach my task by way of analogy, and by applying first principles.

[8] The real question is whether this case (that is the motion to remove the Trustee) is one of the circumstances where the court can and should accept the Trustee's report as admissible evidence. This is only a threshold issue. I need only determine whether the report should be struck, or whether it should constitute admissible evidence. My role is not to determine what weight, if any, should be given to it. That is the task of the judge who hears the removal motion itself.

When have reports been accepted?

[9] The *Bankruptcy and Insolvency Act* sets out particular circumstances where a Trustee is required to file a report. Counsel for Dr. Goldfinger has helpfully outlined them in Schedule C to his factum. A motion to remove a Trustee is not one of the particular circumstances where the Trustee is required to file a report. That said, these are not the only circumstances in which Trustees have filed reports, and the courts have accepted them as evidence.

[10] Trustees and Receivers are officers of the court with particular duties of impartiality and fair dealing. When someone acts as a Trustee of a bankrupt estate, additional obligations are imposed by the terms of the *Bankruptcy and Insolvency Act* and the overriding supervisory status of the Superintendent of Bankruptcy.

[11] Those who act as Trustees or Receivers, in bankruptcy proceedings, receiverships or restructuring under the *CCAA,* routinely report to the court and set out recommendations and responses to questions by way of reports. The courts routinely accept the reports as evidence. Courts do so not only in the situations specifically enumerated under the *Bankruptcy and Insolvency Act.*

[12] For example, in a case related to this one, *Re Bankruptcies of Jack and Mahvash Lechcier-Kimel* [1] on a motion under s. 43(13) of the *Bankruptcy and Insolvency Act* the court relied on the Trustee's reports in coming to its conclusion that various parties, including the Trustee itself, should be added as creditors. There, the Trustee was seeking to be added as a creditor. It filed two reports as the evidence to support its position. The respondents were permitted to cross-examine. The court accepted and relied on the reports, even though s. 43(13) does not make specific reference to a Trustee's delivering a report in those circumstances. Interestingly, s. 43(3) requires that on an application for a bankruptcy order itself, the applicant is required to support the application with an affidavit. Nevertheless, in *Lechcier-Kimel (Re),* the court accepted the Trustee's report as sufficient evidence to support the relief sought.

[1] 2011 ONSC 1859 (S.C.J.)

[13] Trustees' or Receivers' reports have been accepted as admissible evidence on motions by an interim receiver for a finding of contempt against a shareholder of the debtor.[2] Courts have accepted reports as evidence in opposed motions by a Chief Restructuring Officer to file a CCAA plan[3], opposed motions seeking approval to make payments[4] or to sell property[5], and responding to opposed motions for leave to take proceedings against a receiver[6]. Other instances are set out in Farbers' factum.

[14] From these cases I conclude it is entirely proper for the Trustee to submit its evidence on this motion in the form of a report.

Is the report admissible evidence?

[15] Although it is clear the courts have accepted Trustees' reports as admissible evidence, the case law does not articulate particularly well the basis on which the reports are admissible. The moving parties attack the Farbers report's admissibility on various fronts. First they say that the *Rules of Civil Procedure* set out the material to be used on a motion. They infer that as a result, affidavits are required to respond to motions, and therefore a report is an inadmissible response.

[16] Second, they say an affidavit is required in response to a motion to ensure procedural fairness, which includes the right to cross-examine.

[17] Third, they suggest the report is hearsay, does not meet any of the hearsay exceptions, and thus is inadmissible.

[18] Fourth, they say the report should not be admitted because it is neither balanced nor neutral.

[19] Last they take the position the nature of the motion itself requires an affidavit, and is not the type of motion in which a Trustee's report is permitted.

[20] I will deal with each of these arguments in turn.

Are affidavits required to respond to motions?

[21] The moving parties suggest that although this application arises in the context of various bankruptcies, the application itself is simply a proceeding commenced under the *Rules of Civil Procedure,* and absent any contrary provision under the Bankruptcy Rules, the general *Rules of Civil Procedure* must apply. They say

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[2] *New Solutions Financial Corp. v Jennart International Inc.,* 2011 CarswellOnt 238 (S.C.J.)
[3] *HSBC Bank Canada v. Bear Mountain Master Partnership,* [2010] B.C.J. No 1346 (S.C.)
[4] *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.,* 2007 CarswellOnt 5799 (S.C.J.)
[5] *Big Sky Living Inc. (Re),* 2007 CarswellAlta 25 (Q.B.)
[6] *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.,* 2007 CarswellOnt 4896 (S.C.J.)

Farbers is a litigant like any other, and must be subject to the same rules as any other litigant.

[22] They rely on rule 39.01 which sets out the evidence to be used on a motion. Since the rule contemplates affidavit evidence, they suggest no other evidence is either permissible or admissible. As a result, they argue the report must be expunged.

[23] I do not see it that way. Rule 39.01(1) simply states that evidence on a motion or application "may be given by affidavit unless a statute or these rules provide otherwise." The rule does not require that the only evidence to be used on a motion must be in affidavit form. I come to this conclusion by looking at rule 37.10(2) which sets out the necessary contents of a motion record. Subrule 37.10(2)(c) refers to "a copy of all affidavits *and other material* served by any party for use on the motion." [emphasis added] From this I infer that material other than affidavits may properly be used on a motion.

[24] As Farbers' counsel pointed out, in CCAA proceedings, receiverships and bankruptcies, reports are admitted as evidence every day. They are admitted on a vast variety of motions, contested and not. I have already referred to a variety of situations in which this has been the case.

[25] It seems to me that a Trustee's report, by both custom and law, is in no more diminished a position as far as its reliability is concerned as is an affidavit based on information and belief. In fact, given that it is prepared by an officer of the court, with both statutory and common law duties, it is in many ways more reliable than an affidavit that is based entirely on information and belief, but is nevertheless under the *Rules of Civil Procedure, prima facie* admissible.

Does procedural fairness require the right to cross-examine?

[26] Dr. Goldfinger and Mr. Lechcier-Kimel also attack the report on the basis that it deprives them of the right to cross-examine its maker. They say the report is not signed by an individual, and as a result, they do not know whose knowledge forms the basis of the statements in the report, and they are not able to cross-examine to test the accuracy of the statements in the report.

[27] This argument carries no weight. First, common practice permits a party to raise questions about the statements in the report, and ask the Trustee to respond to those questions. The Trustee is obliged to respond. Courts have developed a process

to permit this, and, in some circumstances, to permit a representative of the Trustee to be cross-examined.[7]

[28] Second, and more importantly, here the court made an express order permitting cross-examination. The moving parties take issue with the scope of the cross-examination, and the fact they could not choose who would be presented for cross-examination. They took no steps to seek leave to appeal Newbould J's order. They did not seek to vary it when they encountered what they characterized as difficulties with the person Farbers proposed as the examinee. Having failed to avail themselves of the substantive rights they were given to cross-examine, they can hardly say they have been deprived of procedural fairness.

[29] Even where a court's officer (for example, a court-appointed Chief Restructuring Officer) files an affidavit, the right to cross-examine is not automatic. For example, in *Starcom International Optics Corp. (Re)*[8] the court refused to permit cross-examination because it found there were no issues with the evidence in the affidavit.

Is the report is hearsay and inadmissible on that basis?

[30] At the heart of the moving parties position is their submission the report is hearsay. They say the report does not meet any of the exceptions to the hearsay rule, and therefore it is inadmissible.

[31] Farley J dealt with this in *Bell Canada International Inc. Re*[9], the only case that squarely deals with this issue. When faced with the argument that a Monitor's report was "not evidence", he stated first, it was not "necessary to delve deeply into this question but ... to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding."

[32] In support of this proposition, Farley J quoted approvingly from Wigmore[10] which stated that a report, if made under due authority, stands upon no less favourable footing than other official statements. It is admissible under the general principle. The general principle referred to is the hearsay exception that permits public documents (or as Wigmore calls them, "official statements") to be admitted into evidence. Reports by the court's officers meet the general criteria for the public document exception:

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[7] see, for example, *Anvil Range Mining Corp. (Re),* 2001 CarswellOnt 908 (S.C.J.); *Ravelston Corp. (Re),* [2007] O.J. No. 4414 (S.C.J.), aff'd, 2007 CarswellOnt 1115 (O.C.A.)
[8] [1999] B.C.J. no. 2125 (S.C.)
[9] 2003 CarswellOnt 4537 (S.C.J.)
[10] Wigmore, John Henry, *Evidence in Trials at Common Law*, Little Brown & Company, Toronto & Boston: 1974, at pages 791-6

a) they are made by a public official – trustees are licensed by a government official, the Superintendent in Bankruptcy, and have public duties imposed both by the court and by the *Bankruptcy and Insolvency Act*;

b) the Trustee makes the report in the discharge of a public duty or function – the trustee functions in the context of its duties to the court and to the creditors, and its reports communicate the necessary information to discharge those duties;

c) the reports are made with the intention they serve as a permanent record – as part of the court record, reports are permanent; and

d) the report is available for public inspection – as part of the court record, the report, like the court file, is open to public viewing.

[33] In addressing the issue of whether a report is made under "due authority", Farley J also referred approvingly to *The Law of Receivers and Administrators of Companies*[11] which states that officers of the court (which would include Trustees) are "appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex. p James [(1874) 2Ch. App 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably."

[34] Trustees, as the court's officers, operate under these obligations. In addition, they are subject to the provisions of the *Bankruptcy and Insolvency Act,* including following the prescribed Code of Ethics referred to in s. 13.5 of the *Act*. In looking at a Trustee's obligations, it is important to look at the entire scheme of the *BIA* in relation to a Trustee's duties and continued representation of an estate. For example, section 14 gives the creditors the right to substitute one Trustee for another. Most importantly, the Superintendent has broad powers to deal with a Trustee who has acted improperly. These include revoking the Trustee's licence, requiring the Trustee to make restitution, limiting the Trustee's ability to practice, or doing anything else the Superintendent considers appropriate and the Trustee agrees to. Thus, unlike a Receiver, whose role derives solely from the court order appointing it, the Trustee is subject to the additional duties imposed by the *Bankruptcy and Insolvency Act* itself, and the additional supervision of the Office of the Superintendent.

[35] On the issue of hearsay, the *Rules of Civil Procedure* also set out what may be included in affidavits that are admissible on motions. On an interlocutory motion, an affidavit may be made "on information and belief". What this means is that hearsay evidence is admissible on a motion if the deponent sets out the source of the hearsay evidence and expresses a belief in its truth. It is always up to the court to determine the weight to be given to such evidence. Believing something to be true,

[11] Sir Gavin Lightman and Gabriel Moss, (3rd ed., 2000; Sweet & Maxwell, London) at p 115

however "reliable" the source, and however fervently one believes in the truth does not, of course, make it true. While the Trustee's report may contain hearsay, or indeed be hearsay, given the safeguards imposed by the Trustee's being the court's officer, I conclude the hearsay contained in a Trustee's report is no less admissible on this interlocutory motion than if it had been contained in an affidavit stated to be "on information and belief."

[36] As a result, I conclude a Trustee's report constitutes an exception to the hearsay rule, in the same way as an official statement is excepted. I also conclude the report, insofar as it contains information from others is admissible in the same way as an affidavit containing similar information.

Is the report not balanced or neutral?

[37] Both Dr. Goldfinger and Mr. Lechcier-Kimel take the position the report is not balanced and neutral, but rather it advocates a position on behalf of the estate of Montor. As a result, Mr. Lechcier-Kimel submits the report should be expunged on the basis that it is not a neutral and impartial statement of facts.

[38] It seems to me the question of whether the report is neutral or balanced goes to the weight the court should give the report, if it is admitted. That is not the threshold issue before me; rather, it is a question for the motions judge to decide on the removal motion. I do not see it as a basis to expunge all or part of the report on this motion, although the moving parties will no doubt quite appropriately renew that argument on the removal motion.

Does the nature of the motion require an affidavit?

[39] Dr. Goldfinger and Mr. Lechcier-Kimel rely on the Court of Appeal's decision in *Re Confectionately Yours* [12] to support their position that this motion requires an affidavit from the Trustee. That case arose out of an appeal from the assessment of a receiver's and its counsel's fees. An outline of the receiver's fees had been contained in its report, as opposed to being verified by affidavit. The court held that this resulted in "insulating them from the far-ranging scrutiny of a properly conducted cross-examination." The court determined that a receiver should verify the remuneration it claims by affidavit. Doing so ensures the veracity of the time spent, and provides an opportunity to cross-examine. As a result of this decision, it is now common practice for Trustees/Receivers and lawyers to verify their accounts with brief affidavits stating the hours were spent and the rates are commensurate with rates charged by other firms doing the same kind of work. It is rare, however, for either a Trustee or a lawyer to be cross-examined on one of these affidavits.

[12] 2002 CarswellOnt 3002 (O.C.A.)

[40] Mr. Lechcier-Kimel takes the position that a similar analysis to that in *Re Confectionately Yours* is necessary here. He suggests the purpose for which the report is proffered should determine whether the contents should be provided by affidavit instead. He reasons that if the Trustee is trying to protect its own position or its own interests on this motion it is in the same position as when it is seeking approval of its own fees. Since in those circumstances the Trustee is required to file an affidavit in support, Mr. Lechcier-Kimel infers this is a similar situation that requires an affidavit.

[41] I disagree. The issue of Trustee remuneration (or for that matter the remuneration of its counsel) is something that benefits only the Trustee. Here, the question to be ultimately determined is the removal of the Trustee. Under section 43(9), the court in making a bankruptcy order must appoint a Trustee. The court is to do so having regard to the wishes of the creditors, to the extent the court considers just. Generally, therefore, it is the creditors who choose the Trustee, whose role, among others, is to administer the estate for the benefit of the creditors. Under section 14 of the *Bankruptcy and Insolvency Act* the creditors are free to remove a Trustee and replace it with another of their choosing. Thus, the creditors' interests must be considered in the context of a removal motion. The issue of removal is not strictly personal to the Trustee. I cannot conclude this situation is akin to a Trustee seeking to be paid its fees. To the contrary, in these circumstances, it is entirely appropriate for the Trustee to deliver a report, as opposed to an affidavit.

Conclusion:

[42] The report is therefore admissible. It will be up to the judge hearing the removal motion to determine the weight to be given to it, or any part of it.

[43] Mr. Shea takes the position the moving parties' rights to cross-examine pursuant to Newbould J's order are now spent, and they have no further right to cross-examine. I disagree. Even if I had struck the report, I would have granted Farbers leave to file an affidavit instead. The moving parties would then have cross-examined.

[44] It seems to me it will be helpful to the judge hearing the motion to have the benefit of the limited cross-examine Newbould J envisioned. I will permit that cross-examination to proceed. The parties are meeting with Brown J on April 5 to set a new timetable for the removal motion. He can schedule the cross-examination. If the moving parties do not avail themselves this time of that right to cross-examine, they will be barred in the future from doing so, and the court hearing the removal motion will be free to draw whatever inferences it wishes from their failure to do so.

[45] In case the applicant has not been able to comply with paragraph [47] below before their 9:30 with Brown J, the parties will provide Brown J with a copy of this endorsement in the materials filed for the 9:30 on April 5.

[46] I heard brief submissions from the parties on the issue of costs before they knew the outcome of the motion. On the basis of those submissions, reasonable costs are $15,000 all inclusive. Farbers is entitled to those costs. Since the moving parties' positions were identical, my inclination is to have them bear those costs equally. If the parties disagree, they may make brief written submissions to me concerning the apportionment of those costs within 14 days, failing which an order will go requiring each of Dr. Goldfinger and Mr. Lechcier-Kimel to pay $7,500 on account of Farbers' costs.

[47] In an effort to bring some organization to the procedural history of this application, I also direct that the applicant prepare and maintain a continuing record of all endorsements and orders in this case. It is to be in a 3-ring binder, with a yellow cover and backing page titled "Endorsements Record". It is to include, in chronological order, a photocopy of every endorsement and order made in this case, separated by numbered tabs. It is to contain a Table of Contents, which is to be updated each time a new endorsement or order is made. All 9:30 endorsements are to be included as well. It will be the applicant's responsibility to ensure the Endorsements Record is provided with all other material for any further attendances in this case, including the trial.

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MESBUR J.

Released: 20110331

Tab 10

CITATION: Luigi Martellacci, Re 2014 ONSC 5188

COURT FILE NO.: 31-457461

DATE: 20140910

SUPERIOR COURT OF JUSTICE – ONTARIO
(BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE BANKRUPTCY OF LUIGI MARTELLACCI aka LOUIE MARTELLACCI, of the CITY of TORONTO in the PROVINCE OF ONTARIO

BEFORE: Newbould J.

COUNSEL: *Mark A. Freake*, for the Trustee Grant Thornton Limited

Brandon Jaffe, for Amy McIntosh

HEARD: September 8, 2014

ENDORSEMENT

[1] This is an appeal by the Trustee of the bankrupt Luigi Martellacci from the decision of Master Jean sitting as a registrar in bankruptcy in which she held that a report filed by the Trustee in an appeal by Amy McIntosh from a disallowance of her claim was inadmissible evidence and that the Trustee was required to file a sworn affidavit if it wished to proffer evidence on the appeal.

[2] Amy McIntosh filed a proof of claim with the Trustee in respect to a 1967 Corvette which is in the possession of the Trustee. The Trustee later notified Ms. McIntosh that her claim was disallowed as she had produced insufficient evidence of her beneficial ownership interest in the Corvette.

[3] Ms. McIntosh served the Trustee with a notice of motion and supporting affidavit in which she set out her intention to appeal the Trustee's disallowance. In response, the Trustee

delivered a Trustee's report. Counsel for Ms. McIntosh then inquired as to the authority that permitted the Trustee in a contested disallowance to file a report rather than an affidavit, but stated that if the Trustee agreed to submit to cross-examination the mischief would be addressed. Counsel for the Trustee responded with case authority and then by e-mail stated that the standard protocol was for counsel to ask the Trustee any questions about the Trustee's report and if not satisfied with the answers to seek leave to cross-examine. He further stated that the Trustee would be happy to follow this protocol except that he would consent to the cross-examination provided it was restricted to the questions raised and time limited.

[4] Counsel for Ms. McIntosh did not respond to the Trustee's proposal. One day before the hearing he filed an affidavit alleging that the Trustee had refused to permit cross-examination on the Trustee's report and at the hearing objected to the admissibility of the Trustee's report. The registrar held that the report was inadmissible.

[5] For the reasons that follow, the appeal is allowed. The report of the Trustee is admissible.

Analysis

[6] An appeal of a registrar's order will be allowed where it is demonstrated that the registrar erred in principle or in law or failed to take into account a proper factor or took into account an improper factor which led to a wrong conclusion. See *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 20 C.B.R. (5th) 220 at para 48 (Ont. C.A.) and Houlden, Morawetz and Sarra, *The 2014 Annotated Bankruptcy and Insolvency Act*, at I§54.

[7] In my view the registrar erred in principle and law in coming to her conclusion. She read more into the rules of practice than is provided and she failed to follow established authority binding on her.

[8] The registrar referred to BIA rule 11 which requires every application to the court to be made by motion and to BIA rule 13 which requires the party making the motion to file every affidavit in support of the motion, or the motion, as the case may be. Because the BIA rules do

not specify what should be included in a responding motion record, the registrar looked at rule 39.01(1) of the rules of practice which states:

> Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

[9] The registrar then stated that the rules provide only for affidavits on motions. This cannot be correct. The rule does not say that evidence must be by affidavit. The rule is permissive to allow affidavits unless a statute or rule provides otherwise.

[10] Rule 37.10(1) of the rules of practice provides for the need to serve and file a motion record for a motion. Rule 37.10(2) provides what is to be included in a motion record and in what order. Rule 37.10 (2)(c) requires the motion record to contain "a copy of all affidavits and other material served by any party for use on the motion". As to this rule, the registrar said that the reference to "other material" referred to evidence that may be given because a statute or the rules provides for it, and as no statute or rule provided for a trustee's report on an appeal from a disallowance of a claim, the Trustee's report could not be filed.

[11] I do not read rule 37.10(2)(c) as limiting what "other material" may be used. The limitation to that rule by the registrar requiring "other material" to be authorized by statute or another rule is not contained in the rule and is not warranted. The rule is clearly intended to provide technical direction as to what and how materials are to be put together and filed with the court, and no more.

[12] The conclusion that the report was inadmissible because no statute or rule specifically authorized a trustee's report disregarded the common law. The case authority put before the registrar, namely the decision of Justice Mesbur in *Montor Business Corp. (Trustee of) v. Goldfinger* (2004), 75 C.B.R. (5th) 170 and the cases referred to therein were clear authority that a trustee's report is admissible evidence and there was no appropriate basis to distinguish that authority.

[13] In *Goldfinger*, the trustee responded to a motion to remove the trustee by filing a trustee's report, and a motion was brought to strike the report on the basis that a trustee's report was not

admissible evidence. Justice Mesbur held that the trustee's report was admissible evidence. She stated

> **11** Those who act as Trustees or Receivers, in bankruptcy proceedings, receiverships or restructuring under the *CCAA,* routinely report to the court and set out recommendations and responses to questions by way of reports. The courts routinely accept the reports as evidence. Courts do so not only in the situations specifically enumerated under the *Bankruptcy and Insolvency Act.*

[14] Some of the arguments made on behalf of Ms. McIntosh in this case were made and rejected by Mesbur J. Regarding the rules of practice, Mesbur J. stated:

> **21** The moving parties suggest that although this application arises in the context of various bankruptcies, the application itself is simply a proceeding commenced under the Rules of Civil Procedure, and absent any contrary provision under the Bankruptcy Rules, the general Rules of Civil Procedure must apply. They say Farbers is a litigant like any other, and must be subject to the same rules as any other litigant.
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> **22** They rely on rule 39.01 which sets out the evidence to be used on a motion. Since the rule contemplates affidavit evidence, they suggest no other evidence is either permissible or admissible. As a result, they argue the report must be expunged.
>
> **23** I do not see it that way. Rule 39.01(1) simply states that evidence on a motion or application "may be given by affidavit unless a statute or these rules provide otherwise." The rule does not require that the only evidence to be used on a motion must be in affidavit form. I come to this conclusion by looking at rule 37.10(2) which sets out the necessary contents of a motion record. Subrule 37.10(2)(c) refers to "a copy of all affidavits *and other material* served by any party for use on the motion." [emphasis added] From this I infer that material other than affidavits may properly be used on a motion.
>
> **24** As Farbers' counsel pointed out, in CCAA proceedings, receiverships and bankruptcies, reports are admitted as evidence every day. They are admitted on a vast variety of motions, contested and not. I have already referred to a variety of situations in which this has been the case.
>
> **25** It seems to me that a Trustee's report, by both custom and law, is in no more diminished a position as far as its reliability is concerned as is an affidavit based on information and belief. In fact, given that it is prepared by an officer of the court, with both statutory and common law duties, it is in many ways more reliable than an affidavit that is based entirely on information and belief, but is nevertheless under the Rules of Civil Procedure, prima facie admissible.

[15] Justice Mesbur also dealt with an argument that a trustee's report was inadmissible as being contrary to the hearsay rule. In dismissing this argument, she referred to a decision of Justice Farley in *Bell Canada International Inc., Re*, [2003] O.J. NO. 4378 as follows:

> **31** Farley J dealt with this in *Bell Canada International Inc. Re*, the only case that squarely deals with this issue. When faced with the argument that a Monitor's report was "not evidence", he stated first, it was not "necessary to delve deeply into this question but ... to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding."
>
> **32** In support of this proposition, Farley J quoted approvingly from Wigmore which stated that a report, if made under due authority, stands upon no less favourable footing than other official statements. It is admissible under the general principle. The general principle referred to is the hearsay exception that permits public documents (or as Wigmore calls them, "official statements") to be admitted into evidence. Reports by the court's officers meet the general criteria for the public document exception:
>
> > a) they are made by a public official - trustees are licensed by a government official, the Superintendent in Bankruptcy, and have public duties imposed both by the court and by the *Bankruptcy and Insolvency Act*;
> >
> > b) the Trustee makes the report in the discharge of a public duty or function - the trustee functions in the context of its duties to the court and to the creditors, and its reports communicate the necessary information to discharge those duties;
> >
> > c) the reports are made with the intention they serve as a permanent record - as part of the court record, reports are permanent; and
> >
> > d) the report is available for public inspection - as part of the court record, the report, like the court file, is open to public viewing.
>
> **33** In addressing the issue of whether a report is made under "due authority", Farley J also referred approvingly to *The Law of Receivers and Administrators of Companies* which states that officers of the court (which would include Trustees) are "appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in *ex. p James* (1874) 2 Ch. App 609 officers of the Court are obliged not only to act lawfully, but fairly and honourably."

[16] The registrar questioned the public authority aspect of a Trustee as follows:

> Mesbur J. referred to "due authority" or "public official" exception. In my view the trustee is appointed under the legislation to administer the estate, has certain duties and obligations and is an "officer of the court". Where I have difficulties with this line of argument is that the lawyers too are "officers of the court". There is no suggestion that lawyers could "report to the court" as opposed to file affidavit evidence. I see no reason why trustees should be given special standing in this regard.

[17] Apart from the fact that the conclusions of Mesbur J., and that of Farley J. in *Bell Canada International* quoted by Mesbur J., were so far as the registrar was concerned not a line of argument but rather authority binding on her, the comparison of a trustee and counsel was misconceived. While each may be said to be an officer of the court with duties commensurate with their position, they are not officers in the same capacity. A trustee is a party to a proceeding appointed under statutory authority, or by the court if an order is made to replace a trustee, with statutory duties and duties to the court and to all stakeholders. A lawyer retained by a client advocates for the interests of his or her client and as an officer of the court has a duty of candour and respect for the court. But the advocate is not a public officer in the sense that a trustee in bankruptcy is and is not appointed by the court.

[18] The registrar distinguished *Goldfinger* on the basis that it was a factually different case in that *Goldfinger* involved a motion to remove a trustee whereas this case involves an appeal from a disallowance of a claim by the Trustee. I do not see that as being a legitimate way to distinguish *Goldfinger*. The decisions of Mesbur J. in *Goldfinger* and of Farley J. in *Bell Canada International* were dealing with the principle of the admissibility of a report by a trustee in *Goldfinger* and of a monitor in *Bell Canada International* in light of their positions as trustee and monitor, not just in light of the particular circumstance of each case.

[19] It was contended in argument that there is a distinction between an interim motion or proceeding and a final proceeding such as an appeal from an order disallowing a claim. I do not agree. There is no principled reason for the distinction. Nor is there a principled reason for distinguishing amongst a report of a monitor, a trustee in bankruptcy and a receiver. If the reasoning of the registrar were correct and a trustee's report could not be introduced as evidence unless a statute or rule specifically allowed it, it would mean that reports of receivers and

monitors that are routinely and widely accepted in many proceedings, interim or final, contested or not, could no longer be used. In my view, a report of a trustee in bankruptcy, a monitor or a receiver is admissible in evidence regardless of the nature of the particular motion or application, and whether interim or final or contested or not, unless there is some statutory prohibition of the use of such a report. The rules of practice do not prevent these reports from being admissible evidence.

[20] The registrar accepted the position of Ms. McIntosh that her counsel should have an unfettered right to cross-examine the Trustee and that it was not appropriate to impose restrictions on the cross-examination. This conclusion ignores the practice in Ontario at least regarding cross-examination of court officers such as trustees, receivers and monitors.

[21] The general practice accepted in Ontario is that if a party has questions regarding a report of such a court officer, those questions should be put to the court officer. Generally in my experience, the court officer will answer the questions fully and any follow-up questions that may arise and cross-examination is not necessary. If there is some good reason to cross-examine the court officer, it can be ordered. I do not agree that a person has a *prima facie* right at large to cross-examine a court officer such as a trustee and I would not extend the practice in that way. See Farley J. in *Bell Canada International* at paras. 8 and 9 and his discussion of the limits on cross-examination of a court officer. I agree with his comments.

[22] In this case, counsel for the Trustee suggested that questions could be put to the trustee and that if Ms. McIntosh was not satisfied with the answers, an application to cross-examine the trustee could be made. That is the normal practice. Counsel for the Trustee went further and said he would consent to an order for cross-examination provided it was restricted to the questions raised and time limited. This seemed to be a sensible offer but it was quite open to counsel for Ms. McIntosh to put questions to the Trustee and if not satisfied with the answers move to cross-examine on such terms as required.

[23] I make one last point. The issue here is as to the admissibility of the Trustee's report, and not the weight to be given to it. Whether the Trustee could have filed other evidence, or chosen

to file affidavit evidence, is not the issue. The weight to be given to the Trustee's report will be for the registrar dealing with the appeal from the disallowance of Ms. McIntosh's claim.

Conclusion

[24] The appeal is allowed. The Trustee's report is admissible evidence on the appeal from the disallowance of the claim of Ms. McIntosh. The appellant has requested that this court decide the issue rather than returning it to the registrar. I decline to do so, but direct that the appeal from the disallowance be heard by a different registrar.

[25] The Trustee is entitled to its costs of $1,500 inclusive of HST and disbursements to be paid by Ms. McIntosh within 30 days.

Newbould J.

Date: September 10, 2014

Tab 11

Supreme Court of Canada | Cour suprême du Canada

06 352 001

Her Majesty the Queen

- v. -

Ramnarine Khelawon

- and -

Attorney General of British Columbia and Criminal Lawyers' Association (Ontario) (Ont.) (30857)

CORAM:
The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Madam Justice Deschamps
The Honourable Mr. Justice Fish
The Honourable Madam Justice Abella
The Honourable Madam Justice Charron

Appeal heard:
December 16, 2005

Judgment rendered:
December 14, 2006

Reasons for judgment by:
The Honourable Madam Justice Charron

Concurred in by:

The Right Honourable Beverley McLachlin, P.C.
The Honourable Mr. Justice Binnie
The Honourable Mr. Justice LeBel
The Honourable Madam Justice Deschamps
The Honourable Mr. Justice Fish
The Honourable Madam Justice Abella

Counsel at hearing:

For the appellant
John S. McInnes
Eliot Behar

Sa Majesté la Reine

- c. -

Ramnarine Khelawon

- et -

Procureur général de la Colombie-Britannique et Criminal Lawyers' Association (Ontario) (Ont.) (30857)

CORAM :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Deschamps
L'honorable juge Fish
L'honorable juge Abella
L'honorable juge Charron

Appel entendu :
Le 16 décembre 2005

Jugement rendu :
Le 14 décembre 2006

Motifs de jugement :
L'honorable juge Charron

Souscrivent à l'avis de l'honorable juge Charron :
La très honorable Beverley McLachlin, c.p.
L'honorable juge Binnie
L'honorable juge LeBel
L'honorable juge Deschamps
L'honorable juge Fish
L'honorable juge Abella

Avocats à l'audience :

Pour l'appelante
John S. McInnes
Eliot Behar

For the respondent
Timothy E. Breen

For the intervener Attorney General of British Columbia
Alexander Budlovsky

For the intervener Criminal Lawyers' Association (Ontario)
Louis P. Strezos
Joseph Di Luca

Pour l'intimé
Timothy E. Breen

Pour l'intervenant Procureur général de la Colombie-Britannique
Alexander Budlovsky

Pour l'intervenante Criminal Lawyers' Association (Ontario)
Louis P. Strezos
Joseph Di Luca

Citations	Références
Ont. C.A.: (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL).	C.A. Ont. : (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL).
Ont. S.C.J.: *R. v. Khelawon*, October 29, 2001 (Grossi J.).	C.S.J. Ont. : *R. c. Khelawon*, 29 octobre 2001 (le juge Grossi).

CITATION

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *R. v. Khelawon*, 2006 SCC 57. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *R. v. Khelawon*, [2006] x S.C.R. xxx, 2006 SCC 57.

RÉFÉRENCE

Avant la publication de ce jugement dans le R.C.S., il faut utiliser sa référence neutre : *R. c. Khelawon*, 2006 CSC 57. Après sa publication dans le R.C.S., la référence neutre sera utilisée comme référence parallèle : *R. c. Khelawon*, [2006] x R.C.S. xxx, 2006 CSC 57.

r. *v.* khelawon

Her Majesty The Queen *Appellant*

v.

Ramnarine Khelawon *Respondent*

and

Attorney General of British Columbia and Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Khelawon

Neutral citation: 2006 SCC 57.

File No.: 30857.

2005: December 16; 2006: December 14.

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

on appeal from the court of appeal for ontario

Criminal law — Evidence — Hearsay — Admissibility — Trial judge admitting deceased complainants' hearsay statements to police into evidence — Whether statements admissible under principled exception to hearsay rule — Factors to be

considered in determining whether hearsay statements sufficiently reliable to be admissible.

In1999, C, a cook who worked at a retirement home, found S, a resident of the home, badly injured in his room. His belongings were packed in garbage bags. S told C that the accused, the manager of the home, had beaten him and threatened to kill him if he did not leave the home. C took S to her apartment and cared for him for a few days. She then brought S to a doctor. The doctor testified that he found three fractured ribs and bruises that were consistent with S's allegation of assault but which also could have resulted from a fall. The next day, C took S to the police and S gave a videotaped statement alleging that the accused had assaulted him and threatened to kill him. The statement was not under oath but S answered "yes" when asked if he understood it was important to tell the truth and that he could be charged if he did not tell the truth. Medical records seized from the retirement home described S as angry, aggressive, depressed and paranoid, and revealed that he had been treated for paranoid psychosis and depression. At trial, a psychiatrist who testified at the *voir dire* concluded that S had the capacity to communicate evidence and understood at the time he made his statement to the police that it was important to tell the truth. The defence argued that C influenced S to complain out of spite because the accused previously had terminated C's employment.

The police attended the retirement home where more residents complained that they had been assaulted by the accused. The accused was charged in respect of five complainants but, by the time of the trial, four complainants, including S and D, had died of causes unrelated to the alleged assaults and the fifth was no longer competent to testify. Only one complainant had testified at the preliminary inquiry. The central issue

at trial was whether the complainants' hearsay statements should be received in evidence. The trial judge admitted some of the hearsay based in large part on the striking similarity between the statements. The trial judge ultimately found videotaped statements given by S and D to the police sufficiently credible to found convictions for aggravated assault and uttering a death threat in respect of S, as well as assault causing bodily harm and assault with a weapon in respect of D. The accused was acquitted on the remaining counts. On appeal, a majority of the Court of Appeal excluded all of the hearsay statements and acquitted the accused on all charges. The dissenting judge would have upheld the convictions in respect of S. The Crown appealed as of right from the acquittals in respect of S and was denied leave to appeal from the acquittals in respect of D.

Held: The appeal should be dismissed and the acquittals affirmed.

Hearsay evidence is presumptively inadmissible unless an exception to the hearsay rule applies, primarily because of a general inability to test its reliability. The essential defining features of hearsay are the fact that the out-of-court statement is adduced to prove the truth of its contents and the absence of a contemporaneous opportunity to cross-examine the declarant. Hearsay includes an out-of-court statement made by a witness who testifies in court if the statement is tendered to prove the truth of its contents. In some circumstances, hearsay evidence presents minimal dangers and its exclusion rather than its admission would impede accurate fact finding. Hence over time a number of traditional exceptions to the exclusionary rule were created by the courts. Hearsay evidence that does not fall under a traditional exception may still be admitted under the principled approach if indicia of reliability and necessity are established on a *voir dire*. The reliability requirement is aimed at identifying those cases where the

concerns arising from the inability to test the evidence are sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. The reliability requirement will generally be met by showing (1) that there is no real concern about whether the statement is true or not because of the circumstances in which it came about; or (2) that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested by means other than contemporaneous cross-examination. These two principal ways of satisfying the reliability requirement are not mutually exclusive categories and they assist in identifying the factors that need to be considered on the admissibility inquiry. [2-3] [35] [37] [42] [49] [61-63] [65]

The trial judge acts as a gate-keeper in making the preliminary assessment of the threshold reliability of a hearsay statement and leaves the ultimate determination of its worth to the fact finder. The factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. Comments to the contrary in previous decisions of this Court, including *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, should no longer be followed. In determining admissibility, the court should adopt a more functional approach focussed on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. Whether certain factors will go only to ultimate reliability will depend on the context. In each case, the inquiry is limited to determining the evidentiary question of admissibility. Corroborating or conflicting evidence may be considered in the admissibility inquiry in appropriate cases. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and

accuracy, there is no need for the trial judge to inquire further into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not. [2] [4] [92-93]

In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively inadmissible. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary or the reliability of which is neither readily apparent from the trustworthiness of its contents nor capable of being meaningfully tested by the ultimate trier of fact. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. As in all cases, the trial judge has a residual discretion to exclude admissible hearsay evidence where its prejudicial effect is out of proportion to its probative value. [2-3]

R. v. Khan, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, are examples where the reliability requirement was met because the circumstances in which hearsay statements came about provided sufficient comfort in their truth and accuracy. *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, and *R. v. Hawkins*, [1996] 3 S.C.R. 1043, provide examples where threshold reliability was based on the presence of adequate substitutes for traditional safeguards relied upon to test the evidence. Similarly, in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, the striking similarities between the complainant's prior inconsistent out-of-court statement and the accused's independent statement were so

compelling that the very high reliability of the complainant's statement rendered its substantive admission necessary. [67-68] [73] [82] [86] [88]

S's videotaped statement to the police was inadmissible. Although S's death before trial made his hearsay statement necessary, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. A number of serious issues arise including: whether S was mentally competent; whether he understood the consequences of making his statement; whether he was influenced by C; whether his statement was motivated by dissatisfaction about the management of the home; and, whether his injuries were caused by a fall. S's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and on the trier of fact's ability to properly assess its worth. While the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of S's allegations. The admission of the evidence risked impairing the fairness of the trial. Furthermore, S's evidence could have been taken before his death in the presence of a commissioner and the accused or his counsel thereby preserving both the evidence and the rights of the accused. [7] [108]

Cases Cited

Modified: *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **explained**: *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; **discussed:** *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho v. Wright*, 497 U.S. 805 (1990); **referred to:** *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. O'Brien*, [1978] 1 S.C.R. 591; *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.

Criminal Code, R.S.C. 1985, c. C-46, ss. 709-714.

Authors Cited

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Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston: Little, Brown, and Company, 1923.

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Armstrong and Blair JJ.A.) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), setting aside the accused's convictions. Appeal dismissed.

John S. McInnes and *Eliott Behar*, for the appellant.

Timothy E. Breen, for the respondent.

Alexander Budlovsky, for the intervener the Attorney General of British Columbia.

Louis P. Strezos and *Joseph Di Luca*, for the intervener the Criminal Lawyers' Association (Ontario).

Solicitor for the appellant: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondent: Fleming, Breen, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Louis P. Strezos and Associate, and Di Luca Barristers, Toronto.

SUPREME COURT OF CANADA

HER MAJESTY THE QUEEN

- v. -

RAMNARINE KHELAWON

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA and CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

CORAM: The Chief Justice and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

CHARRON J. —

1. Overview

1 This appeal turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliability. In particular, guidance is sought on what factors should be considered in determining whether a hearsay statement is sufficiently reliable to be admissible. This Court's decision in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, has generally been interpreted as standing for the proposition that circumstances "extrinsic" to the taking of the statement go to ultimate reliability only and cannot be considered by the trial

judge in ruling on its admissibility. The decision has generated much judicial commentary and academic criticism on various grounds, including the difficulty of defining what constitutes an "extrinsic" circumstance and the apparent inconsistency between this holding in *Starr* and the Court's consideration of a semen stain on the declarant's clothing in *R. v. Khan*, [1990] 2 S.C.R. 531, the declarant's motive to lie in *R. v. Smith*, [1992] 2 S.C.R. 915, and most relevant to this case, the striking similarities between statements in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence

in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gate-keeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

3 The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude

admissible evidence where its prejudicial effect is out of proportion to its probative value.

4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

5 In May 1999, five elderly residents of a retirement home told various people that they were assaulted by the manager of the home, the respondent, Ramnarine Khelawon. At the time of trial, approximately two and a half years later, four of the complainants had died of causes unrelated to the assaults, and the fifth was no longer competent to testify. Only one of the complainants had testified at the preliminary inquiry. The central issue at trial was whether the hearsay statements provided by the complainants had sufficient threshold reliability to be received in evidence. Grossi J. held that the hearsay statements from each of the complainants were sufficiently reliable to be admitted in evidence, based in large part on the "striking" similarity between them. He ultimately found Mr. Khelawon guilty of the offences in respect of two of the complainants, Mr. Skupien and Mr. Dinino, and acquitted him on the remaining counts. Mr. Khelawon was sentenced to two and a half years of imprisonment for the offences relating to Mr. Skupien and an additional two years for the offences related to Mr. Dinino.

6 On appeal to the Court of Appeal for Ontario, Rosenberg J.A. (Armstrong J.A. concurring) excluded all statements and acquitted Mr. Khelawon. Blair J.A., in dissent, would have upheld the convictions in respect of Mr. Skupien only. The Crown appeals to this Court as of right, seeking to restore the convictions relating to Mr. Skupien. The Crown also sought but was denied leave in respect of the charges relating to Mr. Dinino.

7 In my view, Mr. Skupien's videotaped statement to the police was inadmissible. Although Mr. Skupien's death before the commencement of the trial made it necessary to resort to his evidence in this form, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. To the contrary, they gave rise to a number of serious issues including: whether Mr. Skupien was mentally competent, whether he understood the consequences of making his statement, whether he was influenced in making the allegations by a disgruntled employee who had been fired by Mr. Khelawon, whether his statement was motivated by a general dissatisfaction about the management of the home, and whether his injuries were caused by a fall rather than the assault. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth. The statements made by other complainants posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. In all the circumstances, particularly given that the Crown's case against Mr. Khelawon was founded on the hearsay statement, the admission of the evidence risked impairing the fairness of the trial and should not have

been permitted. As Rosenberg J.A. aptly noted, the admission of the evidence under the principled approach to the hearsay rule is not the only way the evidence of witnesses who may not be available for trial may be preserved. Sections 709 to 714 of the *Criminal Code*, R.S.C. 1985, c. C-46, expressly contemplate this eventuality and provide a procedure for the taking of the evidence before a commissioner in the presence of the accused or his counsel thereby preserving both the evidence and the rights of the accused.

8 For reasons that follow, I would therefore dismiss the appeal and affirm the acquittals.

2. Background

9 Mr. Khelawon was charged with aggravated assault on Teofil Skupien and threatening to cause him death. He was also charged with aggravated assault and assault with a weapon on Atillio Dinino, and assault causing bodily harm on three other complainants. The offences were alleged to have occurred during the month of May 1999 and, at the time, all the complainants were residents at the Bloor West Village Retirement Home. Mr. Khelawon was the manager of the retirement home and his mother was the owner. As indicated earlier, none of the complainants was available to testify at trial. Hence, the central issue concerned the admissibility of their hearsay statements made to various people. There were 10 statements in total, four of which consisted of videotaped statements made to the police. The trial, held before Grossi J. without a jury, proceeded essentially as a *voir dire* into the admissibility of the evidence, with counsel agreeing that it would not be necessary to repeat the

evidence about any statements later ruled admissible. None of the statements fit within any traditional exception to the hearsay rule. Their admissibility, rather, was contingent upon the Crown meeting the twin requirements of necessity and reliability under the principled approach to the hearsay rule, as established in *Khan*, *Smith* and, later, *Starr*.

10 The charges concerning Mr. Skupien are the only matters before this Court. I will therefore summarize the evidence concerning Mr. Skupien's statements in more detail. I will also describe the circumstances surrounding the taking of the statements from the other complainants to the extent that it is relevant to dispose of this appeal. The Crown sought to introduce three statements made by Mr. Skupien: the first to an employee of the retirement home, the second to the doctor who treated him for his injuries, and the third to the police. Only the latter was admitted at trial. I will describe each statement in turn.

2.1 *Mr. Skupien's Statement to Ms. Stangrat*

11 Mr. Skupien was 81 years old and, at the time of the events in question, he had lived at the Bloor West Village Retirement Home for four years. Mr. Skupien's initial complaint was made to one of the employees at the retirement home, Joanna Stangrat. Ms. Stangrat, also known under several other names, was a cook who had been working at the retirement home for a few months. She had come to know Mr. Skupien because he would often visit the kitchen and would sometimes walk her to the subway at the end of her shifts. Ms. Stangrat played a prominent role in the case concerning Mr. Skupien. In part, it was the theory of the defence at trial that she had

influenced Mr. Skupien and the other complainants in making their complaints out of spite because Mr. Khelawon had given her a notice of termination a few weeks earlier.

12 On May 8, 1999, Ms. Stangrat noticed that Mr. Skupien did not come to breakfast. She went to check on him in his room and found him lying on his bed. His face was red and there was blood around his mouth. When she got closer to him she saw bruising on his eye and nose. His eyes were swollen. When Mr. Skupien saw her, he asked her to come in and close the door. He appeared to be in shock and very shaky. Ms. Stangrat noticed two full green garbage bags on the floor. She closed the door and asked him what had happened and what was in the green garbage bags. Mr. Skupien told her what had happened the previous evening. He also showed her bruises on his upper left chest area.

13 Mr. Skupien told Ms. Stangrat that he had to leave before twelve o'clock that day because "Tony", the name Mr. Khelawon went by, would come back and kill him. Mr. Skupien described to Ms. Stangrat how Mr. Khelawon had come into his room in anger at about 8:00 p.m. the previous evening, and had punched him repeatedly in the face and ribs. After beating him up, Mr. Khelawon had packed the clothes into the green garbage bags and left them on the floor. Ms. Stangrat asked Mr. Skupien why Mr. Khelawon would attack him in this way. He told her that Tony was angry because Mr. Skupien had been going to the kitchen when he had no reason to go there. When the assault ended, Mr. Khelawon threatened Mr. Skupien that either he moved out of the home by twelve noon the next day or he would return and kill him. Mr. Skupien asked her what he should do. Ms. Stangrat told him she would phone her

daughter to come and get him and that he should stay in his room until she was finished her duties for the day.

14 Ms. Stangrat arranged for Mr. Skupien to stay at her daughter's home later that day, and then to her apartment. Mr. Skupien was in pain but he was scared and did not want to see a doctor at that time. Ms. Stangrat kept Mr. Skupien at her apartment where she and a friend of hers alternated caring for him. A few days later, Mr. Skupien agreed to go to the doctor. Ms. Stangrat and her friend took him to see Dr. Pietraszek.

2.2 *Mr. Skupien's Statement to the Treating Physician*

15 On May 12, 1999, Dr. Pietraszek examined Mr. Skupien. He found visible bruising to Mr. Skupien's face as well as bruises to his back and on the left side of his chest and noted that Mr. Skupien appeared to be in pain while breathing. X-rays revealed that he had suffered fractures to three ribs. Dr. Pietraszek testified that Mr. Skupien told him he had been hit in the face and body with something that was either a cane or a pipe. He denied any suggestion that Ms. Stangrat had related the story but acknowledged that she was present and may have helped him in describing what had happened. Dr. Pietraszek considered that the injuries were consistent with Mr. Skupien's account of how they were caused. He also testified that the injuries could have resulted from a fall.

2.3 *Mr. Skupien's Videotaped Statement to the Police*

16 The following day, on May 13, 1999, Ms. Stangrat took Mr. Skupien to the police. Detective Karpow took his complaint. He observed bruising to the left side of Skupien's face, in the eye area. He arranged for Mr. Skupien to give a videotaped statement. Both Detective Karpow and Cst. John Birrell were present. The statement was not given under oath; however, Mr. Skupien was asked if he understood that it was very important that he tell the truth and that if he did not tell the truth "[he] could be charged with that". Mr. Skupien answered "Yes" to both questions. After a few other preliminary questions, he was asked what his complaint was. Mr. Skupien described how, on May 7, 1999, Tony came to his room and said: "enough is enough". He then began beating him by slapping and punching him in the face, the ribs and all over, telling him not to go into the kitchen. He said that if he did not leave, he would come by 12 o'clock the next day and shoot him. Mr. Skupien then went on at some length to make several complaints about the general management of the retirement home until Detective Karpow brought him back to the matter at hand by asking him further questions about the incident and the events that followed. Mr. Skupien was generally responsive to the officer's questions.

17 After the interview was completed, Mr. Khelawon was arrested.

2.4 *Further Investigation*

18 Ms. Stangrat gave the police a list of other people that she thought they should speak to at the retirement home. The next day, on May 14, 1999, several police

officers attended the home to seek these people out. Because there were no markings on the doors, the police had to search through the residence, speaking to residents and nursing staff. When some of the people were located, they were found to be "unresponsive" and no meaningful interviews could be conducted with them. Others, however, were able and willing to speak. The police would identify themselves as police, then ask the residents how things were going at the home and if anything had happened to them that they wanted to talk about. The police arranged to take videotaped statements from those who wanted to speak to them. These included three of the other complainants, Mr. Dinino, Ms. Poliszak and Mr. Grocholska. The fourth complainant, Mr. Peiszterer, could not communicate with the police; however, his son provided a videotaped statement.

2.5 *Medical Records*

19 On May 15, 1999, Det. Karpow attended at the retirement home and met with Dr. Michalski, a physician who attended regularly at the home to see the residents. On May 18, 1999, the police returned to the home and seized the medical records and a journal containing nursing notes.

20 Documentation from Mr. Skupien's file revealed that he had been living in an apartment before suffering a stroke in February 1995. He was transferred to the retirement home in April 1995. A report dated April 13, 1995 noted his condition after the stroke. He suffered occasional periods of confusion, could not go outside on his own, needed help with meal preparation and banking, and had to be reminded to take his medication, but was able to perform all self-care tasks.

21 Dr. Michalski's file noted frequent contact with Mr. Skupien during his stay at the retirement home. From time to time, he was described as "depressed", "aggressive", "angry", and "paranoid". A diagnosis of paranoid psychoses was made in June 1998 and medication was prescribed. In July 1998, "some improvement in paranoia" was noted. In August 1998, he was described as "angry, hostile" and his dosage was increased. In August 1998, he was described as "confused". The possibility of dementia was first noted. In September 1998, he was diagnosed with "depression" and prescribed medication. In September 1998, improvement with the depression was noted, and although apparently "eliminated" in January 1999, depression was again noted in February 1999. The notes also reflect a number of complaints of fatigue, weakness and dizziness.

2.6 *Expert Evidence on the Voir Dire*

22 Dr. Susan Lieff, a geriatric psychiatrist, was qualified to provide opinion evidence on the *voir dire* with respect to Mr. Skupien's capacity to understand the importance of telling the truth and communicate evidence. She also provided an opinion with respect to Mr. Dinino. Her opinion was based solely on her review of the videotaped interviews and medical records. With regard to Mr. Skupien, Dr. Lieff testified that the videotape did not reveal any impaired judgment, delusions or hallucinations, or intellectual pathology. He seemed to comprehend what was asked and responded appropriately. In Dr. Lieff's view, Mr. Skupien's affirmative answer "Yes", when advised of the need to be truthful, reflected a clear understanding. Dr. Lieff did not consult with Dr. Michalski but took issue with his diagnosis of "dementia". In her opinion, the symptoms observed by Dr. Michalski were more

likely side-effects of the anti-psychotic medication he was taking at the time. Dr. Lieff concluded that Mr. Skupien understood that it was important to tell the truth and that he had the capacity to communicate evidence.

3. Trial Judge's Ruling on Admissibility

23 As a preliminary issue, the trial judge ruled that the four complainants who had given videotaped statements were competent at the time within the meaning of s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which he interpreted as requiring that "witnesses must know the importance of telling the truth and must be able to communicate the evidence". In support of this finding, the trial judge relied on his own viewing of the videotapes and on Dr. Lieff's opinion evidence. (The mental capacity of the hearsay declarant is a relevant factor on an inquiry into the statement's admissibility as it may impact on the reliability of the hearsay statement; however, it is important to note that s. 16 has no application here. Section 16 sets out the threshold competency requirement for receiving the testimony of a witness *in court*. The threshold is a low one and the witness's testimony, if received, is then subject to cross-examination in the usual way, including on any relevant matter concerning the witness's mental state. The inquiry into the admissibility of a hearsay statement may require more extensive probing into the declarant's mental competency at the time of making the statement when there is no opportunity to cross-examine the declarant.)

24 After determining the s. 16 issue, the trial judge considered the necessity criterion. Although certain questions were raised at trial as to whether this criterion

was met with respect to some of the complainants' statements, none of the issues concerned Mr. Skupien and hence need not be reviewed here.

25 Finally, the trial judge turned to the question of threshold reliability. He determined that all videotaped statements to the police met the reliability requirement. In support of this finding, he noted that there was "nothing untoward in the police procedure in taking the statements" and, although three of the complainants' statements were taken at the retirement home, rather than at the police station, he found that the "circumstances of taking the statements [were] as formal and solemn as could be expected in the situation". He noted that there was "no animosity directed at the accused" by the complainants in their statements other than voicing their complaint. The complainants "appeared forthright", they were "not evasive", and they did not "attempt to overstate their injuries". There were no "exceedingly leading" questions and, to the extent that there was leading, it went to weight rather than admissibility. All the statements were contemporaneous or made shortly after the events that they described. They knew their assailant well and there was no realistic alternative suspect. Further, both Mr. Skupien and Mr. Dinino had corroborating injuries.

26 The crux of the trial judge's ruling, however, appears to have been his application of the decision of this Court in *U. (F.J.)* in which the complainant's out-of-court statement was admitted on the ground of its"striking similarity" with the accused's statement concerning the same events. Throughout his reasons, the trial judge made repeated references to the similarity between the statements and concluded that "the cumulative combination of similar points renders the overall similarity between the statements sufficiently distinctive to reject coincidence as a likely

explanation". While he found that the oral statements were also "sufficiently similar to fit the principle in *R. v. U. (F.J.)*", he held, citing para. 217 in *Starr* as authority, that "to admit them would be oath-helping in that I have the video statements".

27 In the trial judge's view, the only real hearsay danger raised by the admission of the statements was the absence of cross-examination but, citing *Smith* as authority, he concluded that reliable evidence should not be excluded for this reason alone. The public interest in "the elderly receiving good care" allowed him "to take video statements together to bolster the complainants' credibility". He therefore ruled the videotaped statements admissible and the oral statements inadmissible.

28 At the conclusion of the trial, Grossi J. ultimately found only two of the videotaped statements sufficiently credible to found a conviction, those of Mr. Dinino and Mr. Skupien. Since this appeal concerns the admissibility ruling only, it is not necessary to review the reasons for conviction. It is common ground between the parties that if Mr. Skupien's statements are inadmissible, the convictions must be set aside and the appeal dismissed.

4. Court of Appeal for Ontario (2005), 195 O.A.C. 11

29 Mr. Khelawon appealed his convictions on the ground that the trial judge erred in admitting the videotaped statements. The Court of Appeal was unanimous in finding that Mr. Dinino's statement was not sufficiently reliable to warrant admission. A majority of the court found that Mr. Skupien's statement was also inadmissible due to its unreliability.

30 All three justices interpreted the trial judge's reasons as holding that without the similarity among the statements of the various complainants, none met the requirement of reliability and would therefore have been inadmissible (Rosenberg J.A., at para. 90; Blair J.A., at para. 29). The court therefore focussed on this aspect of the evidence and, indeed, the source of the disagreement between the majority and the dissent was whether the similarity of the statements was a permissible consideration in assessing reliability under the principled approach.

31 Rosenberg J.A., writing for the majority, held that the principle from *U. (F.J.)* could be applied only where the statements relate to the same event, and in most cases would be applied only where the declarant is available for cross-examination (para. 114). Here, the statements related to different incidents. Although a trier of fact might conclude, using similar fact reasoning, that the same person committed all of the crimes, this is an issue going to ultimate reliability, not threshold reliability (para. 115). Only the latter is relevant in determining admissibility. In addition, Rosenberg J.A. held that the comparator statements must also be substantively admissible, because the final decision as to the likelihood of coincidence or collusion rests with the trier of fact (para. 128), and it would be odd for the trier of fact to be assessing ultimate reliability without access to "the very piece of evidence that convinced the trial judge that the statement was reliable" (para. 130). Grossi J.'s decision, therefore, was an impermissible expansion of the principle in *U. (F.J.)*. Rosenberg J.A. also held, at para. 92, that such an expansion was inconsistent with the statement of Iacobucci J. in *Starr*, at para. 217, that "corroborating . . . evidence" should not be considered in determining threshold reliability.

32 In dissent, Blair J.A. held that the central notion underpinning the *U. (F.J.)* "exception" was that absent collusion, prior knowledge, or improper influence, "striking similarities between statements belie coincidence and therefore bolster the reliability of the statement under consideration" (para. 44). While he held that the absence of cross-examination remained a factor to be weighed in assessing threshold reliability, he was of the view that its absence, in and of itself, was not an impediment to the principled application of the *U. (F.J.)* exception. He also found that the exception could apply where the statements related to different events, stating that, for the purpose of finding threshold reliability, he could see no "logical difference" between statements concerning the same accused "doing the same thing on the same occasion" and "the same accused doing the same thing on different occasions" (para. 48), drawing on the rationale for similar-fact reasoning, since both involve admitting evidence on the basis of the "improbability of coincidence" (para. 49). Finally, he found that a finding that the comparator statements are not substantively admissible should not exclude them from the reliability analysis, pointing out that otherwise reliable statements could be held inadmissible for a variety of reasons, including a finding that they were not necessary (para. 53).

33 On the basis of these conclusions, Blair J.A. held that the trial judge had not erred in considering the similarity among the statements in determining their threshold reliability. He then went on to apply "the *U. (F.J.)* exception" to the statements at issue on appeal, and held that although the videotaped statement of Mr. Dinino was inadmissible, the videotaped statement of Mr. Skupien was.

5. Rule Against Hearsay

5.1 *General Exclusionary Rule*

34 The basic rule of evidence is that all relevant evidence is admissible. There are a number of exceptions to this basic rule. One of the main exceptions is the rule against hearsay: absent an exception, hearsay evidence is *not* admissible. Hearsay evidence is not excluded because it is irrelevant — there is no need for a special rule to exclude irrelevant evidence. Rather, as we shall see, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule. Although hearsay evidence includes communications expressed by conduct, I will generally refer to hearsay statements only.

5.2 *Definition of Hearsay*

35 At the outset, it is important to determine what is and what is not hearsay. The difficulties in defining hearsay encountered by courts and learned authors have been canvassed before and need not be repeated here: see *R. v. Abbey*, [1982] 2 S.C.R. 24, at pp. 40-41, *per* Dickson J. It is sufficient to note, as this Court did in *Starr*, at para. 159, that the more recent definitions of hearsay are focussed on the central concern underlying the hearsay rule: the difficulty of testing the reliability of the declarant's assertion. See, for example, *R. v. O'Brien*, [1978] 1 S.C.R. 591, at pp. 593-94. Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of

fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. I will deal with each defining feature in turn.

5.2.1 Statements Adduced for Their Truth

36 The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a "very drunk" condition. If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false. Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the

trier of fact's inability to test the reliability of the statement raises real concerns. Hence, only in the latter circumstance is the evidence about the caller's statement defined as hearsay and subject to the general exclusionary rule.

5.2.2 Absence of Contemporaneous Cross-Examination

37 The previous example, namely where the witness tells the court what A told him, is the more obvious form of hearsay evidence. A is not before the court to be seen, heard and cross-examined. However, the traditional law of hearsay also extends to out-of-court statements made by the witness who does testify in court when that out-of-court statement is tendered to prove the truth of its contents. This extended definition of hearsay has been adopted in Canada: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 763-64; *Starr*, at para. 158. It is important to understand the rationale for treating a witness's out-of-court statements as hearsay.

38 When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. Consider the following example to illustrate the concerns raised by this evidence.

39 In an out-of-court statement, W identifies the accused as her assailant. At the trial of the accused on a charge of assault, W testifies that the accused is *not* her assailant. The Crown seeks to tender the out-of-court statement as proof of the fact that the accused did assault W. In these circumstances, the trier of fact is asked to accept the out-of-court statement over the sworn testimony of the witness. Given the usual premium placed on the value of in-court testimonial evidence, a serious issue arises as to whether it is at all necessary to introduce the statement. In addition, the reliability of that statement becomes crucial. How trustworthy is it? In what circumstances did W make that statement? Was it made casually to friends at a social function, or rather, to the police as a formal complaint? Was W aware of the potential consequences of making that statement, did she intend that it be acted upon? Did she have a motive to lie? In what condition was W at the time she made the statement? Many more questions can come to mind on matters that relate to the reliability of that out-of-court statement. When the trier of fact is asked to consider the out-of-court statement as proof that the accused in fact assaulted W, assessing its reliability may prove to be difficult.

40 Concerns over the reliability of the statement also arise where W does not recant the out-of-court statement but testifies that she has no memory of making the statement, or worse still, no memory of the assault itself. The trier of fact does not see or hear the witness making the statement and, because there is no opportunity to cross-examine the witness *contemporaneously* with the making of the statement, there may be limited opportunity for a meaningful testing of its truth. In addition, an issue may arise as to whether the prior statement is fully and accurately reproduced.

41 Hence, although the underlying rationale for the general exclusionary rule may not be as obvious when the declarant is available to testify, it is the same — the difficulty of testing the reliability of the out-of-court statement. The difficulty of assessing W's out-of-court statement is the reason why it falls within the definition of hearsay and is subject to the general exclusionary rule. As one may readily appreciate, however, the degree of difficulty may be substantially alleviated in cases where the declarant is available for cross-examination on the earlier statement, particularly where an accurate record of the statement can be tendered in evidence. I will come back to that point later. My point here is simply to explain why, by definition, hearsay extends to out-of-court statements tendered for their truth even when the declarant is before the court.

5.3 *Hearsay Exceptions: A Principled Approach*

42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, § 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework,

based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

43 In this case, we are concerned with the admission of evidence under item (d). In particular, the courts below were divided over two main questions: (1) what factors must be considered in deciding whether the evidence is sufficiently reliable to be admitted; and (2) whether the "exception" recognized by this Court in *U. (F.J.)* can be extended to the facts of this case. I will comment first on the second question.

44 In my view, the discussion over whether the "*U. (F.J.)* exception" applies here exemplifies the concern expressed in *U. (F.J.)* itself, that the "new approach to hearsay does not itself become a rigid pigeon-holing analysis" (para. 35). In *U. (F.J.)*, there was a similar debate over whether the "*B. (K.G.)* exception" to the rule against the substantive admission of prior inconsistent statements extended to circumstances where the reliability of the complainant's statement was based, not so much on the

circumstances in which it came about as was the case in *B. (K.G.)*, but on its striking similarity to a statement made by the accused. Lamer C.J. explained how his decision in *B. (K.G.)* was an application of the principled approach to hearsay, and how "[i]n addition . . . a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements" (para. 40). He concluded his analysis by anticipating that yet other situations may arise. He stated the following (at para. 45):

> I anticipate that instances of statements so strikingly similar as to bolster their reliability will be rare. In keeping with our principled and flexible approach to hearsay, other situations may arise where prior inconsistent statements will be judged substantively admissible, bearing in mind that cross-examination alone provides significant indications of reliability. It is not necessary in this case to decide if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission of prior inconsistent statements.

45 As I will discuss later, both *B. (K.G.)* and *U. (F.J.)* highlight the particular concerns raised in cases of prior inconsistent statements. However, following Lamer C.J.'s own words of caution against "rigid pigeon-holing analysis", it is my view that neither *B. (K.G.)* nor *U. (F.J.)* should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria. The majority judgment in *B. (K.G.)* itself leaves room for appropriate substitutes for the criteria it sets out. Further, to interpret these cases as creating new categories of exceptions would not be in keeping with the flexible case-by-case principled approach. We would simply be replacing the traditional set of exceptions with a new and (for the time being) less ossified one. Rather, these cases provide guidance — not fixed categories — on the application of

the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility.

46 I will review *B. (K.G.)* and *U. (F.J.)* in this light as well as some other relevant decisions from this Court. Since the issues raised on this appeal relate to the assessment of reliability, my analysis will be focussed on that criterion. However, as I will explain, necessity and reliability should not be considered in isolation. One criterion may impact on the other. For example, as we shall see, in some cases the need for the evidence may, in large part, be based on the fact that the hearsay statement is highly reliable and the fact-finding process would be distorted without it. However, before I discuss the factors relating to reliability, I want to say a word on the overarching principle of trial fairness.

5.4 *Constitutional Dimension: Trial Fairness*

47 Prior to admitting hearsay statements under the principled exception to the hearsay rule, the trial judge must determine on a *voir dire* that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *Dersch v. Canada (Attorney General)*,

[1990] 2 S.C.R. 1505. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R. v. Rose*, [1998] 3 S.C.R. 262. The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach. As stated by Iacobucci J. in *Starr*, at para. 200, in respect of Crown evidence: "It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."

48 As indicated earlier, our adversary system is based on the assumption that sources of untrustworthiness or inaccuracy can best be brought to light under the test of cross-examination. It is mainly because of the inability to put hearsay evidence to that test, that it is presumptively inadmissible. However, the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns: see *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 69-76. In the context of an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.

49 The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.

6. The Admissibility Inquiry

6.1 *Distinction Between Threshold and Ultimate Reliability: A Source of Confusion*

50 As stated earlier, the trial judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence. It is important that the trier of fact's domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between "ultimate reliability" and "threshold reliability". Only the latter is inquired into on the admissibility *voir dire*.

51 The distinction between threshold and ultimate reliability has been made in a number of cases (see, for example, *B. (K.G.)* and *R. v. Hawkins*, [1996] 3 S.C.R. 1043), but we are mainly concerned here with the elaboration of this principle in *Starr*. In particular, the following excerpt from the Court's analysis has been the subject of much of the discussion and commentary (at paras. 215 and 217):

> In this connection, it is important when examining the reliability of a statement under the principled approach to distinguish between threshold and ultimate reliability. Only the former is relevant to admissibility: see *Hawkins*, *supra*, at p. 1084. Again, it is not appropriate in the circumstances of this appeal to provide an exhaustive catalogue of the factors that may influence threshold reliability. However, our jurisprudence does provide some guidance on this subject. Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide *circumstantial* guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan*, *supra*; *Smith*, *supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins*, *supra*; *U. (F.J.)*, *supra*; *B. (K.G.)*, *supra*).
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> . . .
>
> At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)*(1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability. [Underlining added.]

52 The Court's statement that "threshold reliability is concerned not with whether the statement is true or not" has created some uncertainty. While it is clear that the trial judge does not determine whether the statement will ultimately be relied upon as true, it is not so clear that in every case threshold reliability is *not* concerned with whether the statement is true or not. Indeed, in *U. (F.J.)*, the rationale for admitting the complainant's hearsay statement was based on the fact that "the only

likely explanation" for its striking similarity with the independent statement of the accused was that "they were both telling the truth" (para. 40).

53 Further, it is not easy to discern what is or is not a circumstance "surrounding the statement itself". For example, in *Smith*, the fact that the deceased may have had a motive to lie was considered by the Court in determining threshold admissibility. As both Rosenberg J.A. and Blair J.A. point out in their respective reasons, "in determining whether the declarant had a motive to lie, the judge will necessarily be driven to consider factors outside the statement itself or the immediately surrounding circumstances" (para. 97).

54 Much of the confusion in this area of the law has arisen from this attempt to categorically label some factors as going only to ultimate reliability. The bar against considering "corroborating or conflicting evidence", because it is only relevant to the question of ultimate reliability, is a further example. Quite clearly, the corroborative nature of the semen stain in *Khan* played an important part in establishing the threshold reliability of the child's hearsay statement in that case.

55 This part of the analysis in *Starr* therefore requires clarification and, in some respects, reconsideration. I will explain how the relevant factors to be considered on an admissibility inquiry cannot invariably be categorized as relating either to threshold or ultimate reliability. Rather, the relevance of any particular factor will depend on the particular dangers arising from the hearsay nature of the statement and

the available means, if any, of overcoming them. I will then return to the impugned passage in *Starr*, dealing more specifically with the question of supporting evidence since that reference appears to have raised the most controversy.

6.2 *Identifying the Relevant Factors: A Functional Approach*

6.2.1 Recognizing Hearsay

56 The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This may seem to be a rather obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents *and* (2) there is no opportunity for a contemporaneous cross-examination of the declarant.

57 Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its *truth* should be considered in the context of

the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

58 Second, by putting one's mind, at the outset, to the second defining feature of hearsay — the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci J. in *Starr* identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer C.J. in *U. (F.J.)* expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

6.2.2 Presumptive Inadmissibility of Hearsay Evidence

59 Once the proposed evidence is identified as hearsay, it is presumptively *inadmissible*. I stress the nature of the hearsay rule as a general exclusionary rule because the increased flexibility introduced in the Canadian law of evidence in the past few decades has sometimes tended to blur the distinction between admissibility and weight. Modifications have been made to a number of rules, including the rule against hearsay, to bring them up to date and to ensure that they facilitate rather than impede the goals of truth seeking, judicial efficiency and fairness in the adversarial process. However, the traditional rules of evidence reflect considerable wisdom and judicial experience. The modern approach has built upon their underlying rationale, not discarded it. In *Starr* itself, where this Court recognized the primacy of the principled

approach to hearsay exceptions, the presumptive exclusion of hearsay evidence was reaffirmed in strong terms. Iacobucci J. stated as follows (at para. 199):

> By excluding evidence that might produce unfair verdicts, and by ensuring that litigants will generally have the opportunity to confront adverse witnesses, the hearsay rule serves as a cornerstone of a fair justice system.

6.2.3 Traditional Exceptions

60 The Court in *Starr* also reaffirmed the continuing relevance of the traditional exceptions to the hearsay rule. More recently, this Court in *Mapara* reiterated the continued application of the traditional exceptions in setting out the governing analytical framework, as noted in para. 42 above. Therefore, if the trial judge determines that the evidence falls within one of the traditional common law exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions.

6.2.4 Principled Approach: Overcoming the Hearsay Dangers

61 Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually

met in two different ways: see, for example, *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); D. M. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 17, at p. 29.

62 One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [§ 1420, p. 154]

63 Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues

must be resolved. It is one thing for a person to make a damaging statement about another in a context where it may not really matter. It is quite another for that person to repeat the statement in the course of formal proceedings where he or she must commit to its truth and accuracy, be observed and heard, and be called upon to explain or defend it. The latter situation, in addition to providing an accurate record of what was actually said by the witness, gives us a much higher degree of comfort in the statement's trustworthiness. However, in some cases it is not possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

64 These two principal ways of satisfying the reliability requirement can also be discerned in respect of the traditional exceptions to the hearsay rule. Iacobucci J. notes this distinction in *Starr*, stating as follows:

> For example, testimony in former proceedings is admitted, at least in part, because many of the traditional dangers associated with hearsay are not present. As pointed out in Sopinka, Lederman and Bryant, *supra*, at pp. 278-79:
>
> > . . . a statement which was earlier made under oath, subjected to cross-examination and admitted as testimony at a former proceeding is received in a subsequent trial *because the dangers underlying hearsay evidence are absent.*
>
> Other exceptions are based not on negating traditional hearsay dangers, but on the fact that the statement provides circumstantial guarantees of reliability. This approach is embodied in recognized exceptions such as

> dying declarations, spontaneous utterances, and statements against pecuniary interest. [Emphasis in original; para. 212.]

65 Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.

66 *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. Similarly in *Smith*, the focus of the admissibility inquiry was also on those circumstances that tended to show that the statement was true. On the other hand, the admissibility of the hearsay statement in *B. (K.G.)* and *Hawkins* was based on the presence of adequate substitutes for testing the evidence. As we shall see, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes. In *U. (F.J.)*, the Court considered both those circumstances tending to show that the statement was true and the presence of adequate substitutes for testing the evidence. *U. (F.J.)* underscores the heightened concern over

reliability in the case of prior inconsistent statements where the trier of fact is invited to accept an out-of-court statement over the sworn testimony from the same declarant. I will briefly review how the analysis of the Court in each of those cases was focussed on overcoming the particular hearsay dangers raised by the evidence.

6.2.4.1 *R. v. Khan, [1990] 2 S.C.R. 531*

67 As stated earlier, *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. The facts are well known. *Khan* involved a sexual assault on a very young child by her doctor. The child was incompetent to testify. The child's statements to her mother about the incident were inadmissible under any of the traditional hearsay exceptions. However, the child's statement had several characteristics that suggested the statement was true. Those characteristics answered many of the concerns that one would expect would be inquired into in testing the evidence, had it been available for presentation in open court in the usual way. McLachlin J., in the following oft-quoted statement, summarized them in this way:

> I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. [p. 548]

The facts also revealed that the statement was made almost immediately after the event. That feature removed any concern about inaccurate memory. The fact that the child had no reason to lie alleviated the concern about sincerity. Because the statement was made naturally and without prompting, there was no real danger that it came about because of the mother's influence. Most importantly, as stated in the above excerpt, the event described was one that would ordinarily be outside the experience of a child of her age giving it a "peculiar stamp of reliability". Finally, the statement was confirmed by a semen stain on the child's clothing. These characteristics each went to the truth and accuracy of the statement and, taken together, amply justified its admission. The criterion of reliability was met. There is nothing controversial about the factors considered in *Khan*, except for the supportive evidence of the semen stain. I will come back to that point later.

6.2.4.2 *R. v. Smith, [1992] 2 S.C.R. 915*

68 In *Smith*, this Court's inquiry into the circumstantial guarantees of reliability was also focussed on those circumstances that tended to show that the statement was true.

69 Smith was charged with the murder of K. The Crown's evidence included the testimony of K's mother about four telephone calls K made to her on the night of the murder. Defence counsel did not object to this evidence. Smith was convicted at trial. The Court of Appeal allowed the appeal and ordered a new trial on the ground

that the phone calls were hearsay, and only the first two were admissible for the purpose of establishing K's state of mind. In refusing to apply the curative proviso, the Court of Appeal found that the hearsay had been used to place Smith with K at the time of her death, thereby "buttressing certain identification evidence of questionable reliability" (pp. 922-23). The Crown appealed to this Court.

70 After ruling that the state of mind, or "present intentions" exception did not apply to the phone calls, Lamer C.J. went on to elaborate on and then apply the approach outlined in *Khan*. After quoting extensively from Wigmore on the underlying rationale for the hearsay rule and its exceptions, he elaborated on the reliability prong of the principled analysis and stated as follows (at p. 933):

> If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. [Emphasis added.]

71 In determining whether the phone calls were reliable, Lamer C.J. held that the first two were, but the third was not (the fourth was not in issue on appeal to this Court). With respect to the first two, there was no reason to doubt K's veracity — "[s]he had no known reason to lie" — and the traditional dangers associated with hearsay — perception, memory and credibility — "were not present to any significant degree" (p. 935). As we can see, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and found that these usual concerns were largely alleviated because

of the way in which the statements came about. Hence, the Court concluded that the absence of the ability to cross-examine K should go to the weight given to this evidence, not its admissibility.

72 With respect to the third phone call, however, Lamer C.J. held that "the conditions under which the statement was made do not . . . provide that circumstantial guarantee of trustworthiness that would justify its admission without the possibility of cross-examination" (p. 935). First, he held that she may have been mistaken about Smith returning to the hotel, or about his purpose in returning (p. 936). Second, he held that she might have lied to prevent her mother from sending another man to pick her up. With respect to this second possibility, Lamer C.J. held that the fact that K had been travelling under an assumed name with a credit card which she knew was either stolen or forged demonstrated that she was "at least capable of deceit" (p. 936). Again, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and concluded that these "hypotheses" showed that the circumstances of the statement were not such as to "justify the admission of its contents" since it was impossible to say that the evidence was unlikely to change under cross-examination (p. 937). It is important to note that the Court did not go on to determine whether, on its view of the evidence, the declarant was mistaken or whether she had lied — those would be matters for the ultimate trier of fact to decide. On the admissibility inquiry, it sufficed that the circumstances in which the statement was made gave rise to these issues to bar its admission.

6.2.4.3 *R. v. B. (K.G.), [1993] 1 S.C.R. 740*

73 *B. (K.G.)* provides an example where threshold reliability was essentially based on the presence of adequate substitutes for the traditional safeguards relied upon to test the evidence.

74 The issue in *B. (K.G.)* was the substantive admissibility of prior inconsistent statements made by three of B's friends, in which they told the police that B was responsible for stabbing and killing the victim in the course of a fight. The three recanted their statements at trial. (They subsequently plead guilty to perjury.) The Crown sought to admit the prior statements to police for the truth of their contents. Although the trial judge had no doubt the recantations were false, he followed the traditional common law ("orthodox") rule that the statements could be used only to impeach the witnesses. In light of the doubtfulness of the other identification evidence, the trial judge acquitted B.

75 The issue before this Court was whether the orthodox rule in respect of prior inconsistent statements should be maintained. In reviewing its history, Lamer C.J. noted that, although the prohibition on hearsay was not always recognized as the basis for the rule, similar "dangers" were cited as reasons against admission, namely absence of an oath or affirmation, inability of the trier of fact to assess demeanour, and lack of contemporaneous cross-examination (pp. 763-64). After reviewing the academic criticism, the views of law reform commissioners, legislative

changes in Canada and elsewhere, and developments in the law of hearsay, Lamer C.J. concluded that it was the province and duty of the Court to formulate a new rule (p. 777). He held that "evidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, following this Court's decisions in *Khan* and *Smith*" with the requirements of reliability and necessity "adapted and refined in this particular context, given the particular problems raised by the nature of such statements" (p. 783).

76 The most important contextual factor in *B. (K.G.)* is the availability of the declarant. Unlike the situation in *Khan* or *Smith*, the trier of fact is in a much better position to assess the reliability of the evidence because the declarant is available to be cross-examined on his or her prior inconsistent statement. The admissibility inquiry into threshold reliability, therefore, is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence. The search is for adequate substitutes for the process that would have been available had the evidence been presented in the usual way, namely through the witness, under oath or affirmation, and subject to the scrutiny of contemporaneous cross-examination.

77 Since the declarant testifies in court, under oath or affirmation, and is available for cross-examination, the question becomes why there is any remaining concern over the reliability of the prior statement. As I have indicated earlier, necessity and reliability should not be considered in isolation. One criterion may have an impact on the other. The situation in *B. (K.G.)* is one example. As noted by

Lamer C.J., "[p]rior inconsistent statements present vexing problems for the necessity criterion" (p. 796). Indeed, the declarant is available as a witness. Why should not the usual rule apply and the recanting witness's sworn testimony alone go to the truth of the matter? After all, is that not the optimal test on reliability — that the witness come forth to be seen and heard, swear or affirm to tell the truth in the formal context of court proceedings, and be subjected to cross-examination? If a witness recants a prior statement and denies its truth, the default position is to conclude that the trial process has worked as intended — untruthful or inaccurate information will have been weeded out. There must be good reason to present the prior inconsistent statement as substantive proof over the sworn testimony given in court.

78 As we know, the Court ultimately ruled in *B. (K.G.)*, and the principle is now well established, that necessity is not to be equated with the unavailability of the witness. The necessity criterion is given a flexible definition. In some cases, such as in *B. (K.G.)* where a witness recants an earlier statement, necessity is based on the unavailability of the *testimony*, not the witness. Notwithstanding the fact that the necessity criterion can be met on varied bases, the context giving rise to the need for the evidence in its hearsay form may well impact on the *degree* of reliability required to justify its admission. As stated by Lamer C.J. in *B. (K.G.)*, where the hearsay evidence is a prior inconsistent statement, reliability is a "key concern" (at pp. 786-87):

> The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the

> comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.

79 Lamer C.J. went on to describe the general attributes of in-court testimony that provide the usual safeguards for reliability. He reviewed at some length the compelling reasons to prefer statements made under oath or affirmation, the value of seeing and hearing the witness in assessing credibility, the importance of having an accurate record of what was actually said, and the value of contemporaneous cross-examination. In considering what would constitute an adequate substitute in respect of the prior inconsistent statement, he concluded (at pp. 795-96) that there will be "sufficient circumstantial guarantees of reliability" to render such statements substantively admissible where

> (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party . . . has a full opportunity to cross-examine the witness respecting the statement... Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

80 To say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer. A lot of courtroom testimony proves to be totally unreliable. However, therein lies the safeguard — in the *process* that has uncovered its untrustworthiness. Hence, the

presence of adequate substitutes for that process establishes a threshold of reliability and makes it safe to admit the evidence.

81 Lamer C.J. also added an important proviso, to which I will return later, on the trial judge's discretion to refuse to allow the jury to make substantive use of the statement, even where the criteria outlined above are satisfied when there is any concern that the statement may be the product of some form of investigatory misconduct (p. 801). Here, although the statements were videotaped, and the witnesses were cross-examined, the statements were not made under oath. Whether there was a sufficient substitute to warrant substantive admission was sent back to be determined by the trial judge (p. 805). The appeal was allowed and a new trial ordered. Cory J. (L'Heureux-Dubé J. concurring) agreed with the result but for different reasons that, for the purpose of our analysis, need not be reviewed here.

6.2.4.4 *R. v. U. (F.J.), [1995] 3 S.C.R. 764*

82 *U. (F.J.)* brought back to the Court the issue of admissibility of prior inconsistent statements. In an interview with police, the complainant, J.U., told the interviewing officer that the accused, her father, was having sex with her "almost every day" (para. 4). She gave considerable details about the sexual activity and also described two physical assaults. The interviewing police officer later testified that he had attempted to tape the interview, but that the tape recorder had malfunctioned. He subsequently prepared a summary, based partly on notes and partly on his memory.

83 Immediately after interviewing J.U., the same officer interviewed the accused. Again, the interview was not taped. The accused admitted to having sex with J.U. "many times", describing similar sexual acts and the two physical assaults that J.U. had described (para. 5). At trial, J.U. recanted the allegations of sexual abuse. She claimed to have lied at the behest of her grandmother. The accused denied having told police that he had engaged in sexual activity with J.U.

84 The focus of the discussion before this Court was whether the "rule" in *B. (K.G.)* applied to this case. Although the criteria in *B. (K.G.)* were based on the principled approach in *Khan* and *Smith*, it was not clear whether *B. (K.G.)* established a distinct "rule" for admitting prior inconsistent statements. Lamer C.J. sought to clarify the relationship between these cases, stating as follows (at para. 35):

> *Khan* and *Smith* establish that hearsay evidence will be substantively admissible when it is necessary and sufficiently reliable. Those cases also state that both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis. My decision in *B. (K.G.)* is an application of those principles to a particular branch of the hearsay rule, the rule against the substantive admission of prior inconsistent statements. The primary distinction between *B. (K.G.)*, on the one hand, and *Khan* and *Smith*, on the other, is that in *B. (K.G.)* the declarant is available for cross-examination. This fact alone goes part of the way to ensuring that the reliability criterion for admissibility is met. The case at bar differs from *B. (K.G.)* only in terms of available indicia of reliability. Necessity is met here in the same way it was met in *B. (K.G.)*: the prior statement is necessary because evidence of the same quality cannot be obtained at trial. For that reason, assessing the reliability of the prior inconsistent statement at issue here is determinative.

85 Lamer C.J. went on to determine how the indicia of reliability could be founded on different criteria than those set out in *B. (K.G.)*. The complainant's statement to the police was not made under oath. Nor was it videotaped. Most importantly, however, the declarant was available for cross-examination, thereby significantly alleviating the usual dangers arising from the introduction of hearsay evidence. Yet, the same concerns about the reliability of the prior inconsistent statement arose in this case. The complainant had recanted her earlier allegations. In the usual course of the trial process, this should be the end of the matter. Consider, for example, if the complainant had made the earlier allegations about being sexually assaulted by her father to some girlfriends in the context of playing a game of "Truth or Dare" where each player was being encouraged to outdo the previous one by saying or doing something outrageous. It would be difficult to find justification for introducing her casual statement as substantive proof over her sworn testimony that the events never happened. Hence, the focus must turn on the reliability of the prior inconsistent statement.

86 In *B. (K.G.)*, the Court held that a prior inconsistent statement is sufficiently reliable for substantive admission if it is made in circumstances comparable to the giving of in-court testimony. In *U. (F.J.)*, the reliability requirement was met rather by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and the independent statement made by her father were so compelling that the only likely explanation was that they were both telling the truth. Again here, the criteria of

necessity and reliability intersect. In the interest of seeking the truth, the very high reliability of the statement rendered its substantive admission necessary.

87 Again here, Lamer C.J. added the following proviso (at para. 49):

> I would also highlight here the proviso I specified in *B. (K.G.)* that the trial judge must be satisfied on the balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

6.2.4.5 *R. v. Hawkins, [1996] 3 S.C.R. 1043*

88 This Court's decision in *Hawkins* was concerned mainly with the issue of spousal incompetency. However, it is also instructive on the application of the principled approach to the hearsay rule. My remarks here are confined to the latter aspect of the case. It exemplifies how, in some circumstances, the reliability requirement may be established solely by the presence of adequate substitutes for the safeguards traditionally relied upon to test trial testimony. As we shall see, again here, the opportunity to cross-examine the declarant was a crucial factor. Because there were sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement, the Court concluded that the trial judge erred in excluding the statement based on its perceived lack of probative value.

89 Hawkins, a police officer, was charged with obstructing justice and corruptly accepting money. His then girlfriend, G, testified at his preliminary inquiry. After testifying the first time, G brought an application to testify again and recanted much of what she had said, with explanations. By the time of the trial, Hawkins and G were married and therefore G was incompetent to testify under s. 4 of the *Canada Evidence Act*. After ruling that the common law rule of spousal incompetency applied, and that G's testimony at the preliminary inquiry could not be read in at trial under s. 715 of the *Criminal Code*, the trial judge held that the evidence was not admissible under the principled approach because it was not sufficiently reliable. Hawkins was acquitted. The verdict was overturned by majority decision of the Court of Appeal for Ontario. On further appeal to this Court, the appeal was dismissed but for different reasons. This Court refused to modify the common law rule of spousal incompetency as it was invited to do. The Court agreed with the trial judge that the common law rule applied, and the testimony could not be read in under s. 715. However, a majority of the Court held that the preliminary inquiry testimony could be read in at trial under the principled approach to the admission of hearsay. The three dissenting judges held that this violated the policy underlying s. 4 and should not be permitted.

90 After determining that the necessity criterion was met, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring) addressed reliability. In the circumstances of this case, it could hardly be said that the complainant's testimony was inherently trustworthy. She had given contradictory versions, all under oath. Rather, the Court looked for the presence of a satisfactory basis for evaluating the truth of the statement, stating as follows, at para. 75:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact. [Emphasis added.]

91 The Court held that, generally, a witness's testimony before a preliminary inquiry will satisfy the test for threshold reliability, since the fact that it was given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues will provide sufficient guarantees of its trustworthiness (para. 76). In addition, the accuracy of the statement is certified by a written transcript which is signed by the judge, and the party against whom the hearsay evidence is tendered has the power to call the declarant as a witness. The inability of the trier of fact to observe demeanour was found to be "more than compensated by the circumstantial guarantees of trustworthiness inherent in the adversarial, adjudicative process of a preliminary inquiry" (para. 77). The fact that the early common law was prepared to admit former testimony under certain circumstances indicated an implicit acceptance of its reliability notwithstanding the lack of the declarant's presence (para. 78). Therefore, Lamer C.J. and Iacobucci J. concluded (at para. 79):

> For these reasons, we find that a witness's recorded testimony before a preliminary inquiry bears sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial. The surrounding circumstances of such testimony, particularly the presence of

> an oath or affirmation and the opportunity for contemporaneous cross-examination, more than adequately compensate for the trier of fact's inability to observe the demeanour of the witness in court. The absence of the witness at trial goes to the weight of such testimony, not to its admissibility.

Applying this reasoning to the statement at issue, it was found to be reliable (para. 80).

92 Lamer C.J. and Iacobucci J. added that the trial judge had erred in considering the internal contradictions contained in the testimony because these considerations properly related to the ultimate assessment of the actual probative value of the testimony, a matter for the trier of fact. Although some of the analysis on this last point is couched in terms of categorizing factors as relevant to either threshold or ultimate reliability, an approach which should no longer be adopted, the Court's conclusion on this point exemplifies where the line should be drawn on an inquiry into threshold reliability. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not — recall *U. (F.J.)*.

6.3 *Revisiting paras. 215 and 217 in Starr*

93 As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the context. Hence, some of the comments at paras. 215 and 217 in *Starr* should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*.

94 I want to say a few words on one factor identified in *Starr*, namely "the presence of corroborating or conflicting evidence" since it is that comment that appears to have raised the most controversy. I repeat it here for convenience:

> Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). [para. 217]

95 I will briefly review the two cases relied upon in support of this statement. The first does not really provide assistance on this question and the second, in my respectful view, should not be followed.

96 In *R. v. C.(B.)* (1993), 12 O.R. (3d) 608 (C.A.), the trial judge, in convicting the accused, had used a co-accused's statement as evidence in support of the complainant's testimony. The Court of Appeal held that this constituted an error. While a statement made by a co-accused was admissible for its truth against the co-accused, it remained hearsay as against the accused. The co-accused had recanted his statement at trial. His statement was not shown to be reliable so as to be admitted as an exception to the hearsay rule against the accused. Therefore, this case is of no assistance on the question of whether supporting evidence should be considered or not in determining hearsay admissibility. It simply reaffirms the well-established rule that an accused's statement is only admissible against its maker, not the co-accused.

97 *Idaho v. Wright*, 497 U.S. 805 (1990), is more on point. In that case, five of the nine justices of the United States Supreme Court were not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'" (p. 822). In the majority's view, the use of corroborating evidence for that purpose "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility" (p. 823). By way of

example, the majority observed that a statement made under duress may happen to be true, but evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial. The majority also raised the concern, arising mostly in child sexual abuse cases, that a jury may rely on the partial corroboration provided by medical evidence to mistakenly infer the trustworthiness of the entire allegation.

98 In his dissenting opinion, Kennedy J., with whom the remaining three justices concurred, strongly disagreed with the position of the majority on the potential use of supporting or conflicting evidence. In my view, his reasons echo much of the criticism that has been voiced about this Court's position in *Starr*. He said the following:

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. [pp. 828-29]

99 Kennedy J. also strongly disagreed with the majority's view that only circumstances surrounding the making of the statement should be considered:

> The [majority] does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] . . . terminology unexpected of a child of similar age." But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's test when measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.
>
> The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way. [References omitted; pp. 833-34.]

100 In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement. This Court

itself has not always followed this restrictive approach. Further, I do not find the majority's concern over the "bootstrapping" nature of corroborating evidence convincing. On this point, I agree with Professor Paciocco who commented on the reasoning of the majority in *Idaho v. Wright* as follows (at p. 36):

> The final rationale offered is that it would involve "bootstrapping" to admit evidence simply because it is shown by other evidence to be reliable. In fact, the "bootstrapping" label is usually reserved to circular arguments in which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement: *Ratten v. The Queen*, [1972] A.C. 378. Or, a party claims it can rely on the truth of the contents of a statement because it was a statement made by an opposing party litigant, but then relies on the contents of the statement to prove it was made by an opposing party litigant: see *R. v. Evans*, [1991] 1 S.C.R. 869. Looking to *other* evidence to confirm the reliability of evidence, the thing *Idaho v. Wright* purports to prevent, is the very antithesis of "bootstrapping".

7. Application to this Case

101 Mr. Skupien's statements to the cook, Ms. Stangrat, to the doctor and to the police constituted hearsay. The Crown sought to introduce the statements for the truth of their contents. In the context of this trial, the evidence was very important — indeed the two charges against Mr. Khelawon in respect of this complainant were entirely based on the truthfulness of the allegations contained in his statements.

102 Mr. Skupien's hearsay statements were presumptively inadmissible. None of the traditional hearsay exceptions could assist the Crown in proving its case. The evidence could only be admitted under the principled exception to the hearsay rule.

103 Mr. Skupien's death before the trial made it necessary for the Crown to resort to Mr. Skupien's evidence in its hearsay form. It was conceded throughout that the necessity requirement had been met. The case therefore turned on whether the evidence was sufficiently reliable to warrant admission.

104 Since Mr. Skupien had died before the trial, he was no longer available to be seen, heard and cross-examined in court. There was no opportunity for contemporaneous cross-examination. Nor had there been an opportunity for cross-examination at any other hearing. Although Mr. Skupien was elderly and frail at the time he made the allegations, there is no evidence that the Crown attempted to preserve his evidence by application under ss. 709 to 714 of the *Criminal Code*. He did not testify at the preliminary hearing. The record does not disclose if he had died by that time. In making these comments, I don't question the fact that it was necessary for the Crown to resort to Mr. Skupien's evidence in hearsay form. Necessity is conceded. However, in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. That issue is not raised here.

105 The fact remains however that the absence of any opportunity to cross-examine Mr. Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

106 Obviously, there was no case to be made here on the presence of adequate substitutes for testing the evidence. This is not a *Hawkins* situation where the difficulties presented by the unavailability of the declarant were easily overcome by the availability of the preliminary hearing transcript where there had been an opportunity to cross-examine the complainant in a hearing that dealt with essentially the same issues. Nor is this a *B. (K.G.)* situation where the presence of an oath and a video were coupled with the availability of the declarant at trial. There are no adequate substitutes here for testing the evidence. There is the police video — nothing more. The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement.

107 In my respectful view, there was no case to be made on that basis either. This was not a situation as in *Khan* where the cogency of the evidence was such that, in the words of Wigmore, it would be "pedantic to insist on a test whose chief object is already secured" (§ 1420, at p. 154). To the contrary, much as in the case of the third

statement ruled inadmissible in *Smith*, the circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross-examination. Mr. Skupien was elderly and frail. His mental capacity was at issue — the medical records contained repeated diagnoses of paranoia and dementia. There was also the possibility that his injuries were caused by a fall rather than an assault — the medical records revealed a number of complaints of fatigue, weakness and dizziness and the examining physician, Dr. Pietraszek, testified that the injuries could have resulted from a fall (A.R., vol. 2, at p. 259). The evidence of the garbage bags filled with Mr. Skupien's possessions provided little assistance in assessing the likely truth of his statement — he could have filled those bags himself. Ms. Stangrat's obvious motive to discredit Mr. Khelawon presented further difficulties. The initial allegations were made to her — Dr. Pietraszek acknowledged in his evidence that when he saw Mr. Skupien, Ms. Stangrat was present and may have helped him by giving some indication of what happened. The extent to which Mr. Skupien may have been influenced in making his statement by this disgruntled employee was a live issue. Mr. Skupien had issues of his own with the way the retirement home was managed. This is apparent from his rambling complaints on the police video itself. The absence of an oath and the simple "yes" in answer to the police officer's question as to whether he understood that it was important to tell the truth do not give much insight on whether he truly understood the consequences for Mr. Khelawon of making his statement. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth.

108 As indicated earlier, the crux of the trial judge's finding that the evidence was sufficiently trustworthy was based on the "striking similarities" between the statements of the five complainants. As Rosenberg J.A., I too would not reject the possibility that the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case. However, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. For example, the videotaped interview with Mr. Dinino which formed the basis of the second conviction against Mr. Khelawon was nine minutes in length. It was preceded by a 30-minute interview with the police. The police officer had no notes of the initial interview. Cst Pietroniro acknowledged that it "was very difficult" to get Mr. Dinino to answer questions and that much of the videotape is inaudible. Cst Pietroniro would generally put to Mr. Dinino what he thought Mr. Dinino was saying and Mr. Dinino would respond "yes" or "yeah". Cst Pietroniro agreed that he was making an educated guess as to what Mr. Dinino was saying and that there were some things said by Mr. Dinino that he did not understand. Quite apart from these difficulties, it is also far from clear on the record on precisely what features the trial judge based his finding that there was a "striking similarity" between the various statements. However, I do not find it necessary to elaborate on this point. The admissibility of the other statements is no longer in issue. The Court of Appeal unanimously ruled them inadmissible.

109 I conclude that the evidence did not meet the reliability requirement. The majority of the Court of Appeal was correct to rule it inadmissible.

8. Conclusion

110 For these reasons, I would dismiss the appeal.

r. *c.* khelawon

Sa Majesté la Reine *Appelante*

c.

Ramnarine Khelawon *Intimé*

et

Procureur général de la Colombie-Britannique et Criminal Lawyers' Association (Ontario) *Intervenants*

Répertorié : R. *c.* Khelawon

Référence neutre : 2006 CSC 57.

N° du greffe : 30857.

2005 : 16 décembre; 2006 : 14 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella et Charron.

en appel de la cour d'appel de l'ontario

Droit criminel — Preuve — Ouï-dire — Admissibilité — Juge du procès admettant en preuve les déclarations relatées que des plaignants décédés avaient faites à la police — Ces déclarations étaient-elles admissibles en vertu de l'exception raisonnée à la règle du ouï-dire? — Facteurs à considérer pour décider si des déclarations relatées sont suffisamment fiables pour être admissibles.

En 1999, C, une cuisinière dans une maison de retraite, a trouvé S, un résident de cet établissement, blessé grièvement dans sa chambre. Ses effets personnels étaient entassés dans des sacs à ordure. S a raconté à C que l'accusé, directeur de l'établissement, l'avait battu et avait menacé de le tuer s'il ne quittait pas la maison de retraite. C a conduit S à son appartement et s'est occupée de lui pendant quelques jours. Elle a ensuite conduit S chez un médecin. Ce dernier a témoigné qu'il avait décelé trois côtes fracturées et des ecchymoses qui pouvaient avoir résulté de l'agression alléguée par S, mais aussi d'une chute. Le lendemain, C a conduit S au poste de police, où S a fait une déclaration enregistrée sur bande vidéo, dans laquelle il alléguait que l'accusé l'avait agressé et avait menacé de le tuer. Cette déclaration n'a pas été faite sous serment, mais S a répondu « oui » lorsqu'on lui a demandé s'il comprenait qu'il était important de dire la vérité et que des accusations pourraient être portées contre lui s'il mentait. Les dossiers médicaux saisis à la maison de retraite décrivaient S comme étant « en colère », « agressif », « dépressif » et « paranoïaque », en plus de révéler qu'il avait été traité pour une psychose paranoïaque et une dépression. Au procès, une psychiatre ayant témoigné lors du voir-dire a conclu que S avait la capacité de communiquer les faits dans son témoignage et qu'il comprenait l'importance de dire la vérité au moment où il a fait sa déclaration à la police. La défense a prétendu que C avait amené S à porter plainte pour se venger de l'accusé qui avait mis fin à son emploi auparavant.

Des policiers se sont rendus à la maison de retraite où d'autres résidents se sont plaints d'avoir été agressés par l'accusé. Ce dernier a fait l'objet d'accusations à l'égard de cinq plaignants, mais, au moment du procès, quatre plaignants, dont S et D, étaient décédés de causes non liées aux agressions alléguées, et le cinquième n'était plus habile à témoigner. Un seul plaignant avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir s'il y avait lieur d'admettre en preuve les déclarations relatées des plaignants. Le juge du procès a admis une partie de la preuve par ouï-dire en raison, dans une large mesure, de la similitude frappante des déclarations. En fin de compte, il a estimé que les déclarations enregistrées sur bande vidéo que S et D avaient faites à la police étaient suffisamment crédibles pour justifier des déclarations de culpabilité de voies de fait graves et de menaces de mort à l'endroit de S, ainsi que d'agression ayant causé des lésions corporelles et d'agression armée à l'endroit de D. L'accusé a été acquitté quant aux autres chefs. En appel, la Cour d'appel à la majorité a exclu toutes les déclarations relatées et a acquitté l'accusé relativement à toutes les accusations. Le juge dissident aurait maintenu les déclarations de culpabilité relatives à S. Le ministère public a formé un pourvoi de plein droit contre les acquittements relatifs à S et s'est vu refuser l'autorisation d'appeler à l'égard de ceux relatifs à D.

Arrêt : Le pourvoi est rejeté et les acquittements sont confirmés.

La preuve par ouï-dire est présumée inadmissible à moins qu'une exception à la règle du ouï-dire ne s'applique, essentiellement en raison de l'incapacité générale d'en vérifier la fiabilité. Les caractéristiques déterminantes essentielles du ouï-dire sont le fait que la déclaration extrajudiciaire soit présentée pour établir la véracité de son contenu et l'impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration. Le ouï-dire inclut une déclaration extrajudiciaire d'un témoin qui

dépose en cour lorsque cette déclaration est présentée pour établir la véracité de son contenu. Dans certains cas, la preuve par ouï-dire présente des dangers minimes et son exclusion au lieu de son admission gênerait la constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions traditionnelles à la règle d'exclusion. La preuve par ouï-dire qui ne relève pas d'une exception traditionnelle peut tout de même être admissible suivant la méthode d'analyse raisonnée, si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire. L'exigence de fiabilité vise à déterminer les cas où les préoccupations découlant de l'impossibilité de vérifier la preuve sont suffisamment surmontées pour justifier l'admission de cette preuve à titre d'exception à la règle d'exclusion générale. En général, il est possible de satisfaire à l'exigence de fiabilité en démontrant (1) qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite, ou (2) que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est faite. Ces deux principales façons de satisfaire à l'exigence de fiabilité ne constituent pas des catégories mutuellement exclusives et peuvent aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité. [2-3] [35] [37] [42] [49] [61-63] [65]

Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du seuil de fiabilité d'une déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur. Les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Plus exactement, tous les facteurs pertinents

devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Les observations contraires formulées dans la jurisprudence de notre Cour, dont l'arrêt *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40, ne devraient plus être suivies. Pour se prononcer sur l'admissibilité, le tribunal devrait adopter une approche plus fonctionnelle axée sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. La question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse dépendra du contexte. Dans chaque cas, l'examen ne porte que sur la question de l'admissibilité en matière de preuve. Lors de l'examen de l'admissibilité, il est possible, dans les cas appropriés, de prendre en considération une preuve corroborante ou contradictoire. Dans le cas où l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire que le juge du procès vérifie davantage si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non. [2] [4] [92-93]

En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée inadmissible. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le juge des faits. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la

règle. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire résiduel d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante. [2-3]

Les arrêts *R. c. Khan*, [1990] 2 R.C.S. 531, et *R. c. Smith*, [1992] 2 R.C.S. 915, sont des exemples où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles des déclarations relatées avaient été faites étaient suffisamment rassurantes quant à leur véracité et à leur exactitude. Les arrêts *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, et *R. c. Hawkins*, [1996] 3 R.C.S. 1043, sont des exemples où le seuil de fiabilité reposait sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve. De même, dans l'arrêt *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764, les similitudes frappantes entre la déclaration extrajudiciaire incompatible que la plaignante avait faite antérieurement et celle que l'accusé avait faite de façon indépendante étaient si convaincantes qu'il était nécessaire d'admettre quant au fond la déclaration de la plaignante en raison de sa très grande fiabilité. [67-68] [73] [82] [86] [88]

La déclaration enregistrée sur bande vidéo que S avait faite à la police était inadmissible. Même s'il était nécessaire de recourir à la déclaration relatée de S parce que celui-ci était décédé avant l'ouverture du procès, cette déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle avait été faite ne constituaient pas un gage raisonnable de fiabilité inhérente. Un certain nombre de questions sérieuses se posent, notamment celles de savoir si S jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il a été influencé par C, si sa déclaration était motivée par une insatisfaction à l'égard de l'administration de la maison de retraite et si ses blessures

étaient dues à une chute. L'impossibilité de contre-interroger S limitait substantiellement la capacité de l'accusé de vérifier la preuve et la capacité du juge des faits d'en déterminer correctement la valeur. Même si l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de S. L'admission de cette preuve risquait de compromettre l'équité du procès. En outre, la déposition de S aurait pu être prise, avant son décès, par un commissaire en présence de l'accusé ou de son avocat, ce qui aurait permis de préserver à la fois la preuve et les droits de l'accusé. [7] [108]

Jurisprudence

Arrêt modifié : *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40; **arrêts interprétés :** *R. c. Khan*, [1990] 2 R.C.S. 531; *R. c. Smith*, [1992] 2 R.C.S. 915; *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; *R. c. Hawkins*, [1996] 3 R.C.S. 1043; **arrêts analysés :** *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho c. Wright*, 497 U.S. 805 (1990); **arrêts mentionnés :** *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. O'Brien*, [1978] 1 R.C.S. 591; *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23; *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505; *R. c. Rose*, [1998] 3 R.C.S. 262; *R. c. Mills*, [1999] 3 R.C.S. 668; *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7.

Code criminel, L.R.C. 1985, ch. C-46, art. 709 à 714.

Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 16.

Doctrine citée

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Rosenberg, Armstrong et Blair) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), qui a annulé les déclarations de culpabilité prononcées contre l'accusé. Pourvoi rejeté.

John S. McInnes et *Eliott Behar*, pour l'appelante.

Timothy E. Breen, pour l'intimé.

Alexander Budlovsky, pour l'intervenant le procureur général de la Colombie-Britannique.

Louis P. Strezos et *Joseph Di Luca*, pour l'intervenante la Criminal Lawyers' Association (Ontario).

Procureur de l'appelante : Ministère du Procureur général de l'Ontario, Toronto.

Procureurs de l'intimé : Fleming, Breen, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intervenante la Criminal Lawyers' Association (Ontario) : Louis P. Strezos and Associate, et Di Luca Barristers, Toronto.

Traduction

COUR SUPRÊME DU CANADA

SA MAJESTÉ LA REINE

- c. -

RAMNARINE KHELAWON

- et -

PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE et CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

CORAM : La Juge en chef et les juges Binnie, LeBel, Deschamps, Fish, Abella et Charron

LA JUGE CHARRON —

1. Aperçu

1 Le présent pourvoi porte sur l'admissibilité des déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, qui s'applique cas par cas et repose sur la nécessité et la fiabilité. Plus particulièrement, des indications sont requises sur les facteurs à considérer pour décider si une déclaration relatée est suffisamment fiable pour être admissible. L'arrêt de notre Cour *R. c. Starr*,

[2000] 2 R.C.S. 144, 2000 CSC 40, est généralement interprété comme signifiant que les circonstances « extrinsèques » dans lesquelles la déclaration a été recueillie n'ont une incidence que sur sa fiabilité en dernière analyse et ne peuvent pas être prises en considération par le juge du procès lorsqu'il se prononce sur son admissibilité. Cet arrêt a suscité une multitude de commentaires dans la jurisprudence et de critiques dans la doctrine pour diverses raisons, dont la difficulté de définir ce qui constitue une circonstance « extrinsèque » et l'incohérence manifeste entre cette conclusion de l'arrêt *Starr* et le fait que la Cour a pris en considération une tache de sperme trouvée sur les vêtements de la déclarante dans l'affaire *R. c. Khan*, [1990] 2 R.C.S. 531, la raison de mentir de la déclarante dans l'affaire *R. c. Smith*, [1992] 2 R.C.S. 915, et, ce qui est le plus pertinent en l'espèce, les similitudes frappantes entre les déclarations dans l'affaire *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764.

2 En général, tout élément de preuve pertinent est admissible. La règle excluant le ouï-dire est une exception bien établie à ce principe général. Bien qu'aucun raisonnement unique n'en sous-tende l'évolution historique, l'exclusion dont les déclarations relatées sont présumées faire l'objet tient essentiellement à l'incapacité générale d'en vérifier la fiabilité. Si le déclarant n'est pas présent en cour, il peut se révéler impossible de mettre à l'épreuve sa perception, sa mémoire, sa relation du fait en question ou sa sincérité. Il se peut que la déclaration elle-même ne fasse pas l'objet d'un compte rendu exact. Des erreurs, des exagérations ou des faussetés délibérées peuvent passer inaperçues et mener à des verdicts injustes. Ainsi, la règle interdisant le ouï-dire est censée accroître l'exactitude des conclusions de fait du tribunal et non entraver sa fonction de recherche de la vérité. Toutefois, la difficulté de déterminer la valeur de la preuve par ouï-dire varie selon le contexte. Dans certains cas, cette preuve présente des dangers minimes et son *exclusion* au lieu de son admission gênerait la

constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions à la règle. Tout comme les exceptions traditionnelles à la règle d'exclusion ont été largement conçues en fonction des circonstances où les dangers liés à l'admission de la preuve étaient suffisamment atténués, il doit en être de même pour l'exception générale raisonnée à la règle du ouï-dire. Lorsqu'il est nécessaire de recourir à ce type de preuve, une déclaration relatée peut être admise si son contenu est fiable en raison de la manière dont elle a été faite ou si les circonstances permettent, en fin de compte, au juge des faits d'en déterminer suffisamment la valeur. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du « seuil de fiabilité » de la déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur.

3 La distinction entre seuil de fiabilité et fiabilité en dernière analyse reflète la différence importante entre admettre un élément de preuve et s'y fier. Le juge du procès détermine l'admissibilité en fonction des règles de preuve applicables. C'est au juge des faits qu'il appartient en fin de compte de décider, au regard de l'ensemble de la preuve, s'il y a lieu de se fier à cet élément de preuve pour trancher les questions en litige. L'omission de respecter cette distinction aurait pour effet non seulement de prolonger indûment les audiences portant sur l'admissibilité, mais également de fausser le processus de constatation des faits. En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée *inadmissible*. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire pour trancher la question en litige ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le

juge des faits. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la règle. Les préoccupations relatives à l'équité du procès imprègnent non seulement la décision concernant l'admissibilité, mais encore guident l'exercice du pouvoir discrétionnaire résiduel du juge du procès d'exclure des éléments de preuve même si leur nécessité et leur fiabilité peuvent être démontrées. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante.

4 Comme je l'expliquerai, je suis arrivée à la conclusion que les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Les observations contraires formulées dans la jurisprudence de notre Cour ne devraient plus être suivies. Plus exactement, tous les facteurs pertinents devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Dans chaque cas, l'examen doit être fonction des dangers particuliers que présente la preuve et ne porter que sur la question de l'admissibilité.

5 En mai 1999, cinq personnes âgées résidant dans une maison de retraite ont dit à différentes personnes que le directeur de l'établissement, l'intimé Ramnarine Khelawon, les avaient agressées. Au moment du procès, environ deux ans et demi plus tard, quatre des plaignants étaient décédés de causes non liées aux agressions et le cinquième n'était plus habile à témoigner. Un seul des plaignants avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir si les déclarations relatées des plaignants atteignaient un seuil de fiabilité suffisant pour qu'elles puissent être admises en preuve. Le juge Grossi a conclu que les déclarations

relatées de chacun des plaignants étaient suffisamment fiables pour être admises en preuve, en raison, dans une large mesure, de leur similitude « frappante ». En fin de compte, il a déclaré M. Khelawon coupable des infractions relatives à deux des plaignants, soit MM. Skupien et Dinino, et l'a acquitté à l'égard des autres chefs. M. Khelawon a été condamné à une peine d'emprisonnement de deux ans et demi pour les infractions relatives à M. Skupien et à une peine additionnelle de deux ans pour celles relatives à M. Dinino.

6 Lors de l'appel devant la Cour d'appel de l'Ontario, le juge Rosenberg (avec l'appui du juge Armstrong) a exclu toutes les déclarations et a acquitté M. Khelawon. Le juge Blair, dissident, aurait pour sa part maintenu les déclarations de culpabilité relatives à M. Skupien seulement. Dans son pourvoi de plein droit devant notre Cour, le ministère public sollicite le rétablissement des déclarations de culpabilité relatives à M. Skupien. Il a également sollicité l'autorisation d'appeler des accusations relatives à M. Dinino, mais celle-ci lui a été refusée.

7 À mon avis, la déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police était inadmissible. Même s'il était nécessaire de recourir à ce type de témoignage de M. Skupien parce que celui-ci était décédé avant l'ouverture du procès, la déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle a été faite ne constituaient pas un gage raisonnable de fiabilité inhérente. Au contraire, elles soulevaient un certain nombre de questions sérieuses, notamment celles de savoir si M. Skupien jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il avait été influencé, dans ses allégations, par une employée mécontente qui avait été congédiée par M. Khelawon, si sa déclaration était motivée par une insatisfaction

générale à l'égard de l'administration de la maison de retraite et si ses blessures étaient dues à une chute plutôt qu'à l'agression. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait substantiellement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur. Les déclarations des autres plaignants présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Compte tenu de l'ensemble des circonstances et, en particulier, du fait que la preuve du ministère public contre M. Khelawon reposait sur la déclaration relatée, l'admission de ce témoignage risquait de compromettre l'équité du procès et n'aurait pas dû être autorisée. Comme l'a judicieusement fait remarquer le juge Rosenberg, l'admission de la preuve suivant la méthode d'analyse raisonnée de la règle du ouï-dire n'est pas la seule façon de préserver le témoignage de personnes qui peuvent être dans l'impossibilité de se présenter au procès. Les articles 709 à 714 du *Code criminel*, L.R.C. 1985, ch. C-46, envisagent expressément cette éventualité et établissent une procédure de prise de déposition par un commissaire en présence de l'accusé ou de son avocat, ce qui permet de préserver à la fois la preuve et les droits de l'accusé.

8 Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi et de confirmer les acquittements.

2. Contexte

9 M. Khelawon a été accusé de voies de fait graves et de menaces de mort à l'endroit de Teofil Skupien. Il a également été accusé de voies de faits graves et d'agression armée à l'endroit d'Atillio Dinino ainsi que d'agression ayant causé des

lésions corporelles à trois autres plaignants. Ces infractions auraient été commises au cours du mois de mai 1999 et, à l'époque, tous les plaignants étaient des résidents de Bloor West Village Retirement Home. M. Khelawon était le directeur de l'établissement et sa mère en était la propriétaire. Comme je l'ai indiqué précédemment, aucun des plaignants n'était disponible pour témoigner au procès. En conséquence, la principale question concernait l'admissibilité des déclarations relatées qu'ils avaient faites à diverses personnes. Il y avait en tout 10 déclarations, dont quatre à la police qui étaient enregistrées sur bande vidéo. Le procès tenu devant le juge Grossi siégeant sans jury s'est déroulé essentiellement comme un voir-dire sur l'admissibilité de la preuve, les avocats ayant convenu qu'il ne serait pas nécessaire de reprendre la preuve concernant les déclarations qui seraient par la suite jugées admissibles. Aucune des déclarations n'était visée par quelque exception traditionnelle à la règle du ouï-dire. Pour qu'elles soient admissibles, le ministère public devait plutôt satisfaire à la double exigence de nécessité et de fiabilité selon la méthode d'analyse raisonnée de la règle du ouï-dire, établie dans les arrêts *Khan*, *Smith* et, par la suite, *Starr*.

10 Les accusations relatives à M. Skupien sont les seules soumises à notre Cour. Je vais donc faire un résumé plus détaillé de la preuve concernant les déclarations de M. Skupien. Je vais également décrire les circonstances entourant l'obtention des déclarations des autres plaignants dans la mesure où elles sont pertinentes pour trancher le présent pourvoi. Le ministère public a cherché à produire trois déclarations de M. Skupien : la première faite à une employée de la maison de retraite, la deuxième, au médecin qui a soigné ses blessures, et la troisième, à la police.

Seule la dernière déclaration a été admise en preuve au procès. Je décrirai chacune des déclarations à tour de rôle.

2.1 *La déclaration de M. Skupien à M^me^ Stangrat*

11 Au moment des faits en question, M. Skupien était âgé de 81 ans et vivait depuis quatre ans dans l'établissement Bloor West Village Retirement Home. Il a adressé sa première plainte à l'une des employés de la maison de retraite, M^me^ Joanna Stangrat. Celle-ci, connue également sous plusieurs autres noms, était cuisinière à la maison de retraite depuis quelques mois. Elle connaissait M. Skupien parce que celui-ci se rendait souvent à la cuisine et l'accompagnait parfois jusqu'au métro à la fin de son quart de travail. M^me^ Stangrat a joué un rôle important dans le dossier concernant M. Skupien. La thèse de la défense voulait notamment qu'elle ait amené M. Skupien et les autres plaignants à porter plainte pour se venger de M. Khelawon qui lui avait remis un avis de cessation d'emploi quelques semaines auparavant.

12 Le 8 mai 1999, M^me^ Stangrat a remarqué que M. Skupien n'était pas venu prendre son petit déjeuner. Elle s'est rendue à sa chambre pour vérifier s'il allait bien et l'a trouvé étendu sur son lit. Son visage était rouge et il avait du sang autour de la bouche. Lorsqu'elle s'est approchée de lui, elle a constaté que son oeil et son nez étaient contusionnés. Ses yeux étaient enflés. Lorsque M. Skupien l'a aperçue, il lui a demandé d'entrer et de fermer la porte. Il semblait être en état de choc et très mal en point. M^me^ Stangrat a remarqué la présence sur le plancher de deux grands sacs à ordures verts remplis. Elle a fermé la porte et lui a demandé ce qui s'était passé et ce que contenaient les deux sacs à ordures. M. Skupien lui a raconté ce qui s'était passé

le soir précédent. Il lui a aussi montré les ecchymoses qu'il avait sur la partie supérieure gauche de sa poitrine.

13 M. Skupien a dit à M^me^ Stangrat qu'il devait quitter la maison de retraite avant midi ce même jour parce que « Tony », le surnom de M. Khelawon, reviendrait pour le tuer. Il a expliqué à M^me^ Stangrat que M. Khelawon était entré dans sa chambre en colère vers 20 h le soir précédent et l'avait roué de coups de poing au visage et dans les côtes. Après l'avoir battu, M. Khelawon avait entassé ses vêtements dans les sacs à ordures verts qu'ils avaient ensuite laissés sur le plancher. M^me^ Stangrat a demandé à M. Skupien pourquoi M. Khelawon l'avait ainsi attaqué. Celui-ci a répondu que Tony lui reprochait de se rendre à la cuisine alors qu'il n'avait aucune raison d'y aller. Après avoir agressé M. Skupien, M. Khelawon l'a menacé en lui disant de quitter la maison de retraite avant midi le lendemain, sinon il reviendrait pour le tuer. M. Skupien a demandé à M^me^ Stangrat ce qu'il devait faire. Elle lui a dit qu'elle téléphonerait à sa fille pour qu'elle vienne le chercher et lui a conseillé de rester dans sa chambre jusqu'à ce qu'elle ait terminé ses tâches de la journée.

14 M^me^ Stangrat a fait en sorte que M. Skupien demeure chez sa fille plus tard le même jour, et ensuite à son propre appartement. M. Skupien était souffrant, mais il refusait alors de consulter un médecin parce qu'il avait peur. M^me^ Stangrat l'a gardé à son appartement où elle et une de ses amies se sont occupé de lui à tour de rôle.

Quelques jours plus tard, M. Skupien a accepté de se rendre chez le médecin. M^me^ Stangrat et son amie l'ont amené voir le D^r^ Pietraszek.

2.2 *La déclaration de M. Skupien au médecin traitant*

15 Le 12 mai 1999, le D^r^ Pietraszek a examiné M. Skupien. Il a constaté la présence d'ecchymoses dans son visage ainsi que dans son dos et sur la partie gauche de sa poitrine. Il a aussi remarqué que M. Skupien semblait éprouver de la douleur en respirant. Des radiographies ont permis de constater que trois de ses côtes étaient fracturées. Dans son témoignage, le D^r^ Pietraszek a affirmé que M. Skupien lui avait dit avoir été frappé au visage et sur le corps avec ce qui lui avait semblé être une canne ou un tuyau. Le médecin a rejeté toute idée que M^me^ Stangrat ait raconté cette histoire, mais il a reconnu qu'elle était présente et qu'elle pouvait avoir aidé M. Skupien à décrire ce qui s'était passé. Le D^r^ Pietraszek a estimé que les blessures pouvaient avoir été causées de la façon relatée par M. Skupien. Il a également témoigné que les blessures pouvaient être dues à une chute.

2.3 *La déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police*

16 Le lendemain, soit le 13 mai 1999, M^me^ Stangrat a conduit M. Skupien au poste de police. Le détective Karpow a reçu sa plainte. Il a remarqué la présence d'ecchymoses sur la partie gauche du visage de M. Skupien, près de l'oeil. Le détective s'est arrangé pour que M. Skupien fasse une déclaration enregistrée sur bande vidéo. Le détective Karpow et l'agent John Birrell étaient présents. La déclaration n'a pas été faite sous serment, mais on a demandé à M. Skupien s'il comprenait qu'il était très important de dire la vérité et que, s'il mentait, [TRADUCTION]« des accusations en

ce sens pourraient être portées contre [lui] ». M. Skupien a répondu « oui » aux deux questions. Après quelques autres questions préliminaires, on lui a demandé en quoi consistait sa plainte. Il a alors expliqué comment, le 7 mai 1999, Tony s'était rendu à sa chambre et lui avait dit « en voilà assez ». Il s'était ensuite mis à le battre en lui administrant des gifles et des coups de poing au visage, dans les côtes et un peu partout, et en lui interdisant d'aller à la cuisine. Tony avait dit à M. Skupien que s'il ne partait pas, il reviendrait à midi le lendemain pour l'abattre. M. Skupien a ensuite pris la peine d'ajouter plusieurs plaintes concernant l'administration générale de la maison de retraite, jusqu'à ce que le détective Karpow lui rappelle l'objet de sa démarche en lui posant d'autres questions sur l'épisode en cause et la suite des événements. M. Skupien a généralement bien répondu aux questions du policier.

17 À la suite de cet entretien, M. Khelawon a été arrêté.

2.4 *L'enquête plus approfondie*

18 M^me^ Stangrat a remis aux policiers une liste d'autres personnes auxquelles, selon elle, ils devraient aller s'adresser à la maison de retraite. Le lendemain, soit le 14 mai 1999, plusieurs policiers sont allés rencontrer ces personnes à la maison de retraite. Comme il n'y avait pas d'inscriptions sur les portes, les agents ont dû visiter tout l'établissement, s'entretenant avec des résidents et des membres du personnel infirmier. Parmi les personnes trouvées, certaines se sont montrées [TRADUCTION] « peu réceptives », d'où l'impossibilité d'avoir un entretien utile avec elles. D'autres, toutefois, ont pu et ont voulu parler. Après avoir divulgué leur identité, les policiers demandaient aux résidents comment ça allait à la maison de retraite et s'ils souhaitaient discuter de ce qui pouvait leur être arrivé. Les policiers se sont arrangés

pour enregistrer sur bande vidéo les déclarations des personnes qui voulaient leur parler, dont celles de trois autres plaignants, M. Dinino, M^me^ Poliszak et M. Grocholska. Le quatrième plaignant, M. Peiszterer, n'a pas été en mesure de communiquer avec la police, mais son fils a fourni une déclaration enregistrée sur bande vidéo.

2.5 *Les dossiers médicaux*

19 Le 15 mai 1999, le détective Karpow s'est rendu à la maison de retraite où il a rencontré le D^r^ Michalski, un médecin appelé régulièrement à y soigner les résidents. Le 18 mai 1999, la police est retournée à la maison de retraite et a saisi les dossiers médicaux et un journal contenant des notes du personnel infirmier.

20 La documentation tirée du dossier de M. Skupien a révélé que celui-ci habitait en appartement jusqu'à ce qu'il soit victime d'un accident vasculaire cérébral (AVC) en février 1995. Il a été transféré à la maison de retraite en avril 1995. Un rapport daté du 13 avril 1995 fait état de sa condition après l'AVC. Il connaissait parfois des périodes de confusion, il ne pouvait sortir seul à l'extérieur et il avait besoin d'aide pour préparer ses repas, effectuer ses opérations bancaires et se rappeler de prendre ses médicaments, mais il était en mesure d'accomplir toutes les tâches en matière de soins personnels.

21 Le dossier du D^r^ Michalski faisait état de rencontres fréquentes avec M. Skupien pendant son séjour à la maison de retraite. Parfois, il était décrit comme étant [TRADUCTION] « dépressif », « agressif », « en colère » et « paranoïaque ». En juin 1998, un diagnostic de psychose paranoïaque a été établi et des médicaments ont

été prescrits. En juillet 1998, « la paranoïa a diminué quelque peu ». En août 1998, M. Skupien a été décrit comme étant « en colère et agressif » et la dose a été augmentée. En août 1998, il était qualifié de « confus ». La possibilité de démence était notée pour la première fois. En septembre 1998, un diagnostic de « dépression » a été établi et des médicaments ont été prescrits. Toujours en septembre 1998, une note indique que la dépression est atténuée et, même si elle était apparemment « éliminée » en janvier 1999, la dépression a de nouveau été notée en février 1999. Ces notes font également état d'un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements.

2.6 *Le témoignage d'expert lors du voir-dire*

22 La D^re^ Susan Lieff, une psychiatre gériatrique, a été autorisée à présenter, lors du voir-dire, un témoignage d'opinion sur la capacité de M. Skupien de comprendre l'importance de dire la vérité et de communiquer les faits dans son témoignage. Elle a également exprimé une opinion au sujet de M. Dinino. Son opinion était fondée uniquement sur son examen des entretiens enregistrés sur bande vidéo et des dossiers médicaux. En ce qui concerne M. Skupien, la D^re^ Lieff a témoigné que l'enregistrement ne révélait aucun affaiblissement de jugement, aucun délire, aucune hallucination ni aucune pathologie mentale. Il paraissait comprendre les questions posées et il donnait des réponses pertinentes. Selon la D^re^ Lieff, le « oui » que M. Skupien a répondu lorsqu'il a été informé de la nécessité de dire la vérité indiquait qu'il avait bien compris ce qu'on lui disait. La D^re^ Lieff n'a pas consulté le D^r^ Michalski, mais elle a contesté son diagnostic de « démence ». À son avis, les symptômes observés par le D^r^ Michalski s'apparentaient davantage à des effets secondaires du médicament antipsychotique que M. Skupien prenait à l'époque. La

D^re^ Lieff a conclu que M. Skupien comprenait l'importance de dire la vérité et qu'il était capable de communiquer les faits dans son témoignage.

3. La décision du juge du procès concernant l'admissibilité

23 À titre préliminaire, le juge du procès a conclu que les quatre plaignants ayant fait des déclarations enregistrées sur bande vidéo avaient à l'époque la capacité requise au sens de l'art. 16 de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, qu'il a interprété comme exigeant que [TRADUCTION] « les témoins connaissent l'importance de dire la vérité et soient capables de communiquer les faits dans leur témoignage ». Il a fondé sa conclusion sur son propre visionnement des bandes vidéo et sur le témoignage d'opinion de la D^re^ Lieff. (La capacité mentale du déclarant est pertinente pour examiner l'admissibilité d'une déclaration relatée étant donné qu'elle peut avoir une incidence sur la fiabilité de cette déclaration; cependant, il importe de souligner que l'art. 16 ne s'applique pas en l'espèce. Cet article établit la capacité minimale requise pour qu'un témoignage soit admis *en cour*. Ce seuil est bas et si le témoignage est reçu, il fait ensuite l'objet du contre-interrogatoire habituel qui porte notamment sur toute question pertinente concernant l'état d'esprit du témoin. L'examen de l'admissibilité d'une déclaration relatée peut requérir un examen plus approfondi de la capacité mentale du déclarant au moment où il a fait la déclaration, dans le cas où il est impossible de le contre-interroger.)

24 Après avoir tranché la question de l'art. 16, le juge du procès s'est penché sur le critère de la nécessité. Bien que des questions soulevées au procès aient visé à déterminer si certaines déclarations des plaignants satisfaisaient à ce critère, aucune de

ces questions ne concernaient M. Skupien et c'est pourquoi il n'est pas nécessaire de les examiner en l'espèce.

25 Enfin, le juge du procès a examiné la question du seuil de fiabilité. Il a conclu que toutes les déclarations enregistrées sur bande vidéo qui ont été faites à la police satisfaisaient à l'exigence de fiabilité. À l'appui de cette conclusion, il a souligné qu'il n'y avait [TRADUCTION] « rien de malencontreux dans la procédure suivie par la police pour recueillir les déclarations », et il a conclu que, bien que trois des déclarations des plaignants aient été recueillies à la maison de retraite plutôt qu'au poste de police, « les circonstances dans lesquelles les déclarations ont été recueillies [étaient], en l'occurrence, aussi formelles et solennelles que possible ». Le juge du procès a fait remarquer que, dans leurs déclarations, les plaignants ne faisaient que formuler leurs plaintes respectives « sans montrer de l'animosité pour l'accusé ». Les plaignants « paraissaient francs », ils n'étaient « pas évasifs » et ils « ne tentaient pas d'exagérer leurs blessures ». Les questions posées n'étaient pas « trop suggestives », et les seules questions suggestives touchaient la valeur probante plutôt que l'admissibilité. Toutes les déclarations avaient été effectuées au moment où les faits décrits étaient survenus, ou peu après. Les plaignants connaissaient bien leur agresseur et il n'y avait aucune autre possibilité réaliste de soupçonner quelqu'un d'autre. De plus, MM. Skupien et Dinino avaient tous les deux des blessures corroborantes.

26 Toutefois, la décision du juge du procès semble reposer essentiellement sur son application de l'arrêt *U. (F.J.)* de notre Cour, où la déclaration extrajudiciaire de la plaignante a été admise en preuve à cause de sa « similitude frappante » avec la déclaration de l'accusé concernant les mêmes faits. Dans ses motifs, le juge du procès a mentionné, à maintes reprises, la similitude entre les déclarations et a conclu que

[TRADUCTION] « la combinaison cumulative de points semblables rend[ait] la similitude globale entre les déclarations suffisamment distinctive pour rejeter la coïncidence comme explication probable ». Tout en estimant que les déclarations orales étaient également « suffisamment similaires pour être visées par le principe de l'arrêt *R. c. U. (F.J.)* », il a conclu, en se fondant sur le par. 217 de l'arrêt *Starr*, que « les admettre en preuve équivaudrait à admettre un témoignage justificatif du fait que je suis en possession des déclarations sur bande vidéo ».

27 Selon le juge du procès, le seul véritable danger en matière de ouï-dire que comportait l'admission en preuve des déclarations était l'absence de contre-interrogatoire, mais, s'appuyant sur l'arrêt *Smith*, il a décidé qu'une preuve fiable ne devrait pas être exclue pour ce seul motif. L'intérêt public à ce que « les personnes âgées soient bien traitées » l'autorisait à « considérer les déclarations sur bande vidéo dans leur ensemble pour renforcer la crédibilité des plaignants ». Il a donc conclu à l'admissibilité des déclarations enregistrées sur bande vidéo et à l'inadmissibilité des déclarations orales.

28 À la fin du procès, le juge Grossi a décidé, en fin de compte, que seules deux des déclarations enregistrées sur bande vidéo étaient suffisamment crédibles pour justifier une déclaration de culpabilité, à savoir celles de MM. Dinino et Skupien. Comme le présent pourvoi ne porte que sur la décision concernant l'admissibilité, il n'est pas nécessaire d'examiner les motifs de la déclaration de culpabilité. Les parties conviennent que si les déclarations de M. Skupien sont inadmissibles, les déclarations de culpabilité doivent être annulées et le pourvoi, rejeté.

4. Cour d'appel de l'Ontario (2005), 195 O.A.C. 11

29 M. Khelawon a interjeté appel contre ses déclarations de culpabilité en faisant valoir que le juge du procès avait commis une erreur en admettant en preuve les déclarations enregistrées sur bande vidéo. La Cour d'appel a statué à l'unanimité que la déclaration de M. Dinino n'était pas suffisamment fiable pour être admise en preuve. Les juges majoritaires ont estimé que la déclaration de M. Skupien était également inadmissible en raison de sa non-fiabilité.

30 Les trois juges ont tous interprété les motifs du juge du procès comme signifiant que, n'eût été la similitude entre les déclarations des divers plaignants, aucune d'elles n'aurait satisfait à l'exigence de fiabilité, de sorte qu'elles auraient toutes été inadmissibles (le juge Rosenberg, par. 90; le juge Blair, par. 29). La cour a donc mis l'accent sur cet aspect de la preuve et, en fait, le désaccord entre les juges majoritaires et le juge dissident tenait à la question de savoir si la similitude entre les déclarations pouvait être prise en considération pour apprécier la fiabilité suivant la méthode d'analyse raisonnée.

31 Le juge Rosenberg, s'exprimant au nom des juges majoritaires, a conclu que le principe de l'arrêt *U. (F.J.)* ne pouvait s'appliquer que lorsque les déclarations concernent les mêmes faits et que, dans la plupart des cas, il ne serait appliqué que s'il est possible de contre-interroger le déclarant (par. 114). En l'espèce, les déclarations concernaient des faits différents. Un juge des faits pourrait conclure, suivant le raisonnement des faits similaires, que la même personne a commis tous les crimes, mais c'est là une question de fiabilité en dernière analyse et non de seuil de fiabilité (par. 115). Seul le dernier est pertinent pour déterminer l'admissibilité. De plus, selon

le juge Rosenberg, les déclarations de comparaison doivent également être admissibles quant au fond, parce que la décision finale concernant la probabilité de coïncidence ou de collusion appartient au juge des faits (par. 128), et il serait étrange que celui-ci apprécie la fiabilité en dernière analyse sans avoir accès à [TRADUCTION] « l'élément de preuve même qui a convaincu le juge du procès que la déclaration était fiable » (par. 130). La décision du juge Grossi constituait donc un élargissement inacceptable de la portée du principe de l'arrêt *U. (F.J.)*. Le juge Rosenberg a également décidé, au par. 92, qu'un tel élargissement était incompatible avec l'affirmation du juge Iacobucci dans l'arrêt *Starr*, au par. 217, selon laquelle il n'y a pas lieu de tenir compte d'une « preuve corroborante » pour établir le seuil de fiabilité.

32 Le juge Blair, dissident, a conclu que la notion fondamentale sous-tendant « l'exception » de l'arrêt *U. (F.J.)* veut que, en l'absence de collusion, de connaissance préalable ou d'influence indue, [TRADUCTION] « les similitudes frappantes entre les déclarations écartent toute coïncidence et renforcent donc la fiabilité de la déclaration examinée » (par. 44). Bien qu'il ait décidé que l'absence de contre-interrogatoire demeurait un élément à soupeser en appréciant le seuil de fiabilité, le juge Blair était d'avis que cette absence, en soi, ne faisait pas obstacle à l'application raisonnée de l'exception de l'arrêt *U. (F.J.)*. Il a également conclu que cette exception pouvait s'appliquer quand les déclarations concernaient des faits différents, ajoutant que, pour déterminer le seuil de fiabilité, il ne voyait — compte tenu de la raison d'être du raisonnement des faits similaires — aucune « différence logique » entre une déclaration voulant que le même accusé « ait accompli le même acte à la même occasion » et une déclaration voulant que « le même accusé ait accompli le même acte à différentes occasions » (par. 48), étant donné que les deux situations comportent l'admission d'un élément de preuve fondée sur « l'improbabilité d'une coïncidence » (par. 49). Enfin,

il a estimé que les déclarations de comparaison jugées inadmissibles quant au fond ne devraient pas être exclues de l'analyse de la fiabilité, faisant remarquer que des déclarations par ailleurs fiables pourraient être jugées inadmissibles pour diverses raisons, dont la conclusion qu'elles n'étaient pas nécessaires (par. 53).

33 Compte tenu de ces conclusions, le juge Blair a statué que le juge du procès n'avait commis aucune erreur en tenant compte de la similitude des déclarations pour en déterminer le seuil de fiabilité. Il a ensuite appliqué [TRADUCTION] « l'exception de l'arrêt *U. (F.J.)* » aux déclarations visées par l'appel et a conclu que, même si la déclaration de M. Dinino enregistrée sur bande vidéo était inadmissible, celle de M. Skupien aussi enregistrée sur bande vidéo était par ailleurs admissible.

5. La règle interdisant le ouï-dire

5.1 *Une règle d'exclusion générale*

34 La règle de preuve fondamentale veut que tous les éléments de preuve pertinents soient admissibles. Cette règle fondamentale comporte un certain nombre d'exceptions. L'une des principales exceptions est la règle interdisant le ouï-dire : sauf exception, la preuve par ouï-dire *n'est pas* admissible. La preuve par ouï-dire n'est pas exclue parce qu'elle n'est pas pertinente — une règle spéciale n'est pas nécessaire pour exclure une preuve non pertinente. Comme nous le verrons, c'est plutôt la difficulté de vérifier la preuve par ouï-dire qui sous-tend la règle d'exclusion et, en général, l'atténuation de cette difficulté qui constitue le fondement des exceptions à la règle.

Bien que la preuve par ouï-dire comprenne la conduite expressive, je m'en tiendrai généralement aux déclarations relatées.

5.2 *Définition du ouï-dire*

35 Au départ, il importe de déterminer ce qui constitue du ouï-dire et ce qui n'en constitue pas. Les difficultés que les tribunaux et les auteurs de doctrine ont eues à définir le ouï-dire ont déjà fait l'objet d'un examen approfondi et il n'est pas nécessaire de les reprendre en l'espèce : voir *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 40-41, le juge Dickson. Il suffit de noter, comme notre Cour l'a fait au par. 159 de l'arrêt *Starr*, que les plus récentes définitions du ouï-dire sont axées sur la préoccupation majeure qui sous-tend cette règle du ouï-dire, soit la difficulté de vérifier la fiabilité de l'affirmation du déclarant. Voir, par exemple, l'arrêt *R. c. O'Brien*, [1978] 1 R.C.S. 591, p. 593-594. Notre système accusatoire attache une grande importance à l'assignation de témoins qui déposent sous la foi du serment ou d'une affirmation solennelle et dont le comportement peut être observé par le juge des faits, et le témoignage, vérifié au moyen d'un contre-interrogatoire. Nous considérons que ce processus représente la meilleure façon de vérifier la preuve testimoniale. Parce qu'elle se présente sous une forme différente, la preuve par ouï-dire suscite des préoccupations particulières. La règle d'exclusion générale reconnaît la difficulté pour le juge des faits d'apprécier le poids à donner, s'il y a lieu, à une déclaration d'une personne qui n'a été ni vue ni entendue et qui n'a pas eu à subir un contre-interrogatoire. On craint que la preuve par ouï-dire non vérifiée se voie accorder plus de poids qu'elle n'en mérite. Les caractéristiques déterminantes essentielles du ouï-dire sont donc les suivantes : 1) le fait que la déclaration soit présentée pour établir la véracité de son contenu et 2) l'impossibilité de

contre-interroger le déclarant au moment précis où il fait cette déclaration. J'examinerai chacune de ces caractéristiques déterminantes à tour de rôle.

5.2.1 Déclarations présentées pour établir la véracité de leur contenu

36 Le but dans lequel la déclaration extrajudiciaire est présentée revêt de l'importance lorsqu'il s'agit de déterminer ce qui constitue du ouï-dire, car c'est seulement lorsque la preuve est présentée pour établir la véracité de son contenu qu'il devient nécessaire d'en vérifier la fiabilité. Prenons l'exemple suivant. Au procès d'un accusé inculpé de conduite avec facultés affaiblies, un policier témoigne qu'il a intercepté l'automobile de l'accusé à la suite d'un appel d'un inconnu l'informant que le véhicule était conduit par une personne en état d'« ébriété avancée » qui venait tout juste de quitter une taverne de quartier. Si la déclaration concernant l'état d'ébriété du conducteur est présentée dans le seul but d'établir les motifs que le policier avait d'intercepter le véhicule, il importe peu de savoir si la déclaration de l'auteur inconnu de l'appel était exacte, exagérée ou même fausse. Même si la déclaration est totalement dénuée de fondement, cela n'enlève rien à l'explication que le policier a donnée au sujet de ses actes. Si, par contre, la déclaration est présentée dans le but de prouver que l'accusé avait effectivement les facultés affaiblies, l'incapacité du juge des faits d'en vérifier la fiabilité suscite des préoccupations réelles. Ce n'est donc que dans ce dernier cas que la preuve relative à la déclaration de l'auteur de l'appel constitue du ouï-dire et est assujettie à la règle d'exclusion générale.

5.2.2 L'impossibilité de contre-interroger au moment précis où la déclaration est faite

37 L'exemple précédent, à savoir lorsque le témoin raconte au tribunal ce que A lui a dit, est la forme la plus évidente de preuve par ouï-dire. A n'est pas devant le tribunal de manière à pouvoir être vu, entendu et contre-interrogé. Toutefois, la règle traditionnelle du ouï-dire s'applique également à la déclaration extrajudiciaire du témoin qui dépose en cour lorsque cette déclaration extrajudiciaire est présentée pour établir la véracité de son contenu. Cette définition élargie du ouï-dire a été adoptée au Canada : *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 763-764; *Starr*, par. 158. Il est important de comprendre pourquoi les déclarations extrajudiciaires d'un témoin sont considérées comme étant du ouï-dire.

38 Lorsque, devant le tribunal, le témoin réitère ou adopte — sous la foi du serment ou d'une affirmation solennelle — une déclaration extrajudiciaire antérieure, il va de soi qu'aucune question de ouï-dire ne se pose. Ce n'est pas la déclaration elle-même qui constitue un élément de preuve, mais plutôt le témoignage, qui peut être vérifié de la façon habituelle en observant le témoin et en lui faisant subir un contre-interrogatoire. Toutefois, la question du ouï-dire se pose lorsque le témoin ne réitère pas ou n'adopte pas le contenu de la déclaration extrajudiciaire, et que la déclaration elle-même est présentée pour établir la véracité de son contenu. Prenons l'exemple suivant pour illustrer les préoccupations suscitées par cet élément de preuve.

39 Dans une déclaration extrajudiciaire, W désigne l'accusé comme étant son agresseur. Au procès de l'accusé pour voies de fait, W témoigne que l'accusé *n'est pas* son agresseur. Le ministère public cherche à présenter la déclaration extrajudiciaire pour prouver que l'accusé a effectivement agressé W. Dans ces circonstances, on

demande au juge des faits de retenir la déclaration extrajudiciaire plutôt que le témoignage sous serment du témoin. Compte tenu de l'importance habituellement accordée au témoignage devant le tribunal, une question sérieuse se pose , soit celle de savoir s'il est absolument nécessaire de présenter la déclaration. De plus, la fiabilité de cette déclaration devient déterminante. Jusqu'à quel point est-elle fiable? Dans quelles circonstances W a-t-elle fait cette déclaration? L'a-t-elle faite à brûle-pourpoint à des amis lors d'une activité sociale, ou plutôt à la police à titre de plainte formelle? W était-elle consciente des conséquences que pouvait avoir cette déclaration, voulait-elle qu'on y donne suite? Avait-elle une raison de mentir? Dans quel état était W au moment où elle a fait la déclaration? Bien d'autres questions peuvent venir à l'esprit au sujet de la fiabilité de cette déclaration extrajudiciaire. Lorsqu'on demande au juge des faits de considérer que la déclaration extrajudiciaire prouve que l'accusé a effectivement agressé W, il peut se révéler difficile d'apprécier la fiabilité de cette preuve.

40 Des préoccupations concernant la fiabilité de la déclaration naissent également lorsque W ne revient pas sur sa déclaration extrajudiciaire, mais témoigne qu'elle ne se souvient pas l'avoir faite, ou pis encore, qu'elle n'a aucun souvenir de l'agression elle-même. Le juge des faits ne voit pas ou n'entend pas le témoin faire la déclaration et, puisque qu'il n'y a aucune possibilité de contre-interroger le témoin *au moment précis* où il fait sa déclaration, la possibilité de vérifier utilement la véracité de cette déclaration peut être limitée. De plus, il peut y avoir lieu de se demander si la déclaration antérieure est reproduite intégralement et fidèlement.

41 Ainsi, bien qu'il se puisse que la raison d'être de la règle d'exclusion générale ne soit pas aussi évidente lorsque le déclarant est disponible pour témoigner,

elle reste la même, soit la difficulté de vérifier la fiabilité de la déclaration extrajudiciaire. La difficulté d'apprécier la déclaration extrajudiciaire de W explique pourquoi elle est visée par la définition du ouï-dire et est assujettie à la règle d'exclusion générale. Toutefois, on le comprendra aisément, la difficulté peut être atténuée substantiellement lorsque le déclarant peut être contre-interrogé au sujet de sa déclaration antérieure, en particulier lorsqu'il est possible de déposer en preuve un compte rendu exact de la déclaration. Je reviendrai sur cette question plus loin. Je ne tiens ici qu'à expliquer pourquoi, par définition, le ouï-dire englobe les déclarations extrajudiciaires présentées pour établir la véracité de leur contenu, et ce, même lorsque le déclarant est devant le tribunal.

5.3 *Les exceptions à la règle du ouï-dire : une méthode d'analyse raisonnée*

42 On reconnaît depuis longtemps qu'une application rigide de la règle d'exclusion entraînerait la perte injustifiée d'éléments de preuve très précieux. La déclaration relatée peut, en raison de la manière dont elle a été faite, être intrinsèquement fiable, ou il peut exister suffisamment de moyens de la vérifier en dépit du fait qu'elle est relatée. Partant, un certain nombre d'exceptions de common law ont peu à peu fait leur apparition. Une application rigide de ces exceptions s'est révélée, à son tour, problématique et a donné lieu, dans certains cas, à l'exclusion inutile d'éléments de preuve ou, dans d'autres cas, à leur admission injustifiée. Wigmore a préconisé une application plus souple de la règle, fondée sur les deux principes directeurs qui sous-tendent les exceptions de common law traditionnelles, à savoir la nécessité et la fiabilité (*Wigmore on Evidence* (2e éd. 1923), vol. 3, § 1420, p. 153). Notre Cour a d'abord retenu cette approche dans l'arrêt *Khan* et en a, par la suite, reconnu la primauté dans l'arrêt *Starr*. Le cadre d'analyse applicable selon

l'arrêt *Starr* a été résumé récemment dans l'arrêt *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23, par. 15 :

> a) La preuve par ouï-dire est présumée inadmissible à moins de relever d'une exception à la règle du ouï-dire. Les exceptions traditionnelles continuent présomptivement de s'appliquer.
>
> b) Il est possible de contester une exception à l'exclusion du ouï-dire au motif qu'elle ne présenterait pas les indices de nécessité et de fiabilité requis par la méthode d'analyse raisonnée. On peut la modifier au besoin pour la rendre conforme à ces exigences.
>
> c) Dans de « rares cas », la preuve relevant d'une exception existante peut être exclue parce que, dans les circonstances particulières de l'espèce, elle ne présente pas les indices de nécessité et de fiabilité requis.
>
> d) Si la preuve par ouï-dire ne relève pas d'une exception à la règle d'exclusion, elle peut tout de même être admissible si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire.

43 Dans la présente affaire, il est question d'admission de preuve selon l'al. d). En particulier, les tribunaux d'instance inférieure étaient partagés quant à deux questions principales : 1) Quels facteurs doit-on considérer pour décider si la preuve est suffisamment fiable pour être admise? 2) L'« exception » reconnue par notre Cour dans l'arrêt *U. (F.J.)* peut-elle s'appliquer aux faits de la présente affaire? Je vais d'abord commenter la deuxième question.

44 À mon avis, la débat entourant la question de savoir si « l'exception de l'arrêt *U. (F.J.)* » s'applique en l'espèce illustre le souci exprimé dans l'arrêt *U. (F.J.)* lui-même, à savoir que la « nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories » (par. 35). Dans l'arrêt *U. (F.J.)*, un débat semblable a porté sur la question de savoir si « l'exception de l'arrêt *B. (K.G.)* » à la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles

s'appliquait dans le cas où la fiabilité de la déclaration du plaignant tenait non pas tant aux circonstances dans lesquelles elle avait été faite, comme l'affaire dans *B. (K.G.)*, mais plutôt à sa similitude frappante avec une déclaration de l'accusé. Le juge en chef Lamer a expliqué comment sa décision dans l'affaire *B. (K.G.)* était une application de la méthode d'analyse raisonnée au ouï-dire et comment en outre « l'établissement d'un seuil de fiabilité est parfois possible, dans les cas où le témoin peut être contre-interrogé, lorsqu'il existe une similitude frappante entre deux déclarations » (par. 40). Il a conclu son analyse en prévoyant que d'autres situations peuvent encore se présenter. Voici ce qu'il a affirmé (par. 45) :

> Je m'attends à ce que soient rares les cas de déclarations dont la similitude est frappante au point d'étayer leur fiabilité. Conformément à notre démarche en matière de ouï-dire fondée sur des principes et souple, il peut y avoir d'autres situations où les déclarations antérieures incompatibles seront jugées admissibles quant au fond, compte tenu du fait que le contre-interrogatoire seul donne d'importants indices de fiabilité. En l'espèce, il n'est pas nécessaire de décider si le contre-interrogatoire seul donne une assurance suffisante quant au seuil de fiabilité pour permettre l'admission, quant au fond, de déclarations antérieures incompatibles.

45 Comme je l'expliquerai plus loin, les arrêts *B. (K.G.)* et *U. (F.J.)* font tous les deux ressortir les préoccupations particulières suscitées dans des cas de déclaration antérieure incompatible. Toutefois, compte tenu de la mise en garde du juge en chef Lamer contre une « analyse rigide de catégories » (*U. (F.J.)*, par. 35), j'estime que ni l'arrêt *B. (K.G.)* ni l'arrêt *U. (F.J.)* ne devraient être interprétés comme créant des catégories d'exceptions — fondées sur des critères fixes — à la règle interdisant le ouï-dire. Le jugement majoritaire dans l'affaire *B. (K.G.)* permet lui-même de remplacer par des substituts adéquats les critères qu'il énonce. De plus, interpréter ces arrêts comme créant de nouvelles catégories d'exceptions ne serait pas conforme à la méthode souple d'analyse raisonnée applicable cas par cas. Nous nous trouverions

simplement à remplacer la série d'exceptions traditionnelles par une nouvelle série moins sclérosée (pour l'instant). Au lieu d'établir des catégories fixes, ces arrêts donnent plutôt des indications sur l'application cas par cas de la méthode d'analyse raisonnée en décrivant les préoccupations pertinentes et les facteurs à considérer pour déterminer l'admissibilité.

46 J'examinerai sous cet angle les arrêts *B. (K.G.)* et *U. (F.J.)*, de même que certains autres arrêts pertinents de notre Cour. Puisque les questions soulevées dans le présent pourvoi concernent l'appréciation de la fiabilité, mon analyse portera sur ce critère. Toutefois, comme je l'expliquerai, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. Par exemple, comme nous le verrons, la nécessité de la preuve peut, dans certains cas, découler en grande partie du fait que la déclaration relatée est très fiable et que le processus de constatation des faits serait faussé sans elle. Toutefois, avant d'analyser les facteurs liés à la fiabilité, je tiens à dire un mot sur le principe dominant de l'équité du procès.

5.4 *La dimension constitutionnelle : l'équité du procès*

47 Avant d'admettre les déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, le juge du procès doit décider, lors d'un voir-dire, que la nécessité et la fiabilité ont été établies. Il incombe à la personne qui cherche à présenter la preuve d'établir ces critères selon la prépondérance des probabilités. En matière criminelle, l'examen peut comporter une dimension constitutionnelle parce que la difficulté de vérifier la preuve ou, à l'inverse, l'impossibilité de présenter une preuve fiable peut compromettre la capacité de l'accusé de présenter une défense pleine et entière, qui est un droit garanti par l'art. 7 de la *Charte canadienne des droits et*

libertés : *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505. Le droit de présenter une défense pleine et entière est, à son tour, lié à un autre principe de justice fondamentale, à savoir le droit à un procès équitable : *R. c. Rose*, [1998] 3 R.C.S. 262. La préoccupation relative à l'équité du procès est l'une des raisons primordiales de rationaliser les exceptions traditionnelles à la règle du ouï-dire conformément à la méthode d'analyse raisonnée. Comme l'a précisé le juge Iacobucci, au par. 200 de l'arrêt *Starr*, quant à la preuve du ministère public, « [s]i on permettait au ministère public de présenter une preuve par ouï-dire non fiable contre l'accusé, peu importe qu'elle se trouve ou non à relever d'une exception existante, cela compromettrait l'équité du procès et ferait apparaître le spectre des déclarations de culpabilité erronées. »

48 Comme je l'ai indiqué précédemment, notre système accusatoire repose sur l'hypothèse voulant que le contre-interrogatoire représente le meilleur moyen de révéler les causes d'inexactitude ou de manque de fiabilité. C'est principalement en raison de l'incapacité de la vérifier de cette façon que la preuve par ouï-dire est présumée inadmissible. Toutefois, le droit constitutionnel garanti par l'art. 7 de la *Charte* n'est pas en soi le droit de confronter ou contre-interroger des témoins opposés. Le processus judiciaire accusatoire, qui comprend le contre-interrogatoire, n'est que le moyen de parvenir à la fin recherchée. L'équité du procès, en tant que principe de justice fondamentale, est la fin qui doit être atteinte. L'équité du procès englobe plus que les droits de l'accusé. Bien qu'elle comprenne indubitablement le droit de présenter une défense pleine et entière, l'équité du procès doit aussi être évaluée à la lumière de préoccupations sociales plus globales : voir *R. c. Mills*, [1999] 3 R.C.S. 668, par. 69-76. Dans le contexte d'un examen de l'admissibilité, l'une de

ces préoccupations est l'intérêt qu'a la société à ce que le processus judiciaire permette de découvrir la vérité.

49 La gamme plus vaste d'intérêts compris dans l'équité du procès se reflète dans le double principe de la nécessité et de la fiabilité. Le critère de la nécessité repose sur l'intérêt qu'a la société à découvrir la vérité. Étant donné qu'il n'est pas toujours possible de satisfaire au critère optimal du contre-interrogatoire effectué au moment précis où la déclaration est faite, au lieu de simplement perdre la valeur de la preuve en question, il devient nécessaire dans l'intérêt de la justice de se demander si cette preuve devrait néanmoins être admise sous sa forme relatée. Le critère de la fiabilité vise à assurer l'intégrité du processus judiciaire. Bien qu'elle soit nécessaire, la preuve n'est pas admissible, sauf si elle est suffisamment fiable pour écarter les dangers que comporte la difficulté de la vérifier. Comme nous le verrons, deux motifs différents, qui ne s'excluent pas mutuellement, permettent généralement de satisfaire à l'exigence de fiabilité. Dans certains cas, il se peut que, en raison des circonstances dans lesquelles la déclaration relatée a été faite, le contenu de cette déclaration soit si fiable qu'il aurait été peu ou pas utile de contre-interroger le déclarant au moment précis où il s'est exprimé. Dans d'autres cas, il peut arriver que la preuve ne soit pas aussi convaincante, mais les circonstances permettront de la vérifier suffisamment autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est présentée. Dans ces circonstances, l'admission de la preuve compromettra rarement l'équité du procès. Toutefois, vu que l'équité du procès peut englober des facteurs allant au-delà de l'examen rigoureux de la nécessité et de la fiabilité, le juge du procès a le pouvoir discrétionnaire d'exclure la preuve par ouï-dire lorsque son effet

préjudiciable l'emporte sur sa valeur probante, et ce, même si les deux critères sont respectés.

6. L'examen de l'admissibilité

6.1 *La distinction entre seuil de fiabilité et fiabilité en dernière analyse : source de confusion*

50 Comme nous l'avons vu, le juge du procès décide uniquement si la preuve par ouï-dire est admissible. Il appartient au juge des faits de décider, à l'issue du procès, s'il s'en remettra, en fin de compte, à la déclaration relatée pour trancher les questions en litige, après l'avoir examinée en fonction de l'ensemble de la preuve. Au stade de l'admissibilité, il importe de ne pas empiéter sur la compétence du juge des faits. Si le procès a lieu devant un juge et un jury, il est essentiel que les questions de fiabilité en dernière analyse soient laissées au jury — dans un procès criminel, c'est un impératif constitutionnel. Si le juge siège sans jury, il importe tout autant qu'il ne préjuge pas de la fiabilité en dernière analyse de la preuve avant d'avoir entendu l'ensemble de la preuve au dossier. Il faut donc établir une distinction entre « fiabilité en dernière analyse » et « seuil de fiabilité ». Lors d'un voir-dire portant sur l'admissibilité, l'examen se limite au seuil de fiabilité.

51 La distinction entre seuil de fiabilité et fiabilité en dernière analyse (ou fiabilité ultime ou absolue) a été établie dans un certain nombre d'arrêts (voir, par exemple, *B. (K.G.)* et *R. c. Hawkins*, [1996] 3 R.C.S. 1043). Cependant, nous nous intéressons surtout en l'espèce à l'explication de ce principe contenue dans l'arrêt *Starr*. Une bonne partie des discussions et des commentaires a porté notamment sur l'extrait suivant de l'analyse de la Cour (par. 215 et 217) :

> À cet égard, lorsque la fiabilité d'une déclaration est examinée selon la méthode fondée sur des principes, il importe d'établir une distinction entre le seuil de fiabilité et la fiabilité absolue. Seul le seuil de fiabilité est pertinent relativement à l'admissibilité : voir *Hawkins*, précité, à la p. 1084. Là encore, il ne convient pas, dans les circonstances du présent pourvoi, de fournir une liste détaillée des facteurs qui peuvent influer sur le seuil de fiabilité. Toutefois, notre jurisprudence est utile dans une certaine mesure à ce sujet. Le seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non; c'est une question de fiabilité absolue. Il concerne plutôt la question de savoir si les circonstances ayant entouré la déclaration elle-même offrent des garanties *circonstancielles* de fiabilité. Ces garanties pourraient découler du fait que le déclarant n'avait aucune raison de mentir (voir *Khan* et *Smith*, précités) ou du fait qu'il y avait des mesures de protection qui permettaient de déceler les mensonges (voir *Hawkins*, *U. (F.J.)* et *B. (K.G.)*, précités).
>
> . . .
>
> À l'étape de l'admissibilité de la preuve par ouï-dire, le juge du procès ne devrait pas tenir compte de la réputation générale de sincérité du déclarant, ni d'aucune déclaration antérieure ou ultérieure, compatible ou incompatible. Ces facteurs n'ont pas trait aux circonstances de la déclaration elle-même. De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). En résumé, en vertu de la méthode fondée sur des principes, le tribunal ne doit pas empiéter sur la compétence du juge des faits ni subordonner l'admissibilité de la preuve par ouï-dire à la question de savoir si la preuve est absolument fiable. Il devra cependant examiner si les circonstances ayant entouré la déclaration confèrent suffisamment de crédibilité pour pouvoir conclure que le seuil de fiabilité est atteint. [Je souligne.]

52 L'affirmation de la Cour selon laquelle « [l]e seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non » a créé une certaine incertitude. Même s'il est évident que le juge du procès ne décide pas si la déclaration sera tenue pour véridique en définitive, il n'est pas aussi évident que, dans toute affaire, le seuil de fiabilité *ne* concerne *pas* la question de savoir si la déclaration est véridique ou non. En fait, dans l'arrêt *U. (F.J.)*, on a justifié l'admission de la déclaration relatée de la plaignante par le fait que « la seule explication probable » de

la similitude frappante entre cette déclaration et la déclaration faite de façon indépendante par l'accusé était que « tous les deux disaient la vérité » (par. 40).

53 De plus, il n'est pas facile de discerner ce qui est et ce qui n'est pas une circonstance « ayant entouré la déclaration elle-même ». Par exemple, lorsqu'elle s'est prononcée sur le seuil d'admissibilité dans l'affaire *Smith*, la Cour a tenu compte du fait que la victime pouvait avoir eu une raison de mentir. Comme l'ont souligné les juges Rosenberg et Blair dans leurs motifs respectifs, [TRADUCTION] « pour décider si le déclarant avait une raison de mentir, le juge sera nécessairement amené à considérer des facteurs extérieurs à la déclaration elle-même ou aux circonstances immédiates qui l'ont entourée » (par. 97).

54 La confusion qui règne dans ce domaine du droit tient en grande partie à cette tentative de classer certains facteurs comme touchant uniquement la fiabilité en dernière analyse. Un autre exemple est l'interdiction de tenir compte d'une « preuve corroborante ou contradictoire » parce qu'elle n'est pertinente qu'en ce qui concerne la question de la fiabilité en dernière analyse. De toute évidence, la nature corroborante de la tache de sperme, dans l'affaire *Khan*, a joué un rôle important dans l'établissement du seuil de fiabilité de la déclaration relatée de l'enfant.

55 Cette partie de l'analyse de l'arrêt *Starr* a donc besoin d'être clarifiée et, à certains égards, d'être reconsidérée. J'expliquerai comment les facteurs à considérer lors de l'examen de l'admissibilité ne peuvent pas toujours être classés comme ayant trait soit au seuil de fiabilité, soit à la fiabilité en dernière analyse. La pertinence d'un facteur dépendra plutôt des dangers particuliers découlant du fait que la déclaration constitue du ouï-dire, et des moyens possibles, s'il en est, de les écarter. Je reviendrai

ensuite au passage contesté de l'arrêt *Starr*, en m'attardant plus précisément à la question de la preuve à l'appui étant donné que cette mention paraît avoir soulevé le plus de controverse.

6.2 *Détermination des facteurs pertinents : une approche fonctionnelle*

6.2.1 Reconnaissance du ouï-dire

56 La première question à trancher avant de procéder à l'examen de l'admissibilité d'une preuve par ouï-dire est bien sûr celle de savoir si la preuve proposée constitue du ouï-dire. Cela peut paraître assez évident, mais c'est une première étape importante. Les objections malencontreuses à l'admissibilité d'une déclaration extrajudiciaire, qui tiennent à une méprise sur ce qui constitue du ouï-dire, ne sont pas rares. Comme nous l'avons vu, les déclarations extrajudiciaires ne constituent pas toutes du ouï-dire. Rappelons-nous les caractéristiques déterminantes du ouï-dire. Une déclaration extrajudiciaire constituera du ouï-dire, premièrement, si elle est présentée pour établir la véracité de son contenu *et*, deuxièmement, s'il y a impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration.

57 S'arrêter au départ aux caractéristiques déterminantes du ouï-dire permet de mieux orienter l'examen de l'admissibilité. Comme nous l'avons vu, la première caractéristique particulière du ouï-dire oblige à examiner le but dans lequel la preuve est présentée. Ce n'est que si elle est présentée pour établir la véracité de son contenu que la preuve constitue du ouï-dire. Le fait que la déclaration extrajudiciaire soit présentée pour établir la *véracité* de son contenu devrait être examiné dans le contexte

des questions en litige afin que le tribunal soit mieux en mesure d'évaluer l'effet potentiel de la présentation de cette preuve relatée.

58 Deuxièmement, si on s'arrête au départ à la seconde caractéristique déterminante du ouï-dire, soit l'impossibilité de contre-interroger le déclarant au moment précis où il fait sa déclaration, l'examen de l'admissibilité porte aussitôt sur les dangers d'admettre la preuve par ouï-dire. Dans l'arrêt *Starr*, le juge Iacobucci a décrit l'impossibilité de vérifier la preuve comme étant la « préoccupation majeure » qui sous-tend la règle du ouï-dire. Dans l'arrêt *U. (F.J.)*, le juge en chef Lamer a exprimé le même point de vue, mais plus directement en ces termes : « Le ouï-dire n'est pas admissible comme preuve parce que sa fiabilité ne peut être vérifiée » (par. 22).

6.2.2 La présomption d'inadmissibilité de la preuve par ouï-dire

59 Dès que la preuve proposée est désignée comme étant du ouï-dire, elle est présumée *inadmissible*. J'insiste sur le fait que la règle du ouï-dire est par nature une règle d'exclusion générale, car l'assouplissement accru du droit canadien de la preuve au cours des dernières décennies a parfois eu tendance à estomper la distinction entre admissibilité et valeur probante. Des modifications ont été apportées à un certain nombre de règles — dont la règle interdisant le ouï-dire — afin de les mettre à jour et d'assurer qu'elles favorisent la réalisation des objectifs de recherche de la vérité, d'efficacité du système judiciaire et d'équité du processus accusatoire, au lieu de l'entraver. Toutefois, les règles de preuve traditionnelles témoignent d'une sagesse et d'une expérience judiciaire considérables. L'approche moderne a consolidé, et non écarté, leur raison d'être fondamentale. Dans l'arrêt *Starr* lui-même, où notre Cour a

reconnu la primauté de la méthode d'analyse raisonnée des exceptions à la règle du ouï-dire, la présomption d'exclusion de la preuve par ouï-dire a été réaffirmée de manière non équivoque. Le juge Iacobucci s'est ainsi exprimé (par. 199) :

> En écartant les éléments de preuve susceptibles de donner lieu à des verdicts inéquitables et en assurant que les parties aient généralement la possibilité de confronter des témoins opposés, la règle du ouï-dire est une pierre angulaire d'un système de justice équitable.

6.2.3 Les exceptions traditionnelles

60 Dans l'arrêt *Starr*, la Cour a aussi réaffirmé que les exceptions traditionnelles à la règle du ouï-dire sont toujours pertinentes. Plus récemment, dans l'arrêt *Mapara*, notre Cour a confirmé le maintien des exceptions traditionnelles en établissant le cadre d'analyse applicable, exposé plus haut au par. 42. Par conséquent, si le juge du procès conclut que la preuve relève de l'une des exceptions de common law traditionnelles, cette conclusion est définitive et la preuve est jugée admissible sauf si, dans de rares cas, l'exception elle-même est contestée, comme le précisent ces deux arrêts.

6.2.4 La méthode d'analyse raisonnée : écarter les dangers du ouï-dire

61 Étant donné que la préoccupation majeure sous-jacente est l'impossibilité de vérifier la preuve par ouï-dire, il s'ensuit que, selon la méthode d'analyse raisonnée, l'exigence de fiabilité vise à déterminer les cas où cette difficulté est suffisamment surmontée pour justifier l'admission de la preuve à titre d'exception à la règle d'exclusion générale. Comme certains tribunaux et commentateurs ont pris soin de le souligner, il y a deux manières de satisfaire à l'exigence de fiabilité : voir, par

exemple, *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199 (C.A. Ont.); D. M. Paciocco, « The Hearsay Exceptions: A Game of "Rock, Paper, Scissors" », dans *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 17, p. 29.

62 Une manière consiste à démonter qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite. Le bon sens veut que, si on peut avoir suffisamment confiance en la véracité et l'exactitude de la déclaration, le juge des faits devrait en tenir compte indépendamment du fait qu'elle est relatée. À cet égard, Wigmore a donné l'explication suivante :

> [TRADUCTION] Dans de nombreux cas, on peut facilement voir qu'une telle épreuve requise [c'est-à-dire le contre-interrogatoire] ajouterait peu comme garantie parce que ses objets ont en grande partie déjà été atteints. Si une déclaration a été faite dans des circonstances où même un sceptique prudent la considérerait comme très probablement fiable (en temps normal), il serait trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint. [§ 1420, p. 154]

63 Une autre manière de satisfaire à l'exigence de fiabilité consiste à démontrer que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées. Rappelons-nous que, dans notre système accusatoire, la meilleure façon de vérifier la preuve est de faire témoigner le déclarant sous serment devant le tribunal, tout en lui faisant subir un contre-interrogatoire minutieux. Cette méthode privilégiée n'est pas seulement un vestige de traditions passées. Elle demeure une méthode éprouvée et fiable, particulièrement lorsqu'il faut résoudre des questions de crédibilité. C'est une chose de faire une déclaration

préjudiciable à propos d'autrui dans un contexte où il se peut que cette déclaration n'ait pas vraiment d'importance; c'est une toute autre chose que le déclarant répète sa déclaration dans le cadre de procédures formelles où il doit en garantir la véracité et l'exactitude, être observé et entendu, et être appelé à l'expliquer ou à la défendre. Cette dernière situation, en plus de fournir un compte rendu exact de ce qu'a réellement dit le témoin, nous rassure beaucoup plus quant à la fiabilité de la déclaration. Toutefois, dans certains cas, il n'est pas possible de vérifier la preuve de la meilleure façon, mais les circonstances sont telles que le juge des faits sera néanmoins en mesure d'en vérifier suffisamment la véracité et l'exactitude. Là encore, le bon sens nous indique qu'il ne faudrait pas perdre l'avantage de cette preuve lorsqu'il existe d'autres façons adéquates de la vérifier.

64 Il est également possible de distinguer ces deux principales façons de satisfaire à l'exigence de fiabilité dans le cas des exceptions traditionnelles à la règle du ouï-dire. Le juge Iacobucci note ainsi cette distinction dans l'arrêt *Starr* :

> Par exemple, le témoignage fait dans le cadre d'une instance antérieure est admis, du moins en partie, parce que bien des dangers qui se rattachent traditionnellement à la preuve par ouï-dire ne se posent pas. Comme il a été souligné dans Sopinka, Lederman et Bryant, *op. cit.*, aux pp. 278 et 279 :
>
> > [TRADUCTION] . . . une déclaration qui a été faite antérieurement sous la foi du serment, qui a fait l'objet d'un contre-interrogatoire et qui a été admise en tant que preuve testimoniale lors d'une instance antérieure est admise lors d'un procès ultérieur *parce que les dangers que comporte la preuve par ouï-dire ne se posent pas.*
>
> D'autres exceptions sont fondées non pas sur la suppression des dangers traditionnels de la preuve par ouï-dire, mais sur le fait que la déclaration offre des garanties circonstancielles de fiabilité. Cette méthode se retrouve dans des exceptions reconnues comme les déclarations de mourants, les déclarations spontanées et les déclarations au détriment des intérêts financiers de leur auteur. [En italique dans l'original; par. 212]

65 Certaines exceptions traditionnelles ont une assise différente, tels les aveux de parties (confessions en matière criminelle) et les déclarations de coconspirateurs : voir l'arrêt *Mapara*, par. 21. Dans ces cas, les préoccupations relatives à la fiabilité tiennent à des considérations autres que l'incapacité de la partie en question de vérifier l'exactitude de sa propre déclaration ou de celles de ses coconspirateurs. Partant, les critères d'admissibilité ne sont pas établis de la même façon. Toutefois, dans les cas où la règle d'exclusion repose sur les dangers habituels du ouï-dire, la distinction entre les deux principales façons de satisfaire à l'exigence de fiabilité — bien qu'elle ne crée aucunement des catégories mutuellement exclusives — peut aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité.

66 L'affaire *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. De même, dans l'affaire *Smith*, l'examen de l'admissibilité était aussi axé sur les circonstances qui tendaient à démontrer la véracité de la déclaration. Par contre, dans les affaires *B. (K.G.)* et *Hawkins,* l'admissibilité de la déclaration relatée reposait sur l'existence d'autres moyens adéquats de vérifier la preuve. Comme nous le verrons, la possibilité de contre-interroger le déclarant permet dans une large mesure de satisfaire à l'exigence de substituts adéquats. Dans l'arrêt *U (F.J.)*, la Cour a pris en considération tant les circonstances tendant à démontrer la véracité de la déclaration que l'existence d'autres moyens adéquats de vérifier la preuve. L'arrêt *U. (F.J.)* souligne que la préoccupation relative à la fiabilité augmente dans le cas de déclarations antérieures incompatibles, où le juge des faits est invité à retenir une déclaration extrajudiciaire au lieu du témoignage sous serment du même déclarant. J'examinerai brièvement comment, dans

chacune de ces affaires, l'analyse de la Cour était axée sur la possibilité d'écarter les dangers particuliers du ouï-dire soulevés par la preuve.

6.2.4.1 *R. c. Khan, [1990] 2 R.C.S. 531*

67 Comme je l'ai déjà dit, l'arrêt *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. Les faits sont bien connus. Il y était question d'une agression sexuelle commise par un médecin sur une très jeune enfant. L'enfant était inhabile à témoigner. Les déclarations que l'enfant avait faites à sa mère au sujet de l'épisode n'étaient pas admissibles en application des exceptions traditionnelles à la règle du ouï-dire. Toutefois, la déclaration de l'enfant présentait plusieurs caractéristiques qui donnaient à penser que la déclaration était véridique. Ces caractéristiques répondaient à de nombreuses préoccupations qui auraient été censées être examinées à l'étape de la vérification de la preuve si celle-ci avait pu être présentée en cour de la façon habituelle. La juge McLachlin les a ainsi résumées dans un énoncé souvent cité :

> Je conclus qu'en l'espèce la déclaration de la mère aurait dû être reçue en preuve. Elle était nécessaire puisque le témoignage de vive voix de l'enfant avait été rejeté. Elle était également fiable. L'enfant n'avait aucune raison d'inventer son histoire qu'elle a racontée naturellement sans être incitée à le faire. En outre, le fait qu'on ne pouvait s'attendre à ce que l'enfant connaisse ce genre d'acte sexuel confère à sa déclaration une fiabilité toute particulière. Enfin, sa déclaration a été corroborée par une preuve matérielle. [p. 548]

Les faits révélaient aussi que la déclaration avait suivi presque immédiatement les faits reprochés. Cette caractéristique écartait toute crainte de souvenir inexact. Le fait que l'enfant n'avait aucune raison de mentir atténuait la préoccupation relative à la

sincérité. Puisque la déclaration avait été faite naturellement et sans avoir été provoquée, il n'y avait pas de véritable danger qu'elle ait été faite sous l'influence de la mère. Qui plus est, comme l'indique la citation précédente, les faits décrits dépassaient l'expérience normale d'une enfant de son âge, ce qui conférait à la déclaration une « fiabilité toute particulière ». Enfin, la déclaration était confirmée par la présence d'une tache de sperme sur les vêtements de l'enfant. Chacune de ces caractéristiques touchait la véracité et l'exactitude de la déclaration et, ensemble, elles justifiaient amplement son admission. Le critère de fiabilité était rempli. À l'exception de la preuve à l'appui constituée de la tache de sperme, les facteurs considérés dans l'affaire *Khan* n'avaient rien de controversé. Je reviendrai plus loin sur cette question.

6.2.4.2 *R. c. Smith, [1992] 2 R.C.S. 915*

68 Dans l'arrêt *Smith*, l'examen des garanties circonstancielles de fiabilité effectué par notre Cour était axé également sur les circonstances tendant à démontrer la véracité de la déclaration.

69 M. Smith était accusé du meurtre de K. La preuve du ministère public incluait le témoignage de la mère de K au sujet de quatre appels téléphoniques que K lui avait faits la nuit du meurtre. L'avocat de la défense ne s'est pas opposé à la présentation de cette preuve. M. Smith a été déclaré coupable en première instance. La Cour d'appel a accueilli l'appel et ordonné la tenue d'un nouveau procès pour le motif que les appels téléphoniques constituaient du ouï-dire et que seuls les deux premiers appels étaient admissibles pour établir l'état d'esprit de K. En refusant d'appliquer la disposition réparatrice, la Cour d'appel a conclu que le ouï-dire avait

servi à établir que K était avec M. Smith au moment de son décès, ce qui avait eu pour effet « de renforcer une certaine preuve d'identification d'une fiabilité douteuse » (p. 922-923). Le ministère public s'est pourvu devant notre Cour.

70 Après avoir décidé que l'exception de l'état d'esprit ou des « intentions existantes » ne s'appliquait pas aux appels téléphoniques, le juge en chef Lamer a explicité puis appliqué la méthode exposée dans l'arrêt *Khan*. Après avoir cité longuement Wigmore au sujet la raison d'être de la règle du ouï-dire et de ses exceptions, il s'est attardé au volet « fiabilité » de la méthode d'analyse raisonnée et a déclaré ce qui suit (p. 933) :

> Si une déclaration qu'on veut présenter par voie de preuve par ouï-dire a été faite dans des circonstances qui écartent considérablement la possibilité que le déclarant ait menti ou commis une erreur, on peut dire que la preuve est « fiable », c'est-à-dire qu'il y a une garantie circonstancielle de fiabilité. [Je souligne.]

71 Au sujet de la fiabilité des appels téléphoniques, le juge en chef Lamer a décidé que les deux premiers appels étaient fiables, mais que le troisième ne l'était pas (le quatrième n'étant pas en cause devant notre Cour). Dans le cas des deux premiers appels, il n'y avait aucune raison de douter de la véracité des propos de K — « [e]lle n'avait aucune raison connue de mentir » — et les dangers traditionnellement associés au ouï-dire, à savoir les problèmes de perception, de mémoire et de crédibilité, « étaient dans une large mesure inexistants » (p. 935). Comme nous pouvons le constater, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces préoccupations habituelles étaient grandement atténuées en raison de la façon dont les déclarations avaient été faites. La Cour a donc conclu

que l'incapacité de contre-interroger K devait influer sur le poids accordé à cette preuve et non sur son admissibilité.

72 Toutefois, en ce qui a trait au troisième appel téléphonique, le juge en chef Lamer a statué que « les conditions dans lesquelles la déclaration a été faite ne fournissent pas la garantie circonstancielle de fiabilité qui justifierait son admission sans possibilité de contre-interroger » (p. 935). Premièrement, il a conclu que K a pu se tromper quant au retour de M. Smith à l'hôtel ou quant à la raison de son retour (p. 936). Deuxièmement, il a décidé qu'elle pouvait avoir menti pour empêcher sa mère d'envoyer un autre homme la chercher. Quant à cette seconde possibilité, le juge en chef Lamer a estimé que le fait que K voyageait sous un nom d'emprunt en utilisant une carte de crédit qu'elle savait volée ou contrefaite démontrait qu'elle était « à tout le moins capable de tromper » (p. 936). Là encore, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces « hypothèses » démontraient que les circonstances dans lesquelles la déclaration avait été faite n'étaient pas de nature à « justifie[r] l'admission de son contenu » puisqu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire (p. 937). Il importe de noter que la Cour n'a pas ensuite décidé si, selon sa perception de la preuve, la déclarante était dans l'erreur ou avait menti — ce sont là des questions qui devaient être tranchées en fin de compte par le juge des faits. Lors de l'examen de l'admissibilité, il suffisait que les circonstances dans lesquelles la déclaration avait été faite aient soulevé ces questions pour en empêcher l'admission.

6.2.4.3 *R. c. B. (K.G.), [1993] 1 R.C.S. 740*

73 L'arrêt *B. (K.G.)* est un exemple où le seuil de fiabilité reposait essentiellement sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve.

74 La question litigieuse dans l'arrêt *B. (K.G.)* portait sur l'admissibilité quant au fond de déclarations antérieures incompatibles de trois amis de B, dans lesquelles ceux-ci avaient dit à la police que B avait poignardé à mort la victime au cours d'une bagarre. Les trois sont revenus sur leurs déclarations au procès. (Ils ont, par la suite, plaidé coupable à des accusations de parjure.) Le ministère public sollicitait l'admission des déclarations antérieures faites à la police pour établir la véracité de leur contenu. Bien qu'il n'ait aucunement douté de la fausseté des rétractations, le juge du procès a suivi la règle de common law traditionnelle (« orthodoxe ») selon laquelle les déclarations ne pouvaient servir qu'à attaquer la crédibilité des témoins. Vu le caractère douteux des autres éléments de preuve d'identification, le juge du procès a acquitté B.

75 La question soumise à notre Cour était de savoir s'il y avait lieu de maintenir l'application de la règle orthodoxe à l'égard des déclarations antérieures incompatibles. En faisant l'historique, le juge en chef Lamer a constaté que, bien que l'interdiction du ouï-dire n'ait pas toujours été reconnue comme étant le fondement de la règle, des « dangers » semblables avaient été évoqués pour interdire l'admission d'une déclaration, à savoir l'absence de serment ou d'affirmation solennelle, l'incapacité du juge des faits d'apprécier le comportement et l'absence de contre-interrogatoire au moment précis où la déclaration avait été faite (p. 763-764). Après avoir examiné les

critiques d'auteurs de doctrine, les opinions de membres de commissions de réforme du droit, les changements apportés par le législateur au Canada et ailleurs, ainsi que l'évolution de la règle du ouï-dire, le juge en chef Lamer a conclu qu'il était du ressort et du devoir de la Cour de formuler une nouvelle règle (p. 777). Il a estimé que « la preuve des déclarations antérieures incompatibles d'un témoin, autre que l'accusé, doit être admissible quant au fond, d'après l'analyse fondée sur les principes élaborée dans les arrêts de notre Cour, *Khan* et *Smith* », et que les exigences de fiabilité et de nécessité « doivent être adapté[e]s et raffiné[e]s dans le contexte présent, vu les problèmes particuliers soulevés par la nature de ces déclarations » (p. 783).

76 Le facteur contextuel le plus important dans l'arrêt *B. (K.G.)* est la disponibilité du déclarant. Contrairement à la situation dans l'affaire *Khan* ou l'affaire *Smith*, le juge des faits est beaucoup mieux en mesure d'apprécier la fiabilité de la preuve parce que le déclarant est disponible pour être contre-interrogé au sujet de sa déclaration antérieure incompatible. Par conséquent, l'examen du seuil de fiabilité applicable en matière d'admissibilité ne porte pas tant sur la question de savoir s'il y a un motif de croire que la déclaration est véridique que sur celle de savoir si le juge des faits sera en mesure d'apprécier rationnellement la preuve. Il faut chercher des substituts adéquats au processus qui aurait été disponible si la preuve avait été présentée de la façon habituelle, à savoir par l'entremise du témoin qui vient déposer sous la foi du serment ou d'une affirmation solennelle et qui subit un contre-interrogatoire au moment précis où la déclaration est faite.

77 Étant donné que le déclarant témoigne en cour sous la foi du serment ou d'une affirmation solennelle et qu'il est possible de le contre-interroger, la question est alors de savoir pourquoi se préoccupe-t-on encore de la fiabilité de la déclaration antérieure.

Comme je l'ai indiqué précédemment, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. La situation dans l'affaire *B. (K.G.)* en est un exemple. Comme l'a fait remarquer le juge en chef Lamer, « [l]es déclarations antérieures incompatibles posent des problèmes embarrassants par rapport au critère de la nécessité » (p. 796). En fait, le déclarant est disponible pour témoigner. Pourquoi la règle habituelle ne devrait-elle pas s'appliquer, et pourquoi le témoignage sous serment du témoin qui se rétracte ne devrait-il pas seul permettre de découvrir la vérité? Après tout, n'est-ce pas là le critère optimal en matière de fiabilité — à savoir que le témoin se présente pour être vu et entendu, pour promettre, sous la foi du serment ou d'une affirmation solennelle, de dire la vérité dans le cadre formel de procédures judiciaires, et pour faire l'objet d'un contre-interrogatoire? Si un témoin revient sur une déclaration antérieure et en nie la véracité, la solution par défaut consiste à conclure que le procès a eu les résultats escomptés : les renseignements faux ou inexacts ont été éliminés. Il doit y avoir une bonne raison de présenter la déclaration antérieure incompatible comme preuve quant au fond de préférence au témoignage sous serment devant le tribunal.

78 Comme nous le savons, dans l'arrêt *B. (K.G.)*, la Cour a statué en fin de compte — et ce principe est maintenant bien établi — que la nécessité ne saurait être assimilée à la non-disponibilité du témoin. Le critère de la nécessité reçoit une définition souple. Dans certains cas comme dans l'affaire *B. (K.G.)* où un témoin revient sur une déclaration antérieure, la nécessité tient à la non-disponibilité du *témoignage* et non du témoin. Malgré le fait qu'il peut être satisfait de diverses manières au critère de la nécessité, le contexte qui engendre la nécessité de la preuve par ouï-dire peut bien avoir une incidence sur le *degré* de fiabilité exigé pour en justifier l'admission. Comme l'a dit le juge en chef Lamer dans l'arrêt *B. (K.G.)*,

lorsque la preuve par ouï-dire est une déclaration antérieure incompatible, la fiabilité est une « préoccupation fondamentale » (p. 786-787) :

> Cette préoccupation s'accentue dans le cas des déclarations antérieures incompatibles parce que le juge des faits doit choisir entre deux déclarations faites par le même témoin, par opposition aux autres formes de ouï-dire dans lesquelles une seule version des faits est présentée. Autrement dit, dans le cas des déclarations antérieures incompatibles, l'examen est axé sur la fiabilité relative de la déclaration antérieure et du témoignage entendu au procès, de sorte que des indices et garanties de fiabilité autres que ceux énoncés dans les arrêts *Khan* et *Smith* doivent être prévus afin que la déclaration antérieure soit soumise à une norme de fiabilité comparable avant que les déclarations de ce genre soient admises quant au fond.

79 Le juge en chef Lamer a ensuite décrit les caractéristiques générales d'un témoignage en cour qui offre les garanties habituelles de fiabilité. Il a examiné longuement les raisons impérieuses de préférer les déclarations faites sous la foi du serment ou d'une affirmation solennelle, l'utilité de voir et d'entendre le témoin pour apprécier la crédibilité, l'importance d'avoir un compte rendu exact de ce qui a réellement été dit, et l'avantage du contre-interrogatoire effectué au moment précis où la déclaration est faite. En étudiant ce qui constituerait un substitut adéquat à l'égard de la déclaration antérieure incompatible, il a conclu, aux p. 795-796, qu'il y aura des « garanties circonstancielles de fiabilité suffisantes » pour rendre de telles déclarations admissibles quant au fond

> (i) si la déclaration est faite sous serment ou affirmation solennelle après une mise en garde quant à l'existence de sanctions et à l'importance du serment ou de l'affirmation solennelle, (ii) si elle est enregistrée intégralement sur bande vidéo, et (iii) si la partie adverse [. . .] a la possibilité voulue de contre-interroger le témoin au sujet de la déclaration [. . .] Subsidiairement, il se peut que d'autres garanties circonstancielles de fiabilité suffisent à rendre une telle déclaration admissible quant au fond, à la condition que le juge soit convaincu que les circonstances offrent des garanties suffisantes de fiabilité qui se substituent à celles que la règle du ouï-dire exige habituellement.

80 Il n'est pas tout à fait juste d'affirmer qu'une déclaration est suffisamment fiable parce qu'elle est faite en personne et sous serment, et que le déclarant est contre-interrogé. Maints témoignages en cour s'avèrent tout à fait indignes de foi. Toutefois, c'est là que se situe la garantie — dans le *processus* qui en a révélé le manque de fiabilité. L'existence de substituts adéquats à ce processus établit donc un seuil de fiabilité et permet d'admettre sans risque la preuve.

81 Le juge en chef Lamer a également assujetti à une réserve importante — sur laquelle je reviendrai plus loin — le pouvoir discrétionnaire du juge du procès de refuser que la déclaration soit soumise au jury comme preuve de fond même dans le cas où les critères susmentionnés sont respectés, s'il y a quelque crainte que la déclaration soit le produit d'une forme d'inconduite de la part des enquêteurs (p. 801-802). En l'espèce, bien que les déclarations aient été enregistrées sur bande vidéo et que les témoins aient été contre-interrogés, ces déclarations n'ont pas été faites sous serment. La question de savoir s'il y avait un substitut suffisant pour justifier l'admission quant au fond a été renvoyée au juge du procès pour qu'il la tranche (p. 805). Le pourvoi a été accueilli et un nouveau procès a été ordonné. Le juge Cory (avec l'appui de la juge L'Heureux-Dubé) était d'accord avec le résultat, mais pour des motifs différents qui, pour les besoins de notre analyse, n'ont pas à être examinés ici.

6.2.4.4 *R. c. U. (F.J.), [1995] 3 R.C.S. 764*

82 Dans l'affaire *U. (F.J.)*, la question de l'admissibilité des déclarations antérieures incompatibles a de nouveau été soumise à la Cour. Au cours d'un entretien avec la police, la plaignante, J.U., a déclaré au policier qui l'interrogeait que l'accusé, son père, avait eu des rapports sexuels avec elle [TRADUCTION] « presque chaque jour »

(par. 4). Elle a donné de nombreux détails concernant ces activités sexuelles et a également fait état de deux agressions physiques. Le policier qui l'a interrogée a témoigné plus tard qu'il avait tenté d'enregistrer l'entretien, mais que le magnétoscope avait mal fonctionné. Il a, par la suite, préparé un résumé en se fondant en partie sur les notes qu'il avait prises et en partie sur ce qu'il avait retenu.

83 Immédiatement après avoir interrogé J.U., le même policier a interrogé l'accusé. Là encore, l'entretien n'a pas été enregistré. L'accusé a reconnu avoir eu des rapports sexuels avec J.U. [TRADUCTION] « bien des fois », décrivant des actes sexuels similaires et les deux agressions physiques dont elle avait fait état (par. 5). Au procès, J.U. est revenue sur ses allégations d'abus sexuel. Elle a soutenu avoir menti à la demande de sa grand-mère. L'accusé a nié avoir dit à la police qu'il avait eu des rapports sexuels avec J.U.

84 Le débat devant la Cour portait sur la question de savoir si la « règle » de l'arrêt *B. (K.G.)* s'appliquait à l'affaire. Bien que les critères de l'arrêt *B. (K.G.)* aient été fondés sur la méthode d'analyse raisonnée adoptée dans les arrêts *Khan* et *Smith*, il n'était pas évident que l'arrêt *B. (K.G.)* établissait une « règle » distincte applicable à l'admission des déclarations antérieures incompatibles. Le juge en chef Lamer a cherché à clarifier en ces termes le lien entre ces affaires (par. 35) :

> Il ressort des arrêts *Khan* et *Smith* que la preuve par ouï-dire sera admissible quant au fond lorsqu'elle est nécessaire et suffisamment fiable. Il y est également dit qu'on doit interpréter de façon souple tant la nécessité que la fiabilité, tenant compte des circonstances de l'affaire et veillant à ce que notre nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories. Ma décision dans *B. (K.G.)* est une application de ces principes à une branche particulière de la règle du ouï-dire, la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles. La principale distinction entre l'arrêt *B. (K.G.)* d'une part, et les arrêts *Khan* et *Smith* d'autre part, réside dans le fait que,

> dans l'arrêt *B. (K.G.)*, l'auteur de la déclaration peut être contre-interrogé. Ce seul fait contribue à l'assurance du respect du critère de l'admissibilité quant à la fiabilité. L'espèce diffère de l'arrêt *B. (K.G.)* seulement quant aux indices de fiabilité disponibles. Le critère de la nécessité est rempli en l'espèce de la même façon qu'il y est satisfait dans *B. (K.G.)* : la déclaration antérieure est nécessaire parce qu'une preuve de la même qualité ne peut être obtenue au procès. C'est pour cette raison qu'il est déterminant d'évaluer la fiabilité de la déclaration antérieure incompatible en question en l'espèce.

85 Le juge en chef Lamer a ensuite déterminé comment les indices de fiabilité pouvaient reposer sur d'autres critères que ceux énoncés dans l'arrêt *B. (K.G.)*. La déclaration de la plaignante à la police n'avait pas été faite sous serment et n'avait pas non plus été enregistrée sur bande vidéo. Qui plus est cependant, la déclarante pouvait être contre-interrogée, ce qui atténuait considérablement les dangers habituels découlant de la présentation d'une preuve par ouï-dire. Pourtant, cette affaire suscitait les mêmes préoccupations quant à la fiabilité de la déclaration antérieure incompatible. La plaignante était revenue sur ses allégations antérieures. Dans le cours normal du processus judiciaire, cela devrait mettre un terme à l'affaire. Supposons, par exemple, qu'en jouant avec certaines de ses amies au jeu de la vérité « Truth or Dare », dans lequel chaque joueur est encouragé à surpasser le joueur précédent en disant ou faisant quelque chose qui choque, la plaignante aurait allégué avoir été agressée sexuellement par son père. L'utilisation, à titre de preuve quant au fond, de la déclaration qu'elle a faite à brûle-pourpoint — de préférence à son témoignage sous serment voulant que ces faits ne se soient jamais produits — serait difficilement justifiable. L'accent doit donc être mis sur la fiabilité de la déclaration antérieure incompatible.

86 Dans l'arrêt *B. (K.G.)*, la Cour a conclu qu'une déclaration antérieure incompatible est suffisamment fiable pour être admise quant au fond si elle est faite dans des circonstances comparables à celles d'un témoignage devant le tribunal. Dans

l'affaire *U. (F.J.)*, on a satisfait à l'exigence de fiabilité en démontrant plutôt que la question de savoir si la plaignante avait dit la vérité dans sa déclaration à la police n'était pas vraiment un sujet de préoccupation. Les similitudes frappantes entre sa déclaration et celle faite de façon indépendante par son père étaient si convaincantes que la seule explication vraisemblable était qu'ils disaient tous les deux la vérité. Là encore, les critères de la nécessité et de la fiabilité se recoupent. Par souci de recherche de la vérité, il était nécessaire d'admettre quant au fond la déclaration en raison de sa très grande fiabilité.

87 Là encore, le juge en chef Lamer a ajouté la condition suivante (par. 49) :

> Je soulignerais également les conditions que j'ai précisées dans *B. (K.G.)*, à savoir que le juge du procès doit être convaincu, selon la prépondérance des probabilités, que la déclaration n'est pas le produit de la coercition, que ce soit menaces, promesses, questions trop suggestives de l'enquêteur ou d'une autre personne en situation d'autorité, ou autres manquements des enquêteurs.

6.2.4.5 *R. c. Hawkins, [1996] 3 R.C.S. 1043*

88 L'arrêt *Hawkins* de notre Cour portait surtout sur la question de l'inhabilité à témoigner du conjoint. Toutefois, cet arrêt est également intéressant en ce qui concerne l'application de la méthode d'analyse raisonnée à la règle du ouï-dire. Mes remarques ne visent ici que ce dernier aspect de l'arrêt. Il illustre comment, dans certaines circonstances, seule l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier le témoignage au procès peut permettre de satisfaire à l'exigence de fiabilité. Comme nous le verrons, là encore, la possibilité de contre-interroger la déclarante était un facteur crucial. Parce qu'il y avait suffisamment d'indices de fiabilité pour que le juge des faits dispose d'une base satisfaisante pour examiner la véracité de la déclaration, la Cour a conclu que le juge

du procès avait commis une erreur en excluant la déclaration parce qu'il la croyait dépourvue de valeur probante.

89 M. Hawkins, un policier, a été accusé d'avoir entravé la justice et d'avoir par corruption accepté de l'argent. G, qui était sa petite amie à l'époque, a témoigné à l'enquête préliminaire. Après avoir témoigné la première fois, G a demandé à témoigner de nouveau, et elle est revenue, en s'expliquant, sur une grande partie de ce qu'elle avait dit. Au moment du procès, M. Hawkins et G étaient mariés, et G était, de ce fait, inhabile à témoigner en vertu de l'art. 4 de la *Loi sur la preuve au Canada*. Après avoir décidé que la règle de common law de l'inhabilité du conjoint à témoigner s'appliquait et que le témoignage de G recueilli à l'enquête préliminaire ne pouvait pas être lu au procès en application de l'art. 715 du *Code criminel*, le juge du procès a conclu que la preuve n'était pas admissible selon la méthode d'analyse raisonnée parce qu'elle n'était pas suffisamment fiable. M. Hawkins a été acquitté. Le verdict a été écarté par une décision majoritaire de la Cour d'appel de l'Ontario. Le pourvoi formé par la suite devant notre Cour a été rejeté, mais pour des motifs différents. La Cour a refusé de se rendre à l'invitation de modifier la règle de common law de l'inhabilité du conjoint à témoigner. Elle a convenu avec le juge du procès que la règle de common law s'appliquait et que le témoignage ne pouvait pas être lu en application de l'art. 715. Toutefois, les juges majoritaires de la Cour ont décidé que le témoignage recueilli à l'enquête préliminaire pouvait être lu au procès suivant la méthode d'analyse raisonnée applicable à l'admission du ouï-dire. Les trois juges dissidents ont estimé que cela dérogeait à la politique sous-jacente de l'art. 4 et ne devait pas être permis.

90 Après avoir déterminé que le critère de la nécessité était rempli, le juge en chef Lamer et le juge Iacobucci (avec l'appui des juges Gonthier et Cory) ont abordé

la question de la fiabilité. Dans les circonstances de cette affaire, on ne pouvait guère affirmer que le témoignage de la plaignante était en soi digne de foi. Les versions qu'elle avait toutes présentées sous serment étaient contradictoires. La Cour a plutôt vérifié s'il existait une base satisfaisante pour examiner la véracité de la déclaration, affirmant ceci (par. 75) :

> Le critère de la fiabilité vise un seuil de fiabilité et non une fiabilité absolue. La tâche du juge du procès se limite à déterminer si la déclaration relatée en question renferme suffisamment d'indices de fiabilité pour fournir au juge des faits une base satisfaisante pour examiner la véracité de la déclaration. Plus particulièrement, le juge doit cerner les dangers spécifiques du ouï-dire auxquels donne lieu la déclaration et déterminer ensuite si les faits entourant cette déclaration offrent suffisamment de garanties circonstancielles de fiabilité pour contrebalancer ces dangers. Il continue d'appartenir au juge des faits de se prononcer sur la fiabilité absolue de la déclaration et le poids à lui accorder. [Je souligne.]

91 La Cour a statué qu'en général un témoignage recueilli à l'enquête préliminaire satisfait au critère du seuil de fiabilité puisque le fait qu'il a été présenté sous serment et que le témoin a alors été contre-interrogé dans le cadre d'une audience mettant en cause les mêmes parties et essentiellement les mêmes questions en litige fournit suffisamment de garanties de fiabilité de ce témoignage (par. 76). De plus, l'exactitude de la déclaration est certifiée par une transcription signée par le juge, et la partie contre laquelle la preuve par ouï-dire est présentée a le pouvoir d'assigner le déclarant à témoigner. L'impossibilité pour le juge des faits d'observer le comportement a été qualifiée de « plus que contrebalancé[e] par les garanties circonstancielles de fiabilité propres à la procédure décisionnelle de nature accusatoire que constitue l'enquête préliminaire » (par. 77). Le fait qu'à l'origine on était disposé en common law à admettre en preuve un témoignage antérieur dans certaines circonstances indiquait qu'on en reconnaissait implicitement la fiabilité malgré

l'absence du déclarant (par. 78). Le juge en chef Lamer et le juge Iacobucci ont donc conclu ceci (par. 79) :

> Pour ces motifs, nous sommes d'avis qu'un témoignage enregistré lors d'une enquête préliminaire comporte suffisamment de garanties de fiabilité pour permettre au juge des faits d'en faire une utilisation quant au fond au cours du procès. Les circonstances entourant ce témoignage, tout particulièrement l'existence d'un serment ou d'une affirmation et la possibilité de contre-interrogatoire au moment de la déclaration font plus que contrebalancer l'impossibilité pour le juge des faits d'observer le comportement du témoin en cour. L'absence du témoin au procès influe sur le poids et non sur l'admissibilité du témoignage.

Appliquant ce raisonnement à la déclaration en cause, la Cour a estimé qu'elle était fiable (par. 80).

92 Le juge en chef Lamer et le juge Iacobucci ont ajouté que le juge du procès avait commis une erreur en tenant compte des contradictions internes du témoignage parce que ces considérations se rapportaient, à juste titre, à l'appréciation en dernière analyse de la valeur probante même du témoignage, qui doit être faite par le juge des faits. Bien qu'une partie de l'analyse relative à ce dernier point consiste à classer des facteurs comme se rapportant soit au seuil de fiabilité soit à la fiabilité en dernière analyse — méthode qui ne devrait plus être suivie —, la conclusion de la Cour à cet égard illustre où doit être tracée la ligne de démarcation en matière d'examen du seuil de fiabilité. Lorsque l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire de vérifier davantage si la déclaration est susceptible d'être véridique. Cette question relève alors entièrement, en dernière analyse, du juge des faits et le juge du procès outrepasse son rôle en vérifiant si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la

déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non — qu'on se rappelle l'arrêt *U. (F.J.)*.

6.3 *Réexamen des par. 215 et 217 de l'arrêt Starr*

93 Comme le révèle, je l'espère, l'analyse qui précède, la question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse dépendra du contexte. Partant, certains des commentaires formulés aux par. 215 et 217 de l'arrêt *Starr* ne devraient plus être suivis. Les facteurs pertinents ne doivent plus être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Le tribunal devrait plutôt adopter une approche plus fonctionnelle, comme nous l'avons vu précédemment, et se concentrer sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. De plus, le juge du procès doit demeurer conscient du rôle limité qu'il joue lorsqu'il se prononce sur l'admissibilité — il est essentiel pour assurer l'intégrité du processus de constatation des faits que la question de la fiabilité en dernière analyse ne soit pas préjugée lors du voir-dire portant sur l'admissibilité.

94 Je tiens à dire quelques mots sur un facteur décrit dans l'arrêt *Starr*, à savoir « la présence d'une preuve corroborante ou contradictoire » (par. 217), puisqu'il semble que ce soit ce commentaire qui a soulevé le plus de controverse. Pour des raisons de commodité, je reproduis le commentaire en question :

> De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). [par. 217]

95 J'examinerai brièvement les deux décisions invoquées à l'appui de cet énoncé. La première n'est pas vraiment utile à cet égard et la seconde, selon moi, ne devrait pas être suivie.

96 Dans l'affaire *R. c. C.(B.)* (1993), 12 O.R. (3d) 608 (C.A.), en déclarant l'accusé coupable, le juge du procès avait utilisé la déclaration d'un coaccusé comme preuve étayant le témoignage de la plaignante. La Cour d'appel a conclu que cela constituait une erreur. Alors que la déclaration d'un coaccusé était admissible contre lui comme preuve de sa véracité, elle restait du ouï-dire à l'égard de l'accusé. Le coaccusé était revenu sur sa déclaration au procès. Il n'a pas été démontré que sa déclaration était suffisamment fiable pour être admise contre l'accusé à titre d'exception à la règle du ouï-dire. Cette affaire n'est donc d'aucun secours pour ce qui est de savoir s'il y a lieu de considérer une preuve à l'appui pour décider de l'admissibilité d'un ouï-dire. On y réaffirme simplement la règle bien établie selon laquelle la déclaration d'un accusé n'est admissible que contre lui et non contre un coaccusé.

97 L'arrêt *Idaho c. Wright*, 497 U.S. 805 (1990), est plus à propos. Dans cette affaire, cinq des neuf juges de la Cour suprême des États-Unis n'étaient pas convaincus que [TRADUCTION] « la preuve corroborant la véracité d'une déclaration relatée puisse étayer, à juste titre, la conclusion que la déclaration comporte "des garanties particulières de fiabilité" » (p. 822). Selon les juges majoritaires, l'utilisation d'une preuve corroborante à cette fin « permettrait d'admettre une déclaration présumée peu fiable en se fondant sur la fiabilité d'un autre élément de preuve au procès, résultat que nous croyons contraire à l'exigence que la preuve par ouï-dire admise en vertu de la clause de confrontation des témoins soit à ce point digne de foi qu'il serait peu utile de

contre-interroger le déclarant » (p. 823). Par exemple, les juges majoritaires ont fait observer qu'une déclaration faite sous la contrainte peut se révéler véridique, mais qu'une preuve tendant à corroborer la véracité de cette déclaration ne saurait être substituée au contre-interrogatoire du déclarant au procès. Les juges majoritaires ont aussi exprimé la crainte, surtout dans les affaires d'abus sexuels d'enfants, qu'un jury s'appuie sur la corroboration partielle fournie par la preuve médicale pour inférer à tort la fiabilité de toute l'allégation.

98 Dans ses motifs dissidents, le juge Kennedy, avec l'appui des trois autres juges, s'est dit en profond désaccord avec le point de vue des juges majoritaires concernant l'utilisation potentielle d'un élément de preuve à l'appui ou contradictoire. À mon avis, ses motifs reprennent une bonne partie des critiques formulées au sujet de la position de notre Cour dans l'arrêt *Starr*. Il a affirmé ceci :

> [TRADUCTION] Je ne vois rien qui justifie constitutionnellement cette décision de dissocier la preuve corroborante de l'examen de la question de savoir si les déclarations d'un enfant sont fiables. Il va de soi pour la plupart des gens que l'un des meilleurs moyens de savoir si quelqu'un est digne de foi consiste à vérifier si ses propos sont corroborés par une autre preuve. Par exemple, dans un cas de violence envers une enfant, si une partie de la déclaration relatée de l'enfant veut que l'assaillant lui ait lié les poignets ou qu'il ait eu une cicatrice au bas de l'abdomen, et qu'une preuve matérielle ou un témoignage corrobore cette déclaration — preuve que l'enfant n'aurait pas pu fabriquer —, nous serons probablement plus enclins à croire que l'enfant dit la vérité. À l'inverse, on peut penser à la déclaration qu'un enfant fait de manière spontanée ou, par ailleurs dans des circonstances indiquant qu'elle est fiable, mais qui contient aussi des inexactitudes factuelles incontestées si énormes que la crédibilité de ses déclarations s'en trouve considérablement minée. Selon l'analyse de la Cour, la déclaration satisferait aux exigences de la clause de confrontation des témoins malgré un doute considérable quant à sa fiabilité. [p. 828-829]

99 Le juge Kennedy était aussi en profond désaccord avec le point de vue des juges majoritaires selon lequel seules les circonstances entourant la déclaration doivent être considérées :

> [TRADUCTION] L[es juges majoritaires] n'offre[nt] aucune justification pour écarter l'examen de la preuve corroborante, si ce n'est qu'[ils] indique[nt] que celle-ci ne renforce pas la « fiabilité inhérente » des déclarations. Mais pour déterminer la fiabilité des déclarations, je ne vois aucune différence entre les facteurs qui, selon la Cour, indiquent l'existence de « fiabilité inhérente » et ceux qui, comme la preuve corroborante, ne paraissent pas le faire. Même les facteurs retenus par la Cour obligeront à examiner la preuve même que celle-ci entend soustraire à l'analyse de la fiabilité. La Cour note que l'un des critères de fiabilité est de savoir si l'enfant a « utilis[é] [. . .] un vocabulaire inattendu de la part d'un enfant de son âge ». Mais pour se prononcer sur ce point, il faut examiner les connaissances de l'enfant sur le plan du vocabulaire et la possibilité qu'il a eu ou non d'apprendre le vocabulaire en cause. Et lorsque toutes les circonstances extrinsèques d'une affaire sont prises en compte, il peut se révéler que l'usage d'un mot ou d'un vocabulaire particulier étaye en fait l'inférence d'un contact prolongé avec le défendeur, qui était connu pour son utilisation du vocabulaire en question. Comme autre exemple, la Cour note qu'un motif d'inventer une histoire est significatif en ce qui concerne la question de la fiabilité. Mais si le suspect accuse un tiers d'avoir inventé une fausse preuve contre lui et d'avoir préparé l'enfant, il est sûrement utile de démontrer que ce tiers n'a eu aucun contact avec l'enfant ni aucune possibilité de proposer un faux témoignage. Vu les contradictions inhérentes du critère de la Cour qui se dégagent de ses propres exemples, je pense que sa conclusion se révélera rapidement aussi inapplicable qu'illogique.
>
> Bref, tant les circonstances entourant les déclarations de l'enfant que l'existence d'une preuve corroborante indiquent plus ou moins si les déclarations sont fiables. Si la Cour veut donner à entendre que les circonstances entourant une déclaration sont les meilleurs indices de fiabilité, je doute qu'il en soit ainsi dans tous les cas. Et, si cela était vrai dans une affaire donnée, cela ne justifie pas de passer sous silence d'autres indices de fiabilité comme la preuve corroborante, s'il n'y a aucune autre raison de les écarter. D'ailleurs, je crois que la preuve corroborante sous forme de témoignage ou de preuve matérielle, outre les circonstances bien précises entourant la déclaration, serait un moyen privilégié de déterminer la fiabilité d'une déclaration pour les besoins de la clause de confrontation, pour la simple raison que, contrairement aux autres indices de fiabilité, la preuve corroborante peut être étudiée par le défendeur et appréciée de façon objective et critique par le tribunal de première instance. [Renvois omis; p. 833-834.]

100 À mon avis, l'opinion du juge Kennedy reflète mieux l'expérience canadienne sur cette question. Il s'est révélé difficile et parfois paradoxal de limiter l'enquête aux circonstances entourant la déclaration. Notre Cour elle-même n'a pas toujours adopté cette approche restrictive. De plus, je ne juge pas convaincante la préoccupation des juges majoritaires quant au caractère « autocorroborant » de la preuve corroborante. À cet égard, je suis d'accord avec les commentaires suivants du professeur Paciocco concernant le raisonnement majoritaire de l'arrêt *Idaho c. Wright* (p. 36) :

> [TRADUCTION] Le raisonnement final proposé veut qu'admettre une preuve simplement parce qu'une autre preuve établit qu'elle est fiable en ferait une preuve « autocorroborante ». En fait, on réserve généralement cette étiquette aux arguments circulaires selon lesquels un élément de preuve douteux « s'appuie sur lui-même » pour s'ériger en exception. Par exemple, une partie soutient qu'elle peut s'appuyer sur une déclaration relatée parce qu'elle a été faite sous une pression ou contrainte telle que la possibilité d'invention peut être écartée à juste titre, mais s'appuie ensuite sur le contenu de cette même déclaration pour prouver l'existence de cette pression ou contrainte : *Ratten c. The Queen*, [1972] A.C. 378. Ou encore, une partie affirme qu'elle peut compter sur la véracité d'une déclaration parce qu'elle a été faite par une partie opposée, mais s'appuie ensuite sur le contenu de la déclaration pour prouver qu'elle a été faite par une partie opposée : voir *R. c. Evans*, [1991] 1 R.C.S. 869. S'en remettre à un *autre* élément de preuve pour confirmer la fiabilité d'une preuve, ce que l'arrêt *Idaho c. Wright* vise à prévenir, est l'antithèse même de la preuve « autocorroborante ».

7. Application à la présente affaire

101 Les déclarations que M. Skupien a faites à la cuisinière, M^me^ Stangrat, au médecin et à la police constituaient du ouï-dire. Le ministère public cherchait à présenter ces déclarations pour établir la véracité de leur contenu. Dans le contexte du présent procès, cette preuve était très importante — en fait, les deux accusations portées

contre M. Khelawon relativement à ce plaignant reposaient entièrement sur la véracité des allégations contenues dans les déclarations de ce dernier.

102 Les déclarations relatées de M. Skupien étaient présumées inadmissibles. Aucune des exceptions traditionnelles à la règle du ouï-dire ne pouvait aider le ministère public à établir sa preuve. La preuve ne pouvait être admise qu'en application de l'exception raisonnée à la règle du ouï-dire.

103 Le décès de M. Skupien avant le procès a forcé le ministère public à recourir à son témoignage sous sa forme relatée. Il a été concédé dans toutes les cours que l'on avait satisfait à l'exigence de nécessité. Il s'agissait donc de savoir si le témoignage était suffisamment fiable pour être admis en preuve.

104 Comme M. Skupien était décédé avant le procès, il ne pouvait plus être vu, entendu et contre-interrogé en cour. Il ne pouvait pas être contre-interrogé au moment précis de sa déclaration. Il n'y avait pas eu non plus d'autre possibilité de le contre-interroger à aucune autre audience. Même si M. Skupien était âgé et frêle au moment de ses allégations, rien ne prouve que le ministère public a tenté de préserver son témoignage en application des art. 709 à 714 du *Code criminel*. M. Skupien n'a pas témoigné à l'enquête préliminaire. Le dossier n'indique pas s'il était décédé à cette époque. En faisant ces commentaires, je ne remets pas en question la nécessité pour le ministère public de recourir au témoignage sous forme relatée de M. Skupien. Je reconnais que c'était nécessaire. Toutefois, dans une instance appropriée, il se peut bien que, pour trancher la question de la nécessité, le tribunal se demande si la partie qui veut présenter la preuve a déployé tous les efforts raisonnables pour préserver la preuve du

déclarant de manière à préserver également les droits de l'autre partie. Cette question ne se pose pas en l'espèce.

105 Il reste toutefois que l'absence de possibilité de contre-interroger M. Skupien a une incidence sur la question de la fiabilité. La préoccupation majeure que suscite le caractère relaté de la preuve est l'incapacité de vérifier de la manière habituelle les allégations que cette preuve comporte. La preuve est inadmissible à moins qu'il y ait un autre motif suffisant de la vérifier ou que le contenu de la déclaration soit suffisamment fiable.

106 De toute évidence, il n'y avait aucune preuve à faire en l'espèce au sujet de l'existence d'autres moyens adéquats de vérifier la preuve. Il ne s'agit pas d'une situation comme celle dans l'affaire *Hawkins* où les difficultés présentées par la non-disponibilité de la déclarante pouvaient facilement être surmontées par le fait que l'on disposait de la transcription de l'audience préliminaire où on avait eu l'occasion de contre-interroger la plaignante dans le cadre d'une audience portant essentiellement sur les mêmes questions en litige. Il ne s'agit pas non plus d'une situation comme celle dans l'affaire *B. (K.G.)* où un serment et une bande vidéo s'ajoutaient à la disponibilité du déclarant au procès. Il n'y a en l'espèce aucun autre moyen adéquat de vérifier la preuve. Il y a la bande vidéo de la police — rien d'autre. L'exception raisonnée à la règle du ouï-dire ne constitue pas un moyen de fonder une déclaration de culpabilité sur une déclaration faite à la police sur bande vidéo ou autrement, sans plus. Pour satisfaire à l'exigence de fiabilité en l'espèce, le ministère public ne pouvait se fonder que sur la fiabilité inhérente de la déclaration.

107 À mon avis, il n'y avait aucune preuve à faire sur ce fondement non plus. Il ne s'agissait pas d'une situation comme celle dans l'arrêt *Khan* où la force probante de la preuve était telle que, comme l'a affirmé Wigmore, il serait [TRADUCTION] « trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint » (§ 1420, p. 154). Au contraire, tout comme dans le cas de la troisième déclaration jugée inadmissible dans l'arrêt *Smith*, les circonstances soulevaient un certain nombre de questions sérieuses de sorte qu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire. M. Skupien était âgé et frêle. Sa capacité mentale était en cause — les dossiers médicaux faisaient état de diagnostics répétés de paranoïa et de démence. Il y avait également la possibilité que ses blessures aient résulté d'une chute plutôt que d'une agression — les dossiers médicaux révélaient un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements et le médecin traitant, le D[r] Pietraszek, a témoigné que les blessures pouvaient être dues à une chute (d.a., vol. 2, p. 259). Les sacs à ordures remplis d'effets personnels de M. Skupien étaient peu utiles pour déterminer si la déclaration était susceptible d'être véridique — il pouvait avoir rempli ces sacs lui-même. D'autres difficultés résultaient du motif évident que M[me] Stangrat avait de discréditer M. Khelawon. Les premières allégations ont été formulées devant elle — dans son témoignage, le D[r] Pietraszek a reconnu que M[me] Stangrat était présente lorsqu'il a rencontré M. Skupien et qu'elle pouvait avoir aidé ce dernier en fournissant des indices sur ce qui s'était produit. Il fallait déterminer dans quelle mesure cette employée mécontente pouvait avoir influencé M. Skupien lorsqu'il a fait sa déclaration. M. Skupien avait lui-même certaines récriminations au sujet de la façon dont la maison de retraite était gérée. Cela ressort de ses plaintes incohérentes contenues dans l'enregistrement vidéo de la police. L'absence de serment et le simple « oui » répondu lorsque le policier lui a demandé s'il comprenait qu'il était important de dire la vérité n'aident pas beaucoup à déterminer s'il saisissait vraiment les

conséquences de sa déclaration pour M. Khelawon. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait considérablement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur.

108 Comme nous l'avons vu, la conclusion du juge du procès que la preuve était suffisamment fiable reposait essentiellement sur les « similitudes frappantes » entre les déclarations des cinq plaignants. À l'instar du juge Rosenberg, je suis moi aussi d'avis de ne pas écarter le fait que l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié. Toutefois, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et ne pouvaient être admises quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Par exemple, l'entretien enregistré sur bande vidéo de M. Dinino, sur lequel reposait la deuxième déclaration de culpabilité de M. Khelawon, durait neuf minutes et avait été précédé d'un entretien de 30 minutes avec la police. Le policier ne possédait aucune note de l'entretien initial. L'agent Pietroniro a reconnu qu'il était [TRADUCTION] « très difficile » d'obtenir des réponses de M. Dinino et qu'une grande partie de l'enregistrement était inaudible. Il répétait généralement à M. Dinino ce qu'il croyait que celui-ci avait dit, et M. Dinino répondait par « oui » ou « ouais ». L'agent Pietroniro a reconnu qu'il faisait des suppositions éclairées au sujet de ce que M. Dinino disait et qu'il n'avait pas saisi certains propos de ce dernier. Outre ces difficultés, le dossier est loin d'indiquer clairement sur quelles caractéristiques précises le juge du procès s'est fondé pour conclure à l'existence d'une « similitude frappante » entre les diverses déclarations. Toutefois, je ne juge pas nécessaire de m'étendre sur cette

question. L'admissibilité des autres déclarations n'est plus en cause. La Cour d'appel a décidé, à l'unanimité, qu'elles étaient inadmissibles.

109 Je conclus que la preuve ne satisfait pas à l'exigence de fiabilité. Les juges majoritaires de la Cour d'appel ont eu raison de la déclarer inadmissible.

8. Conclusion

110 Pour ces motifs, je suis d'avis de rejeter le pourvoi.

731.

Tab 12

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Securities Commission v. Money Gate Mortgage Investment Corporation, 2020 ONCA 812
DATE: 20201216
DOCKET: C68064

MacPherson, Zarnett and Jamal JJ.A.

BETWEEN

Ontario Securities Commission

Applicant

and

Money Gate Mortgage Investment Corporation

Respondent

Eli Karp, for the non-party appellant, 2496050 Ontario Inc.

Maya Poliak, for the respondent, Grant Thornton Limited in its capacity as court-appointed receiver of Money Gate Mortgage Investment Corporation

Heard: November 26, 2020 by video conference

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of Justice, dated March 17, 2020, with reasons reported at 2020 ONSC 783.

Zarnett J.A.:

INTRODUCTION

[1] The appellant, 2496050 Ontario Inc., appeals from a final determination of rights made on a motion for advice and directions in receivership proceedings. The motion judge's order declared that a mortgage (the "254 Mortgage") in

favour of the company in receivership, Money Gate Mortgage Investment Corporation ("Money Gate"), was valid and enforceable. It also ordered that funds realized from the sale of the property against which the mortgage had been registered (the "Sale Proceeds") be paid to the respondent, Grant Thornton Limited, Money Gate's court-appointed receiver (the "Money Gate receiver"), for distribution.

[2] The 254 Mortgage was a second mortgage granted by a company in which the appellant is a shareholder, 254656 Ontario Limited ("254"), as security for a loan that, prior to its receivership, Money Gate had made to 254. Upon the sale of the property secured by the mortgage, funds (that is, the Sale Proceeds) were available in excess of what was required to be paid to the first mortgagee.

[3] The Money Gate receiver's position was that the Sale Proceeds were an asset of Money Gate and should be available for distribution to those with proper claims against Money Gate's assets, primarily the investors who had funded Money Gate's mortgage lending activities.

[4] The appellant took the position that the 254 Mortgage was invalid because: (i) 254 required unanimous shareholder approval to borrow and grant security; (ii) the appellant had not consented to the 254 Mortgage, or had only consented conditionally and the condition (that it receive a portion of the mortgage proceeds) was not fulfilled; and (iii) fraud was involved.

[5] On a motion for advice and directions by the Money Gate receiver, the motion judge found that the validity of the mortgage could be determined in a summary fashion. She found that the mortgage was valid, as there had been shareholder consent. Furthermore, even if the appellant had consented on the condition that 254 would pay it a portion of the loan proceeds when received, the non-fulfillment of the condition did not affect the validity of the mortgage but was an issue between the appellant and 254's other shareholder. And although the appellant alleged fraud, the motion judge held that there was no evidence to support this contention.

[6] The appellant argues that the motion judge was not entitled to decide the matter summarily, and that in any event her decision was legally flawed, made on the basis of factual findings that were unavailable on a paper record, and improperly granted what was, in effect, partial summary judgment. The appellant asks us to direct what it says the motion judge should have directed—a trial.

[7] For the reasons that follow, I would dismiss the appeal.

[8] It is important, given the exigencies of receivership proceedings, that a court supervising the receivership decide issues on a summary basis, rather than pursuant to the costlier and more time consuming process of a trial, in cases where a summary process can determine the merits of a dispute fairly and justly. The motion judge did not err, in deciding that this matter could be dealt with

summarily, by borrowing from the approach applied on motions for summary judgment, an approach designed to ensure that a case is disposed of without a trial only where to do so will result in its fair and just determination.

[9] The factual findings the motion judge made were available on the record and her rejection of the appellant's argument of invalidity based on an unfulfilled condition of consent was free of legal error.

[10] The principles that inform when a court should decline to grant what would be a partial summary judgment ought to be applied in the receivership context with due consideration for the time sensitive and multi-stakeholder nature of a receivership proceeding. The motion judge did not infringe any principle against granting partial summary judgment in the context of this case.

BACKGROUND

(i) Money Gate's Receivership

[11] Money Gate was a mortgage investment corporation that lent money secured by residential and commercial mortgages. Between August 2014 and April 2017, in order to fund its activities, it raised approximately $11 million from multiple investors by selling them preferred shares. However, Money Gate never filed a prospectus, was not a reporting issuer, and was not registered with the Ontario Securities Commission ("OSC") in any capacity.

[12] In April 2017, the staff of the OSC ("Staff") commenced an investigation of Money Gate, an affiliated corporation, and two individuals, Ben and Payam Katebian (the "Katebians"), who were Money Gate's directors and officers. A temporary cease trade order was made by the OSC, preventing Money Gate from raising more capital. In December 2017, Staff filed a Statement of Allegations against the targets of its investigation alleging that they had misled investors and engaged in unregistered trading and illegal distributions of securities. In October 2018, the allegations were expanded to include diversion of corporate funds.

[13] The OSC has the power to apply to the Superior Court for the appointment of a receiver of a company where the appointment is in the best interests of the company's creditors, security holders, or subscribers, or is appropriate for the due administration of Ontario securities law: *Securities Act,* R.S.O. 1990, c. S.5, ss. 129 (1) and (2).

[14] In November 2018, the OSC made such an application in respect of Money Gate. The affidavit in support of the application stated that as at November 2, 2018, Money Gate's loan portfolio consisted of nine outstanding loans, the majority of which were in default, and that the portfolio had a realizable value that was significantly less than the amounts Money Gate had raised from investors.

[15] On November 6, 2018, Hainey J. made an order appointing the respondent as receiver in relation to all of the assets, undertaking and properties of Money Gate, including any mortgages in favour of Money Gate. The Money Gate receiver was given broad powers to take possession and control of Money Gate's assets, and collect any money owing to it. Proceedings against the Money Gate receiver were not to be taken or continued without its consent or leave of the court. The Money Gate receiver was given the power to take or defend proceedings relating to Money Gate's assets, and was granted leave to apply to the court for advice and directions in the discharge of its powers and duties.

(ii) The 254 Mortgage

[16] One of the mortgages that Money Gate held at the time of the receivership was the 254 Mortgage. Using funds that had been raised from investors, Money Gate advanced $611,000 to 254's lawyers on May 29, 2017. On June 5, 2017, the 254 Mortgage, signed by 254's sole director, was registered as a second mortgage against property owned by 254 on Dovercourt Road, Toronto (the "Dovercourt Property"), charging that property in favour of Money Gate as security for the repayment of the loan.

[17] It is not in dispute that the funds advanced by Money Gate to 254 were not repaid.

(iii) 254

[18] 254 was incorporated in November 2016. Until May 24, 2017, its sole shareholder was Payam Katebian.

[19] On May 15, 2017, 254's sole shareholder executed a resolution (the "Resolution") amending its Articles by restricting 254's ability to borrow or grant a mortgage without the consent of a majority of its shareholders voting at a meeting, or the consent in writing of all of its shareholders.

[20] On May 24, 2017, the appellant acquired 50% of the shares of 254.

[21] The sole director of 254 at the time of the 254 Mortgage was Rouzbeh Behrouz ("Behrouz").

(iv) The Dovercourt Receivership and the Sale of the Dovercourt Property

[22] On July 4, 2018, on the application of Money Gate, a receiver was appointed over the Dovercourt property. In January 2019, the Dovercourt property was sold, with court approval. From the proceeds, the first mortgagee and the expenses of sale were paid. The balance—the Sale Proceeds—were to be paid to the Money Gate receiver, to be held pending a court order for distribution. The Sale Proceeds ultimately received by the Money Gate receiver ($556,078.73) are significantly less than the amount of investor provided funds ($611,000) that were originally advanced under the 254 Mortgage, and the

amount owing by 254 on that mortgage at the time of the property sale ($768,161.45).

(v) The Money Gate receiver's motion for advice and directions

[23] In order to determine if it could distribute the Sale Proceeds to investors, the Money Gate receiver brought a motion seeking advice and directions of the court. In the motion, the Money Gate receiver noted that it had "heard from" the appellant, who claimed an entitlement to the funds on the basis that the 254 Mortgage should be declared invalid as the appellant did not consent to the granting of that mortgage and its consent, as a 50% shareholder of 254, was required.[1]

(vi) The Motion Judge's Decision

[24] The motion judge granted the Money Gate receiver's request that the 254 Mortgage be declared valid and enforceable, and directed that the Sale Proceeds could be released for distribution.

[25] The motion judge recognized that the motion for advice and directions resulted in a form of summary judgment, as it disposed of the appellant's claim that the 254 Mortgage was invalid and its claim to the proceeds of the sale of the

[1] The appellant commenced an action against the Money Gate receiver, Payam Katebian, 254 and Rouzbeh Behrouz in early 2019. It included a claim to declare the 254 Mortgage invalid. The appellant did not obtain leave to commence that action against the Money Gate receiver, as required by the order of Hainey J. appointing it. The Money Gate receiver advised the appellant it would not respond to the action and considered it a nullity. The action has not proceeded.

Dovercourt Property. She rejected the argument that this was procedurally improper, and held that there was sufficient evidence before her to meet the high threshold for a summary judgment type determination, which she noted was the absence of a genuine issue requiring a trial.

[26] The motion judge examined the evidence, and concluded that on its face, the 254 Mortgage was valid. She found that there was no evidence of fraud. She rejected the argument that the 254 Mortgage was invalidated by an alleged lack of consent by the appellant. She found that the appellant had consented. The non-fulfillment of the condition the appellant imposed on its consent, that 254 pay it a portion of the loan proceeds, did not invalidate the mortgage. It gave rise, rather, to an issue between the appellant and Payam Katebian, who had allegedly retained or diverted those funds.

[27] Alternatively, the motion judge reasoned that Money Gate was entitled to an equitable mortgage and the indoor management rule could be applied to overcome any complaint of non-compliance with the Resolution. She rejected the argument that Payam Katebian's role at Money Gate and 254 prevented either conclusion, given that the investors who funded the mortgage advance had no knowledge of any wrongdoing or corporate non-compliance.

ISSUES ON APPEAL

[28] The appellant advances what are essentially three arguments.

[29] First, the appellant argues that the motion judge lacked the authority, on a motion for advice and directions, to grant what was effectively summary judgment.

[30] Second, the appellant submits that the factual record, viewed against the backdrop of the prevailing law, made the case inapposite for summary disposition without a trial. The appellant submits that there are issues surrounding whether and on what terms it consented to the mortgage, and about the conduct of the Katebians and Behrouz in orchestrating the transaction and the flow of funds, that require a trial for their proper resolution. Additionally, the appellant argues that the motion judge made an error of law in conflating the investors whose money went into Money Gate, with Money Gate itself, thereby disregarding the separate corporate identity of Money Gate.

[31] Third, the appellant complains that what was granted was an improper partial summary judgment in light of the claims it wishes to continue against the Katebians and Behrouz.

ANALYSIS

(i) The Availability of Summary Disposition in a Receivership Proceeding

[32] The motion below was for advice and directions, brought in a receivership proceeding. In my view, this gave the motion judge the power to decide the merits of the dispute about the validity of the 254 Mortgage, and the entitlement

to the Sale Proceeds, in a summary way without a trial, following an approach modelled upon that used on motions for summary judgment. The context and purpose of the receivership support that conclusion.

[33] The Money Gate receiver was appointed under statutory authority that aims at the protection of the best interests of a company's creditors and security holders. The receiver's broad powers, to bring in Money Gate's assets and to hold them for distribution, are in the service of that purpose.

[34] It is clearly foreseeable that, in seeking to collect the company's assets with a view to maximizing what will be available to creditors and security holders, the receiver's efforts may come into collision with positions taken by third parties who dispute the company's ownership or entitlement, and assert their own. Resolving such disputes in a timely way can be key to the effective fulfillment of the object of the receivership.

[35] I see no reason in principle why the receiver's right to apply to the court for advice and directions, a right specifically provided for in the receivership order, cannot be used to resolve a dispute of the type presented here. The asset in question, the 254 Mortgage, was ostensibly an asset of Money Gate, as it was given in its favour. The Sale Proceeds had been paid over to the Money Gate receiver. The question as to entitlement was being raised by the appellant, who was otherwise an outsider to the receivership. The Money Gate receiver was

entitled to advice and directions of the court as to whether the asset—the Sale Proceeds representing a recovery under the 254 Mortgage—was properly available for distribution in light of the appellant's claim.

[36] In support of its position that there are severe limits on what can be done under a motion for advice and directions, the appellant relies on *Re Urbancorp Cumberland 2 GP Inc.*, 2017 ONSC 7649, 56 C.B.R. (6th) 86, a case in which a motion for advice and directions by a company's Monitor, appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), was dismissed. Myers J. held that the Monitor was not truly seeking advice and directions, but was seeking under that guise to assert a claim of the *CCAA* debtor against a third party for monetary relief: at para. 19.

[37] In *Urbancorp*, however, the Monitor had not been given the power to bring proceedings on behalf of the *CCAA* debtor. The issue in *Urbancorp* was therefore not about whether a summary determination of rights between a third party and the debtor's estate could ever be accomplished by a motion for advice and directions. It was about whether the Monitor actually had the power to assert the type of claim it was advancing. Myers J. observed that if the Monitor had the power to bring proceedings, "they can be brought summarily": at paras. 18-22.

[38] Here, the Money Gate receiver was expressly given the power, in the receivership order, to initiate, prosecute and defend proceedings with respect to

Money Gate or its assets. The Money Gate receiver is not simply attempting, under the guise of a motion for advice and directions, to exercise a power it does not have.

[39] Accordingly, *Urbancorp* does not support the appellant's position.

[40] The question of whether a motion for advice and directions may be resorted to by a receiver for the resolution of a dispute with a third party about the company's assets is a separate question from whether the court should deal with the motion summarily, or order a trial. In my view, on the latter question, the key determinant should be whether the dispute raises a genuine issue requiring a trial, in other words, by analogy to the procedure for summary judgment. I reach that conclusion for several reasons.

[41] First, the summary judgment process is designed to be a means to adjudicate and resolve disputes without undue process and protracted trials, and thus avoid unnecessary expense and delay: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. A receivership signals that creditors and other stakeholders are in need of protection. Unnecessary expense and delay can further imperil their positions.

[42] Second, summary judgment is designed to be a fair and just process to resolve a dispute and apply the relevant legal principles to the facts as found:

Hryniak, at para. 28. The interests of the third party—the stranger to the receivership—are therefore respected.

[43] Third, the dividing line between a case that can be disposed of summarily and one where there should be a trial—the genuine issue requiring a trial test—has been the subject of authoritative jurisprudence and is dealt with regularly by Superior Court judges. The same is true of the surrounding features of the test which address how the record is developed and whether it is adequate to make summary judgment the proportionate, expeditious and less expensive means of achieving a fair result. It is preferable to use an established test than to try to construct a new one. In motions seeking a final decision that are not formally motions for summary judgment, the summary judgment procedure provides useful assistance by analogy: *Polywheels Inc. (Re)*, 2010 ONSC 1265, at paras. 6-7.

[44] I therefore conclude that the motion judge did not err in entertaining the matter although it was raised by a motion for advice and directions, and in analogizing it to a motion for summary judgment.

[45] Nor was there unfairness to the appellant in the motion judge proceeding this way. The Money Gate receiver had been directed to hold the Sale Proceeds pending a distribution motion. The Money Gate receiver's material on the motion described the history of the 254 Mortgage, noted the appellant's position that it

was asserting a claim to the Sale Proceeds, and set out the receiver's position that the appellant was aware of and supported 254 borrowing funds and providing a second mortgage. It was clear that the receiver was seeking a final disposition of the appellant's claim by motion, not by a trial. It was equally clear that the appellant was required, if it wished to oppose the receiver's request, to support its position as to the merits of its claim and the appropriate process to determine it, on the basis of evidence, which it had the opportunity to file.

(ii) Did The Motion Judge Err in Deciding that the 254 Mortgage was Valid and that The Sale Proceeds Should Be Available For Distribution Without Ordering A Trial?

[46] In my view the motion judge's essential finding, that there was no genuine issue that required a trial, is unassailable.

[47] The Money Gate receiver's position that the 254 Mortgage was valid and the Sale Proceeds should be available for distribution was firmly rooted in uncontested facts. Money Gate advanced $611,000 to 254 as a loan, and it was not repaid. The 254 Mortgage was signed by 254's sole director and registered against property owned by 254. The Sale Proceeds were funds available to the second mortgage holder, and thus were paid to the Money Gate receiver.

[48] On the other hand, the appellant's position that there was a lack of required shareholder consent to the mortgage, and that a fraud was perpetrated on the appellant, suffers from factual and legal infirmities.

[49] The motion judge found that there was no evidence of fraud. The principal of the appellant who filed an affidavit did not mention fraud. The appellant did not seek or obtain the evidence of the Katebians or Behrouz. By analogy to summary judgment, the appellant was required, by affidavit or other evidence, to set out specific facts showing a genuine issue requiring a trial. It was required to put its best foot forward.

[50] In any event, the fraud that the appellant alleges was perpetrated on it—inducing it to consent to 254 granting a mortgage on the condition that 254 would pay it a portion of the proceeds, and then not honouring that commitment, would not impugn the validity of the 254 Mortgage.

[51] A mortgage that is registered is valid and enforceable according to its nature and intent unless it is a "fraudulent instrument": *Land Titles Act*, R.S.O. 1990, c. L.5 ("*LTA*"), ss. 78 (4) and (4.1).

[52] "Fraudulent instrument" is a narrowly defined term. It includes a charge given by a "fraudulent person", meaning a person who forged the instrument, a fictitious person, or a person who holds oneself out in the instrument to be the owner but knows they are not: *LTA*, s. 1. The appellant's argument does not

address or explain how its fraud theory, if proven, could satisfy that aspect of the definition of "fraudulent instrument". The 254 Mortgage was given by 254, the owner of the property charged, not by a non-existent person. It was executed by 254's sole director. No signature was forged: *1168760 Ontario Inc. v. 6706037 Canada Inc.*, 2019 ONSC 4702 (Div. Ct.), at paras. 33-42.

[53] The definition of "fraudulent instrument" also includes an instrument "that perpetrates a fraud as prescribed with respect to the estate or land affected by the instrument". Fraud as prescribed is the registration of a cessation of a charge by a fraudulent person: *LTA*, s. 1; R.R.O. 1990, Reg. 690, s. 63. The appellant does explain how its fraud theory, if proven, could satisfy this aspect of the definition.

[54] Absent fraud, the appellant's position that the 254 Mortgage lacked its consent as required by the Resolution lands even farther from the statutory requirement of a "fraudulent instrument".

[55] Moreover, the motion judge properly found that the appellant did consent to the 254 Mortgage. She rooted her finding in the appellant's principal's evidence on cross-examination that he consented subject to a condition, and in emails produced by the appellant that referred to the second mortgage transaction proceeding. Her interpretation of this evidence was reasonable, namely that there was a consent, and that fulfilment of the condition of the

consent—a payment by 254 to the appellant out of the loan proceeds—did not affect the validity of the loan transaction between 254 and Money Gate.

[56] Indeed, the fundamental flaw in the appellant's position about conditional consent is that for the transaction to have taken place as the conditional consent contemplated, Money Gate would first have had to advance the loan and be granted the 254 Mortgage. Only then would 254 be in a position to fulfill the condition and pay the appellant. The appellant fails to explain how the non-fulfillment of the condition by 254, after Money Gate's advance was made and the 254 Mortgage was granted, justifies Money Gate losing the right to recover what it advanced.

[57] Accordingly, there was no genuine issue requiring a trial. These findings were sufficient to ground the disposition that the motion judge made.

[58] It is therefore unnecessary to address the appellant's arguments that the motion judge conflated the investors and Money Gate. The alleged conflation appears only in the portion of the decision dealing with an alternative theory of equitable mortgage or the ability to rely on the indoor management rule, and does not affect the main ground of the motion judge's decision.

(iii) The Motion Judge Did Not Grant an Inappropriate Partial Summary Judgment

[59] The appellant argues that the motion judge's decision was nevertheless improper because it deals with only part of the appellant's dispute, and is based on findings that may be inconsistent with what may be found if the appellant pursues its claims against the Katebians and Behrouz.

[60] I would not give effect to this argument.

[61] The motion judge's decision resolved the entire dispute between the appellant and the Money Gate receiver concerning the validity of the 254 Mortgage and the Sale Proceeds. The fact that the appellant commenced an action in early 2019 against the Money Gate receiver and others does not make this determination a partial one, in the sense of resolving part of an action while the remainder proceeds. The action against the Money Gate receiver, commenced without leave, was correctly considered a nullity as against the receiver by the motion judge, who also noted that the appellant had not proceeded at all with the action since its commencement.

[62] Nor, in my view, is there a material risk of inconsistent findings even if one were to take into account the appellant's desire to proceed with its action against others. The motion judge made no finding that the non-fulfilment of the appellant's condition was proper as between the appellant and those responsible

for that fulfillment. She only held that non-fulfillment did not invalidate the 254 Mortgage. Indeed, the fact that a valid mortgage was created is consistent, not inconsistent, with the appellant's claim that it suffered a loss as a result of the conduct of Behrouz and the Katebians in not following through to fulfill the condition the appellant says it imposed when it gave its consent.

[63] The principles that limit the grant of partial summary judgment are aimed at avoiding proceeding in a manner that will not be cost effective, judicious or expeditious because overlapping issues will proceed to trial: *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 146 O.R. (3d) 135, at para. 14. As I have stated a material risk of inconsistent results is not present. Directing a trial and waiting for the appellant to proceed with its long dormant claim against others would involve delays and would not be cost effective, judicious or expeditious. Nor would it be consistent with the goals of the receivership.

CONCLUSION

[64] For these reasons I would dismiss the appeal.

[65] In accordance with the agreement of counsel, I would award the respondent its costs of the appeal fixed in the sum of $15,000, inclusive of taxes and applicable disbursements.

Released: December 16, 2020 "JCM"

"B. Zarnett J.A."

"I agree. J.C. MacPherson J.A."
"I agree. M. Jamal J.A."

Tab 13

SUPREME COURT OF CANADA

CITATION: Kerr *v.* Baranow, 2011 SCC 10

DATE: 20110218
DOCKET: 33157, 33358

BETWEEN:

Margaret Patricia Kerr
Appellant
and
Nelson Dennis Baranow
Respondent

AND BETWEEN:

Michele Vanasse
Appellant
and
David Seguin
Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 221): Cromwell J. (McLachlin C.J. and Binnie, LeBel, Abella, Charron and Rothstein JJ. concurring)

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

KERR *v.* BARANOW

Margaret Patricia Kerr *Appellant*

v.

Nelson Dennis Baranow *Respondent*

- and -

Michele Vanasse *Appellant*

v.

David Seguin *Respondent*

Indexed as: Kerr *v.* Baranow

2011 SCC 10

File Nos.: 33157, 33358.

2010: April 21; 2011: February 18.

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

ON APPEAL FROM THE COURTS OF APPEAL FOR BRITISH COLUMBIA AND ONTARIO

Family law — Common law spouses — Property — Unjust enrichment — Monetary remedy — Whether monetary remedy restricted to quantum meruit award — Whether evidence of joint family venture should be considered in conferring remedy — Whether mutual benefit conferral and reasonable expectations of parties should be considered in assessing award.

Family law — Common law spouses — Property — Resulting trust — Whether evidence of common intention should be considered in context of resulting trust — Whether resulting trust principles apply to property or monetary award in resolution of domestic cases.

Family law — Common law spouses — Support — Parties separating after living together for more than 25 years — Female partner commencing proceedings for a share of property and support — Whether support should be payable from date of trial or date on which proceedings commenced.

In the *Kerr* appeal, K and B, a couple in their late sixties separated after a common law relationship of more than 25 years. They both had worked through much of that time and each had contributed in various ways to their mutual welfare.

K claimed support and a share of property in B's name based on resulting trust and unjust enrichment principles. B counterclaimed that K had been unjustly enriched by his housekeeping and personal assistance services provided after K suffered a debilitating stroke. The trial judge awarded K $315,000, a third of the value of the home in B's name that they had shared, both by way of resulting trust and unjust enrichment, based on his conclusion that K had provided $60,000 worth of equity and assets at the beginning of their relationship. He also awarded K $1,739 per month in spousal support effective the date she commenced proceedings. The court of appeal concluded that K did not make a financial contribution to the acquisition or improvement of B's property that was the basis for her award at trial, and dismissed her property claims. A new trial was ordered for B's counterclaim. The court of appeal further held that the commencement date of the spousal support should be the date of trial.

In the *Vanasse* appeal, it was agreed that S was unjustly enriched by the contributions of his partner, V, during their 12 year common law relationship. For the first four years of cohabitation, both parties pursued their respective careers. In 1997, V took a leave of absence from her employment and the couple moved to Halifax so that S could pursue a business opportunity. Over the next three and a half years, their children were born and V stayed at home to care for them and performed the domestic labour. S worked long hours and travelled extensively for business. In 1998, S stepped down as CEO of the business and the family returned to Ottawa where they bought a home in joint names. In 2000, S received approximately

$11 million for his shares in the business and from that time, until their separation in 2005, he participated more with the domestic chores. The trial judge found no unjust enrichment for the first and last periods of their cohabition, but held that S had been unjustly enriched at V's expense during the period in which the children were born. V was entitled to half of the value of the wealth S accumulated during the period of unjust enrichment, less her interest in the home and RRSPs in her name. The court of appeal set aside this award and directed that the proper approach to valuation was a *quantum meruit* calculation in which the value each party received from the other was assessed and set off.

Held: In *Kerr*, the appeal on the spousal support issue should be allowed and the order of the trial judge should be restored. The appeal from the order dismissing K's unjust enrichment claim should also be allowed and a new trial ordered. The appeal from the order dismissing K's claim in resulting trust should be dismissed. The order for a new hearing of B's counterclaim should be affirmed.

Held: In *Vanasse*, the appeal should be allowed and the order of the trial judge restored.

These appeals require the resolution of five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. The second issue is whether the monetary remedy for a successful unjust enrichment claim must always be assessed on a *quantum meruit* basis. The third area relates to mutual benefit conferral in the context of an unjust enrichment claim and

when this should be taken into account. The fourth concerns the role the parties' reasonable expectations play in the unjust enrichment analysis. Finally, in the Kerr appeal, this Court must also decide the effective date of the commencement of spousal support.

For unmarried persons in domestic relationships in most common law provinces, judge-made law is the only option for addressing the property consequences of the breakdown of those relationships. The main legal mechanisms available have been the resulting trust and the action in unjust enrichment. Resulting trusts arise from gratuitous transfers in two types of situations: the transfer of property from one partner to the other without consideration, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. The underlying legal principle is that contributions to the acquisition of a property, which were not reflected in the legal title, might nonetheless give rise to a property interest. In Canada, added to this underlying notion was the idea that a resulting trust could arise based solely on the "common intention" of the parties that the non-owner partner was intended to have an interest. This theory is doctrinally unsound, however, and should have no continuing role in the resolution of domestic property disputes. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, parties have increasingly turned to the law of unjust enrichment and the remedial constructive trust. Since the decision in *Pettkus v. Becker*, the law of unjust enrichment has provided a much less artificial, more comprehensive and more

principled basis to address claims for the distribution of assets on the breakdown of domestic relationships. It permits recovery whenever the plaintiff can establish three elements: an enrichment of the defendant by the plaintiff, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. This Court has taken a straightforward economic approach to the elements of enrichment and corresponding deprivation. The plaintiff must show that he or she has given a tangible benefit to the defendant that the defendant received and retained. Further, the enrichment must correspond to a deprivation that the plaintiff has suffered. Importantly, provision of domestic services may support a claim for unjust enrichment. The absence of a juristic reason for the enrichment means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff. This third element also provides for due consideration of the autonomy of the parties, their legitimate expectations and the right to order their affairs by contract.

There are two steps to the juristic reason analysis. First, the established categories of juristic reason must be considered, which could include benefits conferred by way of gift or pursuant to a legal obligation. In their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether particular enrichments are unjust.

The object of the remedy for unjust enrichment is to require the defendant to reverse the unjustified enrichment and may attract either a "personal restitutionary

award" or a "restitutionary proprietary award". In most cases, a monetary award will be sufficient to remedy the unjust enrichment but two issues raise difficulties in determining appropriate compensation. Where there has been a mutual conferral of benefits, it is often difficult for the court to retroactively value every service rendered by each party to the other. While the value of domestic services is not questioned, it would be unjust to only consider the contributions of one party. A second difficulty is whether a monetary award must invariably be calculated on a *quantum meruit*, "value received" or "fee-for-services" basis or whether that monetary relief may be assessed more flexibly, on a "value survived basis" by reference to the overall increase in the couple's wealth during the relationship. In some cases, a proprietary remedy may be required. Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, and that a monetary award would be insufficient, a share of the property proportionate to the claimant's contribution can be impressed with a constructive trust in his or her favour.

Three areas in the law of unjust enrichment require clarification. Once the choice has been made to award a monetary remedy, the question is how to quantify it. If a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or to order a monetary remedy calculated on a *quantum meruit* basis. This dichotomy of remedial choice should be rejected, however, as the value survived measure is a perfectly plausible alternative to the constructive trust.

Restricting the money remedy to a fee-for-service calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. The basis of all domestic unjust enrichment claims do not fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. Where the contributions of both parties over time have resulted in an accumulation of wealth, the unjust enrichment occurs when one party retains a disproportionate share of the assets that are the product of their joint efforts following the breakdown of their relationship. The required link between the contributions and a specific property may not exist but there may clearly be a link between the joint efforts of the parties and the accumulation of wealth. While the law of unjust enrichment does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one party to share in the other's property, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. Second, the remedial dichotomy is inconsistent with the inherent flexibility of unjust enrichment and with the Court's approach to equitable remedies. Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development requires recourse to a number of different sorts of remedies depending on the circumstances. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial

strait-jacket. What is essential is that there must be a link between the contribution and the accumulation of wealth. Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation. Third, the remedial dichotomy ignores the historical basis of *quantum meruit* claims. Finally, a remedial dichotomy is not mandated, as has been suggested, by the Court's judgment in *Peter*. *v. Beblow*.

Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture" to which both partners have contributed, the monetary remedy should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. Where the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". The law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances". To be entitled to a monetary remedy on a value-survived basis, the claimant must show both that there was a joint family venture and a link between his or her contributions and the accumulation of wealth.

To determine whether the parties have, in fact, been engaged in a joint family venture, the particular circumstances of each particular relationship must be

taken into account. This is a question of fact and must be assessed by having regard to all of the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family. The pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent to which the parties have formed a true partnership and jointly worked towards important mutual goals. The use of parties' funds entirely for family purposes or where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities and enabling him or her to pursue activities in the paid workforce, may also indicate a pooling of resources. The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they have engaged in a joint family venture. The actual intentions of the parties, either express or inferred from their conduct, must be given considerable weight. Their conduct may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture, but may also conversely negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Another consideration is whether and to what extent the parties have given priority to the family in their decision-making, and whether there has been detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. This may occur where one party leaves the workforce for a period of time to raise children; relocates for the benefit of the other party's career; foregoes career or educational advancement for the benefit of the family or

relationship; or accepts underemployment in order to balance the financial and domestic needs of the family unit.

The unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits. When the appropriate remedy is a money award based on a fee-for-services provided approach, the fact that the defendant has also provided services to the claimant should mainly be considered at the defence and remedy stages of the analysis but may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of a juristic reason for the enrichment. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose. Otherwise, the mutual exchange of benefits should be taken into account only after the three elements of an unjust enrichment claim have been established.

Claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. It is then open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations. Mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step of the juristic reason analysis. In some cases, the fact that mutual benefits were conferred or

that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit that does not fall within the existing categories. The question is whether the parties' mutual expectations show that retention of the benefits is just.

In the *Vanasse* appeal, although not labelling it as such, the trial judge found that there was a joint family venture and that there was a link between V's contribution to it and the substantial accumulation of wealth that the family achieved. She made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of S's substantial contributions. Her findings of fact and analysis indicate that the unjust enrichment of S at the expense of V ought to be characterized as the retention by S of a disproportionate share of the wealth generated from a joint family venture. Several factors suggested that, throughout their relationship, the parties were working collaboratively towards common goals. They made important decisions keeping the overall welfare of the family at the forefront. It was through their joint efforts that they were able to raise a young family and acquire wealth. S could not have made the efforts he did to build up the company but for V's assumption of the domestic responsibilities. Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together, a further indicator that they were working together to achieve common

goals. The length of the relationship is also relevant, and their 12 year cohabitation is a significant period of time. There was also evidence of economic integration as their house was registered jointly and they had a joint bank account. Their words and actions indicated that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children. There is a strong inference from the factual findings that, to S's knowledge, V relied on the relationship to her detriment. She left her career, gave up her own income, and moved away from her family and friends. V then stayed home and cared for their two small children. During the period of the unjust enrichment, V was responsible for a disproportionate share of the domestic labour. There was a clear link between V's contribution and the accumulation of wealth. The trial judge took a realistic and practical view of the evidence and took into account S's non-financial contributions and periods during which V's contributions were not disproportionate to S and her judgment should be restored.

The court of appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment in *Kerr* and in ordering a new hearing on B's counterclaim. On the basis of the unsatisfactory record at trial, which includes findings of fact tainted by clear error, K's unjust enrichment claim should not have been dismissed but a new trial ordered. The court of appeal erred in assessing B's contributions as part of the juristic reason analysis and prematurely truncated K's *prima facie* case of unjust enrichment. The family property approach is rejected, and for K to show an entitlement to a proportionate share of the wealth accumulated

during the relationship, she must establish that B has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. With regard to B's counterclaim, there was evidence that he made very significant contributions to K's welfare such that his counterclaim cannot simply be dismissed. The trial judge also referred to various other monetary and non-monetary contributions which K made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by B. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Further, the court of appeal ought not to have set aside the trial judge's order for spousal support in favour of K effective on the date she had commenced proceedings. It is clear that K was in need of support from B at the date she started her proceedings and remained so at the time of trial. K should not have been faulted for not bringing an interim application in seeking support for the period in question. She suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with B. B had the means to provide support, had prompt notice of her claim, and there was no indication in the court of appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

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APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Tysoe and Smith JJ.A.), 2009 BCCA 111, 93 B.C.L.R. (4th) 201, 266 B.C.A.C. 298, [2009] 9 W.W.R. 285, 66 R.F.L. (6th) 1, [2009] B.C.J. No. 474 (QL), 2009 CarswellBC 642, reversing in part a decision of Romilly J., 2007 BCSC 1863, 47 R.F.L. (6th) 103, [2007] B.C.J. No. 2737, 2007 CarswellBC 3047. Appeal allowed in part.

APPEAL from a judgment of the Ontario Court of Appeal (Weiler, Juriansz and Epstein JJ.A.), 2009 ONCA 595, 252 O.A.C. 218, 96 O.R. (3d) 321, [2009] O.J. No. 3211 (QL), 2009 CarswellOnt 4407, reversing a decision of Blishen J., 2008 CanLII 35922, [2008] O.J. No. 2832 (QL), 2008 CarswellOnt 4265. Appeal allowed.

Armand A. Petronio and *Geoffrey B. Gomery*, for the appellant Margaret Kerr.

Susan G. Label and *Marie-France Major*, for the respondent Nelson Baranow.

John E. Johnson, for the appellant Michele Vanasse.

H. Hunter Phillips, for the respondent David Seguin.

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic

relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

[2] In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention" of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

[3] As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust. In order to successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic reason" for the enrichment. This claim has become the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships. However,

various issues continue to create controversy, and these two appeals, argued consecutively, provide the Court with the opportunity to address them.

[4] In the *Kerr* appeal, a couple in their late-sixties separated after a common law relationship of more than 25 years. Both had worked through much of that time and each had contributed in various ways to their mutual welfare. Ms. Kerr claimed support and a share of property held in her partner's name based on resulting trust and unjust enrichment principles. The trial judge awarded her one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims (2007 BCSC 1863, 47 R.F.L. (6th) 103). He did not address, other than in passing, Mr. Baranow's counterclaim that Ms. Kerr had been unjustly enriched at his expense. The judge also ordered substantial monthly support for Ms. Kerr pursuant to statute, effective as of the date she applied to the court for relief. However, the resulting trust and unjust enrichment conclusions of the trial judge were set aside by the British Columbia Court of Appeal (2009 BCCA 111, 93 B.C.L.R. (4th) 201). Both lower courts addressed the role of the parties' common intention and reasonable expectations. The appeal to this Court raises the questions of the role of resulting trust law in these types of disputes, as well as how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations play in that analysis. This Court is also called upon to decide whether the award of spousal support should be effective as of the date of application, as found by the trial judge, the date the trial began, as ordered by the Court of Appeal, or some other date.

[5] In the *Vanasse* appeal, the central problem is how to quantify a monetary award for unjust enrichment. It is agreed that Mr. Seguin was unjustly enriched by the contributions of his partner, Ms. Vanasse; the two lived in a common law relationship for about 12 years and had two children together during this time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth was due to Ms. Vanasse's efforts as an equal contributor to the family venture (2008 CanLII 35922). The Court of Appeal set aside this finding and, while ordering a new trial, directed that the proper approach to valuation was to place a monetary value on the services provided by Ms. Vanasse to the family, taking due account of Mr. Seguin's own contributions by way of set-off (2009 ONCA 595, 252 O.A.C. 218). In short, the Court of Appeal held that Ms. Vanasse should be treated as an unpaid employee, not a co-venturer. The appeal to this Court challenges this conclusion.

[6] These appeals require us to resolve five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. In my view, it is time to recognize that the "common intention" approach to resulting trust has no further role to play in the resolution of property claims by domestic partners on the breakdown of their relationship.

[7] The second issue concerns the nature of the money remedy for a successful unjust enrichment claim. Some courts take the view that if the claimant's contribution cannot be linked to specific property, a money remedy must always be

assessed on a fee-for-services basis. Other courts have taken a more flexible approach. In my view, where both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result, have accumulated assets, the money remedy for unjust enrichment should reflect that reality. The money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.

[8] The third area requiring clarification relates to mutual benefit conferral. Many domestic relationships involve the mutual conferral of benefits, in the sense that each contributes in various ways to the welfare of the other. The question is how and at what point in the unjust enrichment analysis should this mutual conferral of benefits be taken into account? For reasons I will develop below, this issue should, with a small exception, be addressed at the defence and remedy stage.

[9] Fourth, there is the question of what role the parties' reasonable or legitimate expectations play in the unjust enrichment analysis. My view is that they have a limited role, and must be considered in relation to whether there is a juristic reason for the enrichment.

[10] Finally, there is the issue of the appropriate date for the commencement of spousal support. In my respectful view, the Court of Appeal erred in setting aside the trial judge's selection of the date of application in the circumstances of the *Kerr* appeal.

[11] I will first address the law of resulting trusts as it applies to the breakdown of a marriage-like relationship. Next, I will turn to the law of unjust enrichment in this context. Finally, I will address the specific issues raised in the two appeals.

II. Resulting Trusts

[12] The resulting trust played an important role in the early years of the Court's jurisprudence relating to property rights following the breakdown of intimate personal relationships. This is not surprising; it had been settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, "results" to the person who advances the purchase money: *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, at p. 93, 30 E.R. 42. The resulting trust, therefore, seemed a promising vehicle to address claims that one party's contribution to the acquisition of property was not reflected in the legal title.

[13] The resulting trust jurisprudence in domestic property cases developed into what has been called "a purely Canadian invention", the "common intention" resulting trust: A H. Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009) at p. 642. While this vehicle has largely been eclipsed by the law of unjust enrichment since the decision of the Court in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, claims based on the "common intention" resulting trust continue to be advanced. In the *Kerr* appeal, for example, the trial judge justified the imposition of a resulting trust, in part, on the basis that the parties had a common intention that Mr. Baranow would hold title to the property by way of a resulting trust

for Ms. Kerr. The Court of Appeal, while reversing the trial judge's finding of fact on this point, implicitly accepted the ongoing vitality of the common intention resulting trust.

[14] However promising this common intention resulting trust approach looked at the beginning, doctrinal and practical problems soon became apparent and have been the subject of comment by the Court and scholars: see, e.g., *Pettkus*, at pp. 842-43; Oosterhoff, at pp. 641-47; D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005) ("*Waters*") at pp. 430-35; J. Mee, *The Property Rights of Cohabitees*: *An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), at pp. 39-43; T. G. Youdan, "Resulting and Constructive Trusts" in *Special Lectures of the Law Society of Upper Canada* 1993 – *Family Law: Roles, Fairness and Equality* (1994), 169 at pp. 172-74.

[15] In this Court, since *Pettkus*, the common intention resulting trust remains intact but unused. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust. To explain why, I must first put the question in the context of some basic principles about resulting trusts.

[16] That task is not as easy as it should be; there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the

finer points: see, for example, *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at pp. 449-50; *Waters'*, at pp. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11th ed. 2009), at p. 67. However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters'*, at p. 21.

[17] Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

[18] The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*,

where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (emphasis added).

[19] As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds that property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

[20] The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example, in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried

couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

[21] That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423. Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

[22] This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, *per* Dickson J. (as he then was); p. 474, *per* Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that "a resulting trust is an equitable doctrine that, by operation of

law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another and where there is evidence of a common intention that the property was to be shared by both parties" (emphasis added).

[23] The Court's development of the common intention resulting trust ended with *Pettkus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-3. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettkus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Pettkus v. Becker* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

[24] This, in my view, is as it should be, and the time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases. I say this for four reasons.

[25] First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that

counts. As Professor Waters puts it, “In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention (*Waters’*, at p. 431).” The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition. The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a “resulting” back of the transferred property: *Waters’*, at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: “. . . a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property”: p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

[26] There are problems beyond these doctrinal issues. A second difficulty with the common intention resulting trust is that the notion of common intention may be highly artificial, particularly in domestic cases. The search for common intention may easily become "a mere vehicle or formula" for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties. Dickson J. in *Pettkus* noted the artificiality and undue malleability of the common intention approach: at pp. 843-44.

[27] Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettkus*, at p. 842, that the principles upon which the common intention resulting trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt*, [1970] A.C. 777, and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters'*, at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by Dickson J. in *Pettkus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

[28] Finally, as the development of the law since *Pettkus* has shown, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.

[29] I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch* and *Rathwell*, no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

III. Unjust Enrichment

A. *Introduction*

[30] The law of unjust enrichment has been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. In a series of decisions, the Court has developed a sturdy framework within which to address these claims. However, a number of doctrinal and practical issues require further attention. I will first briefly set out the existing framework, then articulate the issues that in my view require further attention, and finally propose the ways in which they should be addressed.

B. *The Legal Framework for Unjust Enrichment Claims*

[31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed., 2007), c. 4-11, 17 and 19-26).

[32] Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an

enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.

[33] The application of unjust enrichment principles to claims by domestic partners was resisted until the Court's 1980 decision in *Pettkus*. In applying unjust enrichment principles to domestic claims, however, the Court has been clear that there is and should be no separate line of authority for "family" cases developed within the law of unjust enrichment. Rather, concern for clarity and doctrinal integrity mandate that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases" (*Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 997).

[34] Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. The Court in *Peter* was unanimously of the view that the courts "should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases" (p. 997, *per* McLachlin J. (as she then was); see also p. 1023, *per* Cory J.). Thus, while the underlying legal principles of the law of unjust enrichment are the

same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.

[35] It will be helpful to review, briefly, the current state of the law with respect to each of the elements of an unjust enrichment claim and note the particular issues in relation to each that arise in claims by domestic partners.

C. *The Elements of an Unjust Enrichment Claim*

(1) Enrichment and Corresponding Deprivation

[36] The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

[37] The Court has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 31.

[38] For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by

money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

[39] Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

[40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

[41] Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's

expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

[42] A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim

because they are performed out of "natural love and affection". (*Peter*, at pp. 989-95, *per* McLachlin J., and pp. 1012-16, *per* Cory J.).

[43] In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasureable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

> First, the plaintiff must show that no juristic reason from an established category exists to deny recovery [. . .] The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra)*, a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

[44] Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

[45] Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in *Peter* rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, at para. 61.)

(3) Remedy

[46] Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

(a) *Monetary Award*

[47] The first remedy to consider is always a monetary award (*Peter*, at pp. 987 and 999). In most cases, it will be sufficient to remedy the unjust enrichment. However, calculation of such an award is far from straightforward. Two issues have given rise to disagreement and difficulty in domestic unjust enrichment claims.

[48] First, the fact that many domestic claims of unjust enrichment arise out of relationships in which there has been a mutual conferral of benefits gives rise to difficulties in determining what will constitute adequate compensation. While the value of domestic services is not questioned (*Peter*; *Sorochan*), it is unjust to pay attention only to the contributions of one party in assessing an appropriate remedy. This is not only an important issue of principle; in practice, it is enormously difficult for the parties and the court to "create, retroactively, a notional ledger to record and value every service rendered by each party to the other" (R. E. Scane, "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70

Can. Bar Rev. 260, at p. 281). This gives rise to the practical problem that one scholar has aptly referred to as "duelling *quantum meruits*" (J. D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?", in J.W. Neyers, M. McInnes and S.G.A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

[49] A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589, (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly — in effect, on a value survived basis — by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, at para. 50; *Pickelein v. Gillmore (*1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108, at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also: *Matrimonial Property Law in Canada*, vol 1, by J.G. McLeod and A.A. Mamo, eds.(loose-leaf), at pp. 40.78-40.79.

(b) *Proprietary Award*

[50] The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

[51] As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions

have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

[52] The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.).

[53] The extent of the constructive trust interest should be proportionate to the claimant's contributions. Where the contributions are unequal, the shares will be unequal (*Pettkus*, at pp. 852-53; *Rathwell*, at p. 448; *Peter*, at pp. 998-99). As Dickson J. put it in *Rathwell*, "The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions" (p. 454).

D. *Areas Needing Clarification*

[54] While the law of unjust enrichment sets out a sturdy legal framework within which to address claims by domestic partners, three areas continue to generate controversy and require clarification. As mentioned earlier, these are as follows: the approach to the assessment of a monetary award for a successful unjust enrichment

claim, how and where to address the mutual benefit problem, and the role of the parties' reasonable or legitimate expectations. I will address these in turn.

E. *Is a Monetary Award Restricted to Quantum Meruit?*

(1) Introduction

[55] As noted earlier, remedies for unjust enrichment may either be proprietary (normally a remedial constructive trust) or personal (normally a money remedy). Once the choice has been made to award a monetary rather than a proprietary remedy, the question of how to quantify that monetary remedy arises. Some courts have held that monetary relief must always be calculated based on a value received or *quantum meruit* basis (*Bell*), while others have held that monetary relief may also be based on a value survived (i.e. by reference to the value of property) approach (*Wilson*; *Pickelein*; *Harrison*; *MacFarlane; Shannon*). If, as some courts have held, a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or order a monetary remedy calculated on a *quantum meruit* basis. One scholar has referred to this approach as the false dichotomy between constructive trust and *quantum meruit* (McCamus, at pp. 375-76). Scholars have also noted this area of uncertainty in the case law, and have suggested that an *in personam* remedy using the value survived measure is a plausible alternative to the constructive trust (McCamus, at p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), at pp. 394-95). As I will explain below, *Peter* is said to have established this dichotomy of remedial choice. However, in my view, the focus in

Peter was on the availability of the constructive trust remedy, and that case should not be taken as limiting the calculation of monetary relief for unjust enrichment to a *quantum meruit* basis. In appropriate circumstances, monetary relief may be assessed on a value survived basis.

[56] I will first briefly describe the genesis of the purported limitation on the monetary remedy. Then I will explain why, in my view, it should be rejected. Finally, I will set out my views on how money remedies for unjust enrichment claims in domestic situations should be approached.

(2) The Remedial Dichotomy

[57] As noted, there is a widespread, although not unanimous, view that there are only two choices of remedy for an unjust enrichment: a monetary award, assessed on a fee-for-services basis; or a proprietary one (generally taking the form of a remedial constructive trust), where the claimant can show that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property. Some brief comments in *Peter* seem to have spawned this idea, which is reflected in a number of appellate authorities. For instance, in the *Vanasse* appeal, the Ontario Court of Appeal reasoned that since Ms. Vanasse could not show that her contributions were linked to specific property, her claim had to be quantified on a fee-for-services basis. I respectfully do not agree that monetary awards for unjust enrichment must always be calculated in this way.

(3) Why the Remedial Dichotomy Should Be Rejected

[58] In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of *quantum meruit* claims. Finally, it is not mandated by the Court's judgment in *Peter*. For those reasons, this remedial dichotomy should be rejected. The discussion which follows is concerned only with the quantification of a monetary remedy for unjust enrichment; the law relating to when a proprietary remedy should be granted is well established and remains unchanged.

(a) *Life Experience*

[59] The remedial dichotomy would be appropriate if, in fact, the bases of all domestic unjust enrichment claims fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. To be sure, those two bases for unjust enrichment claims exist. However, all unjust enrichment cases cannot be neatly divided into these two categories.

[60] At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of

the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

[61] There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in *Clarke v. Clarke*, [1990] 2 S.C.R. 795, at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), ". . . the Act supports the equality of both parties to a marriage and recognized the joint contribution of the spouses, be it financial or otherwise, to that enterprise. . . . The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized" (emphasis added).

[62] Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

[63] This reality has also been recognized many times and in many contexts by the Court. For instance, in *Murdoch*, Laskin J. (as he then was), in dissent, would have imposed constructive trust relief, on the basis that the facts were "consistent with a pooling of effort by the spouses" to establish themselves in a ranch operation (p. 457), and that the spouses had worked together for fifteen years to improve "their lot in life through progressively larger acquisitions of ranch property" (p. 446). Similarly, in *Rathwell*, a majority of the judges agreed that Mr. and Mrs. Rathwell had pooled their efforts to accumulate wealth as a team. Dickson J. emphasized that the parties had together "decided to make farming their way of life" (p. 444), and that the acquisition of property in Mr. Rathwell's name was only made possible through their "joint effort" and "team work" (p. 461).

[64] A similar recognition is evident in *Pettkus* and *Peter*.

[65] In *Pettkus*, the parties developed a successful beekeeping business, the profits from which they used to acquire real property. Dickson J., writing for the majority of the Court, emphasized facts suggestive of a domestic and financial

partnership. He observed that "each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort" (p. 853); that each contributed to the "good fortune of the common enterprise" (p. 838); that Wilson J.A. (as she then was) at the Court of Appeal had found the wealth they accumulated was through "joint effort" and "teamwork" (p. 849); and finally, that "[t]heir lives and their economic well-being were fully integrated" (p. 850).

[66] I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

[67] The significance of the fact that wealth had been acquired through joint effort was again at the forefront of the analysis in *Peter* where the parties lived together for 12 years in a common law relationship. While Mr. Beblow generated most of the family income and also contributed to the maintenance of the property, Ms. Peter did all of the domestic work (including raising the six children of their blended family), helped with property maintenance, and was solely responsible for the property when Mr. Beblow was away. The reality of their joint venture was acknowledged when McLachlin J. wrote that the "joint family

venture, in effect, was no different from the farm which was the subject of the trust in *Pettkus v. Becker*" (p. 1001).

[68] The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "[I]t is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

[69] Relationships of this nature are common in our life experience. For many domestic relationships, the couple's venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis. Of course, this is a relationship-specific issue; there can be no presumption one way or the other. However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people

live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship.

(b) *Flexibility*

[70] Maintaining a strict remedial dichotomy is inconsistent with the Court's approach to equitable remedies in general, and to its development of remedies for unjust enrichment in particular.

[71] The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: ". . . the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *Lloyds' Mar. & Com. L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their

award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

[72] Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, at p. 47.

[73] Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. This means that a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or other of the two remedial options into which some have tried to force them.

(c) *History*

[74] Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), vol. 1 at § 4:200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) *Peter v. Beblow*

[75] *Peter* does not mandate strict adherence to a *quantum meruit* approach to money remedies for unjust enrichment. One must remember that the focus of *Peter* was on whether the plaintiff's contributions entitled her to a constructive trust over the former family home. While it was assumed by both McLachlin J. and Cory J., who wrote concurring reasons in the case, that a money award would

be fashioned on the basis of *quantum meruit*, that was not an issue, let alone a holding, in the case.

[76] There are, in fact, only two sentences in the judgments that could be taken as supporting the view that this rule should always apply. At p. 995, McLachlin J. said, "Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and the one the trial judge awarded, title to the house based on a constructive trust"; at p. 999, she wrote that "[f]or a monetary award, the 'value received' approach is appropriate". Given that the focus of the case was deciding whether a proprietary remedy was appropriate, I would not read these two brief passages as laying down the sweeping rule that a monetary award must always be calculated on a fee-for-services basis.

[77] Moreover, McLachlin J. noted that the doctrine of unjust enrichment applies to a variety of situations, and that successful claims have been addressed through a number of remedies, depending on the circumstances. Only one of these remedies is a payment for services rendered on the basis of *quantum meruit*: p. 987. There is nothing in this observation to suggest that the Court decided to opt for a one-size-fits-all monetary remedy, especially when such an approach would be contrary to the very flexibility that the Court has repeatedly affirmed with regards to the law of unjust enrichment and corresponding remedies.

[78] This restrictive reading of *Peter* is not consistent with the underlying nature of the claim founded on the principles set out in *Pettkus*. As Professor McCamus has suggested, cases like *Pettkus* rest on a claimant's right to share surplus wealth created by joint effort and teamwork. It follows that a remedy based on notional fees for services is not responsive to the underlying nature of that claim: McCamus, at pp. 376-77. In my view, this reasoning is persuasive whether the joint effort has led to the accumulation of specific property, in which case a remedial constructive trust may be appropriate according to the well-settled principles in that area of trust law, or where the joint effort has led to an accumulation of assets generally. In the latter instance, when appropriate, there is no reason in principle why a monetary remedy cannot be fashioned to reflect this basis of the enrichment and corresponding deprivation. What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in *Peter*, between the "value received" and the "value surviving". Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

[79] Professor McCamus has suggested that the equitable remedy of an accounting of profits could be an appropriate remedial tool: p. 377. While I would not discount that as a possibility, I doubt that the complexity and technicality of that remedy would be well-suited to domestic situations, which are more often

than not rather straightforward. The unjust enrichment principle is inherently flexible and, in my view, the calculation of a monetary award for a successful unjust enrichment claim should be equally flexible. This is necessary to respond, to the extent money can, to the particular enrichment being addressed. To my way of thinking, Professor Fridman was right to say that "where a claim for unjust enrichment has been made out by the plaintiff, the court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled, regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398).

(4) The Approach to the Monetary Remedy

[80] The next step in the legal development of this area should be to move away from the false remedial dichotomy between *quantum meruit* and constructive trust, and to return to the underlying principles governing the law of unjust enrichment. These underlying principles focus on properly characterizing the nature of the unjust enrichment giving rise to the claim. As I have mentioned above, not all unjust enrichments arising between domestic partners fit comfortably into either a "fee-for-services" or "a share of specific property" mold. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of what McLachlin

J. referred to in *Peter* (at p. 1001) as a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

[81] In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

[82] This flexible approach to the money remedy in unjust enrichment cases is fully consistent with *Walsh*. While that case was focused on constitutional issues

that are not before us in this case, the majority judgment was clearly not intended to freeze the law of unjust enrichment in domestic cases; the judgment indicates that the law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances" (para. 61). In short, while emphasizing respect for autonomy as an important value, the Court at the same time approved of the continued development of the law of unjust enrichment in order to respond to the plethora of forms and functions of common law relationships.

[83] A similar approach was taken in *Peter*. Mr. Beblow argued that the law of unjust enrichment should not provide a share of property to unmarried partners because the legislature had chosen to exclude them from the rights accorded to married spouses under matrimonial property legislation. This argument was succinctly — and flatly — rejected with the remark that it is "precisely where an injustice arises without a legal remedy that equity finds a role": p. 994.

[84] It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.

[85] I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

[86] Thus the rejection of the remedial dichotomy leads us to consider in what circumstances an unjust enrichment may be appropriately characterized as a failure to share equitably assets acquired through the parties' joint efforts. While this approach will need further refinement in future cases, I offer the following as a broad outline of when this characterization of an unjust enrichment will be appropriate.

(5) Identifying Unjust Enrichment Arising From a Joint Family Venture

[87] My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to

the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

[88] It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well-grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

[89] In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What

follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

(a) *Mutual Effort*

[90] One set of factors concerns whether the parties worked collaboratively towards common goals. Indicators such as the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent, if any, to which the parties have formed a true partnership and jointly worked towards important mutual goals.

[91] Joint contributions, or contributions to a common pool, may provide evidence of joint effort. For instance, in *Murdoch*, central to Laskin J.'s constructive trust analysis was that the parties had pooled their efforts to establish themselves in a ranch operation. Joint contributions were also an important aspect of the Court's analyses in *Peter*, *Sorochan*, and *Pettkus*. Pooling of efforts and resources, whether capital or income, has also been noted in the appellate case law (see, for example, *Birmingham v. Ferguson*, 2004 CanLII 4764 (Ont. C.A.); *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54, at para.

14). The use of parties' funds entirely for family purposes may be indicative of the pooling of resources: *McDougall*. The parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce (see *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.) and *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382, at para. 27).

(b) *Economic Integration*

[92] Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson; Panara*).

[93] The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over the individual interests of the individual members (McCamus, at p. 366). These and

other factors may indicate that the economic well-being and lives of the parties are largely integrated (see, for example, *Pettkus*, at p. 850).

(c) *Actual Intent*

[94] Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point, however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties *ought* to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.

[95] Courts may infer from the parties' conduct that they intended to share in the wealth they jointly created (P. Parkinson, "Beyond *Pettkus* v. *Becker*: Quantifying Relief for Unjust Enrichment" (1993), 43 U.T.L.J. 217, at p. 245). The conduct of the parties may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture (*Pettkus*; *Peter*; *Sorochan*). In some cases, courts have explicitly labelled the relationship

as a "partnership" in the social and economic sense (*Panara*, at para. 71; *McDougall*, at para. 14). Similarly, the intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was "equivalent to marriage" (*Birmingham*, at para. 1), or where the parties held themselves out to the public as married (*Sorochan*). The stability of the relationship may be a relevant factor as may the length of cohabitation (*Nasser*; *Sorochan*; *Birmingham*). When parties have lived together in a stable relationship for a lengthy period, it may be nearly impossible to engage in a precise weighing of the benefits conferred within the relationship (*McDougall*; *Nasser*).

[96] The title to property may also reflect an intent to share wealth, or some portion of it, equitably. This may be the case where the parties are joint tenants of property. Even where title is registered to one of the parties, acceptance of the view that wealth will be shared may be evident from other aspects of the parties' conduct. For example, there may have been little concern with the details of title and accounting of monies spent for household expenses, renovations, taxes, insurance, and so on. Plans for property distribution on death, whether in a will or a verbal discussion, may also indicate that the parties saw one another as domestic and economic partners.

[97] The parties' actual intent may also negate the existence of a joint family venture, or support the conclusion that particular assets were to be held

independently. Once again, it is the parties' actual intent, express or inferred from the evidence, that is the relevant consideration.

(d) *Priority of the Family*

[98] A final category of factors to consider in determining whether the parties were in fact engaged in a joint family venture is whether and to what extent they have given priority to the family in their decision making. A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. As Professor McCamus puts it, the question is whether the parties have been "[p]roceeding on the basis of understandings or assumptions about a shared future which may or may not be articulated" (p. 365). The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare of the collective or family unit. Whether the roles of the parties fall into the traditional wage earner/homemaker division, or whether both parties are employed and share domestic responsibilities, it is frequently the case that one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment (Parkinson, at p. 243). This may occur in a number of ways including: leaving the workforce for a period of time to raise children; relocating for the benefit of the other party's career (and giving up employment and employment-related networks as a result); foregoing career or educational advancement for the benefit of the family or relationship; and

accepting underemployment in order to balance the financial and domestic needs of the family unit.

[99] As I see it, giving priority to the family is not associated exclusively with the actions of the more financially dependent spouse. The spouse with the higher income may also make financial sacrifices (for example, foregoing a promotion for the benefit of family life), which may be indicative that the parties saw the relationship as a domestic and financial partnership. As Professor Parkinson puts it, the joint family venture may be identified where

> [o]ne party has encouraged the other to rely to her detriment by leaving the workforce or forgoing other career opportunities for the sake of the relationship, and the breakdown of the relationship leaves her in a worse position than she would otherwise have been had she not acted in this way to her economic detriment. [p. 256].

(6) Summary of *Quantum Meruit* Versus Constructive Trust

[100] I conclude:

1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.

2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be

calculated on the basis of the share of those assets proportionate to the claimant's contributions.

3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.

4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.

F. *Mutual Benefit Conferral*

(1) Introduction

[101] As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?

[102] The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are

the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

[103] Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266). Others have looked at mutual benefits as an aspect of the juristic reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in

Wilson). It is apparent that some clarity and consistency is necessary with respect to this issue.

[104] In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

[105] At the outset, however, I should say that this Court's decision in *Peter* does not mandate consideration of mutual benefits at the juristic reason stage of the analysis: see, e.g., *Ford*, at para. 14; *Thomas v. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376, at para. 18. Rather, *Peter* made clear that mutual benefit conferral should generally not be considered at the benefit and detriment stages; the Court also approved the trial judge's decision to take mutual benefits into account at the remedy stage of the unjust enrichment analysis.

[106] In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid $350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required. The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: [1988] B.C.J. No. 887 (QL).

[107] The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266, set aside the judge's finding on the basis that Ms. Peter had failed to establish that she had suffered a deprivation corresponding to the benefits she had conferred on Mr. Beblow. The court reasoned that, although she had performed the services of a housekeeper and homemaker, she had received compensation because she and her children lived in Mr. Beblow's home rent free and he contributed more for groceries than she had.

[108] This Court reversed the Court of Appeal and restored the trial judge's award. The Court was unanimous that Ms. Peter had established all of the elements of unjust enrichment, including deprivation. Cory J. (with whom McLachlin J. agreed on this point) made short work of Mr. Beblow's submission that Ms. Peter had not shown deprivation. He observed, "As a general rule, if it is

found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course be deprivation suffered by the plaintiff": at p. 1013. The Court also unanimously upheld the trial judge's approach of taking account of the benefits Ms. Peter had received at the remedy stage of his decision. As noted, the trial judge had reduced the monthly amount used to calculate Ms. Peter's award by 50 percent to reflect benefits she had received from Mr. Beblow. McLachlin J. did not disagree with this approach, holding at p. 1003 that the figure arrived at by the judge fairly reflected the value of Ms. Peter's contribution to the family assets. Cory J., at p. 1025, referred to the trial judge's approach as "a fair means of calculating the amount due to the appellant". Thus, the Court approved the approach of taking the mutual benefit issue into account at the remedy stage of the analysis. *Peter* therefore does not support the view that mutual benefits should be considered at the benefit/detriment or juristic reason stages of the analysis.

(2) The Correct Approach

[109] As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

[110] I turn first to why mutual benefits should not be addressed at the benefit/detriment stage of the analysis. In my view, refusing to address mutual benefits at that point is consistent with the *quantum meruit* origins of the fee-for-services approach and, as well, with the straightforward economic approach to the benefit/detriment analysis which has been consistently followed by this Court.

[111] An unjust enrichment claim based on a fee-for-services approach is analogous to the traditional claim for *quantum meruit*. In *quantum meruit* claims, the fact that some benefit had flowed from the defendant to the claimant is taken into account by reducing the claimant's recovery by the amount of the countervailing benefit provided. For example, in a *quantum meruit* claim where the plaintiff is seeking to recover money paid pursuant to an unenforceable contract, but received some benefit from the defendant already, the claim will succeed but the award will be reduced by an amount corresponding to the value of that benefit: Maddaugh and McCamus (loose-leaf), vol. 2, at § 13:200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Q.B. *en banc*). In that case, two employees recovered in *quantum meruit* for services provided to the defendant under an unenforceable agreement, but the amount of the award was reduced to reflect the value of benefits the defendant had provided to them. Thus, taking the benefits conferred by the defendant into account at the remedy stage is consistent with general principles of *quantum meruit* claims. Of course, if the defendant has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that defence or claim.

[112] Refusing to take mutual benefits into account at the benefit/detriment stage is also supported by a straightforward economic approach to the benefit/detriment analysis which the Court has consistently followed. *Garland* is a good example. The class action plaintiffs claimed in unjust enrichment to seek restitution for late payment penalties that had been imposed but that this Court (in an earlier decision) found had been charged at a criminal rate of interest: see *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112. The company argued that it had not been enriched because its rates were set by a regulatory mechanism out of its control, and that the rates charged would have been even higher had the company not received the late payment penalties as part of its revenues. That argument was accepted by the Court of Appeal, but rejected on the further appeal to this Court. Iacobucci J., for the Court, held that the payment of money, under the "straightforward economic approach" adopted in *Peter*, was a benefit: para. 32. He stated at para. 36: "There simply is no doubt that Consumers' Gas received the monies represented by the [late payment penalties] and had that money available for use in the carrying on of its business. . . .We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme." The Court held that the company was in fact asserting the "change of position" defence (that is, the defence that is available when "an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned": para. 63). This defence is considered only after the three elements of an unjust enrichment claim have been established: para. 37. Thus the Court

declined to get into a detailed consideration at the benefit/detriment stage of the defendant's submissions that it had not benefitted because of the regulatory scheme.

[113] While *Garland* dealt with the payment of money, my view is that the same approach should be applied where the alleged enrichment consists of services. Provided that they confer a tangible benefit on the defendant, the services will generally constitute an enrichment and a corresponding deprivation. Whether the deprivation was counterbalanced by benefits flowing to the claimant from the defendant should not be addressed at the first two steps of the analysis. I turn now to the limited role that mutual benefit conferral may have at the juristic reason stage of the analysis.

[114] As previously set out, juristic reason is the third of three parts to the unjust enrichment analysis. As McLachlin J. put it in *Peter*, at p. 990, "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'." The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for

the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.

[115] The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

(3) Summary

[116] I conclude that mutual benefits may be considered at the juristic reason stage, but only to the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.

G. *Reasonable or Legitimate Expectations*

[117] The final point that requires some clarification relates to the role of the parties' reasonable expectations in the domestic context. My conclusion is that, while in the early domestic unjust enrichment cases the parties' reasonable

expectations played an important role in the juristic reason analysis, the development of the law, and particularly the Court's judgment in *Garland*, has led to a more limited and clearly circumscribed role for those expectations.

[118] In the early cases of domestic unjust enrichment claims, the reasonable expectations of the claimant and the defendant's knowledge of those expectations were central to the juristic reason analysis. For example, in *Pettkus*, when Dickson J. came to the juristic reason step in the analysis, he said that "where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it" (p. 849). Similarly, in *Sorochan*, at p. 46, precisely the same reasoning was invoked to show that there was no juristic reason for the enrichment.

[119] In these cases, central to the Court's concern was whether it was just to require the defendant to pay — in fact to surrender an interest in property — for services not expressly requested. The Court's answer was that it would indeed be unjust for the defendant to retain the benefits, given that he had continued to accept the services when he knew or ought to have known that the claimant was providing them with the reasonable expectation of reward.

[120] The Court's resort to reasonable expectations and the defendant's knowledge of them in these cases is analogous to the "free acceptance" principle. The notion of free acceptance has been invoked to extend restitutionary recovery beyond the traditional sorts of *quantum meruit* claims in which services had either been requested or provided under an unenforceable agreement. The law's traditional reluctance to provide a remedy for claims where no request was made was based on the tenet that a person should generally not be required, in effect, to pay for services that he or she did not request, and perhaps did not want. However, this concern carries much less weight when the person receiving the services knew that they were being provided, had no reasonable belief that they were a gift, and yet continued to freely accept them: see P. Birks, *Unjust Enrichment* (2nd ed. 2005), at pp. 56-57.

[121] The need to engage in this analysis of the claimant's reasonable expectations and the defendant's knowledge thereof with respect to domestic services has, in my view, now been overtaken by developments in the law. *Garland,* as noted, mandated a two-step approach to the juristic reason analysis. The first step requires the claimant to show that the benefit was not conferred for any existing category of juristic reasons. Significantly, the fact that the defendant also provided services to the claimant is not one of the existing categories. Nor is the fact that the services were provided pursuant to the parties' reasonable expectations. However, the fact that the parties reasonably expected the services to be provided might afford relevant evidence in relation to whether the case falls

within one of the traditional categories, for example a contract or gift. Other than in that way, mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step in the juristic reason analysis set out in *Garland*.

[122] However, different considerations arise at the second step. Following *Peter* and *Garland*, the parties' reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical. As Iacobucci J. put it in *Garland*, this introduces a category of residual situations in which "courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.

[123] It will be helpful in understanding how *Peter* and *Garland* fit together to apply the *Garland* approach to an issue touched on, but not resolved, in *Peter*. In *Peter*, an issue was whether a claim based on the provision of domestic services could be defeated on the basis that the services had been provided as part of the bargain between the parties in deciding to live together. While the Court concluded that the claim failed on the facts, it did not hold that such a claim would inevitably fail in all circumstances: p. 991. It seems to me that, in light of *Garland*, where a "bargain" which does not constitute a binding contract is alleged, the issue will be considered at the stage when the defendant seeks to

show that there is a juristic reason for the enrichment that does not fall within any of the existing categories; the claim is that the "bargain" represents the parties' reasonable expectations, and evidence about their reasonable expectations would be relevant evidence of the existence (or not) of such a bargain.

[124] To summarize:

> 1. The parties' reasonable or legitimate expectations have little role to play in deciding whether the services were provided for a juristic reason within the existing categories.
>
> 2. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.
>
> 3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the

defendant. The question is whether the parties' expectations show that retention of the benefits is just.

[125] I will now turn to the two cases at bar.

IV. The *Vanasse* Appeal

A. Introduction

[126] In the Vanasse appeal, the main issue is how to quantify a monetary award for unjust enrichment. The trial judge awarded a share of the net increase in the family's wealth during the period of unjust enrichment. The Court of Appeal held that this was the wrong approach, finding that the trial judge ought to have performed a *quantum meruit* calculation in which the value that each party received from the other was assessed and set off. This required an evaluation of the defendant Mr. Seguin's non-financial contributions to the relationship which, in the view of the Court of Appeal, the trial judge failed to perform. As the record did not permit the court to apply the correct legal principles to the facts, it ordered a new hearing with respect to compensation and consequential changes to spousal support.

[127] In this Court, the appellant Ms. Vanasse raises two issues:

1. Did the Court of Appeal err by insisting on a strict *quantum meruit* (i.e. "value received") approach to quantify the monetary award for unjust enrichment?

2. Did the Court of Appeal err in finding that the trial judge had failed to consider relevant evidence of Mr. Seguin's contributions?

[128] In my view, the appeal should be allowed and the trial judge's order restored. For the reasons I have developed above, my view is that money compensation for unjust enrichment need not always, as a matter of principle, be calculated on a *quantum meruit* basis. The trial judge here, although not labelling it as such, found that there was a joint family venture and that there was a link between Ms. Vanasse's contribution to it and the substantial accumulation of wealth which the family achieved. In my view, the trial judge made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of Mr. Seguin's undoubted and substantial contributions.

B. Brief Overview of the Facts and Proceedings

[129] The background facts of this case are largely undisputed. The parties lived together in a common law relationship for approximately 12 years, from 1993 until March 2005. Together, they had two children who were aged 8 and 10 at the time of trial.

[130] During approximately the first four years of their relationship (1993 to 1997), the parties diligently pursued their respective careers, Ms. Vanasse with the Canadian Security Intelligence Service ("CSIS") and Mr. Seguin with Fastlane Technologies Inc., marketing a network operating system he had developed.

[131] In March of 1997, Ms. Vanasse took a leave of absence to move with Mr. Seguin to Halifax, where Fastlane had relocated for important business reasons. During the next three and one-half years, the parties had two children; Ms. Vanasse took care of the domestic labour, while Mr. Seguin devoted himself to developing Fastlane. The family moved back to Ottawa in 1998, where Mr. Seguin purchased a home and registered it in the names of both parties as joint tenants. In September 2000, Fastlane was sold and Mr. Seguin netted approximately $11 million. He placed the funds in a holding company, with which he continued to develop business and investment opportunities.

[132] After the sale of Fastlane, Ms. Vanasse continued to assume most of the domestic responsibilities, although Mr. Seguin was more available to assist. He continued to manage the finances.

[133] The parties separated on March 27, 2005. At that time, they were in starkly contrasting financial positions: Ms. Vanasse's net worth had gone from about $40,000 at the time she and Mr. Seguin started living together, to about $332,000 at the time of separation; Mr. Seguin had come into the relationship

with about $94,000, and his net worth at the time of separation was about $8,450,000.

[134] Ms. Vanasse brought proceedings in the Superior Court of Justice. In addition to seeking orders with respect to spousal support and child custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr. Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

[135] Mr. Seguin contested the unjust enrichment claim. While conceding he had been enriched during the roughly three-year period where he was working outside the home full time and Ms. Vanasse was working at home full time (May 1997 to September 2000), he argued there was no corresponding deprivation because he had given her a one-half interest in the family home and approximately $44,000 in Registered Retirement Saving Plans ("RRSPs"). In the alternative, Mr. Seguin submitted that a constructive trust remedy was inappropriate because there was no link between Ms. Vanasse's contributions and the property of Fastlane.

[136] The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportional.

[137] In the second period, however, the trial judge concluded that Mr. Seguin had been unjustly enriched by Ms. Vanasse. Ms. Vanasse had been in charge of the domestic side of the household, including caring for their two children. She had not been a "nanny/housekeeper" and, as the trial judge held, throughout the relationship she had been at least "an equal contributor to the family enterprise". The trial judge concluded that Ms. Vanasse's contributions during this second period "significantly benefited Mr. Seguin and were not proportional" (para. 139).

[138] The trial judge found as fact that Ms. Vanasse's efforts during this second period were directly linked to Mr. Seguin's business success. She stated, at para. 91, that

> Mr. Seguin was enriched by Ms. Vanasse's running of the household, providing child care for two young children and looking after all the necessary appointments and needs of the children. Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane. [Emphasis added.]
>
> Again at para. 137, the trial judge found that
>
> Mr. Seguin was unjustly enriched and Ms. Vanasse deprived for three and one-half years of their relationship, during which time Mr. Seguin often worked day and night and traveled frequently while in Halifax. Mr. Seguin could not have succeeded, as he did, and built up the company, as he did, without Ms. Vanasse assuming the vast majority of childcare and household responsibilities. Mr. Seguin could not have devoted his time to Fastlane but for Ms. Vanasse's assumption of those responsibilities. . . . Mr. Seguin reaped the benefit of Ms. Vanasse's efforts by being able to focus all of his considerable energies and talents on making Fastlane a success. [Emphasis added.]

[139] The trial judge concluded that a monetary award in this case was appropriate, given Mr. Seguin's ability to pay, and lack of a sufficiently direct and substantial link between Ms. Vanasse's contributions and Fastlane or Mr. Seguin's holding company, as required to impose a remedial constructive trust.

[140] With respect to quantification, Blishen J. noted that Ms. Vanasse had received a one-half interest in the family home, but concluded that this was not adequate compensation for her contributions. The trial judge compared the net worths of the parties and determined that Ms. Vanasse was entitled to a one-half interest in the prorated increase in Mr. Seguin's net worth during the period of the unjust enrichment. She reasoned that his net worth had increased by about $8.4 million dollars over the 12 years of the relationship. Although she noted that the

most significant increase took place when Fastlane was sold towards the end of the period of unjust enrichment, she nonetheless prorated the increase over the full 12 years of the relationship, yielding a figure of about $700,000 per year. Starting with the $2.45 million increase attributable to the three and one-half years of unjust enrichment, the trial judge awarded Ms. Vanasse 50 percent of that amount, less the value of her interest in the family home and her RRSPs. This produced an award of just under $1 million.

[141] Mr. Seguin did not appeal Blishen J.'s unjust enrichment finding, and conceded unjust enrichment between 1997 and 2000 on appeal. Therefore, the trial judge's findings that there had been an unjust enrichment during that period and that there was no unjust enrichment during the other periods are not in issue. The sole issue for determination in this Court is the propriety of the trial judge's monetary award for the unjust enrichment which she found to have occurred.

C. *Analysis*

(1) Was the Trial Judge Required to Use a Q*uantum Meruit A*pproach to Calculate the Monetary Award?

[142] I agree with the appellant that a monetary award for unjust enrichment need not, as a matter of principle, always be calculated on a fee-for-services basis. As I have set out earlier, an unjust enrichment is best characterized as one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts. This will be so when the parties were

engaged in a joint family venture and where there is a link between the contributions of the claimant and the accumulation of wealth. When this is the case, the amount of the enrichment should be assessed by determining the claimant's proportionate contribution to that accumulated wealth. As the trial judge saw it, this was exactly the situation of Ms. Vanasse and Mr. Seguin.

(2) Existence of a Joint Family Venture

[143] The trial judge, after a six-day trial, concluded that "Ms. Vanasse was not a nanny/housekeeper". She found that Ms. Vanasse had been at least "an equal contributor to the family enterprise" throughout the relationship and that, during the period of unjust enrichment, her contributions "significantly benefited Mr. Seguin" (para. 139).

[144] The trial judge, of course, did not review the evidence under the headings that I have suggested will be helpful in identifying a joint family venture, namely "mutual effort", "economic integration", "actual intent" and "priority of the family". However, her findings of fact and analysis indicate that the unjust enrichment of Mr. Seguin at the expense of Ms. Vanasse ought to be characterized as the retention by Mr. Seguin of a disproportionate share of the wealth generated from a joint family venture. The judge's findings fit conveniently under the headings I have suggested.

(a) *Mutual Effort*

[145] There are several factors in this case which suggest that, throughout their relationship, the parties were working collaboratively towards common goals. First, as previously mentioned, the trial judge found that Ms. Vanasse's role was not as a "nanny/housekeeper" but rather as at least an equal contributor throughout the relationship. The parties made important decisions keeping the overall welfare of the family at the forefront: the decision to move to Halifax, the decision to move back to Ottawa, and the decision that Ms. Vanasse would not return to work after the sale of Fastlane are all clear examples. The parties pooled their efforts for the benefit of their family unit. As the trial judge found, during the second stage of their relationship from March 1997 to September 2000, the division of labour was such that Ms. Vanasse was almost entirely responsible for running the home and caring for the children, while Mr. Seguin worked long hours and managed the family finances. The trial judge found that it was through their joint efforts that they were able to raise a young family and acquire wealth. As she put it, "Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities" (para. 91). While Mr. Seguin's long hours and extensive travel reduced somewhat in September 1998 when the parties returned to Ottawa, the basic division of labour remained the same.

[146] Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together (in 1997 and 1999), a further indicator that they were working together to achieve common goals. The length of the

relationship is also relevant, and their 12-year cohabitation is a significant period of time. Finally, the trial judge described the arrangement between the parties as a "family enterprise", to which Ms. Vanasse was "at least, an equal contributor" (paras. 138-39).

(b) *Economic Integration*

[147] The trial judge found that "[t]his was not a situation of economic interdependence" (para. 105). That said, there was a pooling of resources. Ms. Vanasse was not employed and did not contribute financially to the family after the children were born, and thus was financially dependent on Mr. Seguin. The family home was registered jointly, and the parties had a joint chequing account. As the trial judge put it, "She was 'the C.E.O. of the kids' and he was 'the C.E.O. of the finances'" (para. 105).

(c) *Actual Intent*

[148] The actual intent of the parties in a domestic relationship, as expressed by the parties or inferred from their conduct, must be given considerable weight in determining whether there was a joint family venture. There are a number of findings of fact that indicate these parties considered their relationship to be a joint family venture.

[149] While a promise to marry or the discussion of legal marriage is by no means a prerequisite for the identification of a joint family venture, in this case the parties' intentions with respect to marriage strongly suggest that they viewed

themselves as the equivalent of a married couple. Mr. Seguin proposed to Ms. Vanasse in July 1996 and they exchanged rings. While they were "devoted to one another and still in love", a wedding date was never set (para. 14). Mr. Seguin raised the topic of marriage again when Ms. Vanasse found out she was pregnant with their first child. Although they never married, the trial judge found that there had been "mutual expectations [of marriage] during the first few years of their 12 year relationship" (para. 64). Mr. Seguin continued to address Ms. Vanasse as "my future wife", and she was viewed by the outside world as such (para. 33).

[150] The trial judge also referred to statements made by Mr. Seguin that were strongly indicative of his view that there was a joint family venture. As the trial judge put it, at para. 28, upon the sale of Fastlane

> Mr. Seguin became a wealthy man. He told Ms. Vanasse that they would never have to worry about finances as their parents did; their children could go to the best schools and they could live a good life without financial concerns.

Again, at para. 98:

> After the sale of the company, Mr. Seguin indicated they could retire, the children could go to the best schools and the family would be well cared for. The family took travel vacations, enjoyed luxury cars, bought a large cabin cruiser which they used for summer vacations and purchased condominiums at Mont-Tremblant.

[151] While the trial judge viewed Mr. Seguin's promises and reassurances as contributing to a reasonable expectation on the part of Ms. Vanasse that she was to share in the increase of his net worth during the period of unjust enrichment, in my view these comments are more appropriately characterized as a reflection of the reality that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children.

(d) *Priority of the Family*

[152] There is a strong inference from the factual findings that, to Mr. Seguin's knowledge, Ms. Vanasse relied on the relationship to her detriment. As the trial judge found, in 1997 Ms. Vanasse gave up a lucrative and exciting career with CSIS, where she was training to be an intelligence officer, to move to Halifax with Mr. Seguin. In many ways this was a sacrifice on her part; she left her career, gave up her own income, and moved away from her family and friends. Mr. Seguin had moved to Halifax in order to relocate Fastlane for business reasons. Ms. Vanasse then stayed home and cared for their two small children. As I have already explained, during the period of the unjust enrichment, Ms. Vanasse was responsible for a disproportionate share of the domestic labour. It was these domestic contributions that, in part, permitted Mr. Seguin to focus on his work with Fastlane. Later, in 2003, the "family's decision" was for Ms. Vanasse to remain home after her leave from CSIS had expired (para. 198). Ms. Vanasse's financial position at the breakdown of the relationship indicates she relied on the relationship to her economic detriment. This is all evidence

supporting the conclusion that the parties were, in fact, operating as a joint family venture.

[153] As a final point, I would refer to the arguments made by Mr. Seguin, which were accepted by the Court of Appeal, that the trial judge failed to give adequate weight to sacrifices Mr. Seguin made for the benefit of the relationship. Later in my reasons, I will address the question of whether the trial judge actually failed in this regard. However, the points raised by Mr. Seguin to support this argument actually serve to reinforce the conclusion that there was a joint family venture. Mr. Seguin specifically notes a number of factors, including: agreeing to step down as CEO of Fastlane in September 1997 to make himself more available to Ms. Vanasse, causing friction with his co-workers and partners, and reducing his remuneration; agreeing to relocate to Ottawa at Ms. Vanasse's request in 1998; and making increased efforts to work at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

(e) *Conclusion on Identification of the Joint Family Venture*

[154] In my view, the trial judge's findings of fact clearly show that Ms. Vanasse and Mr. Seguin engaged in a joint family venture. The remaining question is whether there was a link between Ms. Vanasse's contributions to it and the accumulation of wealth.

(3) Link to Accumulation of Wealth

[155] The trial judge made a clear finding that there was a link between Ms. Vanasse's contributions and the family's accumulation of wealth.

[156] I have referred earlier, in some detail, to the trial judge's findings in this regard. However, to repeat, her conclusion is expressed particularly clearly at para. 91 of her reasons:

> Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these [household and child-rearing] responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.

[157] Given that and similar findings, I conclude that not only were these parties engaged in a joint family venture, but that there was a clear link between Ms. Vanasse's contribution to it and the accumulation of wealth. The unjust enrichment is thus best viewed as Mr. Seguin leaving the relationship with a disproportionate share of the wealth accumulated as a result of their joint efforts.

(4) Calculation of the Award

[158] The main focus of the appeal was on whether the award ought to have been calculated on a *quantum meruit* basis. Very little was argued before this Court regarding the way the trial judge approached her calculation of a proportionate share of the parties' accumulated wealth. I conclude that the trial judge's approach was reasonable in the circumstances, but I stress that I do not

hold out her approach as necessarily being a template for future cases. Within the legal principles I have outlined, there may be many ways in which an award may be quantified reasonably. I prefer not to make any more general statements about the quantification process in the context of this appeal, except this. Provided that the correct legal principles are applied, and the findings of fact are not tainted by clear and determinative error, a trial judge's assessment of damages is treated with considerable deference on appeal: see, e.g., *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.). A reasoned and careful exercise of judgment by the trial judge as to the appropriate monetary award to remedy an unjust enrichment should be treated with the same deference. There are two final specific points that I must address.

[159] Mr. Seguin submits, very briefly, that a proper application of the "value survived" approach in this case would require a careful determination of the contributions by third parties to the growth of Fastlane during the period his own contributions were diminished, as a result of what counsel characterizes as Ms. Vanasse's "demands" that he reduce his hours and move back to Ottawa. This argument is premised on the notion that the money he received from the sale was not justly his to share with Ms. Vanasse. I cannot accept this premise. Unexplained is why he received more than his share when the company was sold or why, having received more than he was due, Ms. Vanasse is still not entitled to an equitable share of what he actually received.

[160] Second, there is the finding of the Court of Appeal that the trial judge failed to take into account evidence of Mr. Seguin's numerous and significant non-financial contributions to the family. I respectfully cannot accept this view. The trial judge specifically alluded to these contributions in her reasons. Moreover, by confining the period of unjust enrichment to the three and one-half year period, the trial judge took into account the periods during which Ms. Vanasse's contributions were not disproportionate to Mr. Seguin's. In my view, the trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to Mr. Seguin's contributions.

D. *Disposition*

[161] I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. The appellant should have her costs throughout.

V. The *Kerr* Appeal

A. *Introduction*

[162] When their common law relationship of more than 25 years ended, Ms. Kerr sued her former partner, Mr. Baranow, advancing claims for unjust enrichment, resulting trust, and spousal support. Mr. Baranow counterclaimed that Ms. Kerr had been unjustly enriched by his housekeeping services provided between 1991 and 2006, and by his early retirement in order to provide her personal assistance. The trial judge awarded Ms. Kerr $315,000, holding that she

was entitled to this amount both by way of resulting trust (to reflect her contribution to the acquisition of property) and by way of remedial constructive trust (as a remedy for her successful claim in unjust enrichment). He also awarded Ms. Kerr $1,739 per month in spousal support effective the date she commenced proceedings. Although the trial judge rejected Mr. Baranow's assertion that Ms. Kerr had been unjustly enriched at his expense, the reasons for judgment and the order after trial do not otherwise address Mr. Baranow's counterclaim.

[163] Mr. Baranow appealed. The Court of Appeal allowed the appeal, concluding that Ms. Kerr's claims for a resulting trust and in unjust enrichment should be dismissed, that Mr. Baranow's claim for unjust enrichment should be remitted to the trial court for determination, and that the order for spousal support should be effective as of the first day of the trial, not as of the date proceedings were commenced.

[164] Ms. Kerr appeals, submitting that the Court of Appeal erred by setting aside the trial judge's findings that:

> (1) a resulting trust arose in her favour;
>
> (2) she had unjustly enriched Mr. Baranow; and
>
> (3) spousal support should begin as of the date she instituted proceedings.

[165] In my view, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that Mr. Baranow's counterclaim be returned to the Supreme Court of British Columbia for hearing. However, my view is that Ms. Kerr's unjust enrichment claim should not have been dismissed, but rather a new trial ordered. While the trial judge's errors certainly were not harmless, it is not possible to say on this record, which includes findings of fact tainted by clear error, that her unjust enrichment claim would inevitably fail if analyzed using the clarified legal framework set out above. With respect to the commencement date of the spousal support order, I would set aside the order of the Court of Appeal and restore the trial judge's order.

B. *Overview of the Facts*

[166] The trial judge's disposition of both the resulting trust and unjust enrichment claims turned on his conclusion that Ms. Kerr had provided $60,000 worth of equity and assets at the beginning of the relationship. This fact, in the trial judge's view, supported awarding her one-third of the value of the home she shared with Mr. Baranow at the time of separation. According to the trial judge, this $60,000 of equity and assets consisted of three elements: her $37,000 of equity in the Coleman Street home she had shared with her former husband; the value of an automobile; and the value of furniture which she brought into her relationship with Mr. Baranow. The trial judge did not make specific findings of fact about the value of either Ms. Kerr's or Mr. Baranow's non-monetary

contributions to the relationship. As previously noted, while the judge rejected in a single sentence Mr. Baranow's contention that Ms. Kerr had been unjustly enriched at his expense, the judge did not explain the basis of that conclusion. Mr. Baranow's counterclaim was not otherwise addressed.

[167] The trial judge's findings of fact, of course, must be accepted unless tainted with clear and determinative error. In this case, however, the Court of Appeal's intervention on some of the judge's key findings was justified, because those findings simply were not supported by the record. I will have to delve into the facts, more than might otherwise be required, to explain why.

[168] The parties began to live together in Mr. Baranow's home on Wall Street in Vancouver in May 1981. Shortly afterward, they moved into Ms. Kerr's former matrimonial home on Coleman Street. They had met at their mutual place of work, the Port of Vancouver, where she worked as a secretary and he as a longshoreman. Ms. Kerr was in midst of a divorce. Through her separation agreement, Ms. Kerr received her husband's interest in their former matrimonial home on Coleman Street in North Vancouver, all of the furniture in the house, and a 1979 Cadillac Eldorado. However, Ms. Kerr's ex-husband owed more than $400,000 and Ms. Kerr was guarantor of some of that debt.

[169] In the summer of 1981, the Coleman Street property was the subject of foreclosure proceedings and, according to the evidence, was about to be foreclosed on July 29, 1981. Ms. Kerr testified at trial that, at the time, she had

two teenage children, was earning under $30,000 a year, and had no money to save the house.

[170] Ms. Kerr instructed her lawyer to place the titles to the Coleman Street property and the vehicle into Mr. Baranow's name. Mr. Baranow paid $33,000 in cash to secure the property against outstanding debts, and guaranteed a $100,000 mortgage at a rate of 22 percent. He then began to make the mortgage payments and eventually refinanced the mortgage, together with that on his Wall Street property, and assumed that new mortgage himself.

[171] The couple lived together for the next 25 years, first in the Wall Street property, then at Coleman Street, then in a temporary apartment, and finally in their "dream home" which they constructed on Mr. Baranow's Wall Street property.

[172] While the parties lived together in the Coleman Street property (from September 1981 to December 1985), Mr. Baranow retained the $450 per month he received by renting out his Wall Street property. The trial judge found that, although the parties kept their financial affairs separate, there was an arrangement by which Mr. Baranow would pay the property taxes and mortgage payments on both the Coleman Street and the Wall Street properties. The mortgage on both properties was paid off before July 1985. However, Mr. Baranow took out a $32,000 mortgage on the Wall Street property in July 1985, which was paid in full by August 1988.

[173] The Coleman Street property was sold in August 1985 for $138,000. This sale was at a considerable loss, taking into account the real estate commission, the $33,000 in cash Mr. Baranow had contributed at the time of the transfer to him, and the mortgage payments he alone had made between the transfer in the summer of 1981 and the sale in the summer of 1985.

[174] The parties moved into an apartment (from August 1985 until October 1986) while they constructed their "dream home" at the Wall Street location. The existing dwelling was torn down and replaced. Mr. Baranow spent somewhere between $97,000 and $105,000 on its construction, with additional amounts spent for materials, labour and permits. Ms. Kerr, the trial judge found, was involved with the planning, interior decorating and cleaning. She also planted sod, tended the flower garden, and paid for some wood paneling in the downstairs bedroom. In addition, she made contributions towards the purchase of furniture, appliances, and other chattels for the Wall Street property. Her son paid $350 per month in rent, which Mr. Baranow retained. At one point in his reasons, the trial judge stated that Ms. Kerr paid "all of the household expenses and the insurance on the new house . . . even after the $32,000.00 mortgage was paid off by [Mr. Baranow] in August 1988" (para. 24). However, at another point, the judge noted that Ms. Kerr paid the utilities and insurance and bought "some groceries" (para. 36). Mr. Baranow, he found, paid the property-related expenses, consisting of property taxes (less the disability benefit attributable to Ms. Kerr) and upkeep (which was minimal in the new house). The trial judge found that the current value of the

Wall Street property was $942,500, compared with $205,000 in October of 1986. He then concluded that, given there were no mortgage payments after 1988, Ms. Kerr's share of the expenses "was probably higher" than Mr. Baranow's for approximately 18 years before they stopped living together.

[175] In 1991, Ms. Kerr suffered a massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work. Her health steadily deteriorated, and relations between the couple became increasingly strained. Mr. Baranow took an early retirement in 2002. The trial judge acknowledged that Mr. Baranow claimed to have done this to care for Ms. Kerr, but noted that early retirement was also favourable to him. The trial judge found that Mr. Baranow started to experience "caregiver fatigue" and began exploring institutional care alternatives in June 2005. The next summer, in August 2006, Ms. Kerr had to undergo surgery on her knee. After the surgery, Mr. Baranow made it clear to the hospital staff that he was not prepared to have her return home. Ms. Kerr was transferred to an extended care facility where she remained at the time of trial. The trial judge found that, in the last 18 months Ms. Kerr resided at the Wall Street property, Mr. Baranow did most of the housework and helped her with her bodily functions.

C. *Analysis*

(1) <u>The Resulting Trust Issue</u>

[176] The trial judge found that Mr. Baranow held a one-third interest in the Wall Street property by way of resulting trust for Ms. Kerr, on three bases. The Court of Appeal found that each of these holdings was erroneous. I respectfully agree.

(a) *Gratuitous Transfer*

[177] The trial judge found that the transfer of the Coleman Street property to Mr. Baranow was gratuitous, therefore raising the presumption of a resulting trust in Ms. Kerr's favour. At the time of transfer to Mr. Baranow, roughly $133,000 was required to save the property (it was subject to a first mortgage of just under $80,000, a second mortgage of just under $35,000, a judgment in favour of the Bank of Montreal of just under $12,000, and other miscellaneous debts and charges, adding up to roughly $133,000). There was also a $26,500 judgment in favour of CIBC, which was of concern to Ms. Kerr, although it is not listed in the payouts required to close the transfer. We know that Ms. Kerr had guaranteed some of her former husband's debts, and that she declared bankruptcy in 1983 in relation to $15,000 of debt for which she had co-signed with her former husband.

[178] The Court of Appeal reversed the trial judge's resulting trust finding, holding that the transfer was not gratuitous. The court pointed to the contributions and liabilities undertaken by Mr. Baranow to make the transfer possible, and concluded that the trial judge's finding in this regard constituted a palpable and overriding error.

[179] On this point, I respectfully agree with the Court of Appeal. There is no dispute that Mr. Baranow injected roughly $33,000 in cash, and guaranteed a $100,000 mortgage, so that the property would not be lost to the bank in the foreclosure proceedings. This constituted consideration, and the transfer therefore cannot reasonably be labelled gratuitous. The respondent would have us hold otherwise on the basis of technical arguments about the lack of a precise coincidence between the time of the transfer and payments, and the lack of payment directly to Ms. Kerr because Mr. Baranow's payments were made to her creditors. These arguments have no merit. An important element of the trial judge's finding of a resulting trust was his conclusion that there was "no evidence" that Mr. Baranow's payment of $33,000 in cash and his guarantee of the $100,000 mortgage "were in connection with the transfer or part of an agreement between the parties so as to constitute consideration for the transfer" (para. 76). Putting to one side for the moment whether this finding reflects a correct understanding of a gratuitous transfer, the judge clearly erred in making this statement; there was in fact much evidence to that precise effect. Mr. Baranow testified that Ms. Kerr had "tearfully asked" Mr. Baranow for help to save the property from the creditors. Ms. Kerr's solicitor recorded in his reporting letter that Ms. Kerr felt she had little choice but to convey the property to Mr. Baranow "faced with the large outstanding debts of [her] husband which include[d] a Judgment taken by C.I.B.C. for a debt outstanding in the amount of $26,500.00". At trial, Ms. Kerr was asked whether she had requested Mr. Baranow to save the house; she responded, "I guess so". Thus, contrary to the

judge's finding, there was in fact considerable evidence that Mr. Baranow's paying off of the debts and guaranteeing the mortgage were in connection with the transfer of the property to him. This evidence shows that he accepted the transfer and assumed the financial obligations at Ms. Kerr's request, and in order to further her purpose of preventing the creditors from foreclosing on the property.

[180] The Court of Appeal was correct to intervene on this point and conclude that the transfer was not gratuitous. The trial judge's imposition of a resulting trust on one-third of the Wall Street property on this basis accordingly cannot be sustained.

(b) *Ms. Kerr's Contributions*

[181] The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of $60,000: $37,000 in equity from the transfer of the Coleman Street property to Mr. Baranow; $20,000 for the value of the Cadillac also transferred to Mr. Baranow; and $3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title of Coleman, Mr. Baranow was able to "re-mortgage both properties for $116,000.00 and apply the $16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's

contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the extent of the resulting trust which he imposed on the Wall Street property.

[182] The Court of Appeal reversed this finding as not being supported by the record. The court noted that Ms. Kerr did not have $37,000 in equity in the Coleman Street property when Mr. Baranow took title, Mr. Baranow did not receive any beneficial interest in the vehicle, and there was no evidence of the value of the furnishings.

[183] I agree with the Court of Appeal's disposition of this issue. As it pointed out, the evidence showed that, in addition to Mr. Baranow paying cash and guaranteeing a mortgage, he paid the monthly mortgage payments, taxes and upkeep expenses on the Coleman property until it was sold in 1985 for $138,000 (less real estate commission). Mr. Baranow received no beneficial interest in the vehicle and the judge made no finding about the value of the furnishings. There was not, in any meaningful sense of the word, any equity in the Coleman property for Ms. Kerr to contribute to the acquisition or improvement of the Wall Street property. I would affirm the conclusion of the Court of Appeal on this point.

(c) *Common Intention Resulting Trust*

[184] The trial judge also appears to have based his conclusions about the resulting trust on his finding of a common intention on the part of Ms. Kerr and Mr. Baranow to share in the Wall Street property. For the reasons I have given

earlier, the "common intention" resulting trust has no further role to play in the resolution of disputes such as this one. I would hold that a resulting trust should not have been imposed on the Wall Street property on the basis of a finding of common intention between these parties.

(d) *Conclusion With Respect to Resulting Trust*

[185] In my view the Court of Appeal was correct to set aside the trial judge's conclusions with respect to the resulting trust issues.

(2) Unjust Enrichment

[186] The trial judge also found that Mr. Baranow had been unjustly enriched by Ms. Kerr to the extent of $315,000, the value of the one-third interest in the Wall Street property determined during the resulting trust analysis. The judge found that Ms. Kerr had provided the following benefits to Mr. Baranow:

a. $37,000 equity in the Coleman Street property

b. the automobile

c. the furnishings

d. $16,000 in refinancing permitted by the Coleman transfer and applied to the Wall Street property

e. $22,000 gained on the resale of the Coleman Street property

f. household expenses and insurance paid on both properties

g. spousal services such as housework, entertaining guests and preparing meals until Ms. Kerr's disability made it impossible to continue

h. assistance with planning and decoration of the Wall Street house

i. financial contributions towards the purchase of chattels for the new home

j. a disability tax exemption

k. approximately five years' worth of rental income from Ms. Kerr's son

[187] Turning to the element of corresponding deprivation, the trial judge noted that it was "unlikely" that Ms. Kerr had given up any career or educational opportunities over the course of the relationship. Furthermore, her income remained unchanged, even following her stroke, due to her receipt of disability pensions and other benefits. The judge found that she had lived rent-free for the entire relationship. He concluded, however, that she had suffered a deprivation because, had she not contributed her equity in the Coleman Street property, it was "reasonable to infer that she would have used it to purchase an asset in her own name, invest for her own benefit, use it for some personal interest, or otherwise

avail herself of beneficial financial opportunity": para. 92. He also concluded, without elaboration, that the benefits that she received from the relationship did not overtake her contributions.

[188] The Court of Appeal set aside the trial judge's finding of unjust enrichment. It found that Mr. Baranow's direct and indirect contributions, by which Ms. Kerr was enriched and for which he was not compensated, constituted a juristic reason for any enrichment which he experienced at her expense. The court found that, for reasons mentioned earlier, there was no $60,000 contribution by Ms. Kerr and therefore her claim rested on her indirect contributions. The court also concluded that the trial judge's analysis failed to assess the extent of Mr. Baranow's direct and indirect contributions to Ms. Kerr, including: his payment of accommodation expenses for the duration of the relationship; his contribution to the purchase price of the van which Ms. Kerr still possesses; her receipt of almost half of his lifetime amount of union medical benefits, used to pay for her health care expenses; his taking early retirement with a reduced monthly pension to care for Ms. Kerr; and his provision of extensive personal caregiver and domestic services without compensation. Moreover, in the Court of Appeal's view, the trial judge had failed to note that Mr. Baranow's payment of her living expenses permitted her to save about $272,000 over the course of the relationship.

[189] The appellant challenges the Court of Appeal's decision on two bases. First, she argues that the court improperly interfered with the trial judge's finding of fact with respect to Ms. Kerr's $60,000 contribution to the relationship. Second, she submits that the court improperly considered the question of mutual benefits through the lens of juristic reason, and that this resulted in the court failing to consider globally who had been enriched and who deprived. Ms. Kerr's submission on this latter point is that consideration of mutual benefit conferral should occur during the first two steps of the unjust enrichment analysis: enrichment and corresponding deprivation. Once that has been established, she argues that the legitimate expectations of the parties may be considered as part of the analysis of whether there was a juristic reason for the enrichment. The main point is that, in the appellant's submission, it was open to the trial judge to conclude that the parties' legitimate expectation was that they would accumulate wealth in proportion to their respective incomes; without a share of the value of the real property acquired during the relationship, that reasonable expectation cannot be realized.

[190] More fundamentally, the appellant urges the Court to adopt what she calls the "family property approach" to unjust enrichment. In essence, the appellant submits that her contributions gave rise to a reasonable expectation that she would have an equitable share of the assets acquired during the relationship.

[191] I will deal with these submissions in turn.

(a) *Findings of Fact Regarding the $60,000 Contribution*

[192] As noted earlier, the Court of Appeal was right to set aside the trial judge's conclusion that the appellant had contributed $60,000 to the couple's assets. There was, in no realistic sense of the word, any "equity" to contribute from the Coleman Street property to acquisition of the new Wall Street "dream home". Furthermore, the appellant retained the beneficial use of the motor vehicle, and there was no satisfactory evidence of the value of the furniture. The judge's findings on this point were the product of clear and determinative error.

(b) *Analysis of Offsetting Enrichments*

[193] On this issue, I cannot accept the conclusions of either the trial judge or the Court of Appeal. As noted, in his determination of the extent of Ms. Kerr's unjust enrichment, the trial judge largely ignored Mr. Baranow's contributions. However, for the reasons I have developed earlier, the Court of Appeal erred in assessing Mr. Baranow's contributions as part of the juristic reason analysis; this analysis prematurely truncated Ms. Kerr's *prima facie* case of unjust enrichment. I have set out the correct approach to this issue earlier in my reasons. As, in my view, there must be a new trial of both Ms. Kerr's unjust enrichment claim and Mr. Baranow's counterclaim, it is not necessary to say anything further. The principles set out above must accordingly be applied at the new trial of these issues.

(c) *The "Family Property Approach"*

[194] I turn finally to Ms. Kerr's more general point that her claim should be assessed using a "family property approach". As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

(d) *Disposition of the Unjust Enrichment Appeal*

[195] I conclude that the findings of the trial judge in relation to unjust enrichment cannot stand. The next question is whether, as the Court of Appeal decided, Ms. Kerr's claim for unjust enrichment should be dismissed or whether it ought to be returned for a new trial. With reluctance, I have concluded the latter course is the more just one in all of the circumstances.

[196] The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was

evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separated from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

[197] More fundamentally, Ms. Kerr's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that I have set out. Even assuming that Ms. Kerr made out her claim in unjust enrichment, it is not possible to fairly apply the joint family venture approach to this case on appeal, using the record available to this Court. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Moreover, even if one were persuaded that the evidence permitted resolution of the joint family venture issue, the record is unsatisfactory for deciding whether Ms. Kerr's contributions to a joint family venture were linked to the accumulation of wealth and, if so, in what proportion. The trial judge found that her payment of household expenses and insurance payments, along with the "proceeds" from the Coleman Street property, allowed Mr. Baranow to pay off the $116,000 mortgage on both properties before July 1985. There is, thus, a finding that her contributions were linked to the accumulation of wealth, given that the Wall Street property was valued at

$942,500 at the time of trial. However, as the judge's findings with respect to Ms. Kerr's equity in the Coleman Street property cannot stand, this conclusion is considerably undermined. For much the same reason, there is no possibility on this record of evaluating the proportionate contributions to a joint family venture. In short, to attempt to resolve Ms. Kerr's unjust enrichment claim on its merits, using the record before this Court, involves too much uncertainty and risks injustice.

[198] In this respect, the *Kerr* appeal is in marked contrast to the *Vanasse* appeal. There, an unjust enrichment was conceded and the trial judge's findings of fact closely correspond to the analytical approach I have proposed. In the present appeal, while the findings made do not appear to demonstrate a joint family venture or a concomitant link to accumulated wealth, it would be unfair to reach that conclusion without giving an opportunity to the parties to present their evidence and arguments in light of the approach set out in these reasons.

[199] Reluctantly, therefore, I would order a new trial of Ms. Kerr's unjust enrichment claim, as well as affirm the Court of Appeal's order for a hearing of Mr. Baranow's counterclaim.

(3) Effective Date of Spousal Support

[200] The final issue is whether, as the Court of Appeal held, the trial judge erred in making his order for spousal support in favour of Ms. Kerr effective on

the date she had commenced proceedings rather than on the first day of trial. In my respectful view, the Court of Appeal erred in its application of the relevant factors and ought not to have set aside the trial judge's order.

[201] The trial judge found that the appellant's income in 2006 was $28,787 and the respondent's income was $70,520, on the basis of their respective income tax returns. He then applied the Spousal Support Advisory Guidelines ("SSAG") to arrive at a range of $1,304 to $1,739 per month. He settled on an amount at the higher end of that range in order to assist Ms. Kerr in pursuing a private bed while waiting for a subsidized bed in a suitable facility closer to her family.

[202] The Court of Appeal agreed with the trial judge that Ms. Kerr was entitled to an award of spousal support given the length of the parties' relationship, her age, her fixed and limited income and her significant disability; she was entitled to a spousal support award that would permit her to live at a lifestyle that is closer to that which the parties enjoyed when they were together; and that the judge had properly determined the quantum of support. The Court of Appeal concluded, however, that the trial judge had erred in ordering support effective the date Ms. Kerr had commenced proceedings. It faulted the judge in several respects: for apparently having made the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government- subsidized care facility and had not had to

encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.

[203] The appellant submits that the decision to equate the principles pertaining to retroactive spousal support with those of retroactive child support has been done without any discussion or legal analysis. Furthermore, she argues that the Court of Appeal's reasoning places an untoward and inappropriate burden on applicants, essentially mandating that they apply for interim spousal support or lose their entitlement. Lastly, she argues that there is a legal distinction between retroactive support before and after the application is filed, and that in the latter circumstance there is less need for judicial restraint. I agree with the second and third of these submissions.

[204] There is no doubt that the trial judge had the discretion to award support effective the date proceedings had been commenced. This is clear from the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

(5) An order under this section may also provide for one or more of the following:

. . .

(d) payment of support in respect of any period before the order is made;

[205] The appellant requested support effective the date her writ of summons and statement of claim were issued and served. She was and is not seeking support for the period before she commenced her proceedings, or for any period during which another court order for support was in effect. I note that she was obliged by statute to seek support within a year of the end of cohabitation: s. 1(1), definition of "spouse" para. (b), of the *FRA*. Ms. Kerr made her application just over a month after the parties ceased living together.

[206] I will not venture into the semantics of the word "retroactive": see *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, at paras. 2 and 69-70; *S.(L.) v. P.(E.)* (1999), 67 B.C.L.R. (3d) 254, (C.A.), at paras. 55-57. Rather, I prefer to follow the example of Bastarache J. in *D.B.S.* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

[207] While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse.

However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

[208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. It that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *D.B.S.*, at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated

spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, for example, M.L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.

[209] Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *D.B.S.*, at paras. 100-103).

[210] Neither of these concerns carries much weight in this case. The order was made effective the date on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount. Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with more diligence.

[211] In *D.B.S.*, Bastarache, J. referred to the date of effective notice as the "general rule" and "default option" for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support has been described by the Ontario Court of Appeal as the "usual commencement date", absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175, at para. 24. While in my view, the decision to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *D.B.S.*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

[212] Other relevant considerations noted in *D.B.S.* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award. The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example concealing assets or failing to make appropriate disclosure: *D.B.S.*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *D.B.S.* analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of *D.B.S.* may be easily adapted to the

situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in *D.B.S.* emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

[213] In light of these principles, my view is that the Court of Appeal made two main errors.

[214] First, it erred by finding that the circumstances of the appellant were such that there was no need prior to the trial. The trial judge found, and the Court of Appeal did not dispute, that the appellant was entitled to non-compensatory spousal support, at the high end of the range suggested by the SSAG, for an indefinite duration. Entitlement, quantum, and the indefinite duration of the order were not appealed before this Court. It is clear that Ms. Kerr was in need of support from the respondent at the date she started her proceedings and remained so at the time of trial. The Court of Appeal rightly noted the relevant factors, such

as her age, disability, and fixed income. However, the Court of Appeal did not describe how Ms. Kerr's circumstances had changed between the commencement of proceedings and the date of trial, nor is any such change apparent in the trial judge's findings of fact. As I understand the record, one of the objectives of the support order was to permit Ms. Kerr to have access to a private pay bed while waiting for her name to come up for a subsidized bed in a suitable facility closer to her son's residence. From the date she commenced her proceedings until the date of trial, she resided in the Brock Fahrni Pavilion in a government-funded extended care bed in a room with three other people. In my respectful view, her need was constant throughout the period. If the Court of Appeal's rationale was that Ms. Kerr's need would only arise once she actually had secured the private pay bed, its decision to make the order effective the first day of trial seems inconsistent with that approach. The Court of Appeal did not suggest that her need was any different on that day than on the day she had commenced her proceedings. Nor did the court point to any financial hardship that the trial judge's award would have on Mr. Baranow.

[215] Respectfully, the Court of Appeal erred in principle in setting aside the judge's order effective as of the date of commencement of proceedings on the ground that Ms. Kerr had no need during that period, while upholding the judge's findings of need in circumstances that were no different from those existing at the time proceedings were commenced.

[216] Second, the Court of Appeal in my respectful view was wrong to fault Ms. Kerr for not bringing an interim application, in effect attributing to her unreasonable delay in seeking support for the period in question. Ms. Kerr commenced her proceedings promptly after separation and, in light of the fact that the trial occurred only about thirteen months afterward, she apparently pursued those proceedings to trial with diligence. There was thus clear notice to Mr. Baranow that support was being sought and he could readily take advice on the likely extent of his liability. Given the high financial, physical, and emotional costs of interlocutory applications, especially for a party with limited means and a significant disability such as Ms. Kerr, it was in my respectful view unreasonable for the Court of Appeal to attach such serious consequences to the fact that an interim application was not pursued. The position taken by the Court of Appeal to my way of thinking undermines the incentives which should exist on parties to seek financial disclosure, pursue their claims with due diligence, and keep interlocutory proceedings to a minimum. Requiring interim applications risks prolonging rather than expediting proceedings. The respondent's argument based on the fact that a different legal test would have applied at the interim support stage is unconvincing. After a full trial on the merits, the trial judge made clear and now unchallenged findings of need on the basis of circumstances that had not changed between commencement of proceedings and trial.

[217] In short, there was virtually no delay in applying for maintenance, nor was there any inordinate delay between the date of application and the date of

trial. Ms. Kerr was in need throughout the relevant period, she suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with the respondent. Mr. Baranow had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

[218] While it is regrettable that the judge did not elaborate on his reasons for making the order effective as of the date proceedings had been commenced, the relevant legal principles applied to the facts as he found them support the making of that order and the Court of Appeal erred in holding otherwise.

[219] In summary, I conclude that the Court of Appeal erred in setting aside the portion of the judge's order for support between the commencement of proceedings and the beginning of trial. I would restore the order of the trial judge making spousal support effective September 14, 2006.

D. *Disposition*

[220] I would allow the appeal in part. Specifically, I would:

a. allow the appeal on the spousal support issue and restore the order of the trial judge with respect to support;

b. allow the appeal with respect to the Court of Appeal's decision to dismiss Ms. Kerr's unjust enrichment claim and order a new trial of that claim;

c. dismiss the appeal in relation to Ms. Kerr's claim of resulting trust and the ordering of a new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

[221] As Ms. Kerr has been substantially successful, I would award her costs throughout.

Appeal 33157 allowed in part with costs.

Appeal 33358 allowed with costs.

Solicitors for the appellant Margaret Kerr: Hawthorne, Piggott & Company, Burnaby.

Solicitor for the respondent Nelson Baranow: Susan G. Label, Vancouver.

Solicitors for the appellant Michele Vanasse: Nelligan O'Brien Payne, Ottawa.

Solicitors for the respondent David Seguin: MacKinnon & Phillips, Ottawa.

Tab 14

Supreme Court of Canada | Cour suprême du Canada

94 194 001

THE MARITIME LIFE ASSURANCE COMPANY

- v. -

SASKATCHEWAN RIVER BUNGALOWS LTD.

- and -

CONNIE DOREEN FIKOWSKI

CORAM:

The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Appeal heard:

March 14, 1994

Judgment rendered:

June 23, 1994

Reasons for judgment:

The Hon. Mr. Justice Major

Concurred in by:

The Hon. Mr. Justice La Forest
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci

LA MARITIME, COMPAGNIE D'ASSURANCE-VIE

- c. -

SASKATCHEWAN RIVER BUNGALOWS LTD.

- et -

CONNIE DOREEN FIKOWSKI

CORAM:

L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Appel entendu:

le 14 mars 1994

Jugement rendu:

le 23 juin 1994

Motifs de jugement:

L'honorable juge Major

Souscrivent à l'avis de l'honorable juge Major:

L'honorable juge La Forest
L'honorable juge L'Heureux-Dubé
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci

KM

Counsel at hearing:

For the appellant:
James D. McCartney
Brian E. Leroy

For the respondents:
James S. Peacock

Avocats à l'audience:

Pour l'appelante:
James D. McCartney
Brian E. Leroy

Pour les intimées:
James S. Peacock

Citations	Références
Alta. Q.B.: Deyell J., May 24, 1989.	B.R. Alb.: le juge Deyell, 24 mai 1989.
Alta. C.A.: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶1-2895.	C.A. Alb.: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶1-2895.

sask. river bungalows *v.* maritime life

The Maritime Life Assurance Company *Appellant*

v.

Saskatchewan River Bungalows Ltd. and Connie Doreen Fikowski *Respondents*

Indexed as: Saskatchewan River Bungalows Ltd. *v.* Maritime Life Assurance Co.

File No.: 23194.

1994: March 14; 1994: June 23.

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

on appeal from the court of appeal for alberta

Insurance -- Policy lapse -- Waiver -- Insurance premium remaining unpaid after grace period expired -- Insurer requesting immediate payment of premium -- Whether insurer waived right to compel timely payment under policy -- If so, whether waiver still in effect when payment tendered.

Insurance -- Relief against forfeiture -- Waiver -- Insurance premium remaining unpaid after grace period expired -- Insurer requesting immediate payment of premium -- Whether insurer waived right to compel timely payment

under policy -- If not, whether relief against forfeiture should be granted under s. 10 of Judicature Act, R.S.A. 1980, c. J-1.

In 1978, Maritime issued an insurance policy on the life of MF to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Fikowski ("CF"), who became the beneficiary. SRB remained responsible for paying the annual premiums. On July 24, 1984, SRB mailed a cheque to pay the annual premium due on July 26, but this cheque was never received by Maritime, nor was it deducted from SRB's bank account. After the grace period expired on August 26, Maritime sent a late payment offer to SRB agreeing to accept payment of the July premium if it was postmarked or received by September 8, but SRB did not respond to this offer. In November Maritime wrote a letter advising CF that the premium due on July 26, 1984 remained unpaid and stating that "this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium". Finally, in February 1985 Maritime sent a notice of policy lapse to the respondents. The application for reinstatement appended to the notice required evidence of insurability. Since SRB closed its hotel business and picked up the corporate mail infrequently during the winter season, it did not become aware of the late payment offer, the November letter or the lapse notice until April 1985. It then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused. MF was by then terminally ill and uninsurable. He died in August. Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The trial judge dismissed the respondents' claim for benefits under the policy and

refused to grant them relief against forfeiture. A majority of the Court of Appeal allowed the respondents' appeal. The issues here are whether Maritime waived its right to compel timely payment in accordance with the terms of the policy, and, if there was no waiver, whether the respondents are entitled to relief against forfeiture under s. 10 of the *Judicature Act*.

Held: The appeal should be allowed.

The respondents are not entitled to any of the benefits under the policy. The demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy. The waiver was not still in effect, however, when SRB tendered payment of the missing premium in July 1985. Waiver can be retracted if reasonable notice is given to the party in whose favour it operates. A notice requirement should not be imposed, however, where there is no reliance on the waiver. Here, the respondents were not aware of Maritime's waiver until they received the November letter in April 1985 and therefore did not rely on it. The statement that "this policy has lapsed" contained in the February lapse notice accordingly took effect on its terms. In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. Even if a reasonable notice requirement were imposed, it would thus be adequately met by the respondents' failure to tender a replacement cheque until July 1985, three months later. Maritime had no obligation to accept the replacement cheque, and the policy

lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case.

Relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach. The reasonable conduct requirement is not met in this case. The respondents knew, at all relevant times, that MF was terminally ill and uninsurable, but they nonetheless chose to have their correspondence from Maritime sent to a post office mail box over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. As the respondents are barred by their conduct from recovering, it is not necessary to determine whether the court's general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act* or whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context.

Cases Cited

Referred to: *Holwell Securities Ltd. v. Hughes*, [1974] 1 All. E.R. 161; *W. J. Alan & Co. v. El Nasr Export and Import Co.*, [1972] 2 Q.B. 189; *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 584; *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259; *Marchischuk*

v. Dominion Industrial Supplies Ltd., [1991] 2 S.C.R. 61; *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231; *Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144; *Anguish v. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376, leave to appeal refused, [1988] 2 S.C.R. vii; *McGeachie v. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), aff'd (1893), 23 S.C.R. 148; *Northern Life Assurance Co. of Canada v. Reierson*, [1977] 1 S.C.R. 390, *Hartley v. Hymans*, [1920] 3 K.B. 475; *Charles Rickards Ltd. v Oppenhaim*, [1950] 1 K.B. 616; *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused, [1978] 2 S.C.R. vii; *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691; *Liscumb v. Provenzano* (1985), 51 O.R. (2d) 129 (H.C.J.), aff'd 55 O.R. (2d) 404 (C.A.); *Stenhouse v. General Casualty Insurance Co. of Paris*, [1934] 3 W.W.R. 564; *Swan Hills Emporium and Lumber Co. v. Royal General Insurance Co. of Canada* (1977), 2 A.R 63; *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company* (1908), 17 O.L.R. 462.

Statutes and Regulations Cited

Insurance Act, R.S.A 1980, c. I-5, ss. 201, 205, 211.

Judicature Act, R.S.A. 1980, c. J-1, s. 10.

Authors Cited

Snell, Edmund Henry Turner. *Snell's Equity*, 29th ed. London: Sweet & Maxwell, 1990.

Waddams, S. M. *The Law of Contracts*, 3rd ed. Toronto: Canada Law Book, 1993.

APPEAL from a judgment of the Alberta Court of Appeal (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶1-2895, reversing a decision of the Court of Queen's Bench dismissing the respondents' action against the appellant. Appeal allowed.

James D. McCartney and *Brian E. Leroy*, for the appellant.

James S. Peacock, for the respondents.

Solicitors for the appellant: MacKimmie Matthews, Calgary.

Solicitors for the respondents: Code Hunter, Calgary.

SUPREME COURT OF CANADA

THE MARITIME LIFE ASSURANCE COMPANY

- v. -

SASKATCHEWAN RIVER BUNGALOWS LTD.

- and -

CONNIE DOREEN FIKOWSKI

CORAM: La Forest and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

MAJOR J.:

I. Facts

On July 26, 1978, the appellant Maritime Life Assurance Company ("Maritime") issued an insurance policy on the life of Michael Fikowski Sr. to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Connie Fikowski, at which time she became the beneficiary. SRB retained the responsibility of paying the annual premiums under the policy.

The policy issued to the respondents was a term policy, renewable every five years. The policy expiry date was the insured's 70th birthday -- July 26, 2000. However, prior to July 26, 1988, the policy-holder had an option to convert the policy to a new life or endowment policy. The policy contained the following conditions relating to premium payment:

> 2. PREMIUM PAYMENT PROVISIONS
>
> (1) General
>
> The agreements made by the Company and contained in this contract are conditional upon payment of the premiums as they become due.
>
> Each premium is payable on or before its due date at the Head Office of the Company.
>
> (2) Grace Period
>
> After the first period has been paid, a grace period of thirty-one days following its due date is allowed for the payment of each subsequent premium. During the grace period, this policy continues in effect.
>
> (3) Non-payment of Premiums
>
> If any premium remains unpaid at the end of the grace period, this policy automatically lapses (terminates because of non-payment of premiums).
>
> Under certain conditions, this policy may be reinstated, as described below.
>
> (4) Reinstatement
>
> This policy may be reinstated within 3 years of the date of the lapse upon written application to the Company subject to the following conditions:
>
> a) evidence that satisfies the Company of the life insured's good health and insurability must be submitted; and

b) all unpaid premiums plus interest, at a rate to be determined by the Company, must be paid to the Company.

Over the years, SRB paid the annual policy premium irregularly. In 1979, the policy lapsed after SRB failed to pay the annual premium within the 31-day grace period. The policy was subsequently reinstated in accordance with the reinstatement provision (clause 2(4)) of the policy. In 1981, SRB again failed to make payment within the grace period. On this occasion, Maritime accepted late payment and did not require evidence of insurability or an application for reinstatement.

On July 24, 1984, SRB mailed a cheque for $1,316.00 to pay the annual premium due on July 26, 1984. On August 13, 1984, SRB received a premium due notice from Maritime, requesting payment of $1,361.00. It sent Maritime a cheque for $45.00 -- the difference between the July 24 cheque and the amount demanded in the payment due notice. This second cheque was received by Maritime on August 22, 1984. The first cheque, in the amount of $1,316.00, was never received by Maritime, nor was it deducted from SRB's bank account.

Subsequent to the expiry of the grace period on August 26, 1984, Maritime sent a late payment offer to SRB. In this offer, Maritime agreed to accept late payment of the July premium if it was "postmarked or, if not mailed,

received at the Head Office at Halifax, N.S." on or before September 8, 1984. The offer also contained an explicit reserve of Maritime's right to require evidence of insurability. SRB did not respond to the late payment offer.

On November 28, 1984, Maritime wrote a letter ("the November letter") advising the respondent Connie Fikowski that the premium due on July 26, 1984 remained unpaid. This letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

Finally, on February 2, 1985, Maritime sent a notice of policy lapse to the respondents. This notice was originally sent to an incorrect address in Vancouver, but was eventually forwarded to SRB. It read, in part:

> According to our records this policy has lapsed for non-payment of the premium due on the date shown. The policy is no longer in force and no benefits are payable. Because your insurance affords valuable protection and represents a worthwhile investment we invite you to apply for reinstatement of the policy.

The Application for Reinstatement appended to the lapse notice required evidence of insurability.

SRB closed its hotel business at Lake Louise, Alberta for the winter season around the middle of November, 1984. SRB picked up the corporate mail on an infrequent basis throughout the winter. As a result, SRB did not become aware of the late payment offer, the November letter or the lapse notice until April, 1985. They then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused.

On July 9, 1985, SRB's insurance agent informed Maritime that Michael Fikowski Sr. was terminally ill and uninsurable. On August 10, 1985, Michael Fikowski Sr. died. On October 11, 1985, Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The respondents then commenced the present action, claiming a right to benefits under the policy or, alternatively, relief against forfeiture.

II. Judgments Below

A. *Alberta Court of Queen's Bench*

Deyell J. rejected the plaintiffs' claim and refused to grant them relief against forfeiture. He made no specific finding as to whether a cheque was actually mailed to Maritime by SRB in July 1984, but emphasized that Maritime did not receive payment and advised SRB accordingly. Deyell J. reasoned that

the respondents had to "live with the results" of their decision to have their corporate mail sent to Lake Louise throughout the year. As well, he considered that SRB was obliged to do more than search for a cancelled cheque when they learned of the policy lapse in April of 1985. Deyell J. further ruled that Connie Fikowski was bound by SRB's actions.

B. *Alberta Court of Appeal*

A majority of the Alberta Court of Appeal allowed the respondents' appeal: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. ¶ 1-2895. The majority held that the postal acceptance rule did not apply, since an express term of the policy required that premiums be paid, not posted, by the due date: *Holwell Securities Ltd. v. Hughes*, [1974] 1 All. E.R. 161. However, both Harradence and Hetherington JJ.A. considered that, because it encouraged policy-holders to mail premium payments, Maritime was barred from demanding strict compliance with the time requirements for payment under the policy. Harradence J.A. cast this ruling in terms of estoppel, while Hetherington J.A. relied on waiver. Both agreed that, until the respondents were notified that the 1984 cheque had not been received and were given a reasonable period during which to effect payment, Maritime could not terminate the policy for non-payment.

Hetherington J.A. considered that none of Maritime's acts, including the late payment offer, the November letter and the lapse notice, gave the respondents reasonable notice that Maritime intended to rely on the lapsing provision of the policy. The February lapse notice was premature because it stated that "this policy has lapsed", without giving reasonable notice to the respondents. As such, Maritime's right to rely on the lapsing provision of the policy was never reinstated. She concluded that the policy was still in force in August 1985.

Harradence J.A found that the respondents could have made payment within a reasonable period after they received actual notice of the overdue premium in April 1985. However, the respondents failed to pay within this period. Their three-month delay in providing a replacement cheque was unreasonable, and the policy lapsed. However, Harradence J.A. concluded that it was an appropriate case to relieve against forfeiture under s. 10 of the *Judicature Act*, R.S.A. 1980, c. J-1.

In dissent, McClung J.A. stated that Maritime did not waive its right to rely on the lapsing provision of the policy by encouraging policy holders to use the mail. He found that while Maritime had waived its position in the November letter, the eventual payment of the missing premium in July 1985 did not comply with the request for "immediate payment" in the November letter. As a result, there was no waiver. In addition, he concluded that the Court had no jurisdiction

to relieve against forfeiture since the field was occupied by a statutory scheme (the *Insurance Act*, R.S.A. 1980, c. I-5).

III. Issues

This appeal raises two issues:

(1) Did Maritime waive its right to compel timely payment in accordance with the terms of the policy?

(2) If there was no waiver, are the respondents entitled to relief against forfeiture under the *Judicature Act*, R.S.A. 1980, c. J-1., s. 10?

IV. Analysis

A. *Waiver*

Maritime's position is that the policy issued to the respondents lapsed after the expiry of the grace period for payment of the 1984 premium. Fikowski Sr.'s death occurred when the policy was not in force and the respondents had no right to benefits under it.

The respondents' position is that Maritime, through its conduct, waived its right to compel timely payment under the policy. The respondents further

submit that none of Maritime's acts were sufficient to retract its waiver of time and that the policy was still in force at the time of death.

Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see e.g. *W. J. Alan & Co.* v. *El Nasr Export and Import Co.*, [1972] 2 Q.B. 189 (C.A.) and *Re Tudale Explorations Ltd. and Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S. M. Waddams, *The Law of Contracts* (3rd ed. 1993), at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.

Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. C.A.);*Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock*

Development Corp. (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that by encouraging policy-holders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the $45.00 partial payment, and in

accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

It is not necessary to address each of the factors identified by the respondents, for it seems clear that the November letter, taken alone, constituted a waiver of Maritime's right to receive timely payment under the policy. The November letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

As late as November 28, 1984, Maritime was willing to continue coverage under the policy upon payment of the July 1984 premium. The November letter makes no mention of evidence of insurability, nor does it speak of reinstatement. As such, it constitutes clear evidence of Maritime's intention to waive its right to compel timely payment. In this regard, little weight should be given to the assertion that the policy was "technically out of force", for the qualifier "technical" removes all meaning from the expression "out of force". In any event, this assertion does not detract from the clarity of Maritime's demand for payment.

The appellant submits that, whereas the right to compel timely payment is clearly waived where premium payments are received and deposited

by an insurance company after the expiry of the policy grace period (*Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144; *Anguish v. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376 (C.A.), leave to appeal refused [1988] 2 S.C.R. vii, a mere demand for payment beyond the grace period is insufficient. Support for that proposition is found in *McGeachie v. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), aff'd (1893), 23 S.C.R. 148, and in *Northern Life Assurance Co. of Canada v. Reierson*, [1977] 1 S.C.R. 390. In both cases, this Court concluded that a demand for payment was equivocal or insufficient to give rise to a waiver. However, in some circumstances a demand for payment may constitute waiver. The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

The demand for payment in the present appeal provides stronger evidence of waiver than did the demands in either *McGeachie* or *Reierson*. The demand for payment by the appellant in its November letter was made well beyond the expiry of the grace period. As well, payment in the present case was tendered prior to the occurrence of the event insured against. Any doubt about whether Maritime intended to waive the time requirements of the policy was resolved by the testimony of its legal advisor, who indicated that, having received the $45.00 partial payment, Maritime was <u>still</u> awaiting payment of the July 1984

premium in January 1985. It was for this reason that the lapse notice was not sent until February 2, 1985. In these circumstances, the demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy.

As the November letter constituted waiver, the question is then whether the waiver was still in effect when SRB tendered payment of the missing premium in July 1985.

Waiver can be retracted if reasonable notice is given to the party in whose favour it operates: *Hartley v. Hymans*, [1920] 3 K.B. 475; *Charles Rickards Ltd. v. Oppenhaim*, [1950] 1 K.B. 616; *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused [1978] 2 S.C.R. vii. As Waddams notes, the "reasonable notice" requirement has the effect of protecting reliance by the person in whose favour waiver operates: *The Law of Contracts, supra,* at paras. 604 and 606. It follows that a notice requirement should not be imposed where reliance is not an issue: *ibid.* at para. 606. In the present appeal, the respondents were not aware of Maritime's waiver until they received the November letter, along with the lapse notice and late payment offer, in April 1985. It follows that they did not rely on Maritime's waiver. In such circumstances, Maritime was not required to give any notice of its intention to

lapse the policy. The statement that "this policy has lapsed", contained in the February lapse notice, took effect on its terms.

In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. An informal communication of a party's intention to insist on strict compliance with the terms of a contract is sufficient notice: see e.g. *Guillaume v. Stirton, supra*. The respondents did not tender a replacement cheque until July 1985, three months after they became aware of Maritime's intentions. As such, even if a reasonable notice requirement were imposed, it would be adequately met by the respondents' failure to act between April and July.

Maritime's waiver, as contained in the November letter, was no longer in effect when the respondents sought to make payment in July 1985. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case. Therefore, the respondents are not entitled to any of the benefits under the policy.

B. *Relief against Forfeiture*

The second issue on appeal is the Court's equitable jurisdiction to relieve against forfeiture. The respondents submit that the general power to grant relief, contained in s. 10 of the *Judicature Act*, should be exercised in this case. The appellant contends that the *Judicature Act* does not apply since the field is occupied by a statutory scheme (the *Insurance Act*). It further submits that the respondents' loss was not a forfeiture and argues that, in any event, this is not an appropriate case for granting relief.

Section 10 of the *Judicature Act* reads:

> **10** Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.); *Snell's Equity* (29th ed. 1990), at pp. 541-42.

The Ontario High Court in *Liscumb v. Provenzano* (1985), 51 O.R. (2d) 129, aff'd 55 O.R. (2d) 404 (C.A.), relying on the *Shiloh* decision, summarized the governing principles as follows (at p. 137, *per* McKinlay J.):

> I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

The first element of the test set out in *Liscumb* -- the reasonable conduct requirement -- is not met in this case. The respondents knew, at all relevant times, that Fikowski Sr. was terminally ill and uninsurable. Nonetheless, they chose to have their correspondence from Maritime sent to Lake Louise over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. The trial judge, who was in a position to assess the respondents' conduct, concluded that it was not reasonable. He wrote:

> The corporation chose to have a mail box at the Post Office at Lake Louise to receive its corporate mail on a 12 month basis and having made that decision I think they must live with the results. If you only pick-up your mail every two weeks then you are going to be late in getting notices that may be of some importance. Ultimately when the advice that the policy had lapsed was received in late April or early May of 1985 Mr. Michael Fikowski and Mr. J. D. Thomas

> started a search for a cancelled cheque. Under the circumstances in this day and age of long distance telephones and all the communications that are available I think that they had an obligation to their company to take additional procedures in regard to this matter. They were advised that payment had not been made. There were procedures to have the policy reinstated. If they were going to do anything about it, it had to be done quickly. It wasn't until July 25th, if memory serves me correctly, met [*sic*] the replacement cheque was sent out, that is three months after they ultimately received the notice.
>
> I therefore find that the plaintiff's case fails and that they are not entitled to relieve against forfeiture.

As the failure to satisfy the first test in *Liscumb* determines the outcome of this appeal, it is unnecessary to comment on the second and third tests outlined in the case.

As the respondents are barred by their conduct from recovering, it is not necessary to determine whether our general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act*. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited (*Insurance Act*, ss. 201, 205, 211), does not preclude application of the *Judicature Act* to contracts of life insurance. The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.

Several of the authorities cited by the appellant involved forfeitures made under statutory insurance conditions, which is not the case here: *Stenhouse v. General Casualty Insurance Co. of Paris*, [1934] 3 W.W.R. 564 (Alta. S.C.A.D.); *Swan Hills Emporium and Lumber Co. v. Royal General Insurance Co. of Canada* (1977), 2 A.R. 63 (S.C.A.D.). The case of *Johnston v. Dominion of Canada Guarantee and Accident Insurance Co.* (1908), 17 O.L.R. 462 (C.A.) treated the insurance legislation at issue as a statutory code, and for this reason is no longer good law.

It is also unnecessary to determine whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context. Clearly, the holder of a term life policy has no vested right to benefits until the loss insured against -- death of the insured -- has occurred. However, a modern understanding of the doctrine of relief would likely expand the notion of forfeiture to include less tangible losses, such as the loss of an option to convert a term policy into one under which benefits would be certain, or the loss of one's insurability. This question remains open.

C. *Conclusion*

For the foregoing reasons, I would allow the appeal with costs, set aside the judgment of the Alberta Court of Appeal and restore the judgment at trial.

Tab 15

COURT FILE NO.: 68-CV-369244
DATE: 2009/06/24

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Motors Insurance Corporation	)	Lee Samis, for the Applicant/Respondent in Appeal
	)	
Applicant (Respondent in Appeal)	)	
	)	
- and -	)	
	)	
Old Republic Insurance Company	)	Mark K. Donaldson, for the Respondent/Appellant in Appeal
	)	
Respondent (Appellant in Appeal)	)	
	)	
	)	**HEARD:** June 11, 2009

Herman J.

[1] Old Republic Insurance Company appeals from the decision of Arbitrator M. Guy Jones, dated November 24, 2008.

[2] The arbitrator's decision arises out of a motor vehicle accident in which the vehicle that was insured by Old Republic hit the vehicle that was insured by Motors Insurance Corporation. The driver of the Motors' vehicle was seriously injured and Motors continues to pay accident benefits to him. Motors claims indemnification from Old Republic for its payments by way of a loss transfer claim.

[3] Old Republic submits that the arbitrator erred when he decided:

(i) Old Republic had waived its right to dispute its insured's fault for the accident and was estopped from disputing responsibility for Motors' loss transfer claim; and

(ii) Old Republic's insured bore 20% responsibility for the accident.

Background

[4] Motors' loss transfer claim arises from a motor vehicle accident that occurred on March 11, 2005.

[5] On that day, Robert Doiron was operating a tractor-trailer combination owned by the Pepsi Bottling Group and insured by Old Republic. Mr. Doiron was driving westbound on Highway 407.

[6] The Pepsi truck was struck twice by a UPS truck which had moved into its lane.

[7] The second impact caused Mr. Doiron to lose control. The Pepsi truck moved across westbound lanes, through the median and into the eastbound lanes of Highway 407. This resulted in a collision with a vehicle that was driven by Mr. Andrew Leroux and insured by Motors.

[8] As a result of the accident, Mr. Leroux sustained serious and devastating injuries. He applied to Motors to receive statutory accident benefits. Motors paid and continues to pay accident benefits to him.

[9] On June 22, 2005, Motors provided Old Republic with a Notification of Loss Transfer, indicating its intention to pursue indemnification pursuant to the loss transfer provisions. Sedgwick CMS handled the handled the claim on behalf of Old Republic.

[10] On June 29, 2005, Old Republic denied the loss transfer claim.

[11] On or about November 25, 2005, Motors forwarded to Old Republic a Request for Indemnification claiming a total amount of $45,323.50.

[12] By letter dated November 29, 2005, Sedgwick, on behalf of Old Republic, again denied the loss transfer claim.

[13] As a result of the denial, Motors served on Old Republic a Notice to Participate and Demand for Arbitration, dated December 14, 2005.

[14] On March 23, 2006, Motors sent a second Request for Indemnification to Old Republic.

[15] By letter dated April 19, 2006, Mr. Michaud, a claims examiner with Sedgwick, acknowledged that Pepsi would accept Motors' Loss Transfer Indemnity Request from November 29, 2005. He said that they would respond shortly to the second request.

[16] On June 1, 2006, Old Republic issued payment to Motors.

[17] By letter dated July 13, 2006, Louise Rivett, the operations manager at Sedwick, responded to the second Request for Indemnification. She said that Segdgwick would give no further consideration to Motor's request for payment under the loss transfer provision. She also requested reimbursement of the funds paid on June 1, 2006.

[18] Motors sent two additional Requests for Indemnification to Old Republic in September 2006 and October 2007. As of October 2007, Mr. Leroux had been deemed catastrophically impaired and Motors was continuing to pay accident benefits. Old Republic did not pay anything further.

[19] The parties agreed to the appointment of the arbitrator. The hearing was held on March 25, 2008 and the arbitrator issued his decision on November 24, 2008.

Issues

[20] The primary issue is whether the letter of April 19, 2006 constituted a waiver of Old Republic's right to dispute Motors' loss transfer claim. A secondary issue is the apportionment of fault for the accident as between the driver of the UPS truck and the driver of the Pepsi truck.

Standard of Review

[21] Section 275 (4) of the *Insurance Act*, R.S.O. 1990, c.I.8, provides that if insurers are unable to agree with respect to loss transfer indemnification, the dispute shall be resolved through arbitration. The agreement between the parties provides for full rights of appeal with respect to "all issues, law, and mixed fact and law".

[22] The parties agree that the arbitrator's decision involves mixed fact and law but disagree as to the appropriate standard of review that should be applied. Old Republic submits that the appropriate standard is correctness, while Motors submits that the appropriate standard is reasonableness.

[23] The Supreme Court of Canada reconsidered the standard of review that courts should apply to decisions of adjudicative tribunals in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9. The court determined that there were two standards of review: reasonableness and correctness.

[24] The court's task in each case is to determine which of these two standards to apply. The court is required to undertake a two-step analysis. The first step is to find out whether the jurisprudence has already determined the degree of deference to be given with regard to the particular category of question. If it has, that is the end of the analysis. If it has not, the court then has to examine various factors to help it identify the proper standard of review.

[25] The following factors support a conclusion that the court should give the decision maker deference and apply the reasonableness standard:

(i) the existence of a privative clause;

(ii) a discrete and special administrative regime in which the decision maker has special expertise; and

(iii) the nature of the question of law.

[26] The correctness standard will be applied if the question of law is of central importance to the legal system and outside the specialized area of expertise of the decision maker (*Dunsmuir v. New Brunswick* at para. 55).

[27] The Ontario Court of Appeal considered the standard of review applicable to an arbitrator under the *Insurance Act* in *Oxford Mutual Insurance Company v. Co-Operators General Insurance Company* (2006), 83 O.R. (3d) 591 (C.A.). The issue before the arbitrator was whether the relationship between the injured person and his mother made him principally dependent upon her for his care. The arbitrator's task was to apply the correct legal principles to the factual findings about the particular circumstances of the relationship. It was therefore a question of mixed fact and law and was closer to a factual determination. Lang J.A. concluded that, given the special expertise of arbitrators in evaluating facts for a determination of dependency for statutory accident benefits entitlement, unless the arbitrator's decision was unreasonable, it was entitled to deference.

[28] There are several decisions of this court, following the decision in *Oxford Mutual*, that consider the application of the standard of review to decisions of arbitrators under the *Insurance Act*. Brown J. conducted a useful review of these decisions in *Zurich Insurance Co. v. Personal Insurance Co.*, [2009] O.J. NO. 2157 (Sup. Ct.) at paras. 25-27, a case involving a priority dispute. He noted that, of the two cases that cited *Oxford Mutual*, the court in *Aviva Insurance Company of Canada v. Royal & SunAlliance Insurance Company*, [2008] O.J. No. 3240 (Sup. Ct.) concluded that the reasonableness standard applied to questions of mixed fact and law while the court in *Lombard Canada v. Royal & SunAlliance* concluded that correctness was the appropriate standard.

[29] After reviewing these various cases, Brown J. concluded at para. 29, that the applicable standard of review of decisions by arbitrators under the *Insurance Act* was that articulated in *Oxford Mutual*: correctness on questions of law; and reasonableness on questions of fact and questions of mixed fact and law.

[30] In my opinion, the issues in this case are ones within the special expertise of the arbitrator: loss transfer claims and apportionment of liability in motor vehicle accidents. I note that in *Aviva Insurance Company of Canada v. Royal & SunAlliance Insurance Company*, Mesbur J. referred to the special expertise of arbitrators in determining issues of loss transfer when she reached her conclusion that the arbitrator's decision should be afforded deference.

[31] I conclude that the appropriate standard of review in the case before me is one of reasonableness.

Waiver and Estoppel

The Arbitrator's Decision

[32] The arbitrator concluded that Old Republic had waived its right to dispute its insured's fault for the accident. He also concluded that Old Republic was estopped from disputing responsibility for Motors' loss transfer claim.

[33] His conclusion rested primarily on his consideration of three pieces of evidence: the letters from Sedgwick of April 19, 2006 and July 13, 2006, and the transcript of the examination under oath of Louise Rivett of Sedgwick.

[34] By letter dated April 19, 2006, Mr. Marcel Michaud, of Sedgwick, wrote Motors in response to Motors' request for indemnification. He stated that "we acknowledge that Pepsi Bottling Group will accept your Loss Transfer Indemnity Request from November 25, 2005". He also indicated that they were reviewing the indemnification request from March 23, 2006 and would be commenting upon it shortly.

[35] On June 1, 2006, Old Republic issued a cheque to Motors in payment of the first indemnity request.

[36] Sedgwick sent a second letter to Motors on July 13, 2006. This letter was from Ms. Rivett, Mr. Michaud's supervisor at Sedgwick. She stated that they had now completed their investigation into the motor vehicle accident. Since the accident was governed by the ordinary rules, they would give no further consideration to Motors' request for payments under the loss transfer provision. Ms. Rivet also indicated that the previous payment that had been made was "on an interim basis pending completion of our investigation". She requested repayment without delay.

[37] The third piece of evidence was the examination of Ms. Rivett. She explained that payment of the first request for indemnification was made because, upon receipt of the notice to participate in arbitration, there was further review and consideration, including receipt of a legal opinion. It was decided at that point "in order to avoid arbitration that they would agree to pay Motors the first subrogation request".

[38] The arbitrator also considered the broader context of loss transfer claims. They are part of a statutory scheme to allow for the relatively quick and efficient transfer of risk between insurers. There is a premium on speed and efficient resolution. The users are sophisticated. The arbitrator noted that, in such a system, it is desirable that parties' agreements be enforced, except in the most extreme circumstances.

[39] The arbitrator's interpretation of Old Republic's conduct was as follows:

> There is little doubt in my mind that Old Republic, after conducting an investigation of the facts and obtaining a legal opinion, had made a conscious decision to pay the loss transfer request and it did so for these reasons and the desire to avoid arbitration expenses.

[40] The arbitrator did not accept Old Republic's position that it had changed its mind because "we have now completed our investigation into the motor vehicle accident", as Ms. Rivett claimed in her letter. Rather, he concluded that, based on the evidence, Sedgwick had changed its mind because another person had reviewed the file, took a different view of the applicability of Rule 12 (4) (the rule that provides that, in certain circumstances, where a car is

over the centre line of the road at the time of the accident, the driver of that car is 100% at fault) and had obtained new counsel.

[41] The arbitrator concluded that the letter of April 16 constituted a clear and unequivocal agreement between the parties so as to constitute a waiver. Furthermore, this was a situation to which estoppel applied in that Motors had acted in reliance on Old Republic's actions.

[42] In the result, Old Republic was not entitled to repayment of the monies it had already paid and it was responsible for the ongoing payment of all reasonable loss transfer claims.

Analysis

[43] A determination of whether there was waiver and estoppel involves questions of mixed fact and law: an application of the law of waiver and estoppel to the facts in this case.

[44] The arbitrator stated that waiver does not require prejudice but does require expressed words and an unequivocal course of action. He applied the criteria in the cases of *Gill v. Zurich* (2002), 156 O.A.C. 390, 35 C.C.L.I. (3d) 239 (O.C.A.) and *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company*, [1994] 2 S.C.R. 490 (S.C.R.).

[45] In *Saskatchewan River Bungalows*, the Supreme Court stated at para. 20 that waiver will only be found "where the evidence demonstrates that the waiving party had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them".

[46] Given the sophistication of the parties, there can be no doubt that Old Republic had a full knowledge of its rights. What is in question is whether Old Republic had an unequivocal and conscious intention to abandon those rights.

[47] The arbitrator found that the April 2006 letter was written on the basis of an investigation of the facts and a desire to avoid arbitration expenses. Sedgwick had also obtained a legal opinion.

[48] The arbitrator did not accept Sedgwick's claim that its change of position, as reflected in the July 2006 letter, was due to it just having completed its investigation. Rather, Sedgwick changed its mind because someone new had looked at the file and they had obtained new legal counsel. While Ms. Rivet stated in the July 2006 letter that payment had been made to Old Republic on an interim basis, pending investigation, there was no such qualification in Mr. Michaud's April 2006 letter nor was there any qualification when the funds were paid.

[49] Old Republic relied on the decision in *Gan General Insurance Company v. State Farm Mutual Automobile Insurance Company*, [1999] O.J. No. 447. In that case, the vehicle insured by Gan hit several vehicles, one of which was insured by State Farm. State Farm paid out benefits and sought loss transfer against GAN. GAN paid State Farm approximately $11,000 for loss transfer claims. GAN later requested repayment from State Farm saying it had incorrectly applied the fault determination rules and did not owe the money. Pitt J. concluded that the money had been paid in error and should be repaid.

[50] Pitt J. cited *Moore (Township) v. Guarantee Co. of North America* (1991), 1 O.R. (3d) 370 (Gen. Div.) at 378, in which Eberle J. said that money paid because of a mistake of law or fact may be recovered subject to equitable defences, such as, where the payee has changed his position or where the payment was made in settlement of a claim.

[51] The arbitrator distinguished *Gan* from the facts before him because he concluded that Old Republic had made a conscious decision to pay, after an investigation and receiving a legal opinion, and in order to avoid arbitration expenses.

[52] In my opinion, the arbitrator applied the correct legal principles. He considered the broader context of loss transfer claims. His finding that Sedgwick did not make a payment by mistake, but rather, made a conscious decision to pay in order to avoid the costs of arbitration was reasonable given the evidence before him and is entitled to deference. So too, was his conclusion that Old Republic had therefore waived its right to dispute Motors' loss transfer claim. His conclusion was also, in my opinion, correct.

[53] The doctrines of waiver and promissory estoppel are closely related. Both doctrines rest on the principle that a party should not be allowed to go back on a choice where it would be unfair to the other party to do so (*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company* at para. 9). The added feature of estoppel is detrimental reliance.

[54] The arbitrator's treatment of the issue of estoppel was brief. He adopted the test for estoppel that was articulated by the Supreme Court of Canada in *Ryan v. Moore*, [2005] S.C.R. 53. However, it is not clear from his reasons how Motors relied on the April 2006 letter to its detriment. While Motors did not proceed with the arbitration at that time, Motors was aware of the change in position three months later and the arbitration did proceed.

[55] I contrast this situation to that in *Kingsway General Insurance Company v. The Personal Insurance Company* (August 2004, Arbitrator G. Jones), a decision of the same arbitrator. In that decision, the arbitrator outlined the ways in which Kingsway had relied on Personal's acceptance of the loss transfer dispute to its detriment. It had, in fact, relied on Personal's position for more than six years. As a result of the time that had passed, Personal was no longer able to conduct a thorough investigation. That situation is very different from the case at hand.

[56] I have some difficulty in concluding that the arbitrator's decision with respect to the application of estoppel is reasonable given the lack of evidence of detrimental reliance. I have, however, concluded that his decision with respect to waiver is both reasonable and correct.

Apportionment of Liability

Arbitrator's Decision

[57] The conclusion on waiver effectively ends the matter, in that the result is that Old Republic is responsible for all reasonable loss transfer claims. However, the arbitrator went on to consider other issues that the parties had raised.

[58] Of these issues, the one that Old Republic now challenges is the arbitrator's apportionment of liability.

[59] Applying the ordinary rules of law, the arbitrator concluded that the action of the UPS truck was the main contributing factor to the accident. The UPS truck struck the Pepsi truck, which caused it to go out of control, cross the median and hit the vehicle driven by Mr. Leroux.

[60] However, the arbitrator also found that the Pepsi truck driver had contributed to the accident. The driver of the Pepsi truck had originally thought that his truck had been struck on the opposite side of the truck than was actually struck. He was talking on his cell phone at the time of the first contact with the UPS truck.

[61] Based on the evidence, the arbitrator found that the UPS truck was 80% at fault for the accident and the Pepsi truck was 20 % at fault.

[62] There was no *vive voce* evidence at the hearing. The evidence before the arbitrator included: various documents (including the accident report); a transcript of the *Highway Traffic Act* trial of the driver of the UPS truck; a transcript of the examination for discovery of Mr. Doiron, the driver of the Pepsi truck; and a video of the accident;

Analysis

[63] Although there was no *vive voce* evidence, the arbitrator had ample evidence before him so as to be in a position to apportion liability.

[64] While the arbitrator concluded that the UPS truck driver was primarily at fault, he found that the Pepsi driver was 20% at fault. The arbitrator noted, in particular, that the Pepsi truck driver thought that his truck had been struck on the opposite side and that he was on his cell phone at the time. In the transcript of his discovery, the driver said that he was concerned about his daughter and had been talking to her to find out how she was. He also indicated that the first time he was aware that something was wrong was when he was hit.

[65] Given this evidence, the arbitrator's conclusion as to the apportionment of fault was a reasonable one to reach and should be accorded deference.

Conclusion

[66] For the reasons set out above, I have concluded that the arbitrator's decision that Old Republic has waived its right to dispute the loss transfer claim is both reasonable and correct. The appeal is therefore dismissed.

[67] I would urge the parties to try to resolve the matter of costs. If they are unable to do so, they may make brief written submissions (no more than three pages in length plus a bill of costs). Motors should provide their submissions within 14 days of the release of this decision. Old

Republic has a further 14 days within which to provide a response.

_____

Herman J.

Released: June 24, 2009

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DATE: [yyyymmdd]

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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REASONS FOR JUDGMENT

[Name] J.

Released: [Click & Type date]

Tab 16

DEC 23 1980

Vol 6 494

Supreme Court of Canada

Cour suprême du Canada

DEC 29 1980

8040337C

LOTHAR PETTKUS

v.

ROSA BECKER

CORAM:

The Right Honourable Bora Laskin, P.C., C.J.C.
The Hon. Mr. Justice Martland
The Hon. Mr. Justice Ritchie
The Hon. Mr. Justice Dickson
The Hon. Mr. Justice Beetz
The Hon. Mr. Justice Estey
The Hon. Mr. Justice McIntyre
The Hon. Mr. Justice Chouinard
The Hon. Mr. Justice Lamer

Appeal heard
June 23, 1980

Judgment pronounced
December 18, 1980

Reasons for judgment by

The Hon. Mr. Justice Dickson

Concurred in by

The Chief Justice
The Hon. Mr. Justice Estey
The Hon. Mr. Justice McIntyre
The Hon. Mr. Justice Chouinard
The Hon. Mr. Justice Lamer

Reasons concurring in result by

The Hon. Mr. Justice Martland

Concurred in by

The Hon. Mr. Justice Beetz

Reasons concurring in result by

The Hon. Mr. Justice Ritchie

Counsel at hearing:

For the appellant:

Mr. Barry B. Swadron, Q.C.
Miss Susan G. Himel

For the respondent:

Mr. Sidney N. Lederman
Mr. G.E. Langlois

LOTHAR PETTKUS

c.

ROSA BECKER

CORAM:

Le très honorable Bora Laskin, C.P., J.C.C.
L'honorable juge Martland
L'honorable juge Ritchie
L'honorable juge Dickson
L'honorable juge Beetz
L'honorable juge Estey
L'honorable juge McIntyre
L'honorable juge Chouinard
L'honorable juge Lamer

Appel entendu
le 23 juin 1980

Jugement prononcé
le 18 décembre 1980

Motifs de jugement par

L'honorable juge Dickson

Souscrivent à l'avis du juge Dickson

Le Juge en chef
L'honorable juge Estey
L'honorable juge McIntyre
L'honorable juge Chouinard
L'honorable juge Lamer

Motifs au même effet par

L'honorable juge Martland

Souscrit à l'avis du juge Martland

L'honorable juge Beetz

Motifs au même effet par

L'honorable juge Ritchie

Avocats à l'audience:

Pour l'appelante:

Me Barry B. Swadron, c.r.
Me Susan G. Himel

Pour l'intimée:

Me Sidney N. Lederman
Me G.E. Langlois

SUPREME COURT OF CANADA

LOTHAR PETTKUS

v.

ROSA BECKER

CORAM: The Chief Justice and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

DICKSON J:

The appellant, Lothar Pettkus, through toil and thrift, developed over the years a successful beekeeping business. He now owns two rural Ontario properties, where the business is conducted, and he has the proceeds from the sale, in 1974, of a third property, located in the Province of Quebec. It is not to his efforts alone, however, that success can be attributed. The respondent, Rosa Becker, through her labour and earnings, contributed substantially to the good fortune of the common enterprise. She lived with Mr. Pettkus from 1955 to 1974, save for a separation in 1972. They were never married. When the relationship sundered in late 1974, Miss Becker commenced this action, in which she sought a declaration of entitlement to a one-half interest in the lands and a share in the beekeeping business.

I

The Facts

Mr. Pettkus and Miss Becker came to Canada from central Europe, separately, as immigrants, in 1954. He had $17.00 upon arrival. They met in Montreal in 1955. Shortly thereafter, Mr. Pettkus moved in with Miss Becker, on her invitation. She

was thirty years old and he was twenty-five. He was earning $75.00 per week; she was earning $25.00 to $28.00 per week, later increased to $67.00 per week.

A short time after they began living together, Miss Becker expressed the desire that they be married. Mr. Pettkus replied that he might consider marriage after they knew each other better. Thereafter, the question of marriage was not raised, though within a few years Mr. Pettkus began to introduce Miss Becker as his wife and to claim her as such for income tax purposes.

From 1955 to 1960 both parties worked for others. Mr. Pettkus supplemented his income by repairing and restoring motor vehicles. Throughout the period Miss Becker paid the rent. She bought the food and clothing and looked after other living expenses. This enabled Mr. Pettkus to save his entire income, which he regularly deposited in a bank account in his name. There was no agreement at any time to share either monies or property placed in his name. The parties lived frugally. Due to their husbandry and parsimonious lifestyle, $12,000 had been saved by 1960 and deposited in Mr. Pettkus' bank account.

The two travelled to Western Canada in June 1960. Expenses were shared. One of the reasons for the trip was to locate a suitable farm at which to start a beekeeping business. They spent some time working at a beekeeper's farm.

They returned to Montreal, however, in the early autumn of 1960. Miss Becker continued to pay the apartment rent out of her income until October 1960. From then until May 1961, Mr. Pettkus paid rent and household expenses, Miss Becker being jobless. In April 1961, she fell sick and required hospitalization.

In April 1961, they decided to buy a farm at Franklin Centre, Quebec, for $5,000. The purchase money came out of the bank account of Mr. Pettkus. Title was taken in his name. The floor and roof of the farmhouse were in need of repair. Miss Becker used her money to purchase flooring materials and she assisted in laying the floor and installing a bathroom.

For about six months during 1961 Miss Becker received unemployment insurance cheques, the proceeds of which were used to defray household expenses. Through two successive winters she lived in Montreal and earned approximately $100 per month as a babysitter. These earnings also went toward household expenses.

After purchasing the farm at Franklin Centre the parties established a beekeeping business. Both worked in the business, making frames for the hives, moving the bees to the orchards of neighbouring farmers in the spring, checking the hives during the summer, bringing in the frames for honey extraction during July and August, and the bees for winter storage in autumn. Receipts from sales of honey were handled by Mr. Pettkus; payments for purchases of bee hives and equipment were made from his bank account.

The physical participation by Miss Becker in the bee operation continued over a period of about fourteen years. She ran the extracting process. She also, for a time, raised a few chickens, pheasants and geese. In 1968, and later, the parties hired others to assist in moving the bees and bringing in the honey. Most of the honey was sold to wholesalers, though Miss Becker sold some from door to door.

In August 1971, with a view to expanding the business a vacant property was purchased in East Hawkesbury, Ontario at

a price of $1,300. The purchase monies were derived from the Franklin Centre honey operation. Funds to complete the purchase were withdrawn from the bank account of Mr. Pettkus. Title to the newly acquired property was taken in his name.

In 1973 a further property was purchased, in West Hawkesbury, Ontario, in the name of Mr. Pettkus. The price was $5,500. The purchase monies came from the Franklin Centre operation, together with a $1,900 contribution made by Miss Becker, to which I will again later refer. 1973 was a prosperous year, yielding some 65,000 pounds of honey, producing net revenue in excess of $30,000.

In the early 1970's the relationship between the parties began to deteriorate. In 1972 Miss Becker left Mr. Pettkus, allegedly because of mistreatment. She was away for three months. At her departure, Mr. Pettkus threw $3,000 on the floor. He told her to take the money, a 1966 Volkswagon, forty bee hives containing bees, and "get lost". The bee hives represented less than ten percent of the total number of hives then in the business.

Soon thereafter, Mr. Pettkus asked Miss Becker to return. In January, 1973, she agreed, on condition he see a marriage counselor, make a will in her favor and provide her with $500 per year so long as she stayed with him. It was also agreed that Mr. Pettkus would establish a joint bank account for household expenses, in which receipts from retail sales of honey would be deposited. Miss Becker returned; she brought back the car and $1,900 remaining out of the $3,000 she had earlier received. The $1,900 was deposited in Mr. Pettkus' account. She also brought the forty bee hives but the bees had died in the interim.

In February 1974 the parties moved into a house on the West Hawkesbury property, built in part by them and in part by contractors. The money needed for construction came from the honey business, with minimal purchases of materials by Miss Becker.

The relationship continued to deteriorate and on October 4, 1974 Miss Becker again left, this time permanently, after an incident in which she alleged that she had been beaten and otherwise abused. She took the car and approximately $2,600 in cash, from honey sales. Shortly thereafter the present action was launched.

At trial, Miss Becker was awarded forty bee hives, without bees, together with $1,500, representing earnings from those hives for 1973 and 1974.

The Ontario Court of Appeal varied the judgment at trial by awarding Miss Becker a one-half interest in the lands owned by Mr. Pettkus and in the beekeeping business.

II

Resulting Trust

This appeal affords the Court an opportunity to clarify the equivocal state in which the law of matrimonial property was left, following *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

Broadly speaking, it may be said that the principles which have guided development of recent Canadian case law are to be found in two decisions of the House of Lords: *Pettit v. Pettit*, [1970] A.C. 777 and *Gissing v. Gissing*, [1971] A.C. 886. In neither judgment does a majority opinion emerge. Though it is not necessary to embark upon a detailed analysis of the two cases, the legacy of *Pettit* and *Gissing* should be

noted. First, the decisions upheld the judicial quest for that fugitive common intention which must be proved in order to establish beneficial entitlement to matrimonial property. Second, the Law Lords did not feel free to ascribe or impute an intention to the parties, not supported by evidence, in order to achieve "equity" in the division of assets of partners to a marriage. Third, in *Gissing* four of the Law Lords spoke of "implied, constructive or resulting trust" without distinction.

A majority of the Court in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 adopted the "common intention" concept of Lord Diplock in *Gissing*:

> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other. (p. 438)

In *Murdoch*, it was held that there was no evidence of common intention. In *Rathwell, supra* common intention was held to exist. Although the notion of common intention was endorsed in *Murdoch* and in *Rathwell*, many difficulties, chronicled in the cases and in the legal literature on the subject, inhered in the application of the doctrine in matrimonial property disputes. The sought-for "common intention" is rarely, if ever, express; the courts must glean 'phantom intent' from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisition of property.

Failing evidence of direct contribution by a spouse, there may be evidence of indirect benefits conferred: where, for example, one partner pays for the necessaries while the other retires the mortgage loan over a period of years, *Fibrance v. Fibrance*, [1957] 1 All E.R. 357.

The artificiality of the common intention approach has been stressed. Professor Donovan Waters in a comment in (1975) 53 Can. B. Rev. 366 stated:

> ... In other words, this "discovery" of an implied common intention prior to the acquisition is in many cases a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset. It is in fact a constructive trust approach masquerading as a resulting trust approach. (p. 368)

Professor Waters also observed, in a discussion of the resulting trust and constructive trust doctrines:

> After all, in few cases will the inferring of an agreement be impossible or unreasonable, and, where it is so, justice and equity may well come to the same conclusion as that produced by the law of resulting trusts. But too often the resulting trust theory produces a result at odds with what would seem the more desirable outcome, or there is a fight through the appeal courts, and then what may well be difference of judicial opinion on the factual merits becomes a difference on the subtleties of the law of trusts. (p. 377)

In *Murdoch v. Murdoch*, Laskin J., as he was then, introduced in a matrimonial property dispute the concept of constructive trust to prevent unjust enrichment. It is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement. It was described this way in *Rathwell*, at p. 455:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by

> the court in order to achieve a result consonant with good conscience. As a matter of of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment.

Although the resulting trust approach will often afford a wife the relief she seeks, the resulting trust is not available, as Professor Waters points out, (p. 374): "where the imputation of intention is impossible or unreasonable". One cannot imply an intention that the wife should have an interest if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the alleged agreement "altogether tenuous". Where evidence is inconsistent with resulting trust, the court has the choice of denying a remedy or accepting the constructive trust.

Turning then to the present case and common intention, the evidence is clear that Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. She conceded there was no specific arrangement with respect to the use of her money. She said "No, we just saved together. It was meant to be together, it was ours". The arrangement "was without saying anything ... there was nothing talked over ..." She testified she was not interested in the amount Mr. Pettkus had in the bank. In response to the question "but he never told that what he was saving was yours?" she replied: "I never asked".

It is apparent Mr. Pettkus took a negative view of Miss Becker's entitlement. His testimony makes it clear that he never regarded her as his wife. The finances of each were completely separate, except for the joint account opened

for the retail sales of honey. Mr. Pettkus was asked in cross-examination: "you both saved together?", and replied: "I saved, she didn't". Uncommitted to marriage or to a permanent relationship it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. Miss Becker said they were to "save together" but the truth is that Mr. Pettkus saved at the expense of Miss Becker.

With respect to the period from 1955 until the spring of 1961, the trial judge found:

> Now the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.
>
> Moreover, the evidence does not clearly show that from 1955 to May, 1961, the Plaintiff contributed more than the Defendant to the overall expenses of the household, so that I find that the $12,000 accumulated by the Defendant was due to his superior salary, his frugal living and his off job gains from repairs. It is to be noted that the Plaintiff made also some savings. (emphasis added).

Whatever the passage may lack in point of gallantry, the words underlined represent findings of fact by the trial judge, negating common intention.

As to the contribution by Miss Becker to the beekeeping business, the trial judge found:

> As the honey business is a seasonal one, the Defendant continued his side line, repairs of German cars but both businesses were not enough sometimes to keep the household solvent so that the Plaintiff had to work outside a few times. I also find that during that period the Plaintiff helped the Defendant to a certain degree in the operation of the honey business, especially during the extracting period but such help was seasonal and marginal as the Defendant employed outside help in the peak periods.

The trial judge dealt with Miss Becker's claim to a part interest in the Ontario properties, for the 1971 to 1974 period, in the following manner:

> The plaintiff alleges that those sums came from the Franklin Centre honey operation and claims a part interest in those Ontario properties and on account of her active participation in the honey business. Once again, it would never have occurred to the Plaintiff to make such a claim explicitly at the time because such a trust wasn't in the contemplation of either party, even implicitly. (emphasis added)

Again there is a rejection of the notion of implied intention and resulting trust. At trial, Mr. Pettkus testified:

> Q. All right. Now did you ever have any discussions with her as to whether or not she had an interest in either your garage business of your bee business?
>
> A. It was all mine. She had no interest in the business, no.
>
> Q. Did she ever suggest that she did?
>
> A. No.

With regard to the arrangement under which Miss Becker was to receive $500 per year, Mr. Pettkus testified:

> A. Well, I knew the whole business is in my name and she had nothing so I figures it's only fair to give her a little bit of money and I figured the five hundred dollars, pay for all the expenses and she would have five hundred dollars every year as long as she stayed with me and if there's a good crop if there's no crop well of course I can't pay.

In the view of the Ontario Court of Appeal, speaking through Madam Justice Wilson, the trial judge vastly underrated the contribution made by Miss Becker over the years. She had made possible the acquisition of the Franklin Centre property and she had worked side by side with him for fourteen years building up the beekeeping operation.

The trial judge held there was no common intention, either express or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding.

I am not prepared to infer, or presume, common intention when the trial judge has made an explicit finding to the contrary and the appellate court has not disturbed the finding. Accordingly, I am of the view that Miss Becker's claim grounded upon resulting trust must fail. If she is to succeed at all, constructive trust emerges as the sole juridical foundation for her claim.

III

Constructive Trust

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* (1760), 2 Burr. 1005, put the matter in these words: "... the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. (See A.W. Scott, "Constructive Trusts", (1955), 71 L.Q.R. 39; Leonard Pollock, "Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell", (1978) 16 Alberta Law Review 357). The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury. See *Babrociak v. Babrociak* (1978), 1 R. of Fam. L. (2d) 95 (Ont. C.A.); *Re Spears and Levy et al* (1975) 52 D.L.R. (3d) 146 (N.S.C.A.);

Douglas v. Guaranty Trust Company of Canada (1978), 8 R. of Fam. L. (2d) 98 (Ont. H.C.); *Armstrong v. Armstrong* (1978), 93 D.L.R. (3d) 128 (Ont. H.C.).

How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy in the case of *Ruabon S.S. Co. Ltd. v. London Assurance*, [1900] A.C. 6 with these words: "... I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." (p. 10) Lord Macnaughten, in the same case, put it this way: "There is no principle of law that a person should contribute to an outlay merely because he has derived a benefit from it". (p. 15) It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be "unjust" in the circumstances of the case.

Miss Becker supported Mr. Pettkus for 5 years. She then worked on the farm for about 14 years. The compelling inference from the facts is that she believed she had some

interest in the farm and that that expectation was reasonable in the circumstances. Mr. Pettkus would seem to have recognized in Miss Becker some property interest, through the payment to her of compensation, however modest. There is no evidence to indicate that he ever informed her that all her work performed over the 19 years was being performed on a gratuitous basis. He freely accepted the benefits conferred upon him through her financial support and her labour.

On these facts, the first two requirements laid down in *Rathwell* have clearly been satisfied: Mr. Pettkus has had the benefit of 19 years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

I conclude, consonant with the judgment of the Court of Appeal, that this is a case for the application of constructive trust. As Madam Justice Wilson noted, "the parties lived together as husband and wife, although unmarried for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre during the lean years, but worked side by side with him for fourteen years building up the beekeeping operation which was their main source of livelihood."

Madam Justice Wilson had no difficulty in finding that a constructive trust arose in favour of the respondent by virtue of "joint effort" and "teamwork", as a result of which Mr. Pettkus was able to acquire the Franklin Centre pro-

perty, and subsequently the East Hawkesbury and West Hawkesbury properties. The Ontario Court of Appeal imposed the constructive trust in the interests of justice and, with respect, I would do the same.

IV

The "Common Law" Relationship

One question which must be addressed is whether a constructive trust can be established having regard to what is frequently, and euphemistically, referred to as a "common law" relationship. The purpose of constructive trust is to redress situations which would otherwise denote unjust enrichment. In principle, there is no reason not to apply the doctrine to common law relationships. It is worth noting that counsel for Mr. Pettkus, and I think correctly, did not, in this Court, raise the common law relationship in defence of the claim of Miss Becker, otherwise than by reference to the *Family Law Reform Act*, S.O. 1978, c.2.

Courts in other jurisdictions have not regarded the absence of a marital bond as any problem. See *Cooke v. Head*, [1972] 2 All E.R. 38; *Eves v. Eves*, [1975] 3 All E.R. 768; *Spears v. Levy, supra;* and in the United States, *Marvin v. Marvin* (1976) 557 P 2nd 106 and a comment thereon (1977) 90 Harv. L.R. 1708. In *Marvin* the Supreme Court of California stated that constructive trust was available to give effect to the reasonable expectations of the parties, and to the notion that unmarried co-habitants intend to deal fairly with each other.

I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy

period. This was not an economic partnership nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost twenty years. Their lives and their economic well-being were fully integrated. The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.

In recent years, there has been much statutory reform in the area of family law and matrimonial property. Counsel for Mr. Pettkus correctly points out that the *Family Law Reform Act* of Ontario, enacted after the present litigation was initiated, does not extend the presumption of equal sharing, which now applies between married persons, to common law spouses. The argument is made that the courts should not develop equitable remedies that are 'contrary to current legislative intent'. The rejoinder is that legislation was unnecessary to cover these facts, for a remedy was always available in equity for property division between unmarried individuals contributing to the acquisition of assets. The effect of the legislation is to divide 'family assets' equally, regardless of contribution, as a matter of course. The Court is not here creating a presumption of equal shares. There is a great difference between directing that there be equal shares for common law spouses, and awarding Miss Becker a share equivalent to the money or money's worth she contributed over some nineteen years. The fact there is no statutory regime directing equal division of assets acquired by common law spouses is no bar to the availability of an equitable remedy in the present circumstances.

V

Settlement or Estoppel

Another question argued is whether acceptance by

Miss Becker of $3,000, forty bee hives and a car, upon temporary separation, and the imposition of terms on her return, estopped further claim. The trial judge answered this question in the affirmative. With respect, I think that he was wrong in so holding. A person is not estopped by accepting a sum of money, the amount of which is not negotiated, thrown at one's feet. There was no agreement by Miss Becker as to her interest in what I would regard as joint assets, nor can the conditions exacted by Miss Becker upon resumption of co-habitation be any bar to her claim. The filing by Mrs. Rathwell in *Rathwell, supra,* of a caveat claiming a one-tenth interest was held to be no basis for rejecting her claim to share equally in assets accumulated by her and her husband.

VI

Causal Connection

The matter of "causal connection" was also raised in defence of Miss Becker's claim, but does not present any great difficulty. There is a clear link between the contribution and the disputed assets. The contribution of Miss Becker was such as enabled, or assisted in enabling, Mr. Pettkus to acquire the assets in contention. For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute. Miss Becker indirectly contributed to the acquisition of the Franklin Centre farm by making possible an accelerated rate of saving by Mr. Pettkus. The question is really an issue of fact: was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the Franklin Centre property and to an interest in the Hawkesbury properties, and the beekeeping business? The

Ontario Court of Appeal answered this question in the affirmative, and I would agree.

VII

Respective Proportions

Although equity is said to favour equality, as stated in *Rathwell* it is not every contribution which will entitle a spouse to a one-half interest in the property. The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.

It could be argued that Mr. Pettkus contributed somewhat more to the material fortunes of the joint enterprise than Miss Becker but it must be recognized that each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort. Physically, Miss Becker pulled her fair share of the load; weighing only 87 pounds, she assisted in moving hives weighing 80 pounds. Any difference in quality or quantum of contribution was small. The Ontario Court of Appeal in its discretion favoured an even division and I would not alter that disposition, other than to note that in any accounting regard should be had to the $2,600, and the car, which Miss Becker received on separation in 1974.

VIII

I would not wish to conclude without reference to the conflict of laws question lurking in the background in this case. The evidence discloses that the parties were domiciled in the Province of Quebec from 1955 until at least August 1971, when vacant property was purchased in East Hawkesbury, Ontario. It is arguable that the laws of the Province of Quebec, and

not those of Ontario, should govern the rights of the parties. This point was not pleaded, nor was it addressed by court or counsel in any of the earlier proceedings. It was not alluded to during argument in this Court.

The position in law would seem to me to be as stated by Professor Jean Castel, in "Droit international privé québécois" (Butterworths 1980, pp. 803-804). Although, before an inferior court, the law of another province in Canada has to be proven in the same manner as the law of a foreign country, that rule does not have application in an appeal to this Court. This Court follows the rule drawn by the House of Lords in the case of *Cooper v. Cooper* (1888), 13 A.C. 88 (H.L.) and takes judicial notice of the statutory or other laws prevailing in every province and territory in Canada even in cases where such statutes or laws may not have been proved in evidence in the courts below. This Court however, does not take judicial notice of the law of another province unless that law has been pleaded in the first instance. As Cannon J. held in *Canadian National Steamship Co. Ltd. v. Watson,* [1939] S.C.R. 11 at p. 18 it would be unfair for this Court to take, *suo motu,* judicial notice of the statutory laws of another province, ignored in the pleadings.

I would dismiss the appeal with costs to the respondent.

IN THE SUPREME COURT OF CANADA

LOTHAR PETTKUS

- v -

ROSA BECKER

CORAM: The Chief Justice and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

MARTLAND J.:

I am in agreement with the reasons of Mr. Justice Ritchie. I would like to outline my reasons for my concurrence with his opinion as to the application of the theory of a constructive trust in the circumstances of this case.

This is the third case to come before this Court in which a claim has been made for the recognition of an interest in what is claimed to be "family property". In the first two cases, the claim was made by a wife as against her husband. In the present case the claimant is not the wife of the defendant.

In *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 the wife claimed a partnership interest in three quarter sections of land and in all the other assets of her husband. The trial judge held that the parties were not partners and also held that no relationship existed which would give the plaintiff the right to claim as a joint owner in equity any of the farm

assets. Before this Court, the wife's claim was placed, not on the basis of partnership, but on the existence of a resulting trust. In rejecting the wife's claim, the majority of the Court referred to the two leading English authorities, *Pettitt v. Pettitt*, [1970] A.C. 777 and *Gissing v. Gissing*, [1971] A.C. 886, and also pointed out that in those cases the wife's claim related only to the matrimonial home. The following passages were cited with approval from the judgment of Lord Diplock in the latter case at pp. 905 and 909:

> A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.
>
> . . .
>
> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arises in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.

The conclusion reached was that in the light of the evidence in the case and the findings of the trial judge it could not be said that there was any intention that the beneficial interest in the property in issue did not belong solely to the husband.

The majority of the Court did not adopt the opinion expressed in the dissenting judgment that the court could find a constructive trust, not dependent upon evidence of intention.

In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, this Court was again concerned with a claim by a wife to a beneficial interest in land, the legal ownership of which was in the husband and such interest was found, on the evidence, to exist. Three members of the Court were of the view that the claim could be supported on the basis of either a resulting trust, founded upon common intention, or a constructive trust, founded upon unjust enrichment. Two members of the Court decided that a resulting trust had been established and that a decision as to the application of the principles of unjust enrichment and constructive trust was unnecessary. Four members of the Court rejected the application, in cases of this kind, of the doctrine of a constructive trust as a means of preventing unjust enrichment. The reasons for so deciding are to be found at pages 471 to 474 of the report, and it is unnecessary to repeat them here.

As pointed out earlier, the present case is not concerned with the rights of a wife and so is not concerned with matrimonial property. Any recognition by this Court of the right of a court to impose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment has very wide implications and involves judicial legislation in that it extends substantially the existing law.

The scope of the doctrine of unjust enrichment in English law is somewhat nebulous. The broad statement of Lord Mansfield in the case of *Moses v. Macferlan* (1760), 2 Burr 1005 was made in relation to an action for money had and received to the plaintiff's use. It was in this context that he said: "The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by

ties of natural justice and equity to refund the money".

Later decisions did not support the generality of this statement but held that the action for money had and received had to be placed on a contractual basis founded upon an implied promise to pay. Scrutton L.J. in *Holt v. Markham,* [1923] 1 K.B. 504 at 513, referred to the "now discarded doctrine of Lord Mansfield". Lord Greene in *Maryon v. Ashcroft,* [1938] 1 K.B. 49 at 62, said that: "Lord Mansfield's view upon those matters, attractive though they be, cannot now be accepted as laying the true foundation for the claim".

Although Lord Wright in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ld.,* [1943] A.C. 32 at 62 expressed sympathy with Lord Mansfield's view, it may be noted that some years later in *Reading v. Attorney-General,* [1951] A.C. 507 at pp. 513-14, Lord Porter said:

> ... It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognized by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

In the *Pettitt (supra)* case, at p. 795, Lord Reid dealt with the theory of unjust enrichment as follows:

> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another. And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved.

He did not suggest that in that case recognition of the beneficial interest could be effected by means of a constructive trust.

It would appear that in English law the existence of an unjust enrichment has been recognized in claims for the return of money, which was the case in *Moses v. Macferlan (supra)* in which Lord Mansfield's statement was made.

I turn now to the nature of a constructive trust as so far recognized. The areas in which a constructive trust has been found to exist have usually been in cases where a fiduciary relationship exists, *e.g.* a trustee or fiduciary taking advantage of his position to make a profit for himself. Such a trust has also been found to exist where a person having knowledge of an existing trust acquires the legal title to the trust property. In relation to the matter of unjust enrichment, the following passage appears in Snell's *Principles of Equity*, 27th ed., at p. 186:

> In some jurisdictions the constructive trust has come to be treated as a remedy for many cases of unjust enrichment; whenever the court considers that the property in question ought to be restored, it simply imposes a constructive trust on the recipient. In England, however, the constructive trust has in general remained essentially a substantive institution; ownership must not be confused with obligation, nor must the relationship of debtor and creditor be converted into one of trustee and *cestui que trust*. Yet the attitude of the courts may be changing; and although the constructive trust is probably not confined to cases arising out of a fiduciary relationship, it is far from clear what other circumstances suffice to raise it or how far it can be employed as a species of equitable remedy to enforce legal rights.

The authority for the statement "the attitude of the courts may be changing" is given in the case of *Hussey v. Palmer*, [1972] 1 W.L.R. 1286. In that case, the plaintiff went to live with her daughter and son-in-law and paid the cost of adding an extra bedroom to their house. The arrangement did not work and the plaintiff left. She sued to recover

the money she had expended. In the Court of Appeal, Lord Denning found there was a constructive trust. Phillimore L.J. regarded the matter as a resulting trust and Cairns L.J. dissented.

The validity of the judgment is questionable as indicated in the discussion of it in (1973) 89 L.Q.R. 2. Lord Denning, at p. 1290, referred to a constructive trust as a "trust imposed by law whenever justice and good conscience require it". Commenting on this generalization, the note in the *Law Quarterly Review* says, at p. 4:

> These large generalisations will be more familiar to American than English lawyers. This applies especially to the notion that resulting and constructive trusts run together and the amalgam is an equitable remedy: see *e.g.* A.W. Scott (1955) 71 L.Q.R. 39. Indeed, even those writers who have some sympathy with the notion do not suggest that it is already part of English law: see Hanbury's *Modern Equity* (9th ed. 1969) pp. 222, 223; Goff & Jones, *Restitution* (1966) p. 37.

In my opinion, the adoption of this concept involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe judges with a very wide power to apply what has been described as "palm tree justice" without the benefit of any guide-lines. By what test is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.

As stated in the reasons of my brother Ritchie, the determination of this appeal in the respondent's favour can be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

IN THE SUPREME COURT OF CANADA

LOTHAR PETTKUS

v.

ROSA BECKER

Coram: The Chief Justice and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

RITCHIE J.:

I have had the benefit of reading the reasons for judgment prepared for delivery by my brother Dickson which contain an accurate account of the facts giving rise to this appeal.

I agree with the conclusion reached by Mr. Justice Dickson, but as my reasons for doing so are substantially different from those adopted by him, I find it necessary to express myself separately.

The difference between us stems from the fact that I find that the advances made by the plaintiff throughout the period of the relationship between the parties to be such as to support the existence of a resulting trust which is governed by the legal principles adopted by the majority of this Court in Murdoch v. Murdoch, [1975] 1 S.C.R. 423 and Rathwell v. Rathwell, [1978] 2 S.C.R. 436, whereas Mr. Justice Dickson, in applying the reasoning contained in the dissenting opinions in those cases to the evidence as he interpreted it, concluded that the circumstances disclosed the existence of a constructive trust arising out of and dependant upon the applicability of the doctrine of "unjust enrichment".

The leading cases of Pettitt v. Pettitt, [1970] A.C. 777 and Gissing v. Gissing, [1971] A.C. 886, afford a comprehensive though not entirely consistent review of the law respecting the disposition to be made of matrimonial property in the event of a marital break-up and it is made plain from the judgment of Lord Denning in Cooke v. Head, [1972] 2 All E.R. 38 at p.40 that the same considerations apply in the case of a man and his mistress who had been living in what is now frequently referred to as a "common law" relationship.

I should make it plain at the outset that in my opinion contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household give rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. This opinion appears to me to be borne out in the following passage taken from the reasons for judgment of Lord Pearson in Gissing v. Gissing, at p.902 where he said:

> If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour. If she did make constributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury.

The same proposition is elaborated in the reasons for judgment of Lord Reid, speaking for himself, in the case of Pettitt v. Pettitt, supra where he said at p.795:

> But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a

> similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so, he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse who owns the property is absent and without his knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.
>
> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another.

It will be seen that in the case of Gissing v. Gissing, supra, four of the law Lords spoke of "implied constructive or resulting trusts" without any apparent distinction and this is to be found in other English authorities, but it is nevertheless noteworthy that when there is a conjugal relationship between the parties the presumption of a resulting trust arises for the benefit of the donor wherever there is evidence of a contribution of money or money's worth having been made by one spouse towards the acquisition of property by the other, and this presumption persists until the relationship is dissolved unless it is rebutted by "evidence showing some other intention".

It is contended on behalf of the appellant that the five-year difference in age between the parties constituted evidence justifying the learned trial judge in making the following finding:

> Now, the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.

With the greatest respect for those who take a different view, I cannot but find that this gratuitously insulting conclusion is based upon the trial judge's opinion that, whatever her motives may have been, the respondent's intention in making the contributions was to benefit the appellant and it is clear that they were acquiesced in and indeed freely accepted by him to be applied for and towards the maintenance and operation of a joint household. Accordingly, the last quoted comments of the trial judge in my view support the existence of a common intention giving rise to a presumption of a resulting trust and nothing said by him in this paragraph can be considered as evidence rebutting the presumption to which the contributions made by the respondent give rise.

In the latter part of his reasons for judgment the learned trial judge made a further finding to the effect that a trust entitling the respondent to a part interest in the Ontario farm properties "was not in the contemplation of either party even implicitly".

My brother Dickson has made a finding that "the trial judge held there was no common intention either expressed or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding".

For my part, however, I would adopt the following paragraph from the judgment of Wilson J.A. in the Court of Appeal:

> With all due respect to the learned trial judge I think he vastly underrated the contribution the appellant made to the acquisition of the assets held in the respondent's name. The parties lived together as husband and wife, although unmarried, for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre by supporting them both exclusively from her income during 'the lean years', but worked side by side with him for fourteen years building up the bee-keeping operation which was their main source of livelihood. The respondent did not deny that she supported him for the first five or six years of their lives together while he put away all his earnings in the bank.

In my view these findings constitute evidence that the Hawkesbury properties and the bee-keeping operation were subject to a resulting trust in favour of the respondent and I do not find it necessary to import the doctrine of "unjust enrichment" from the law of quasi contract in order to dispose of this appeal.

As to the share to which the respondent is entitled upon the dissolution of the relationship, I am, like my brother Dickson, in accord with the disposition made of the matter by the Court of Appeal.

As I reach the same conclusion as my brother Dickson, it may be thought that these reasons are somewhat superfluous but I find myself unable to subscribe to the application of the doctrine of constructive trusts under the circumstances here disclosed and I wish to disassociate myself with any suggestion in conformity with the trial judge's bitter criticism of the respondent.

In view of all the above, I would dismiss this appeal with costs to the respondent.

Tab 17

Court File No. B266/95

96 064 027

ONTARIO COURT (GENERAL DIVISION)
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36	John T. Porter and Lynn O'Brien for the Applicant Brown & Collett, Limited
AND IN THE MATTER OF BROWN & COLLETT, LIMITED	Raymond F. Leach and B.F. Fischer for Hay Stationery Incorporated
	HEARD: January 29, 30, 31 February 1, 19, 20

REASONS FOR DECISION

WINKLER J.

INTRODUCTION

This is an action brought by Hay Stationery Incorporated ("Hay") for recovery of monies allegedly held in trust for Hay by Brown & Collett, Limited ("Brown & Collett") pursuant to a business arrangement involving a common client.

On September 13, 1995, the Honourable Mr. Justice Farley made an Order (the "CCAA Order") staying all proceedings against Brown & Collett and authorizing the company to file a Plan of Compromise and Arrangement pursuant to provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the "CCAA"). Brown &

Collett filed a Plan of Compromise and Arrangement on September 29, 1995 (the "Plan"), which was approved by Brown & Collett's creditors on December 11, 1995 and sanctioned by the Court on December 20, 1995 (the "Sanction Order"). Pursuant to the plan, a claim in trust is one of the categories of claims against Brown & Collett which is not compromised by the plan.

Hay Stationery now brings this motion for a declaration that part of its claim against Brown & Collett is a valid trust claim and as such, constitutes an Unaffected Obligation under the Plan which is not subject to compromise. Brown & Collett oppose the motion, on the grounds that the claim by Hay is no more than an unsecured debt.

On November 30, 1995, this Court directed that there be a trial of an issue to determine whether part of Hay's claim against Brown & Collett is in fact a valid trust claim.

It has been agreed by the parties that the trial of the issue is to be bifurcated. That is, the first part of the trial is to determine whether Hay has a valid trust claim. If such a trust claim is established, the second part of the trial will deal with remedy including any resultant asset tracing issues. The essential facts for the determination of this matter are not in dispute, which has been greatly assisted by the Agreed Statement of Facts reached between counsel, supplemented by viva voce evidence.

THE FACTS

General

Both Hay and Brown and Collett carry on business as suppliers of stationery and office products. Hay is based in London, Ontario, while Brown & Collett's main office is located in Mississauga, Ontario. From time to time, the two companies have entered into business ventures together, the nature of which will be explored in more detail below.

The Ford Account

As early as 1991, Brown & Collett began to court Ford Motor Company ("Ford") in the hope of becoming the chief office supplier to Ford's Oakville plant. In the course of this process, Brown & Collett became aware that Ford required their Oakville, Talbotville and Windsor plants to be supplied by the same company. In order to service the other Ford locations, Brown & Collett approached Hay to assist them in landing the contract. Consequently, in 1993 the two companies entered into an arrangement whereby Brown & Collett would exclusively supply and service the Oakville Ford plant and Hay would exclusively supply and service the Talbotville and Windsor Ford plants. Each company used only their own inventory to supply Ford.

Sometime prior to this arrangement, Ford commenced an internal policy known as Ford 2000, the aim of which was to increase efficiency by reducing the number of vendors to the company. Pursuant to this program, Ford required that it deal with only one vendor as supplier of office products for all of its Ontario locations. As far as Ford was concerned, this term was non-negotiable.

As a result of this policy, the Ford account was negotiated by representatives from Brown & Collett. Hay had no direct dealings with Ford during the negotiations, although Hay and Brown & Collett negotiated, as between themselves, those points which were of concern to them. The arrangement operated as follows.

The Ford account was unusual in that orders were placed electronically, through Ford's C-PARS system. C-PARS is the Ford computer software system which deals with the generation and placement of orders. Hay and Brown & Collett were obliged to use Ford's C-PARS system in order to secure the Ford account.

Whenever Ford ordered office supplies, the order was keyed into the computer, which would automatically assign a release number to that order. The order, after being approved

internally at Ford, would then appear in a Brown & Collett electronic mailbox to which both Hay and Brown & Collett had access. Brown & Collett would take all orders from their electronic mailbox, re-direct any orders that related to the Talbotville and Windsor plants to Hay's mailbox. Brown & Collett would fill from its own inventory any orders which related to the Oakville plant. Hay would retrieve the forwarded orders from its mailbox, fill them from its inventory, and ship the product directly to Ford.

Neither Hay nor Brown & Collett formally invoiced Ford for the purchased product. When Ford received office supplies, the original order would be retrieved on the Ford computer. As long as the product received matched the order placed and everything else was satisfactory, the employee in receipt of the supplies would enter into the computer the sales order number from the packing slip. This number constituted both the receipt and invoice. At that stage authorization was given to Ford's Dearborn, Michigan U.S. headquarters to pay for the transaction.

All cheques were paid by Dearborn, made payable to and forwarded only to Brown & Collett. The cheques contained the sales order number typed in by the Ford employee so that one could determine which orders were being paid by Ford. Once the cheques were received by Brown & Collett, they were cashed and deposited in its general account. They were then reconciled and any monies paid in respect of goods supplied by Hay to the Windsor and Talbotville plants were to be forwarded to Hay. Brown & Collett did not receive any fee or commission for their role in reconciling the cheques and forwarding that portion of the payment attributable to Hay. At no time did Hay invoice Brown & Collett for goods supplied by it to Ford.

Although Brown & Collett handled all the orders and payment from Ford, Hay dealt directly with Ford and Ford employees at the Windsor and Talbotville plants on a daily basis. Deliveries were made by Hay right to the desk of the Ford employee who had ordered supplies, and Hay hired a sales representative based in Windsor whose sole responsibility

was to service Ford on a daily basis. In short, Ford was aware that the two plants were being serviced by Hay and not by Brown & Collett.

Mr. Donald Clark, on behalf of Hay, negotiated the Ford account with Mr. Donald Wortman of Brown & Collett. Mr. Clark testified he has no recollection of ever having talked about the establishment of a trust account in his negotiations with Mr. Wortman concerning the monies attributable to Hay in the operation of the Ford account. Mr. Clark also testified that he never stipulated that the Hay portion of the Ford payments received by Brown & Collett were to be held in a separate account by Brown & Collett pending payment to Hay. Further, he confirmed that he never referred to the Ford monies as being trust funds either internally at Hay, or in his conversations with Brown & Collett.

Mr Clark testified that the two companies had dealt with each other for many years. He believed they had a "gentleman's agreement", that there was an understanding that funds were to be forwarded to Hay immediately upon reconciliation by Brown & Collett.

Hay and Brown & Collett began supplying Ford in July or early August of 1993. Hay received its first Ford account payment from Brown & Collett in November, 1993. Throughout the operation of the Ford account, Hay complained to Brown & Collett about the delay in reconciling cheques received from Ford and forwarding the monies attributable to Hay. The average time lapse between the receipt of cheques by Brown & Collett and the receipt of forwarded funds by Hay was several months. This delay lengthened over the life of the arrangement between the companies, notwithstanding the parties' understanding that monies were to be forwarded immediately. The last payment received by Hay from Brown & Collett was in May, 1995, although Brown & Collett allegedly continued to receive funds from Ford until December, 1995. Since May, 1995 Hay asserts that Brown & Collett has received some $343, 519.74 from Ford, in respect of product supplied by Hay. Hay has not received any of that money.

By its own admission, Brown & Collett deposited Hay's portion of the funds to its general account at the Toronto Dominion Bank and used the money in the daily operation of the company. This process continued after Brown & Collett had filed its Plan under the CCAA. Brown & Collett has paid other Unaffected Obligations since filing the Plan, however, including payments totalling $284,522.39 to Canadian Treasury Management, the corporation appointed by the court to manage the operation of Brown & Collett; $106,086.28 to BDO Dunwoody, the company appointed by the court to monitor the business affairs of Brown & Collett; $872,436.19 to Meighen Demers, counsel for Brown & Collett; and $1,680,000.00 to the Toronto Dominion Bank in respect of an outstanding loan.

Gold Leaf Office Products Limited

At all material times, both Hay and Brown & Collett were members of Gold Leaf Office Products Limited ("Gold Leaf"). Gold Leaf carried on business as a buying group for stationery products and was comprised of various stationery companies across Canada. Gold Leaf acquired a number of customers over the years which had offices across the country, and wished to have their stationery requirements dealt with centrally. These were referred to as Gold Leaf National Accounts.

When a particular member of Gold Leaf obtained a contract with a customer having branch offices across the country, one of the methods of accommodating the customer was for a the particular Gold Leaf dealer, or Gold Leaf itself, to be designated the Host Dealer. The Host Dealer would then contract with other Gold Leaf dealers to supply product to the branch offices of the customer. The customer would order its stationery requirements from a designated Gold Leaf dealer closest to the location of the customer's office. That local Gold Leaf dealer would then ship the product to the customer and invoice the Host Dealer, who held the master contract with the customer. The Host Dealer would then invoice the customer for all stationery supplies sold to the customer at all locations. When payment was

received by the Host Dealer, the proportionate amount would be forwarded to the local Gold Leaf supplier. This arrangement was one, amongst others, that was typically used by Gold Leaf members to accommodate National Accounts. From a customer's perspective their contract was with the Host Dealer who would then be regarded as a supplier having national branches.

National Accounts were accommodated by the use of specific computer software known as the Gold Leaf Office Supply System ("GLOSS") which assisted the members in accounting, billing and reporting activities. The reports prepared using GLOSS could be tailored to meet the specific requirements of each customer. Members of Gold Leaf were charged a fee for the use of GLOSS.

Counsel for Brown & Collett have conceded that there were many different variations of Gold Leaf accounts. Almost every account was unique in that it was structured to accommodate the specific needs of the individual customer. With all of the National Accounts however, the Host Dealer was responsible for paying the local dealer after it had received and reconciled the payment from the National Account customer.

The Relationship Between Hay and Brown & Collett

Brown & Collett and Hay had an ongoing business relationship prior to the establishment of the Ford account. Both had been involved in Gold Leaf since the early 1980's, and had worked together on a number of National Accounts. Brown & Collett was a Host Dealer for a number of Gold Leaf accounts for which Hay provided product.

In each of these cases, Hay supplied branch locations of a customer with whom Brown & Collett held the master account. Hay would invoice Brown & Collett for the goods supplied. Brown & Collett would subsequently invoice the customer and include in its invoice the value of stationery products supplied by Hay. As was the case with all Gold

Leaf National Accounts, there was an understanding between Hay and Brown & Collett regarding the terms of payment for these accounts. Upon receipt of payment, Brown & Collett was to remit any funds due to Hay immediately after Brown & Collett had reconciled the account.

In June, 1993 Ford was a potential National Account, and it appeared on a listing of Gold Leaf National Accounts along with Carrier Canada, Otis Canada, Motorola Canada, Ecilab Ltd. and Leon's Furniture, which were also Gold Leaf National Accounts at the time. The supply of stationery products to these latter customers forms the basis of Hay's further unsecured claim against Brown & Collett (which claim is not part of this trial of an issue).

It was Mr. Clark's evidence that the Ford account was not a National Account. The main distinction between a National Account and the Ford account, he stated, was the fact that Hay did not invoice Brown & Collett at all with respect to the Ford account. Nor was the Ford account handled through Gold Leaf. Ford, he said, was on the National Account list in error. All information required for the Ford account was processed and available through C-PARS. The GLOSS method of billing was not required. On cross-examination, he admitted that the understanding Hay had with Brown & Collett regarding the handling of Ford payments was the same as the understanding Hay had with Brown & Collett regarding the handling of National Account payments. In both cases, on receipt of payment, Brown & Collett was to remit any funds due to Hay immediately after Brown & Collett had reconciled the account. Hay's accounts receivable listing shows Ford as the account debtor. Brown & Collett does not appear as an account of Hay with respect to Ford. Similarly, in respect of National Accounts serviced through Brown & Collett, Hay shows the customer as being the account debtor on its account receivable listing, and not Brown & Collett.

There were distinct similarities between the Ford account and other National Accounts. However, I accept Mr. Clark's evidence, which was unrebutted as Brown &

Collett called no witnesses, that the Ford account was not a National Account. As stated, it was not dealt with through Gold Leaf, there were no invoices as between Hay and Brown & Collett, and the area serviced did not go beyond provincial boundaries. It was a discrete and idiosyncratic transaction subject to the terms agreed upon between Ford and Brown & Collett and between Brown & Collett and Hay.

Value of Hay's Claim re: Ford

According to statements provided by Ford, which Brown & Collett concede they have no evidence to refute, Brown & Collett has been paid $1,926,881.70 for goods supplied by both Brown & Collett and Hay. Of this sum, Hay has received $628,313.68 from Brown & Collett directly. Hay remains unpaid for a substantial part of the goods supplied to Ford, notwithstanding that Brown & Collett now acknowledge they have received these funds from Ford.

Hay originally claimed the sum of $329,000.00 in its Statement of Claim, being the value of goods shipped by Hay to Ford as at June 20, 1995. The amount claimed was the value of all goods shipped as of that date. Hay now claims the amount of $343,519.74 which represents the value of stationery and supplies delivered by Hay to Ford, and for which Ford had made payment to Brown & Collett up to September 13, 1995. The original Proof of Claim delivered by Hay in relation to this matter was reduced to this figure once Hay had updated their reconciliation of the amounts Brown & Collett had received from Ford. This figure is not disputed by Brown & Collett in this proceeding.

Hay's Unsecured Claim

Brown & Collett owes Hay $9,274.63 in respect of several of the Gold Leaf National Accounts referred to above. Hay has acknowledged in its Proof of Claim that its claim in this regard is that of an unsecured creditor.

Brown & Collett's obligation to Hay regarding these Gold Leaf accounts was to reconcile the accounts upon receipt of funds, and to immediately remit the appropriate portion to Hay. Counsel for Brown & Collett assert that this obligation was identical to Brown & Collett's obligation in respect of payments received from Ford. There is no distinction it is said, between the nature of the funds received by Brown & Collet for these Gold Leaf accounts and the funds received by Brown & Collett for the Ford account. Brown & Collett submit that if the Gold Leaf accounts are simple unsecured debts, so then are the amounts owing to Hay in respect of the Ford account. In light of my finding that the Ford account if not a National Gold Leaf Account, it is unnecessary to address this point further.

SUMMARY

The facts may be summarised as follows. Brown & Collett and Hay entered into an oral agreement to jointly supply Ford; Brown & Collett to supply the Oakville location and Hay to supply Windsor and Talbotville. Neither supplier would invoice for goods shipped. Each would service its designated locations and ship from its own inventory. They agreed between themselves on pricing. They stipulated to Ford that payment would be remitted for goods supplied by both companies to Brown & Collett in cheques payable to Brown & Collett. Brown & Collett undertook to reconcile the accounts as between the two suppliers and remit funds owing to Hay forthwith. Meanwhile the cheque from Ford was deposited in the Brown & Collett general account.

It seems to me that the raison d'etre for the agreement between Brown & Collett and Hay is apparent. Brown & Collett offered to include Hay in the Ford account because, without Hay's inclusion to service Windsor and Talbotville, the Ford account could not be obtained. Hay, on the other hand, was anxious to participate in a large account which it could not have obtained access to other than through Brown & Collett's involvement. There was an obvious mutuality of benefit to both companies. Given that Ford insisted on one

supplier of record, and that Brown & Collett was the contact company of the two joint participants in the account, payment was directed to Brown & Collett and Brown & Collett acted as a "conduit" regarding funds attributable to Hay.

Brown & Collett's dilatoriness in transmitting Hay's funds was explained by Brown & Collett, in response to Hay's pressing for more prompt payment, as being due to the difficulty in reconciling the Brown & Collett and Hay portions of the Ford remittances. It was not until preparation for this litigation, when Hay received copies of the cheque stubs sent by Ford to Brown & Collett, that Hay learned Brown & Collett's explanation for the delay could not be accurate, in that Ford itself had reconciled the shipments of the companies, and had forwarded that information to Brown & Collett along with the payments.

Subsequently, Brown & Collett explained failure to pay Hay as being due to the fact that payment had not been received from Ford. It was not until delivery of the affidavit of Peter Perly, president of Canadian Treasury Management, in December, 1995, that Brown & Collett even conceded that it had received the monies now claimed. Accordingly, the evidence is clear that both of Brown & Collett's explanations for the delay in payments were untrue, and I so find.

Although the funds were deposited in the Brown & Collett account upon receipt, it was not a term of the agreement that Brown & Collett would be entitled to use the funds attributable to Hay for its own purposes, pending reconciliation. Brown & Collett had no right, title or interest in the monies.

In my opinion, for the purposes of collection, reconciliation and remission of funds between Brown & Collett and Hay, Brown & Collett acted as Hay's agent. The terms of the agreement were clear and not disputed. Brown & Collett was to reconcile and remit to Hay forthwith after receipt from Ford.

ISSUES

The parties to this proceeding are *ad item* that trust monies owed by Brown & Collett are Unaffected Obligations for the purposes of the Plan of Arrangement and are not, therefore, compromised by the Plan. Hence the issues in this proceeding are these:

1. Is there an implied trust with respect to the monies owed by Brown & Collett to Hay?

2. If not, has Hay made out a claim for unjust enrichment giving rise to the imposition of a constructive trust?

LAW AND ANALYSIS

Implied Trust

Counsel for Hay asserts that the court ought to conclude that an implied trust exists with respect to the Ford monies owing to Hay. The elements of an implied trust are the same as those of an express trust.

According to D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 107, in order for an express trust to come into existence, it must have three essential characteristics: 1) the intention of the alleged settlor to create a trust must be certain; 2) the subject matter of the trust or trust property must be certain; and 3) the objets or beneficiaries of the trust must be certain. The principle of the "three certainties" is fundamental to the creation of a trust. Accordingly, Hay must demonstrate that there was a certain intention to create a trust in respect of the funds owing to Hay in the context of the agreement between Brown & Collett and Hay. Next, Hay must prove with certainty that it was the intended beneficiary of the trust.

Counsel for Hay submits that, in the absence of clear and certain language demonstrating the intention to form a trust, the court may interpret the language and behaviour of the alleged settlor as evidencing such certain intention, and may imply a trust; and that the evidence in the instant matter supports such a conclusion. I disagree.

The evidence is categorical that the parties did not intend to create an express trust. Similarly, there is no evidence to support the implication of a trust. It was the evidence of Mr. Clark that the creation of trust was never mentioned by either party, nor were the subject monies ever referred to as trust funds in discussions between Brown & Collett and Hay, or internally at Hay. The funds attributable to Hay were not intended to be, nor were they segregated. This submission is without merit.

Unjust Enrichment and Constructive Trust

The centrepiece of Hay's submission is that the circumstances of the instant case make out an equitable claim for unjust enrichment, the appropriate remedy for which would be the imposition of a constructive trust. Counsel for Hay concedes that were it to be successful on the unjust enrichment argument, the only meaningful remedy is the imposition of a constructive trust. As stated, a trust claim is the only available avenue given the terms of the Plan of Compromise and Arrangement under the CCAA.

Unjust enrichment is an equitable doctrine which permits the court to order restitution in situations where one party has benefitted unfairly at the expense of another. In a series of cases commencing in 1954 with the decision of the Supreme Court of Canada in *Deglman v. Guaranty Trust Co, of Canada*, [1954] S.C.R. 725, Canadian courts have adopted the equitable doctrine of unjust enrichment as the legal framework for the remedy of the injustice which occurs where one party makes a substantial contribution to the property of another party without compensation.

The notion of unjust enrichment was considered by Dickson J. (as he then was) in *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 847:

> The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* put the matter in these words"...the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. ...The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. (emphasis in the original)

More recently, McLachlin J. conducted a detailed analysis of the principles of unjust enrichment in *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621. The elements of the doctrine are set out at p. 643:

> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point,the second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of *quantum meruit* or *quantum valebat*. Another equitable remedy, available traditionally where one person was possessed of equitable title to property in which another had an interest, was the constructive trust. ...the remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that found the action and the property in which the trust is claimed.

The doctrine of unjust enrichment has most frequently been invoked in the context of family law property division cases. However in *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Notice of Appeal to the Court of Appeal filed), unjust enrichment was considered in the context of a commercial insolvency. In that case, the

employees of an insolvent insurance company sought to impress the assets of the company with a constructive trust sufficient to fund the employee benefit plan. Although Blair J. ultimately held that there had not been any unjust enrichment in the circumstances of that case, he adopted the analysis of McLachlin J. in *Peter v. Beblow, supra.* In so doing, he stated at p. 769:

> In carrying out the enrichment-detriment analysis the courts have generally taken an economic approach, recognizing these elements as the "morally neutral" components of the mix, and looking to the third element, that of the absence of juristic reason for the enrichment, as the source of the "unjustness".

Applying a straight economic analysis to the first point, I find that Brown & Collett received an enrichment. Brown & Collett acknowledges that it received the monies paid by Ford, and did not forward the amounts attributable to Hay.

With respect to the second stage of the test, Mr. Justice Cory, in *Peter v. Beblow, supra,* stated at p. 631:

> Indeed, I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. there is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic.

Applying this logic to the present case, Hay forwarded office supplies to Ford, from its own inventory. It was never paid for these supplies, although Brown & Collett received and retained the payment by Ford. Accordingly, I find that there was an enrichment in the hands of Brown & Collet, with a corresponding deprivation to Hay.

This leads inexorably to the next step, which is to ascertain whether there is any juristic reason which would justify the enrichment. Determination of the presence or absence

of a juristic reason for an enrichment is the stage of analysis where the court must consider whether the enrichment is "unjust". The nature of this third element of the test was considered by McLachlin J. in *Peter v. Beblow, supra* at p. 645:

> This court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment... It is in connection with the third element - absence of juristic reason for the enrichment - that such considerations may more properly find their place. *It is at this third stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust". ...In every case, the fundamental concern is the legitimate expectation of the parties.* (emphasis added)

Similarly, in *Royal Bank v. Pioneer Trust* (1988), 68 C.B.R. (N.S.) 124 (Sask. Q.B.), Gerein J. described the third stage of the unjust enrichment test at p. 131:

> As I understand the law, if there is a juristic reason for maintaining an enrichment then such enrichment should not be characterised as unjust.

An elaboration of what will constitute a juristic reason for the enrichment is found in the reasons of Blair J. in *Confederation Life, supra,* where four general propositions to assist in making the determination are set out at pp. 772-3:

> (i) An obligation to make the contribution which leads to the enrichment - whether that obligation arises in a debtor-creditor or other contractual context, or whether by reason of the principles of common law or of equity, or whether it arises by way of statutory provision - may constitute a juristic reason.
>
> (ii) The reasonable expectations of the parties must be considered, in particular whether the party providing the contribution leading to the enrichment did so with a reasonable expectation of receiving an interest in property, and the other party knew or ought to have known of this reasonable expectation. The test in this case is an objective one.
>
> (iii) It must be evident that the retention of the benefit would be unjust in the circumstances of the case.

> (iv) Finally, the juristic reason for the enrichment need not always be tied irrevocably to the person who asserts the unjust enrichment but may arise out of a relationship between the person enriched and some other person.
>
> In short, a "juristic reason" simply means some underlying justification, grounded in a legal or equitable base, for the circumstances that have arisen, notwithstanding that the benefit/detriment equilibrium has since become unbalanced.

In the present case, counsel for Brown & Collet assert that the more common application of the doctrine of unjust enrichment is in the family law context and that the doctrine should be applied sparingly in a commercial context, if at all. I do not accept this proposition. In my opinion, the principles of unjust enrichment are equally applicable to a commercial context, and should be applied in the same fashion as in any other context. I am comforted in this approach by the words of McLachlin J. in *Peter v. Beblow, supra,*at p. 649 - 650:

> I doubt the wisdom of dividing unjust enrichment cases into two categories - commercial and family - for the purpose of determining whether a constructive trust lies. ...In short, the concern for clarity and doctrinal integrity with which this court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

Indeed, application of the principles of unjust enrichment in a commercial context have been recognised as promoting both commercial conscience and bargaining in good faith. In *Lac Minerals v. International Corona Resources* (1989), 61 D.L.R. (4th) 14, the Supreme Court of Canada applied a remedial constructive trust in a commercial situation. In *Lac*, a company revealed confidential information about mineral deposits in a piece of property, during negotiations with a view to commencing a joint venture. The defendant then purchased the property independently, and developed a profitable mine on the site. The plaintiff was successful in an action for breach of confidence leading to a finding of unjust

enrichment and the application of a constructive trust. In considering the applicability of an equitable remedy in a commercial context, Mr. Justice La Forest observed at p. 47:

> The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties.

Finally, in *Atlas Cabinets v. National Trust Co.* (1990), 68 D.L.R. (4th) 161, the British Columbia Court of Appeal, in concluding that the elements of the unjust enrichment test were equally applicable in a commercial context, held at p. 171:

> In the context of a domestic relationship those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing. ...in a business relationship, honest dealing not equal dealing should set the standard of fairness. ...To my mind the key to the correct interpretation and application of the decision of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of unjust enrichment.

And later at p. 172:

> In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in *Pettkus v. Becker* when they are applied to a commercial context.

I agree with the approach taken in the authorities above. Principles of unjust enrichment may properly be considered in a commercial context, with the aim of promoting sound commercial conscience and honest dealing between parties. In order to determine whether or not there exists a valid juristic reason, it is incumbent upon the court to ascertain whether there is any legal obligation, contractual or otherwise, which will justify an enrichment, keeping in mind at all times the legitimate expectations of the parties. In a commercial setting, the court must remain mindful of goal of the promoting honest dealing and sound commercial conscience.

In the present case, it is asserted on behalf of Brown & Collett that the relationship between the parties was a simple contractual debtor-creditor relationship. It is stated that the enrichment of Brown & Collett was incurred within the framework of that relationship, and as such, constitutes a juristic reason for the enrichment.

In support of the argument that the relationship between the parties is simply one of debtor-creditor, Brown & Collett relies on the decision of Morden J.A. in *H.E.P. Comm. v. Brown*, [1960] O.R. 91 (C.A.). In that case, an agent appointed to collect accounts had placed the collected monies in a safe which was later burgled. The court held that the agent was not in a position of trustee of the actual money which comes into his hands, but is simply a debtor of his principal, and consequently liable to repay the money on that basis. Mr. Justice Morden stated at p. 94:

> An agent has been held to be a trustee of moneys he has received from or for his principal where he is specifically instructed to keep such moneys separate. ...On the other hand and in contrast, where the sole duty of the agent with respect to the money is to pay it to his principal, the relationship between the parties is that of debtor and creditor.

In the case at bar, Brown & Collett was the agent of Hay for purposes of collection, reconciliation and remittance of monies owing by Ford to Hay. It was not required to maintain a separate account. I accept the contention that the parties are merely debtor and creditor, and not trustee and beneficiary in the sense of an express or implied trust. However, in my opinion, a debtor creditor relationship and a finding of unjust enrichment are not, of necessity, mutually exclusive.

Counsel for Brown & Collett submits that by reason of the debtor creditor relationship, this court should not make a finding of unjust enrichment. In support of this contention, I am directed to the reasons of Blair J. in *Confederation Life, supra*, at p. 771:

> The case-law indicates that a contractual debtor-creditor relationship will be sufficient to establish the existence of a juristic reason for an enrichment *that can be accounted for on the basis of that contractual relationship*. (emphasis added)

Here it cannot be said, however, that the enrichment of Brown & Collett can be accounted for on the basis of the contractual relationship . On the contrary, the enrichment is in clear breach of the agreement.

Similarly, in *Royal Bank v. Touche Ross Limited*, *supra*, the bank provided cash in the amount of $30,000 to a trust company, in exchange for a cheque in the same amount. Winding up proceedings were subsequently commenced, and the bank brought an action claiming the liquidator held the monies in trust as constructive trustee. In holding that the existence of a debtor-creditor relationship was sufficient justification for the enrichment, Gerein J. held at p. 131:

> In short, a debtor and creditor relationship was created. As I see it, the transaction in its essence was like unto other commercial transactions. Like many of those, this transaction went bad; but that fact does not justify setting aside the transaction. To do so would have the result of seriously infringing upon the efficacy of contracts as a whole. The avoidance of this potential result is good juristic reason to permit the enrichment.

And later at p. 133:

> I hold the view that the plaintiff and defendant are parties to a creditor-debtor relationship. It is not unjust in law to hold the plaintiff to that status with the attendant consequences.To do otherwise would have no basis in law and would cause wrongful harm to other creditors.

In *Royal Bank* the court was asked to set aside the transaction. That is not so in the instant case.

In response to the submissions of Brown & Collett, Hay asserts that the mere existence of a contractual debtor-creditor relationship is not necessarily a bar to a finding of unjust enrichment, and points to several recent cases which have reached such a conclusion within the context of a debtor-creditor relationship. In *Sharby v. N.R.S. Elgin Realty Ltd. Estate* (1991), 3 O.R. (3d) 129, the claimants were real estate salespersons who worked as independent contractors for a bankrupt brokerage firm. The salespersons brought a claim for unjust enrichment in respect of commissions they had earned but not been paid. In allowing the claim, Killeen J. held that it was in fact the very contract with the brokerage firm which elevated the plaintiffs' status from that of a mere employee, relied on the terms of the contract to demonstrate the absence of juristic reason for the enrichment. He stated at p. 142:

> Finally, there is no legitimate juristic reason for the enrichment: the very contract under which the monies in question have been taken states that N.R.S. is only to have 35 per cent and not 100 per cent.

Similarly, in *Atlas, supra,* the British Columbia Court of Appeal the respondents were subcontractors on a construction project. The project was financed by the appellant trust company under a first mortgage, which permitted the company to make advances at its discretion. The owner incurred financial difficulties, however on the strength of assurances from the appellant's mortgage manager that monies would be retained in a holdback to ensure their payment, the subcontractors finished the project. The trust company foreclosed, taking title to the project, but the subcontractors were not paid. In allowing the claim for unjust enrichment, Lambert J.A. held that the only possible juristic reason which could exist to justify the enrichment in the hands of the trust company was the mortgage commitment letter, which contained a clause conferring discretion on the trust company to refuse further advances. However, the court held that by providing assurances that the subcontractors would be paid, the trust company had waived the right to rely on that discretion, and was estopped from doing so.

The facts of *Atlas* are on all fours with the matter presently before me. The logic is compelling, and I am persuaded by it. While it may be that in certain circumstances the fact that an enrichment and a corresponding deprivation have taken place in a contractual debtor creditor context will operate to provide a juristic reason for the enrichment, it does not automatically follow that such a relationship precludes the finding of an unjust enrichment. As McLachlin J. stated in *Peter v. Beblow, supra,* the primary consideration in assessing whether there is any juristic reason is the legitimate expectation of the parties.The debts incurred in the above-noted cases were all incurred in the normal course of business and within the parameters of the contracts negotiated between the parties. Here, quite the opposite occurred.

The terms of the agreement were as simple as they were clear. Brown & Collett was expected to receive, reconcile and remit that funds attributable to Hay. Although it was to deposit the funds in the general account, it was not to apply the funds to its own use. The agreement was that Brown & Collett was to reconcile and remit forthwith! Instead, under the guise of difficulties encountered in reconciliation, it applied the funds during this period of delay to its own use. This did not come within the stated purview of the contract. Rather, it was a blatant breach of the agreement, which cannot, with any force, be said to justify the enrichment.

Hay went along with delays in remittance to it. It was mislead as to the reason for these delays, and as a consequence suffered prejudice. I cannot accede to a submission that there was a juristic reason for this enrichment and perforce it is, in my view, unjust.

Brown & Collett asserts that Hay did adequately protect its own interests, that Hay negotiated payments terms with Brown & Collett, and had the opportunity to implement additional safeguards of the monies owing to it. Hay did not do so, and in the submission of Brown & Collett, simply made a bad bargain. Counsel for Brown & Collett argues that the court should not interfere with contractual relations to make a better bargain for the parties

than they negotiated for themselves, and the fact that the parties freely negotiated and entered into the agreement is a juristic reason which will justify the enrichment. In support of this argument, Brown & Collett relies on *Touche Ross, supra,* and on the judgement of Harman L.J. in *Campbell Discount Co. Ltd. v. Bridge*, [1961] 1 Q.B. 445 (C.A.) at 459:

> Similarly I rather deprecate the attempt to urge the court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be disadvantageous to one of the parties. It is pointed out in one of the cases cited to us yesterday... that: "the Chancery "mends no man's bargain," and I do not therefore see my way to call in aid equity to mend what may be an unfortunate situation..."

This proposition cannot constitute a juristic reason in the circumstances of this case. It may be that Hay should have protected itself by requiring that their accounts be segregated, and as Brown & Collett asserts, if the parties made a bad bargain, the court cannot step in and create a better one. However, in my opinion. the court is not required to do that in order to reach a finding of unjust enrichment. Hay does not request that the court impose additional terms in the agreement with Brown & Collett, but merely seeks to hold Brown & Collett to the very terms which Brown & Collett agreed to.

If Brown & Collett had incurred the enrichment within the framework of the contract with Hay, the existence of the contract would indeed constitute a valid juristic reason for the enrichment. Brown & Collett did not act within the agreement however, and it was through the breaches referred to above that the enrichment was incurred. Given that Brown & Collett violated the agreement, it is not open to it to now claim that the existence of the agreement constitutes a valid juristic reason for the enrichment. To accept such a defence would be to allow Brown & Collett to use the very contract which it breached as a justification for the enrichment flowing from that breach, and to profit from its wrongdoing.

In the alternative, Brown & Collett asserts that because the company has filed a Plan of Arrangement and Compromise, its creditors are all subject to the same statutory framework, and this framework should operate as a juristic reason for the enrichment. In support of this contention, Brown & Collett argues that the Plan of Arrangement under the CCAA is analogous to the ordering of priorities in the *Bankruptcy Act,* and rely on the decision of Wilson J., in *Abraham v. Canadian Admiral Corp.* (1993), 20 C.B.R. (3d) 257 at 316:

> However, in this case, the subject matter giving rise to the trust claim is within the queue of defined preferred creditors. I find that, when the subject matter of the trust is defined within the s. 107 queue, a trust claim cannot elevate the plaintiff's claim to that of a secured creditor without circumventing the intended legislative purpose of the *Bankruptcy Act.* The juristic reason why the plaintiffs' claim cannot succeed is that the legislature has enunciated a national code for the distribution of the bankrupt's estate. It would not, in my view, be appropriate for a court to re-order clear statutory priorities specified in the queue of preferred creditors in the *Bankruptcy Act* by a finding of constructive trust.

This case is distinguishable in its facts from the instant matter. In *Abraham*, Wilson J. was considering an constructive trust claim brought by a group of creditors of a bankrupt company. The creditors brought a number of statutory trust claims, and argued constructive trust in the alternative. Wilson J. permitted the action to proceed based on the statutory claims, but then gave what would have been her disposition on the alternative arguments. With respect to the constructive trust claim, Wilson J. noted that they fell within a list of preferred creditors as defined within the *Bankruptcy Act*, and held that to allow the claims would amount to elevating them above those of the secured creditors, and effectively rewriting the priorities under the Act.

In contrast, in the present case, the category of trust claims is one of a number of Unaffected Obligations defined as such in the Plan of Arrangement. To allow a trust claim to proceed in this context, would not amount to a re-ordering of a statutory order of priorities, but would be consistent with the priorities as defined in the Plan.

In any event, the argument is circular, since if Hay is successful on its trust claim, the status of Unaffected Obligation would remove it from the ambit of the CCAA and the Plan of Arrangement. Accordingly, this argument must fail.

In light of the above reasons, it is my conclusion that Brown & Collett has been unjustly enriched at the expense of Hay. The existence of the enrichment and deprivation have been conceded by counsel, and applying the guidelines as set out in *Confederation Life* and the other cases cited, I am unable to find any juristic reason which would operate to justify the enrichment.

Remedy

In light of my conclusion that Brown & Collett diverted the funds attributable to Hay to its own cash flow under the pretence of reconciling the two accounts, I now turn to the question of remedy.

Although a wide range of remedies are available to a court to redress an unjust enrichment, Hay seeks in this proceeding a singular remedy, namely a constructive trust. The reason for this is a practical one dictated by the fact that, as all counsel agree, a trust is the only means by which the amounts owed by Brown & Collett to Hay can be said to constitute an Unaffected Obligation within the meaning of the court sanctioned compromise of debts under the CCAA. In other words it is the only way that Hay can recover the full amount owing to it. The question, therefore, is whether the court is prepared to impose a constructive trust in the instant circumstances.

Notwithstanding that counsel agreed at the beginning of this proceeding, with the court's concurrence, to separate the issue of unjust enrichment and remedy into two stages for hearing purposes, nonetheless both parties dealt with the issue of constructive trust in this initial phase. Counsel for Hay urged the court to impress with a constructive trust all of the

assets of Brown & Collett. It is trite law that a constructive trust must attach to specific property and that there be a direct link between the contribution giving rise to the unjust enrichment and the property in which the trust is claimed.

Dickson J. (as he then was), considered the requirement in a family law context in *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289 at 306:

> Where... a spouse does contribute to family life, the Court has the difficult task of deciding whether there is any causal connection between the contribution and the disputed asset. It has to assess whether the contribution was such as enabled the spouse with title to acquire the asset in dispute. That will be a question of fact to be found in the circumstances of the particular case. If the answer is affirmative, then the spouse with title becomes accountable as a constructive trustee.

Madam Justice McLachlin expanded on the concept in *Peter v. Beblow, supra,* at p. 649:

> The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker, supra,* and *Sorochan v, Sorochan, supra,* as I understand those cases.

In response to a request that a trust be imposed on a broad basis such as is sought here, Anderson J. stated in *Re Allan Realty of Guelph* (1979), 29 C.B.R. 229 at 245:

> Nor would it be easy to find the certainty of subject matter which is fundamental. What was the subject matter? Was it the deposit, or the commission when paid by the vendor, or a combination of these, or was it the chose in action? The argument on behalf of the brokers opened up all these

> questions and, in my respectful view, concluded none. I would be very hesitant to declare a trust with respect to subject matter so amorphous.

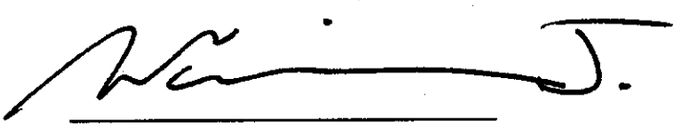
I am not prepared to accede to Hay's request that a constructive trust be imposed on all of the assets of Brown & Collett. The subject matter is too "amorphous", to adopt the words of Anderson J., above. However, I will not finally dispose of Hay's claim on this ground at this stage of the proceeding. As stated, Counsel have agreed to bifurcate this hearing so that remedy, including tracing, be dealt with as a second phase, should Hay succeed on the issue of unjust enrichment. The question of the appropriateness of a constructive trust is clearly a matter of remedy. As such, even though the parties have addressed this area at the initial phase, all of the material facts necessary for an ultimate remedial disposition are not before the court at this time. Until that is the case, it seems to me to be premature to decide this point.

There is, however, a further and more compelling reason for leaving this issue to the second phase of the proceeding, over and above the fact that it is clearly a matter of remedy and properly at the second stage. During the hearing, counsel for Brown & Collett advised the court that because Hay has impugned the payment of numerous large unaffected obligations by Brown & Collett, including the accounts rendered by the law firm of which counsel is a member, he is of the view that he has a conflict of interest in respect of those issues to be dealt with at the second phase of the proceeding dealing with remedy. For this reason he would not be appearing to make submission with respect to remedy, and Brown & Collett would be represented by new counsel. Clearly the appropriateness of a constructive trust is a question of remedy. The conflict of interest about which counsel is concerned, in my view, enures to all remedial questions whether dealt with at phase I or phase II of the hearing.

This issue will therefore be dealt with at the second stage of this proceeding to permit Brown & Collett an opportunity to appoint and instruct fresh counsel. This will also

ensure that all of the material facts necessary for a final disposition on remedy are before the court.

Accordingly, I will instruct the registrar to schedule this matter for continuation of hearing, dates to be co-ordinated to accommodate counsel. The continuation of hearing shall deal with matters of remedy, including tracing, in accordance with the agreement between counsel.



WINKLER J.

RELEASED: FEBRUARY 26, 1996

Court File No. B266/95

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
COMMERCIAL LIST

B E T W E E N :

IN THE MATTER OF THE
COMPANIES' CREDITORS
ARRANGEMENT ACT,
R.S.C. 1985, c. C-36

- and -

AND IN THE MATTER OF
BROWN & COLLETTT,
LIMITED

REASONS FOR DECISION

J. WINKLER, J.

Released : **February 26, 1996**

29p

Tab 18

Supreme Court of Canada | Cour suprême du Canada

97 143 032

FOTIOS KORKONTZILAS, PANAGIOTA KORKONTZILAS and OLYMPIA TOWN REAL ESTATE LIMITED

v.

NICK SOULOS

CORAM:

The Hon. Mr. Justice La Forest
The Hon. Mr. Justice Sopinka
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Major

Appeal heard:
February 18, 1997

Judgment rendered:
May 22, 1997

Reasons for judgment by:
The Hon. Madam Justice McLachlin

Concurred in by:

The Hon. Mr. Justice La Forest
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Mr. Justice Major

FOTIOS KORKONTZILAS, PANAGIOTA KORKONTZILAS et OLYMPIA TOWN REAL ESTATE LIMITED

c.

NICK SOULOS

CORAM:

L'honorable juge La Forest
L'honorable juge Sopinka
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Major

Appel entendu:
Le 18 février 1997

Jugement rendu:
Le 22 mai 1997

Motifs de jugement par:
L'honorable juge McLachlin

Souscrivent à l'avis de l'honorable juge McLachlin:

L'honorable juge La Forest
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge Major

Dissenting reasons by:
The Hon. Mr. Justice Sopinka

Concurred in by:
The Hon. Mr. Justice Iacobucci

Counsel at hearing:

For the appellants:
Thomas G. Heintzman, Q.C.
Darryl A. Cruz

For the respondent:
David T. Stockwood, Q.C.
Susan E. Caskey

Motifs de dissidence par:
L'honorable juge Sopinka

Souscrit à l'avis de l'honorable juge Sopinka:
L'honorable juge Iacobucci

Avocats à l'audience:

Pour les appelants:
M[e] Thomas G. Heintzman, c.r.
M[e] Darryl A. Cruz

Pour l'intimé:
M[e] David T. Stockwood, c.r.
M[e] Susan E. Caskey

Citations	Références
Ont. Ct. (Gen. Div.): (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205.	C. Ont. (Div. gén.): (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205.
Ont. C.A.: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221.	C.A. Ont.: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221.

PARAGRAPH NUMBERING

The paragraph numbering will now appear in the SCR.

NUMÉROTATION DES PARAGRAPHES

La numérotation des paragraphes figurera désormais dans le RCS.

soulos *v.* korkontzilas

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited *Appellants*

v.

Nick Soulos *Respondent*

Indexed as: Soulos *v.* Korkontzilas

File No.: 24949.

1997: February 18; 1997: May 22.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Trusts and trustees -- Constructive trust -- Agency -- Fiduciary duties -- Real estate agent making offer to purchase property on behalf of client -- Vendor rejecting offer but advising agent of amount it would accept -- Agent buying property for himself instead of conveying information to client -- Market value of property decreasing from time of agent's purchase -- Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

Real property -- Remedies -- Constructive trust -- Agency -- Real estate agent making offer to purchase property on behalf of client -- Vendor rejecting offer but

advising agent of amount it would accept -- Agent buying property for himself instead of conveying information to client -- Market value of property decreasing from time of agent's purchase -- Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

K, a real estate broker, entered into negotiations to purchase a commercial building on behalf of S, his client. The vendor rejected the offer made and tendered a counteroffer. K rejected the counteroffer but "signed it back". The vendor advised K of the amount it would accept, but instead of conveying this information to S, K arranged for his wife to purchase to property, which was then transferred to K and his wife as joint tenants. S brought an action against K to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in his community. He abandoned his claim for damages because the market value of the property had decreased from the time of the purchase by K. The trial judge found that K had breached a duty of loyalty to S, but held that a constructive trust was not an appropriate remedy because K had not been "enriched". The Court of Appeal, in a majority decision, reversed the judgment and ordered that the property be conveyed to S subject to appropriate adjustments.

Held (Sopinka and Iacobucci JJ. dissenting): The appeal should be dismissed.

Per La Forest, Gonthier, Cory, **McLachlin** and Major JJ.: The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they

should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.

The following conditions should generally be satisfied before a constructive trust based on wrongful conduct will be imposed: (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands; (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff; (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.

Here K's breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust. First, K was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted a breach of his equitable duty of loyalty. Second, the assets in K's hands resulted from his agency activities in breach of his equitable obligation to S. Third, a constructive trust is required to remedy the deprivation S suffered because of his

continuing desire to own the particular property in question. A constructive trust is also required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty. Finally, there are no factors which would make imposition of a constructive trust unjust in this case.

Per **Sopinka** and Iacobucci JJ. (dissenting): The ordering of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. The trial judge's decision not to order such a remedy should be overturned on appeal only if the discretion has been exercised on the basis of an erroneous principle. The trial judge committed no such error here. He considered the moral quality of K's actions and there is thus no room for appellate intervention on this ground. He was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which is a correct statement of the law. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In this case, S withdrew his claim for damages. While compensatory damages were unavailable since no pecuniary loss was suffered, S could have sought exemplary damages. His decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust. The trial judge also considered deterrence, but held that it alone could not justify a remedy in this case.

Even if appellate review were appropriate, the remedy of a constructive trust was not available on the facts of this case. Recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment, and there was no enrichment, and therefore no unjust enrichment, here. The unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role and supported by specific consideration of the

principles set out in *Lac Minerals*. Deterrence does not suggest that a constructive trust should be available even where there is no unjust enrichment. Despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not held it to be necessary where a tort duty or a contractual duty has been breached to order remedies even where no loss resulted. There is nothing which would justify treating breaches of fiduciary duties any differently in this regard. In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not have any significant effect on deterrence. Exemplary damages are available if deterrence is deemed to be particularly important, and an unscrupulous fiduciary has to reckon with the possibility that if there were gains in value to the property, he or she would be compelled to pay damages or possibly give up the property.

Cases Cited

By McLachlin J.

Referred to: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *White v. Central Trust Co* (1984), 17 E.T.R. 78; *Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276; *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (1919); *Neale v. Willis* (1968), 19 P. & C.R. 836; *Binions v. Evans*, [1972] Ch. 359; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286; *Neste Oy v. Lloyd's Bank Plc (The Tiiskeri)*, [1983] 2 Lloyd's Rep. 658; *Elders Pastoral Ltd. v. Bank of New Zealand*, [1989] 2 N.L.L.R. 180; *Mogal Corp. v. Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101,783; *Re Goldcorp Exchange Ltd. (In Receivership)*, [1994] 2 All. E.R. 806; *Hodgkinson v Simms*, [1994] 3 S.C.R. 377; *Meinhard v Salmon*, 164 N.E. 545 (1928); *Ontario Wheat Producers'*

Marketing Board v. Royal Bank of Canada (1984), 9 D.L.R. (4th) 729; *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269.

By Sopinka J. (dissenting)

Donkin v. Bugoy, [1985] 2 S.C.R. 85; *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Canson Enterprises v Boughton & Co* , [1991] 3 S.C.R. 534; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Brissette Estate v Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87; *Pettkus v Becker*, [1980] 2 S.C.R. 834; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729l *MacMillan Bloedel Ltd. v Binstead* (1983), 14 E.T.R. 269; *Reading v. The King*, [1948] 2 All E.R. 27, aff'd [1951] 1 All E.R. 617; *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592; *Phipps v. Boardman* [1965] 1 All E.R. 849, aff'd [1966] 3 All E.R. 721; *Lee v. Chow* (1990), 12 R.P.R. (2d) 217.

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221, reversing a decision of the Ontario Court (General Division) (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205, dismissing the respondent's action against the appellants for conveyance of a property. Appeal dismissed, Sopinka and Iacobucci JJ. dissenting.

Thomas G Heintzman, Q.C., and *Darryl A. Cruz*, for the appellants.

David T. Stockwood, Q.C., and *Susan E. Caskey*, for the respondent.

Solicitors for the appellants: McCarthy Tétrault, Toronto.

Solicitors for the respondent: Stockwood, Spies & Campbell, Toronto.

SUPREME COURT OF CANADA

FOTIOS KORKONTZILAS, PANAGIOTA KORKONTZILAS and OLYMPIA TOWN REAL ESTATE LIMITED

- and -

NICK SOULOS

CORAM: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

McLACHLIN J.:

I

1 This appeal requires this Court to determine whether a real estate agent who buys for himself property for which he has been negotiating on behalf of a client, may be required to return the property to his client despite the fact that the client can show no loss. This raises the legal issue of whether a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff. In my view, this question should be answered in the affirmative.

II

2 The appellant Mr. Korkontzilas is a real estate broker. The respondent, Mr. Soulos, was his client. In 1984, Mr. Korkontzilas found a commercial building which he thought might interest Mr. Soulos. Mr. Soulos was interested in purchasing the building. Mr. Korkontzilas entered into negotiations on behalf of Mr. Soulos. He offered $250,000. The vendor, Dominion Life, rejected the offer and tendered a counter-offer of $275,000. Mr. Soulos rejected the counter-offer but "signed it back" at $260,000 or $265,000. Dominion Life advised Mr. Korkontzilas that it would accept $265,000. Instead of conveying this information to Mr. Soulos as he should have, Mr. Korkontzilas arranged for his wife, Panagiota Goutsoulas, to purchase the property using the name Panagiot Goutsoulas. Panagiot Goutsoulas then transferred the property to Panagiota and Fotios Korkontzilas as joint tenants. Mr. Soulos asked what had happened to the property. Mr. Korkontzilas told him to "forget about it"; the vendor no longer wanted to sell it and he would find him a better property. Mr. Soulos asked Mr. Korkontzilas whether he had had anything to do with the vendor's change of heart. Mr. Korkontzilas said he had not.

3 In 1987 Mr. Soulos learned that Mr. Korkontzilas had purchased the property for himself. He brought an action against Mr. Korkontzilas to have the property conveyed to him, alleging breach of fiduciary duty giving rise to a constructive trust. He asserted that the property held special value to him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member. However, Mr. Soulos abandoned

his claim for damages because the market value of the property had, in fact, decreased from the time of the Korkontzilas purchase.

4 The trial judge found that Mr. Korkontzilas had breached a duty of loyalty to Mr. Soulos, but held that a constructive trust was not an appropriate remedy because Mr. Korkontzilas had purchased the property at market value and hence had not been "enriched": (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (hereinafter cited to O.R.). The decision was reversed on appeal, Labrosse J.A. dissenting: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (hereinafter cited to O.R.).

5 For the reasons that follow, I would dismiss the appeal. In my view, the doctrine of constructive trust applies and requires that Mr. Korkontzilas convey the property he wrongly acquired to Mr. Soulos.

III

6 The first question is what duties Mr. Korkontzilas owed to Mr. Soulos in relation to the property. This question returns us to the findings of the trial judge. The trial judge rejected the submission of Mr. Soulos that an agreement existed requiring Mr. Korkontzilas to present all properties in the Danforth area to him exclusively before other purchasers. He found, however, that Mr. Korkontzilas became the agent for Mr. Soulos when he prepared the offer which Mr. Soulos signed with respect to the property at issue. He further found that this agency relationship extended to reporting

the vendor's response to Mr. Soulos. This relationship of agency was not terminated when the vendor made its counter-offer. The trial judge therefore concluded that Mr. Korkontzilas was acting as Mr. Soulos' agent at all material times.

7 The trial judge went on to state that the relationship of agent and principal is fiduciary in nature. He concluded that as agent to Mr. Soulos, Mr. Korkontzilas owed Mr. Soulos a "duty of loyalty". He found that Mr. Korkontzilas breached this duty of loyalty when he failed to refer the vendor's counter-offer to Mr. Soulos.

8 The Court of Appeal did not take issue with these conclusions. The majority did, however, differ from the trial judge on what consequences flowed from Mr. Korkontzilas' breach of the duty of loyalty.

IV

9 This brings us to the main issue on this appeal: what remedy, if any, does the law afford Mr. Soulos for Mr. Korkontzilas' breach of the duty of loyalty in acquiring the property in question for himself rather than passing the vendor's statement of the price it would accept on to his principal, Mr. Soulos?

10 At trial Mr. Soulos' only claim was that the property be transferred to him for the price paid by Mr. Korkontzilas, subject to adjustments for changes in value and losses incurred on the property since purchase. He abandoned his claim for damages at an early stage of the proceedings. This is not surprising, since Mr. Korkontzilas had

paid market value for the property and had, in fact, lost money on it during the period he had held it. Still, Mr. Soulos maintained his desire to own the property.

11 Mr. Soulos argued that the property should be returned to him under the equitable doctrine of constructive trust. The trial judge rejected this claim, on the ground that constructive trust arises only where the defendant has been unjustly enriched by his wrongful act. The fact that damages offered Mr. Soulos no compensation was of no moment: "It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none" (p. 69). Furthermore, "it seems simply disproportionate and inappropriate to utilize the drastic remedy of a constructive trust where the plaintiff has suffered no damage" (p. 69). The trial judge added that nominal damages were inappropriate, damages having been waived, and that Mr. Soulos had mitigated his loss by buying other properties.

12 The majority of the Court of Appeal took a different view. Carthy J.A. held that the award of an equitable remedy is discretionary and dependent on all the facts before the court. In his view, however, the trial judge had exercised his discretion on a wrong principle. Carthy J.A. asserted that the moral quality of the defendant's act may dictate the court's intervention. Most real estate transactions involve one person acting gratuitously for the purchaser, while seeking commission from the vendor. The fiduciary duties of the agent would be meaningless if the agent could simply acquire the property at market value, and then deny that he or she is a constructive trustee because no damages are suffered. In such circumstances, equity will "intervene with

a proprietary remedy to sustain the integrity of the laws which it supervises" (p. 261). Carthy J.A. conceded that Mr. Soulos' reason for desiring the property may seem "whimsical". But viewed against the broad context of real estate transactions, he found that the remedy of constructive trust in these circumstances serves a "salutary purpose". It enables the court to ensure that immoral conduct is not repeated, undermining the bond of trust that enables the industry to function. The majority accordingly ordered conveyance of the property subject to appropriate adjustments.

13 The difference between the trial judge and the majority in the Court of Appeal may be summarized as follows. The trial judge took the view that in the absence of established loss, Mr. Soulos had no action. To grant the remedy of constructive trust in the absence of loss would be "simply disproportionate and inappropriate", in his view. The majority in the Court of Appeal, by contrast, took a broader view of when a constructive trust could apply. It held that a constructive trust requiring reconveyance of the property could arise in the absence of an established loss in order to condemn the agent's improper act and maintain the bond of trust underlying the real estate industry and hence the "integrity of the laws" which a court of equity supervises.

14 The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may

appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions.

15 It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of constructive trust, the theory underlying the constructive trust, and the purposes which the constructive trust serves in our legal system.

V

16 The appellants argue that this Court has adopted a view of constructive trust based exclusively on unjust enrichment in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Therefore, they argue, a constructive trust cannot be imposed in cases like this where the plaintiff can demonstrate no deprivation and corresponding enrichment of the defendant.

17 The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. This served the end, not only of doing justice in the case before the court, but of protecting

relationships of trust and the institutions that depend on these relationships. These goals were accomplished by treating the person holding the property as a trustee of it for the wronged person's benefit, even though there was no true trust created by intention. In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

18 While specific situations attracting a constructive trust have been identified, the older English jurisprudence offers no satisfactory limiting or unifying conceptual theory for the constructive trust. As D. W. M. Waters, *The Constructive Trust* (1964), at p. 39, puts it, the constructive trust "was never any more than a convenient and available language medium through which ... the obligations of parties might be expressed or determined". The constructive trust was used in English law "to link together a number of disparate situations ... on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee": J. L. Dewar, "The Development of the Remedial Constructive Trust" (1981), 6 *Est. & Tr Q.* 312, at p. 317, citing Waters, *supra*

19 The situations in which a constructive trust was recognized in England include constructive trusts arising on breach of a fiduciary relationship, as well as trusts imposed to prevent the absence of writing from depriving a person of proprietary rights, to prevent a purchaser with notice from fraudulently retaining trust properties, and to enforce secret trusts and mutual wills. See Dewar, *supra*, at p. 334. The

fiduciary relationship underlies much of the English law of constructive trust. As Waters, *supra*, at p. 33, writes: "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trust's operation". At the same time, not all breaches of fiduciary relationships give rise to a constructive trust. As L. S. Sealy, "Fiduciary Relationships", [1962] *Camb. L.J.* 69, at p. 73, states:

> The word "fiduciary," we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied. [Emphasis in original.]

Nor does the absence of a classic fiduciary relationship necessarily preclude a finding of a constructive trust; the wrongful nature of an act may be sufficient to constitute breach of a trust-like duty: see Dewar, *supra*, at pp. 322-23.

20 Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them. Most notably, Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment. It is now established that a constructive trust may be imposed in the absence of wrongful conduct like breach of fiduciary duty, where three elements are present: (1) the enrichment of the defendant; (2) the corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Pettkus v. Becker*, *supra*.

21 This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Pettkus v. Becker* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. The language used makes no such claim. A. J. McClean, "Constructive and Resulting Trusts -- Unjust Enrichment in a Common Law Relationship -- Pettkus v. Becker" (1982), 16 *U.B.C.L. Rev.* 156 at p. 170, describes the ratio of *Pettkus v Becker* as "a modest enough proposition". He goes on: "It would be wrong ... to read it as one would read the language of a statute and limit further development of the law".

22 Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations. D. M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors, (1989), 68 *Can. Bar Rev* 315, at p. 318, states: "the constructive trust that is used to remedy unjust enrichment must be distinguished from the other types of constructive trusts known to Canadian law prior to 1980". Paciocco asserts that unjust enrichment is not a necessary condition of a constructive trust (at p. 320):

> ... in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall.

23 Dewar, *supra,* holds a similar view (at p. 332):

> While it is unlikely that Canadian courts will abandon the learning and the classifications which have grown up in connection with the English constructive trust, it is submitted that the adoption of the American style constructive trust by the Supreme Court of Canada in *Pettkus v. Becker* will profoundly influence the future development of Canadian trust law.

Dewar, *supra*, at pp. 332-33, goes on to state: "In English and Canadian law there is no general agreement as to precisely which situations give rise to a constructive trust, although there are certain general categories of cases in which it is agreed that a constructive trust does arise". One of these is to correct fraudulent or disloyal conduct.

24 M. M. Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust", (1988), 26 *Alta. L. Rev.* 407, at p. 414, sees unjust enrichment as a useful tool in rationalizing the traditional categories of constructive trust. Nevertheless he opines that it would be a "significant error" to simply ignore the traditional principles of constructive trust. He cites a number of Canadian cases subsequent to *Pettkus v. Becker*, *supra*, which impose constructive trusts for wrongful acquisition of property, even in the absence of unjust enrichment and correlative deprivation, and concludes that the constructive trust "cannot always be explained by the unjust enrichment model of constructive trust" (p. 416). In sum, the old English law remains part of contemporary Canadian law and guides its development. As La Forest J.A. (as he then was) states in *White v. Central Trust Co.* (1984), 17 E.T.R. 78 (N.B.C.A.), at p. 90, cited by Litman, *supra*, the courts "will not venture far onto an uncharted sea when they can administer justice from a safe berth".

25 I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

VI

26 Various principles have been proposed to unify the situations in which the English law found constructive trust. R. Goff and G. Jones, *The Law of Restitution* (3rd ed. 1986), at p. 61, suggest that unjust enrichment is such a theme. However, unless "enrichment" is interpreted very broadly to extend beyond pecuniary claims, it does not explain all situations in which the constructive trust has been applied. As McClean, *supra,* at p. 168, states: "however satisfactory [the unjust enrichment theory] may be for other aspects of the law of restitution, it may not be wide enough to cover all types of constructive trust." McClean goes on to note the situation raised by this appeal: "In some cases, where such a trust is imposed the trustee may not have obtained any benefit at all; this could be the case, for example, when a person is held to be a trustee *de son tort.* A plaintiff may not always have suffered a loss." McClean concludes (at pp. 168-69): "Unjust enrichment may not, therefore, satisfactorily explain all types of restitutionary claims".

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):

> "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

28 Other scholars agree with McClean that good conscience may provide a useful way of unifying the different forms of constructive trust. Litman, *supra*, adverts to the "natural justice and equity" or "good conscience" trust "which operates as a remedy for wrongs which are broader in concept than unjust enrichment" and goes on to state that this may be viewed as the underpinning of the various institutional trusts as well as the unjust enrichment restitutionary constructive trust (at pp. 415-16).

29 Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davies L.J. suggested that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": *Carl Zeiss Stiftung v Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276 (C.A.). Cardozo J. similarly endorsed the unifying theme of good conscience in *Beatty v Guggenheim Exploration Co.*, 122 N.E. 378 (1919), at p. 380.

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. [Emphasis added.]

30 Lord Denning M.R. expressed similar views in a series of cases applying the constructive trust as a remedy for wrong-doing: see *Neale v. Willis* (1968), 19 P. & C.R. 836; *Binions v. Evans*, [1972] Ch. 359; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286. In *Binions*, referring to the statement by Cardozo J., *supra*, Denning M.R. stated that the court would impose a constructive trust "for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises" (p. 368). In *Hussey*, he said the following of the constructive trust (at pp. 1289-90): "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it".

31 Many English scholars have questioned Lord Denning's expansive statements on constructive trust. Nevertheless, he is not alone: Bingham J. similarly referred to good conscience as the basis for equitable intervention in *Neste Oy v. Lloyd's Bank Pic*, [1983] 2 Lloyd's Rep. 658.

32 The New Zealand Court of Appeal also appears to have accepted good conscience as the basis for imposing a constructive trust in *Elders Pastoral Ltd. v. Bank of New Zealand*, [1989] 2 N.L.L.R. 180. Cooke P., at pp. 185-86, cited the following passage from Bingham J.'s reasons in *Neste Oy*, *supra*, at p. 666:

> Given the situation of [the defendants] when the last payment was received, any reasonable and honest directors of that company (or the actual directors had they known of it) would, I feel sure, have arranged for the repayment of that sum to the plaintiffs without hesitation or delay. It would have seemed little short of sharp practice for [the defendants] to take any benefit from the payment, and it would have seemed contrary to any ordinary notion of fairness that the general body of creditors should profit from the accident of a payment made at a time when there was bound to be a total failure of consideration. Of course it is true that insolvency always causes loss and perfect fairness is unattainable. The bank, and other creditors, have their legitimate claims. It nonetheless seems to me that at the time of its receipt [the defendants] could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred. [Emphasis added.]

Cooke P. concluded simply (at p. 186): "I do not think that in conscience the stock agents can retain this money." *Elders* has been taken to stand for the proposition that even in the absence of a fiduciary relationship or unjust enrichment, conduct contrary to good conscience may give rise to a remedial constructive trust: see *Mogal Corp. v Australasia Investment Co. (In Liquidation)* (1990), 3 N.Z.B.L.C. 101,783; J. Dixon, "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment" (1995), 7 *Auck U. L Rev.* 147, at pp. 157-58. Although the Judicial Committee of the Privy Council rejected the creation of a constructive trust on grounds of good conscience in *Re Goldcorp Exchange Ltd. (In Receivership)*, [1994] 2 All E.R. 806, the fact remains that good conscience is a theme underlying constructive trust from its earliest times.

33 Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of

institutions like fiduciary relationships which the courts of equity supervised. As La Forest J. states in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 453:

> The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as *Keech* in the passage cited *supra*; see also *Canadian Aero*, *supra*, at pp. 607 and 610; *Canson*, *supra*, at p. 547, *per* McLachlin J. In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility.

The constructive trust imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

36 The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

37 In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed

in this direction. The courts do, however, find constructive trusts in circumstances similar to those at bar. Equity traditionally recognized the appropriateness of a constructive trust for breach of duty of loyalty simpliciter. The English law is summarized by Goff and Jones, *The Law of Restitution*, *supra*, at p. 643:

> A fiduciary may abuse his position of trust by diverting a contract, purchase or other opportunity from his beneficiary to himself. If he does so, he is deemed to hold that contract, purchase, or opportunity on trust for the beneficiary.

P. Birks, *An Introduction to the Law of Restitution* (1985) (at pp. 330; 338-43) agrees. He suggests that cases of conflict of interest not infrequently may give rise to constructive trust, absent unjust enrichment. Birks distinguishes between anti-enrichment wrongs and anti-harm wrongs (at p. 340). A fiduciary acting in conflict of interest represents a risk of actual or potential harm, even though his misconduct may not always enrich him. A constructive trust may accordingly be ordered.

38 Both categories of constructive trust are recognized in the United States; although unjust enrichment is sometimes cited as the rationale for the constructive trust in the U.S., in fact its courts recognize the availability of constructive trust to require the return of property acquired by wrongful act absent unjust enrichment of the defendant and reciprocal deprivation of the plaintiff. Thus the authors of *Scott on Trusts* (3rd ed. 1967), vol. V, at p. 3410, state that the constructive trust "is available where property is obtained by mistake or by fraud or by other wrong". Or as Cardozo C.J. put it, "[a] constructive trust is, then, the remedial device through which

preference of self is made subordinate to loyalty to others" (*Meinhard v. Salmon*, 164 N.E. 545 (1928), at p. 548, cited in *Scott on Trusts, supra*, at p. 3412. *Scott on Trusts, supra,* at p. 3418, states that there are cases "in which a constructive trust is enforced against a defendant, although the loss to the plaintiff is less than the gain to the defendant or, indeed, where there is no loss to the plaintiff".

39 Canadian courts also recognize the availability of constructive trusts for both wrongful acquisition of property and unjust enrichment. Applying the English law, they have long found constructive trusts as a consequence of wrongful acquisition of property, for example by fraud or breach of fiduciary duty. More recently, Canadian courts have recognized the availability of the American-style remedial constructive trust in cases of unjust enrichment: *Pettkus v. Becker, supra.* However, since *Pettkus v. Becker* Canadian courts have continued to find constructive trusts where property has been wrongfully acquired, even in the absence of unjust enrichment. While such cases appear infrequently since few choose to litigate absent pecuniary loss, they are not rare.

40 Litman, *supra*, at p. 416, notes that in "the post-*Pettkus v. Becker* era there are numerous cases where courts have used the institutional constructive trust without adverting to or relying on unjust enrichment". The imposition of a constructive trust in these cases is justified not on grounds of unjust enrichment, but on the ground that the defendant's wrongful act requires him to restore the property thus obtained to the plaintiff.

41 Thus in *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor.

42 Again, in *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C.S.C.), a constructive trust was imposed on individuals who knowingly participated in a breach of fiduciary duty despite a finding that unjust enrichment would not warrant the imposition of a trust because the plaintiff company could not be said to have suffered a loss or deprivation since its own policy precluded it from receiving the profits. Dohm J. (as he then was) stated that the constructive trust was required "not to balance the equities but to ensure that trustees and fiduciaries remain faithful and that those who assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, *supra*, at pp. 167-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

VII

45 In *Pettkus v. Becker*, *supra*, this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows ed. *Essays on the Law of Restitution* (1991), I would identify four conditions which generally should be satisfied:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

VIII

46 Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

47 First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his

duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and elsewhere, have traditionally treated as involving an equitable duty, breach of which may give rise to a constructive trust, even in the absence of unjust enrichment.

48 Second, the assets in the hands of Mr. Korkontzilas resulted from his agency activities in breach of his equitable obligation to the plaintiff. His acquisition of the property was a direct result of his breach of his duty of loyalty to his client, Mr. Soulos.

49 Third, while Mr. Korkontzilas was not monetarily enriched by his wrongful acquisition of the property, ample reasons exist for equity to impose a constructive trust. Mr. Soulos argues that a constructive trust is required to remedy the deprivation he suffered because of his continuing desire, albeit for non-monetary reasons, to own the particular property in question. No less is required, he asserts, to return the parties to the position they would have been in had the breach not occurred. That alone, in my opinion, would be sufficient to persuade a court of equity that the proper remedy for Mr. Korkontzilas' wrongful acquisition of the property is an order that he is bound as a constructive trustee to convey the property to Mr. Soulos.

50 But there is more. I agree with the Court of Appeal that a constructive trust is required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty: see *Hodgkinson v. Simms*, *supra*, *per* La Forest J. If real estate agents are permitted to retain properties which they acquire for

themselves in breach of a duty of loyalty to their clients provided they pay market value, the trust and confidence which underpins the institution of real estate brokerage will be undermined. The message will be clear: real estate agents may breach their duties to their clients and the courts will do nothing about it, unless the client can show that the real estate agent made a profit. This will not do. Courts of equity have always been concerned to keep the person who acts on behalf of others to his ethical mark; this Court should continue in the same path.

51 I come finally to the question of whether there are factors which would make imposition of a constructive trust unjust in this case. In my view, there are none. No third parties would suffer from an order requiring Mr. Korkontzilas to convey the property to Mr. Soulos. Nor would Mr. Korkontzilas be treated unfairly. Mr. Soulos is content to make all necessary financial adjustments, including indemnification for the loss Mr. Korkontszilas has sustained during the years he has held the property.

52 I conclude that a constructive trust should be imposed. I would dismiss the appeal and confirm the order of the Court of Appeal that the appellants convey the property to the respondent, subject to appropriate adjustments. The respondent is entitled to costs throughout.

SUPREME COURT OF CANADA

FOTIOS KORKONTZILAS, PANAGIOTA KORKONTZILAS and OLYMPIA TOWN REAL ESTATE LIMITED

v.

NICK SOULOS

CORAM: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

SOPINKA J.:

53 I have read the reasons of my colleague McLachlin J. While I agree with her conclusion that a breach of a fiduciary duty was made out herein, I disagree with her analysis concerning the appropriate remedy. In my view, she errs in upholding the decision of the majority of the Court of Appeal to overturn the trial judge and impose a constructive trust over the property in question. There are two broad reasons for my conclusion. First, the order of a constructive trust is a discretionary matter and, as such, is entitled to appellate deference. Given that the trial judge did not err in principle in declining to make such an order, appellate courts should not interfere with the exercise of his discretion. Second, even if appellate review were appropriate in the present case, a constructive trust as a remedy is not available where there has been no unjust enrichment. The main source of my disagreement with McLachlin J. arises in consideration of the second point, but in order to address the reasons of the majority in the court below as well, I will consider both of these issues in turn.

Standard of Review and the Exercise of Discretion

54 It is a matter of settled law that appellate courts should generally not interfere with orders exercised within a trial judge's discretion. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: see *Donkin v. Bugoy*, [1985] 2 S.C.R. 85. As acknowledged by the majority in the Court of Appeal ((1995), 25 O.R. (3d) 257, at p. 259), the decision to order a constructive trust is a matter of discretion. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, the majority held that the order of a constructive trust in response to a breach of a fiduciary duty would depend on all the circumstances. La Forest J. stated at p. 674:

> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award....[A constructive trust] is but one remedy, and will only be imposed in appropriate circumstances.

The discretionary approach to constructive trusts is also consistent with the approach to equitable remedies generally: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 585.

55 Given that ordering a constructive trust is a discretionary matter, it is necessary to show an error in principle on the part of the trial judge in order to overturn the judge's decision not to order such a remedy. In my view, the trial judge committed no such error.

56 The majority of the Court of Appeal apparently found that the trial judge erred in failing to consider the moral blameworthiness of the appellants' actions. Similarly, McLachlin J. would hold that a constructive trust was appropriate in the present case simply because of considerations of "good conscience". In my view, the trial judge considered the moral quality of the appellants' actions and thus there is no room for appellate intervention on this ground. He stated ((1991), 4 O.R. (3d) 51, at p. 69) that, while "[n]o doubt the maintenance of commercial morality is an element of public policy and a legitimate concern of the court", morality should generally not invite the intervention of the court, except where it is required in aid of enforcing some legal right. Put another way, in my view the trial judge was of the opinion that where there is otherwise no justification for ordering a constructive trust or any other remedy, the morality of the act will not alone justify such an order, which statement of the law is in my view correct.

57 The majority of the Court of Appeal stated (at pp. 259-60) that the principles set out by the trial judge may be applicable where there are alternative remedies, but are questionable where only one remedy is available, as in the present case. I do not accept this contention. If a constructive trust is held to be inappropriate where there are a variety of remedies available, I cannot understand the principle behind the conclusion that such a remedy may be appropriate where it is the only remedy available. The trial judge has a discretion to order a constructive trust, or not to order one, and this discretion should not be affected by the number of available remedies. In the present case, the plaintiff withdrew his claim for damages. While compensatory damages were unavailable since the plaintiff suffered no pecuniary loss (which I will discuss further below in assessing whether a constructive trust could have

been ordered), the plaintiff could have sought exemplary damages – his decision not to do so should not bind the trial judge's discretion with respect to the order of a constructive trust.

58 The trial judge put significant emphasis on the absence of pecuniary gains in concluding that he would not order a constructive trust. For the reasons which I set out in detail below, I am of the opinion that the trial judge was correct in this regard. On the other hand, the majority of the Court of Appeal and McLachlin J. hold that the trial judge erred in improperly appreciating the deterrence role of a constructive trust in the present case. In my view, consideration of deterrence fails to disclose any error in principle on the part of the trial judge. Deterrence, like the morality of the acts in question, may be relevant to the exercise of discretion with respect to the remedy for a breach of a fiduciary duty (see, e.g., *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at pp. 421 and 453), but the trial judge in the present case did not fail to consider deterrence in deciding whether to order a constructive trust. As noted above, he stated that while "maintenance of commercial morality is ... a legitimate concern of the court" (p. 69), it would not alone justify ordering a remedy in the present case. In my view, his mention of the "maintenance of commercial morality" indicates that the judge considered deterrence, but held that it alone could not justify a remedy in the present case. Thus, even if failure to consider deterrence could be considered an error in principle, the trial judge in the present case did not so err.

59 In my view, the trial judge committed no error in principle which could justify a decision to set aside his judgment and order a constructive trust. Even if the trial judge did commit some error in principle, however, in my view the remedy of a

constructive trust was not available on the facts of the present case. That is, even if no deference is owed to the trial judge, the majority below erred in ordering a constructive trust and the appeal should be allowed. The following are my reasons for this conclusion.

Unjust Enrichment and the Availability of a Constructive Trust

60 McLachlin J. would hold that there are two general circumstances in which a constructive trust may be ordered: where there has been unjust enrichment and where there has been an absence of "good conscience". While unjust enrichment and the absence of "good conscience" may both be present in a particular case, McLachlin J. is of the view that either element individually is sufficient to order a constructive trust. By failing to consider the "good conscience" ground on its own, McLachlin J. finds that the trial judge erred. I respectfully disagree with this finding. In my view, recent case law in this Court is very clear that a constructive trust may only be ordered where there has been an unjust enrichment. For example, passages in *Lac Minerals*, *supra*, set out the circumstances in which an order of a constructive trust might be appropriate. In my opinion, it is clear from that decision that a constructive trust is not available as a remedy unless there has been an unjust enrichment. La Forest J. stated at pp. 673-74:

> This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. v Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, [[1980] 2 S.C.R. 834], where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He

> identified that *Pettkus v. Becker*, *supra*, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.
>
> In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that Lac hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "The principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v Becker*, at p. 847, the converse is not true. The constructive trust does not lie at the heart of the law of restitution. [Emphasis added.]

La Forest J. added at p. 678:

> Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. [Emphasis added.]

61 In *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, the majority cited some of the passages above from *Lac* with approval and held at p. 96 that, "[t]he requirement of unjust enrichment is fundamental to the use of a constructive trust."

62 Citing only *Pettkus, supra*, specifically, McLachlin J. states at para. 21 that it and other cases should not be taken to expunge from Canadian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "The requirement of unjust enrichment is fundamental

to the use of a constructive trust" could do anything but expunge from Canadian law the use of constructive trusts where there has been no enrichment. Unjust enrichment has been repeatedly stated to be a requirement for a constructive trust; thus to order one where there has been no unjust enrichment would clearly depart from settled law.

63 Even aside from the case law, in my view, the unavailability of a constructive trust in the absence of unjust enrichment is consistent with the constructive trust's remedial role. The respondent submitted that if no remedy is available in the present case, there would inappropriately be a right without a remedy. I disagree. Clearly, the beneficiary has a right to have the fiduciary adhere to its duty, and if damages are suffered, the beneficiary has a right to a remedy. In my view, this is analogous to remedial principles found elsewhere in the private law. Even if a duty is owed and breached in other legal contexts, there is no remedy unless a loss has been suffered. I may owe a duty to my neighbour to shovel snow off my walk, and I may breach that duty, but if my neighbour does not suffer any loss because of the breached duty, there is no tort and no remedy. Similarly, I may have a contractual duty to supply goods at a specific date for a specific price, but if I do not and the other party is able to purchase the same goods at the contract price at the same time and place, the party has not suffered damage and no remedy is available. It is entirely consistent with these rules to state that even if a fiduciary breaches a duty, if the fiduciary is not unjustly enriched by the breach, there is no remedy.

64 Remedial principles generally thus support the rule against a constructive trust where there has been no unjust enrichment. The rule is also supported, in my view, by specific consideration of the principles governing constructive trusts set out

in *Lac Minerals*. In *Lac Minerals*, La Forest J. stated that, even where there has been unjust enrichment, the constructive trust will be an exceptional remedy; the usual approach would be to award damages. He stated at p. 678:

> In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter Engineering Co. v. Syncrude Canada Ltd., supra,* had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [Emphasis added.]

65 La Forest J. thus held that generally an aggrieved beneficiary will only be entitled to damages, not to the property itself. This implies that the beneficiary does not generally have a right to the property in question, but rather has a right to receive the value of the gains resulting from the acquisition of the property. Following this reasoning, if the value of the gains is zero, that is, there is no unjust enrichment, the beneficiary will not have a right to a remedy. Consequently, where there has been no unjust enrichment, there is no right to a constructive trust or any other remedy.

66 While, in my view, recent decisions of this Court and the principles underlying them settle the matter, McLachlin J. cites other Canadian case law in concluding that constructive trusts may be ordered even where there has not been unjust enrichment. She cites three lower court decisions which she claims involved the award of a constructive trust absent unjust enrichment. With respect, I do not read any one of these cases as supporting her claim. An unjust enrichment exists where there has been an enrichment of the defendant, a corresponding deprivation experienced by

the plaintiff and the absence of any juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. McLachlin J. fails to cite a case where a remedial constructive trust was ordered absent such an enrichment.

67 In *Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (Ont. C.A.), a constructive trust was imposed on a bank which received money with actual knowledge that it belonged to someone other than the depositor. The bank was a secured creditor of the depositor, which depositor was in financial difficulty at the time of the deposits. Clearly, this case involved an unjust enrichment: the bank benefitted by gaining rights over the deposited money, as well as by increasing the likelihood of repayment of the depositor's credit; the plaintiff (a corporation whose agent, the depositor, breached his fiduciary obligations) was deprived of its right to its money; and there was no juristic reason for the enrichment. Thus, the order of a constructive trust responded to an unjust enrichment, whether or not the court adverted to such doctrine.

68 *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269 (B.C.S.C.) is also, in my view, a case of unjust enrichment. In this case, a fiduciary to a corporation breached his duty by engaging in self-dealing without disclosing his interest. A constructive trust was imposed over the secret profits even though the plaintiff organization, because of its internal policy, could not have realized the profits itself. While the fiduciary was plainly enriched, the trial judge and McLachlin J. conclude that since the plaintiff could not have realized the profits, there was no "corresponding deprivation" and therefore no unjust enrichment.

69 I disagree with McLachlin J. that there was no unjust enrichment in *Binstead*. First of all, courts have consistently treated fiduciaries' profits explicitly as unjust enrichment, whether or not the beneficiary could have earned the profits itself. For example, in *Reading v. The King*, [1948] 2 All E.R. 27 (K.B.D.), aff'd [1949] 2 All E.R. 68 (C.A.), aff'd [1951] 1 All E.R. 617 (H.L.), Denning J. stated at p. 28:

> It matters not that the master has not lost any profit, nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has unjustly enriched himself by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money.... [Emphasis added.]

In *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at pp. 621-22, Laskin J., as he then was, stated:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. [Emphasis added.]

Reading and *O'Malley* are clear: the characterization of the profits earned by a fiduciary in breach of duty is one of unjust enrichment, whether or not the corporation could have earned the profits itself. Thus, *Binstead* involved unjust enrichment, contrary to McLachlin J.'s assertion.

70 I wish to add that the treatment of the profits as unjust enrichment in *Reading, O'Malley*, and *Binstead* is not inconsistent with the general rules governing unjust enrichment. The plaintiff in each case had a right to have the fiduciary adhere to his duty. When the defendant breached that duty, the profits earned as a result of that breach are essentially treated in equity as belonging to the corporation, whether or not the corporation could have earned those profits in the absence of the breach. As an example of the proprietary analogy, Denning M.R. stated at p. 856 in *Phipps v. Boardman*, [1965] 1 All E.R. 849 (C.A.), aff'd [1966] 3 All E.R. 721 (H.L), that:

> [W]ith *information or knowledge* which he has been employed by his principal to collect or discover, *or which he has otherwise acquired*, for the use of his principal, then again if he turns it to his own use, so as to make a profit by means of it for himself, he is accountable ... for such information or knowledge is the property of his principal, just as much as an invention is.... [Italics in original; underlining added.]

71 Thus, in *Binstead*, the retention of the profits by the fiduciary would have deprived the corporation of its right to the profits. The deprivation is represented by the monies obtained by the fiduciary as a result of infringing the rights of the plaintiff. In order for there not to have been deprivation and unjust enrichment in circumstances otherwise similar to *Binstead*, the self-dealing could not have resulted in any secret profits – if a remedy were awarded in a case without profit, thus no enrichment nor deprivation, McLachlin J. could well point to the case for support. Given that there was profit in *Binstead*, however, there was unjust enrichment which justified the order of a constructive trust, whether or not the court explicitly relied upon unjust enrichment.

72 In summary, McLachlin J. fails to refer to a single Canadian case where a constructive trust was ordered despite the absence of unjust enrichment. Given this conclusion and given that recent cases of this Court unambiguously foreclose the possibility of ordering a constructive trust in the absence of unjust enrichment, in my view McLachlin J. is in error in concluding that a constructive trust may be ordered in the absence of unjust enrichment.

73 Aside from Canadian case law, McLachlin J. attempts to rely on various scholars and foreign case law as providing support for her conclusion. Because of the clear statement of the law recently set out by this Court, in my view the scholarly writings and foreign cases are only useful insofar as the policy they set out suggests that the law in Canada should be modified. I will therefore simply address the policy upon which McLachlin J. relies, rather than each case and each article she cites.

74 Simply put, McLachlin J., reasoning similarly to the majority below, concludes that to fail to permit the order of a constructive trust where there has been a breach of a fiduciary duty, but no unjust enrichment, would inadequately safeguard the integrity of fiduciary relationships. She says at para. 33 that ordering a constructive trust simply on the basis of "good conscience",

> addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised.... The constructive trust imposed for breach of fiduciary relationship, thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

According to McLachlin J., then, deterrence of faithless fiduciaries requires the availability of constructive trust as a remedy even where there has been no unjust enrichment.

75 In my view, deterrence is not a factor which suggests modifying the law of Canada and permitting the order of a constructive trust even where there has been no unjust enrichment. As noted above, despite considerations of deterrence, it is true throughout the private law that remedies are typically unavailable in the absence of a loss. Courts have not, because of concern about protecting the integrity of these duties, held it to be necessary where a tort duty, or a contractual duty, has been breached to order remedies even where no loss resulted. I fail to see what distinguishes the role of fiduciary duties from the very important societal roles played by other legal duties which would justify their exceptional treatment with respect to remedy.

76 In any event, the unavailability of a constructive trust in cases where there is no unjust enrichment does not, in my opinion, have any significant effect on deterring unfaithful fiduciaries and protecting the integrity of fiduciary relationships. First, if deterrence were deemed to be particularly important in a case, the plaintiff may seek and the trial judge may award exemplary damages; a constructive trust is not necessary to preserve the integrity of the relationship, even if this integrity were of particular concern in a given case. The fact that exemplary damages were not sought in the present case should not compel this Court to order a constructive trust in their place. Second, even if a remedy were unavailable in the absence of unjust enrichment, which is not true given exemplary damages, deterrence is not precluded. Taking a case similar to the present appeal, while an unscrupulous fiduciary would know that he or

she would not be compelled to give up the surreptitiously obtained property if there were no gains in value to the property, he or she must also reckon with the possibility that if there were gains in value, and therefore unjust enrichment, he or she would be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to breach his or her duty because of the prospect of pecuniary gains, which would, I imagine, be the typical, if not the exclusive, motive for such a breach, not ordering a constructive trust where there have been no pecuniary gains does not affect deterrence. I therefore disagree with McLachlin J. that deterrence suggests that a constructive trust should be available even where there is no unjust enrichment.

77 As is clear, I cannot agree with McLachlin J. that a constructive trust could be ordered, and indeed should have been ordered, in the present case even if there was no unjust enrichment. In order to decide whether such a remedy could be ordered, in my view, it must be decided whether there was unjust enrichment in the present case.

Was There Unjust Enrichment?

78 In my opinion, there was no enrichment and therefore no unjust enrichment in the present case. It is first of all plain that there were no pecuniary advantages accruing to the appellants from the purchase of the property. The trial judge stated (at p. 68):

> I now consider the facts of the case at bar. The nature of the duty and of the breach have already been discussed. At an interlocutory stage, the plaintiff abandoned any claim for damages. This step involved no sacrifice because the plaintiff could not have proved any. [Emphasis added.]

Any enrichment from the purchase of the property was not pecuniary, which would suggest that there has in fact been no enrichment and therefore no unjust enrichment.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the defendant's pecuniary gains may not represent the enrichment of the defendant or the deprivation of the plaintiff. Analogizing to the award of specific performance in contract, where property that is the subject of a contract is unique or otherwise difficult to value, and the contract is breached, it may be held that monetary damages are inadequate and thus a remedy of specific performance must be ordered to compensate the plaintiff adequately. In such cases, pecuniary damages may not represent the loss to the plaintiff or the gain to the defendant from the breach. Thus, perhaps, an enrichment could be found in the absence of a change in market price if the property were unique or otherwise difficult to value.

80 Whether or not such considerations could be relevant to a finding of an enrichment, the property in question was not found to be unique or otherwise difficult to value in a manner relevant to the remedy. The trial judge noted that the respondent had asserted that the property in question had special value to him given its tenant, a bank, and the significance of being a landlord to a bank in the Greek community. The trial judge (at p. 69) held that such a factor should not be taken into account any more than personal attachment in an eminent domain case. In other words, while there may have been personal motivation for the purchase, this was not relevant to an assessment of the value of the property. This indicates, in my view, that the trial judge did not view the property to be unique in a manner meaningful to the remedial analysis. Such a conclusion is plain in the trial judge's analysis of *Lee v. Chow* (1990), 12 R.P.R. (2d)

217 (Ont. S.C.). In *Lee*, a constructive trust was declared in a property that had been purchased surreptitiously by an agent in a situation similar to the present case. The trial judge in the instant appeal distinguished *Lee* in the following way (at p. 70):

> [The circumstances in *Lee*] included the following: a degree of dependence by the plaintiff which, in my view, is lacking in the case at bar; that it was a residential property meeting the specific requirements of the plaintiff, rather than a commercial property having value only as an investment; and that it appeared probable that the acquisition price represented a bargain, while the property at issue in the case at bar did not. [Emphasis added.]

In *Lee* there were pecuniary gains, thus an enrichment, and the property had unique qualities which helped justify a constructive trust. In the present case there were no pecuniary gains, and the trial judge did not find any meaningful non-pecuniary advantages associated with the property – the property had value "only as an investment". In my view, given the absence of both pecuniary and non-pecuniary advantages from the property, there was no enrichment and therefore no unjust enrichment.

81 In the absence of unjust enrichment, in my view the trial judge was correct not to order the remedy sought, a constructive trust. The trial judge stated (at p. 69):

> A constructive trust was deemed appropriate in *Lac Minerals, supra*, because damages were deemed to be unsatisfactory. It would be anomalous to declare a constructive trust, in effect, because a remedy in damages is unsatisfactory, the plaintiff having suffered none.

The trial judge, in the absence of pecuniary damages which might have indicated unjust enrichment, declined to order a constructive trust. Neither the majority of the Court of Appeal nor McLachlin J. raise an error in principle in the trial judge's reasons; indeed, in my view they err in concluding that a constructive trust is available in the present case. Even if the trial judge ignored factors such as the moral quality of the defendants' acts and deterrence, which he did not, and even if this could be construed as an error in principle, the factors to be considered in ordering a constructive trust only become relevant at the second stage of the inquiry when it is decided what remedy is appropriate. Unless unjust enrichment is made out at the first stage of the inquiry, there is no need to consider the factors relevant to ordering a constructive trust. The majority of the Court of Appeal erred in interfering with the trial judge's discretion and in deciding that a constructive trust may be ordered in the absence of unjust enrichment.

Conclusion

82 Since the trial judge did not err in not ordering a constructive trust, but rather the majority of the Court of Appeal did in ordering one, I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. In the circumstances, I would not award costs to the appellants either here or in the Court of Appeal.

Tab 19

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pemberton Music Festival Limited Partnership (Re),* 2017 BCSC 2398

Date: 20171229
Docket: B170370
Registry: Vancouver

In the Bankruptcy and Insolvency

In the Matter of the Consolidated Bankruptcy of Pemberton Music Festival Limited Partnership and 1115666 B.C. Ltd.5666 B.C. Ltd.

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for Bankrupt and the Applicant:	Mary Buttery H. Lance Williams
Counsel for Trustee:	Kibben M. Jackson Danielle Toigo
Place and Date of Hearing:	Vancouver, B.C. December 1, 2017
Place and Date of Judgment:	Vancouver, B.C. December 29, 2017

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INTRODUCTION

[1] On May 18, 2017, the host of the Pemberton Music Festival (the "Festival"), the Pemberton Music Festival Limited Partnership ("PMFLP") and its general partner, 111566 B.C. Ltd. ("111 B.C. Ltd."), made assignments in bankruptcy. Ernst & Young was appointed as trustee in bankruptcy (the "Trustee"). On May 23, 2017, the bankruptcy estates of PMFLP and 111 B.C. Ltd. were consolidated into this action.

[2] As a result of the bankruptcy proceedings, the Festival was cancelled for 2017.

[3] At the time of the bankruptcy, PMFLP and 111 B.C. Ltd. held cash in hand of $3,310,837, derived in large part from the sale of tickets for the 2017 Festival.

[4] This application is a contest between the Festival's ticket sellers, the applicants Ticketfly, LLC ("Ticketfly") and Ticketfly Canada Services Inc. ("Ticketfly Canada"), and the Trustee over the disposition of funds held in the bankrupts' estate derived from ticket sales. The applicants assert those funds are held by the Trustee on a constructive trust in favour of the ticket purchasers. The applicants also say they are subrogated to the rights of ticket purchasers who they have reimbursed for the purchase of their tickets. The Trustee maintains there is no basis for the imposition of a constructive trust and contends the funds are available for distribution to the general creditors of the estate.

[5] By their Amended Notice of Application filed November 29, 2017, Ticketfly and Ticketfly Canada, by their assignee Pandora Media Inc. ("Pandora"), apply for the following orders:

> [2] All funds held by Trustee that were derived by the Debtors from the sale of tickets (the "**Tickets**") for the 2017 Pemberton Music Festival (the "**Funds**") are held by the Trustee pursuant to a constructive trust in favour of the purchasers of the Tickets (the "**Purchasers**"), or any party subrogated to their position, and do not form "property" of the Debtors pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") or otherwise.

> [3] To the extent a Purchaser has been reimbursed for the purchase of the Tickets by Ticketfly or Ticketfly Canada (in its capacity as the credit card processor for the Debtors or otherwise), Ticketfly and Ticketfly Canada (or their assignees) are subrogated and shall stand in the place of the Purchaser with respect to the Funds.
>
> [4] The Trustee shall continue to hold the Funds in trust, in a segregated interest bearing account, until such time as the Trustee and Pandora can come to an agreement, acting reasonably, on a distribution protocol to return such Funds to Purchasers (or their subrogees, as the case may be), or as otherwise ordered by the court.
>
> [5] The Trustee, Pandora, Ticketfly, and Ticketfly Canada are at liberty to apply to the court for further advice and direction regarding the implementation of this Order.

[6] Ticketfly was the exclusive ticket seller for the Festival.

[7] Ticketfly, by its Canadian subsidiary, Ticketfly Canada, processed credit card payments for the sale of Festival tickets and remitted the net proceeds to PMFLP or 111 B.C. Ltd.

[8] Many ticket holders obtained refunds for the cost of their tickets from their credit card companies, which then charged back Ticketfly Canada.

[9] The applicants contend that to the extent that any ticket sales processed by Ticketfly Canada were charged back to Ticketfly Canada by its credit card processor, Ticketfly Canada stands in the ticket holders' position.

[10] In seeking the imposition of a constructive trust, the applicants rely primarily upon the doctrine of unjust enrichment. However, they also submit the court may order a constructive trust to remedy debtor misconduct. Here, the applicants contend that the debtors misled the ticket-purchasing public by authorizing the sale of tickets when they had no firm intention of proceeding with the Festival. The applicants say the debtors can have had no legitimate expectation of retaining the ticket sale proceeds if the Festival was cancelled.

BACKGROUND FACTS

[11] The facts giving rise to this application are succinctly summarized in the notice of application, the application response of the Trustee and the First Report of the Trustee dated June 6, 2017, all of which I have drawn upon in setting out the background to this dispute.

The Festival, its organization and history

[12] The Festival was first held in Pemberton, British Columbia in 2008, and was staged again in 2014, 2015, and 2016.

[13] In 2012, local investors interested in reviving the Festival were introduced to Huka Entertainment LLC ("Huka"), as an experienced producer of music festivals. In September 2013, the local investors and Huka agreed they would jointly own the Festival and that Huka would be engaged as the exclusive producer of the Festival.

[14] Pursuant to that agreement, PMFLP was formed for the purpose of operating the Festival.

[15] When PMFLP was formed, the limited partners were H1 Canada Events Corp., a wholly-owned subsidiary of H1 Events LLC ("H1 Events") holding 75% of the limited partnership units, and Janspec Holdings Limited ("Janspec"), holding 25% of the units. The general partner of PMFLP was Twisted Tree Circus GP Ltd. ("Twisted Tree"). H1 Events owned 75% of the shares in Twisted Tree. All of Twisted Tree's directors were senior executives of Huka.

[16] Paragraph V.a. of the Production Services and Talent Buy Agreement made between Huka and Twisted Tree on behalf of PMFLP, authorized Huka to contract with third parties for the provision of services and to execute such contracts on behalf of the general partner.

[17] After the formation of PMFLP, by a Services Agreement dated July 25, 2013 and amended September 16, 2016, Huka engaged Ticketfly as the sole and

exclusive ticket seller for the Festival. Ticketfly Canada processed the ticket sales for the Festival.

[18] On March 31, 2014 a new local investor became a limited partner in PMFLP. The new local investor subscribed for 20 limited partnership units while concurrently Janspec and H1 Canada surrendered five and 15 limited partnership units in PMFLP, respectively. On April 1, 2014, Janspec sold its remaining 20 units in PMFLP to a related company, 0956573 B.C. Ltd. ("095"). As a result of these transactions, as of April 1, 2014, the interests held by the limited partners in PMFLP were as follows:

i. 60% held by H1 Canada;

ii. 20% held by 095; and

iii. 20% held by the new local investor.

[19] The new local investor and the other local investors are referred to collectively in the Trustee's First Report as the Canadian Investors.

[20] In 2014, when the Festival was held for the first time since 2008, it incurred a loss of approximately of $16.9 million, which was funded by the Canadian Investors.

[21] The Canadian Investors, dissatisfied with the result of the 2014 Festival, demanded that Huka make significant changes to its oversight of the Festival.

[22] In 2015, the Festival incurred losses of $16.8 million, which, again, were borne by the Canadian Investors.

[23] The 2016 Festival was a three-day event attended by an average of 38,423 concert goers per day. Ticket sales revenue for the 2016 Festival was $15,230,800. However, the 2016 Festival incurred an operating loss of approximately $14 million.

[24] Following three years of substantial losses, the Canadian Investors arranged for an experienced Canadian producer to review the 2016 Festival to determine the source of its losses. On the Canadian producer's recommendation, the Canadian

Investors approached two well-known producers to produce the 2017 Festival; however, neither was prepared to do so if Huka continued to be involved.

[25] Through 2017, relations between the Canadian Investors and Huka became increasingly strained.

[26] In early 2017, the Canadian Investors offered to purchase the interest of Huka and of the individual shareholder in H1 Events at fair market value, but received no response to their offer.

[27] By early 2017, the Canadian Investors were concerned about the financial viability of the Festival as a result of delays in announcing the entertainment lineup for the event.

[28] On February 21, 2017, following numerous requests by Huka and in order to both gauge interest in the 2017 Festival and attract potential investors, the Canadian Investors agreed that Huka should commence 2017 ticket pre-sales.

[29] On February 23, 2017, on Huka's instruction, Ticketfly began selling tickets for the 2017 Festival.

[30] On March 3, 2017, the Canadian Investors informed Huka in writing that they were not prepared to proceed with the 2017 Festival if Huka remained the producer of the Festival and retained control of the general partner.

[31] Through March 2017, the Canadian Investors insisted that Huka relinquish its role as producer of the Festival, and demanded as a condition for moving forward with the 2017 Festival that they acquire control of the general partner.

[32] In April 2017, following a three-week mediation between Huka and the Canadian Investors, Huka agreed to replace Twisted Tree with a new general partner, but negotiated to continue in its role as producer with the assistance of an experienced producer chosen by the Canadian Investors.

[33] On or about April 20, 2017, following the mediation, Twisted Tree resigned as the general partner of PMFLP. 111 B.C. Ltd. was incorporated and replaced Twisted Tree as the new general partner of PMFLP.

[34] After ticket sales commenced, and while they continued, the Canadian Investors remained concerned about the financial viability of the Festival. Although Huka advised the Canadian Investors on March 20, 2017 that PMFLP was solvent, on March 29, 2017, the Canadian producer informed them that Huka had significantly understated the outstanding accounts payable from the 2016 Festival.

[35] As the Trustee reported, after 111 B.C. Ltd. took possession of the books and records of PMFLP, it became clear that the Festival was in worse financial shape than Huka had initially represented to the Canadian Investors.

[36] Huka was unable to attract any new investors. The Canadian Investors were neither prepared nor able to continue to fund the 2017 Festival.

[37] Because PMFLP continued to hold a significant amount of funds (largely consisting of ticket sale proceeds), the Canadian Investors decided that rather than expend the remaining funds in circumstances where the Festival was not sustainable, they should put all of the assets of PMFLP into the hands of the Trustee.

[38] On the evening of May 16, 2017, the directors of 111 B.C. Ltd. unanimously voted to authorize the assignment in bankruptcy of both PMFLP and 111 B.C. Ltd.

Ticket sales and the ticket sale proceeds

[39] The Services Agreement between Huka (referred to in the Agreement as "Partner" of Ticketfly) contained the following terms:

> 5.1 Cancelled Events: If any Event for which Ticketfly sold Tickets is cancelled, or postponed (each, a "Cancelled Event") or Ticketfly receives a high volume of complaints for a particular event, the Account Balance shall be held and made available for distribution by Ticketfly to Ticket purchasers entitled to refunds. For purposes of the Agreement, the term "Account Balance" shall mean the amount of funds held at any time by Ticketfly on account of Ticket Sales for all Events, less the amount of Ticket Sales

> proceeds which Ticketfly is entitled to retain hereunder. If at any time, the Account Balance is not sufficient to pay for anticipated refunds or Chargebacks (as defined below), Partner shall deliver the amount of such deficiency ("Deficiency Amount") to Ticketfly no later than seventy-two (72) hours after notice by Ticketfly to Partner. Ticketfly shall have the right to offset any Deficiency Amount against any amounts held by Ticketfly on behalf of Partner. Partner authorizes Ticketfly to refund the Ticket Face Price and Service Fees at the original point of purchase.
>
> 5.2. Chargebacks: Partner shall be responsible for any Chargebacks Ticketfly receives from its merchant bank in connection with the Events. Ticketfly reserves the right to hold the Account Balance due, deduct Chargebacks from Settlements or to bill Partner for up to twelve (12) months after the occurrence of an Event. For purposes of the Agreement, "Chargebacks" shall mean the amounts that the merchant bank is charged back by a cardholder or a card issuer under the card organization's rules (e.g. cardholder dispute, fraud, declined transaction, returned Tickets for Cancelled Events, etc.). For certain continuing Events that have a history of significant chargebacks or Partner is holding an Event for the first time using the Ticketfly System, Ticketfly reserves the right to hold 5% of all Settlements as a reserve against chargebacks up to but not exceeding six (6) months following the date of such Event. Ticketfly will notify Partner if Ticketfly will hold any Settlement amounts as a chargeback reserve at the time of the respective Event is created in the Ticketfly System and tickets are available for sale.
>
> 9. SETTLEMENT. Ticketfly shall collect all proceeds from Ticket Sales, deposit them in an account maintained by Ticketfly and remit the portion of such proceeds due to Partner less the amounts to which Ticketfly is entitled pursuant to this Agreement. . . .

[40] Under the Services Agreement, Huka was responsible for reimbursing Ticketfly for chargebacks it incurred, including those arising from refunds issued for cancelled events.

[41] Ticketfly sold tickets for the Festival to purchasers on terms and conditions, which included:

> Occasionally, events are canceled or postponed by the promoter, team, band or venue. Should this occur, we will attempt to contact you to inform you of refund or exchange procedures for that event. For exact instructions on any canceled or postponed event, please check the event information online or contact http://support.ticketfly.com/. If you purchase a ticket through Ticketfly.com, and a refund is issued, then Ticketfly will most likely give you a refund by issuing a credit to the credit card that you used to purchase that ticket.

> Ticketfly acts as the agent of the Event Promoter and as such typically only offers refunds and/or exchanges based on the Event Promoter's instructions. Ticketfly is not obligated to issue a refund except to the extent that the Event Promoter responsible for bringing you the event (1) instructs us to issue a refund, and (2) provides us with the funds necessary to issue refunds. In order to receive a refund or an exchange that may be offered, you will have to comply with the Event Promoter's instructions or deadlines, which, along with the decision about whether or not to issue a refund or an exchange, may be at the Event Promoter's discretion.

[42] On Huka's instructions, from February 23, 2017 until April 19, 2017, Ticketfly Canada retained the ticket sale proceeds payable to Huka under the Services Agreement. On or about April 19, 2017, at Huka's direction, Ticketfly Canada remitted ticket sale proceeds, net of the fees payable to Ticketfly under the Services Agreement, to PMFLP. The Trustee's representative, Mr. Venetsansos, has sworn, and I find, that PMFLP used those funds to pay costs related to the Festival.

[43] After April 20, 2017, Ticketfly Canada, at the direction of Huka and/or 111 B.C. Ltd. made several more remittances of ticket sale proceeds. Ticketfly Canada's remittances totalled $8,150,307.34. Of that amount, Ticketfly Canada paid $7,861,834.15 into bank accounts controlled by PMFLP. Ticketfly Canada paid the balance to a talent agency representing artists scheduled to perform at the 2017 Festival.

[44] The ticket sale proceeds remitted to PMFLP were used in part to pay Festival-related expenses, including artist deposits, vendor deposits, producer fees and taxes. The Canadian Investors received none of these funds.

[45] On May 16, 2017, as a result of slow ticket sales and the failure of PMFLP or 111 B.C. Ltd. to obtain additional financing for the Festival, 111 B.C. Ltd. determined that it lacked the funding necessary to stage the 2017 Festival.

Bankruptcy and cancellation of 2017 Festival

[46] On May 18, 2017, PMFLP and 111 B.C. Ltd. made assignments in bankruptcy and the Trustee was appointed as trustee of the debtors' estates. On the

same day, the Trustee provided notice of the bankruptcy and of its appointment to Huka, and immediately sought the termination of ticket sales for the 2017 Festival.

[47] Ticketfly ceased selling tickets on May 18, 2017. Ticketfly has retained possession of the proceeds of its ticket sales from May 4 through May 18, 2017, in the amount of $348,060.

[48] When the Festival was cancelled, an average of 18,230 tickets had been sold for each day of the Festival.

[49] On May 18, 2017, the Trustee posted notice of the debtors' bankruptcy proceeding on the Festival website, informing ticket holders that the 2017 Festival was cancelled and that they might be able to obtain refunds of the ticket price from their credit card companies.

[50] Most ticket holders acted on the Trustee's advice. They obtained refunds from their credit card companies, which then executed "chargebacks" against Ticketfly Canada. The ticket holder received a refund from his or her credit card company while at the same time, Ticketfly was charged by the credit card company with the amount of this loss.

[51] On June 6, 2017, Ticketfly filed a proof of claim with the Trustee alleging an unsecured and contingent claim against the debtors in the amount of $7.9 million for chargeback amounts that Ticketfly claimed to have paid the credit card companies where ticket holders sought refunds for tickets purchased for the 2017 Festival.

[52] By a notice of disallowance issued on November 17, 2017, the Trustee disallowed Ticketfly's proof of claim on the basis that Pandora had paid all of the chargeback amounts. The Trustee also demanded that Ticketfly immediately remit to the Trustee any ticket sale proceeds from the 2017 Festival that Ticketfly retained.

[53] On June 24, 2017, Ticketfly informed counsel for the Trustee that it claimed a constructive trust over the ticket sale funds held by the estate.

[54] As of May 18, 2017, PMFLP and 111 B.C. Ltd. possessed cash in the amount of $3,310,837. The Trustee takes the position that because the ticket sale funds were deposited to various PMFLP accounts that also held funds derived from other sources, including deposit returns and investor funds, it is not possible to determine what portion of the cash held by the estate derives from the ticket sale funds.

ISSUES

[55] The following issues arise for determination on this application:

a) Are the ticket sale proceeds subject to a constructive trust, either for unjust enrichment or to remedy misconduct on the part of the debtors?

i. With respect to unjust enrichment, was there an enrichment of the debtors' estates; a corresponding deprivation of the ticket purchasers and/or Ticketfly Canada or its assignee Pandora; and an absence of any juristic reason for the enrichment of the debtors?

ii. Do the ticket sale proceeds constitute specific, identifiable property capable of being the subject of a constructive trust?

iii. In bankruptcy proceedings, is the remedy of constructive trust limited to exceptional circumstances where the debtor is enriched by its own misconduct?

iv. If so, was there such misconduct on the part of the debtors?

b) If a constructive trust is imposed on the ticket sale proceeds, is Ticketfly Canada entitled to subrogation to the extent that it has paid the chargebacks to the purchasers as a result of cancellation of the 2017 Festival?

c) Has there been an effective assignment to Pandora of Ticketfly Canada's claims in these bankruptcy proceedings?

DISCUSSION AND ANALYSIS

Subrogation and Assignment

[56] Before I address the substance of the applicants' claim of constructive trust, I will deal briefly with the issues of subrogation and assignment. I do so in response

to the Trustee's preliminary submission that neither Ticketfly nor Ticketfly Canada has shown that they suffered any loss that would give rise to a claim against the estate. The Trustee contends that Ticketfly's own evidence is that its parent company, Pandora, has paid the chargeback amounts claimed against Ticketfly and that accordingly, Ticketfly suffered no loss, and there is no basis on which the court could grant the relief sought by the applicants. Further, the Trustee argues that because Pandora has paid the chargebacks, Ticketfly is not entitled to be subrogated to the position of ticket holders whose ticket purchases were the subject of chargebacks by their credit card companies.

[57] In his first affidavit, sworn August 16, 2017, Mr. Jeremy Liegl, the Assistant Secretary of Pandora, deposed that Pandora was in the process of selling Ticketfly to Eventbrite LLC. Mr. Liegl went on to state that as the current parent of Ticketfly, Pandora was paying the chargebacks against Ticketfly.

[58] At para. 35 of his first affidavit, Mr. Liegl deposed:

> . . . Pursuant to Pandora's pending transaction with Eventbrite, Pandora has agreed that it will continue to pay all costs related to these bankruptcies and the cancellation of the Festival after the sale of Ticketfly closes.

[59] In his second affidavit, sworn November 29, 2017, Mr. Liegl explained that Ticketfly Canada, as a wholly-owned subsidiary of Ticketfly is the entity legally responsible for paying the chargebacks.

[60] Mr. Liegl also stated, at paras. 9 and 10 of his second affidavit:

> 9. To clarify paragraph 35 of my first affidavit, Ticketfly Canada is directly and legally responsible for paying the Chargebacks pursuant to the Canadian Replication Agreement. Accordingly, Pandora was not directly paying the Chargeback losses incurred by Ticketfly Canada or Ticketfly. Instead, I am advised by Lindsay Aulick, Director, Accounting, of Pandora, and do verily believe, that prior to the sale of Ticketfly to Eventbrite, Pandora was required to inject further capital into Ticketfly to keep it capitalised as a result of the losses suffered by Ticketfly/Ticketfly Canada due to the Chargebacks. <u>For certainty, Pandora was not indemnifying Ticketfly or Ticketfly Canada for Chargebacks, but rather was funding its wholly owned subsidiary in the ordinary course of business.</u> [Emphasis added.]

> 10. As part of the transaction between Pandora and Eventbrite, Pandora agreed to assume responsibility for any and all obligations of Ticketfly resulting from these bankruptcies, including the costs associated with the Chargebacks paid by Ticketfly, and was assigned any recovery that Ticketfly may be entitled to in these bankruptcy proceedings. Attached hereto and marked as Exhibit "F" is a copy of the agreement among Eventbrite, Pandora and Ticketfly.

[61] On September 1, 2017, when Pandora sold Ticketfly to Eventbrite, Pandora assumed responsibility for all liability of Ticketfly arising from the refund of ticket purchases including the chargebacks, and received an assignment of all of Ticketfly's rights to any legal proceedings, including these bankruptcy proceedings.

[62] Subrogration is an equitable right that allows a person who pays a debt or discharges a liability of another person to "stand in the shoes" of the creditor and "enforce against the debtor all rights which the creditor himself could have asserted": Kevin McGuinness, *The Law of Guarantee*, 3d ed. (Markham: LexisNexis Canada) at 10.18.

[63] Rights of subrogation arise immediately upon payment and permit one party to stand in the shoes of another and advance any claims that the original party may have against the other party: *Alberta (Treasury Branches) v. Alberta (Public Trustee)*, 2002 ABQB 781 at para. 46.

[64] The conditions the claimant must satisfy to qualify for subrogation, as stated by Farley J. in *Westpac Banking Corp. v. Duke Group Ltd.*, [1994] O.J. No. 2203 (Ont. C.J. Gen. Div.) at para. 18 are:

1) The claimant must have made payment to protect his own interests;

2) The claimant must not have been a volunteer;

3) The payment must satisfy debt for which the claimant was not primarily liable;

4) The entire debt must have been paid; and

5) Subrogation must not cause injustice to the rights of others.

[65] Ticketfly Canada was responsible for payment of the chargebacks by operation of the following agreements. First, on March 8, 2012, Pandora, together with Pandora Media California, LLC (the "Pandora Entities"), entered into a Payment Processing Agreement with J.P. Morgan Chase Bank, NA, and Paymentech LLC ("Paymentech").

[66] Under Article 6.2 of the Payment Processing Agreement, the Pandora Entities have "full liability for all Chargebacks".

[67] The Payment Processing Agreement was later amended to add Ticketfly as a party.

[68] Paymentech and Ticketfly Canada are parties to the Canadian Replication Agreement by which they agreed to be bound by and adopt the terms and conditions of the Payment Processing Agreement with respect to processing Ticketfly Canada's Canadian transactions. By the Canadian Replication Agreement, Ticketfly was required to pay the chargebacks for the refunds issued by credit card companies to ticket purchasers.

[69] Those purchasers who have received refunds have recovered the loss arising from their ticket purchases and cannot claim against the debtors' estate. As the applicants submit, subrogation, by preventing double recovery, would not prejudice the purchasers. There is no suggestion that subrogation would cause prejudice to any party in this proceeding.

[70] I find that Ticketfly Canada was obliged to pay the chargebacks for ticket purchasers' refunds and incurred the costs of doing so. As Mr. Liegl has deposed, due to the losses suffered by Ticketfly Canada as a result of the chargebacks, Pandora injected additional capital into Ticketfly in order to fund a wholly-owned subsidiary in the ordinary course of business. Pandora then took a valid assignment in writing of any right of recovery to which Ticketfly might be entitled in the bankruptcy proceedings.

[71] As the applicants submit, claims against a bankrupt's estate are assignable: *Hattle's Feed Mill Ltd. (Re)*, [1995] 20 C.B.R. (N.S.) 229 (Ont. S.C., In Bankruptcy) at para. 17, as are constructive trust claims: *Fission Uranium Corp. v. Dahrouge*, 2014 BCSC 1214 at para. 122.

[72] I conclude that if the ticket sale proceeds are held by the Trustee on a constructive trust, Ticketfly Canada would be entitled to be subrogated to the position of ticket purchasers whose ticket purchases were refunded through chargebacks.

Are the ticket sale proceeds subject to a constructive trust for unjust enrichment or to remedy misconduct on the part of the debtors?

Applicable Legal Principles

[73] The three requirements that must be satisfied for a finding unjust enrichment are an enrichment; a corresponding deprivation; and the absence of any juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at para. 38.

[74] In order for a constructive trust to be found, there must be a link between the plaintiff's contribution and the property in which the trust is claimed. Further, monetary compensation must be inadequate: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at paras. 26, 29.

[75] In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, the Court held that a constructive trust may be imposed where good conscience so requires. The Court identified two general categories where good conscience may require the imposition of a constructive trust. The first category provides a remedy where a defendant wrongfully obtains property and the second concerns the prevention of unjust enrichment. As the Court explained, the two categories are not mutually exclusive:

> 34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is

> informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.
>
> 35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.
>
> 36 The situations which the judge may consider in deciding whether good conscience requires imposition of a constructive trust may be seen as falling into two general categories. The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. The traditional English institutional trusts largely fall under but may not exhaust (at least in Canada) this category. The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

[76] Writing for the majority in *Soulos*, McLachlin J. (as she then was) explained at para. 43:

> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

[77] In *Soulos*, at para. 45, the Court also identified four conditions to be satisfied for the imposition of a constructive trust for wrongful conduct:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

Unjust Enrichment

[78] Bearing these principles in mind, I will first address the applicants' claim for the imposition of a constructive trust based on unjust enrichment before turning the claim founded on alleged debtor misconduct.

[79] The applicants submit that:

(a) when PMFLP and its general partner authorized the sale of tickets for the 2017 Festival, they were aware, in light of the dysfunctional relationship between the Canadian Investors and Huka, and the substantial losses over the previous three years, that it was uncertain whether the Festival would proceed;

(b) ticket holders purchased tickets in order to gain entry to the Festival;

(c) as a result of the Festival's cancellation, the ticket holders did not receive the benefits they reasonably expected when they purchased their tickets;

(d) ticket holders could not have reasonably expected they would be unsecured creditors or that the ticket sale proceeds would be divided among PMFLP's creditors in the event the Festival was cancelled;

(e) PMFLP cannot reasonably have expected to retain the ticket sale proceeds in the event the Festival was cancelled; and

(f) the bankruptcy estate of the debtors has been unjustly enriched by the value of the ticket sale proceeds held by the Trustee, in the absence of any juristic reason for the enrichment.

[80] Here, the debtors' estates have been enriched by the ticket sale proceeds. The ticket holders, who did not receive the consideration for which they bargained, suffered a corresponding deprivation (although many have since received refunds issued by their credit card companies and charged back to Ticketfly Canada). I would add that by virtue of the terms of their contract for the purchase of tickets from Ticketfly, set out at para. 41 of these reasons, the ticket holders may well have had a legitimate expectation that in the event of cancellation of the Festival they would receive a refund, either from Ticketfly or from the debtors.

[81] However, I find that there is a juristic reason for the enrichment of the debtors' estates. By the Services Agreement, Ticketfly was the exclusive ticket seller for the Festival. Ticket holders purchased their tickets for the 2017 Festival from Ticketfly. By paragraph 9 of the Services Agreement, Ticketfly was required to collect all proceeds from ticket sales, deposit them to a Ticketfly account, and then remit the net proceeds due to Huka. Pursuant to the Services Agreement, Ticketfly Canada, initially at Huka's direction, and later at the direction of Huka and/or 111 B.C. Ltd., remitted the net ticket sale proceeds to PMFLP. In my view, the payment of the net ticket sale proceeds to the debtors pursuant to the Services Agreement constituted a juristic reason for the enrichment of the estate.

[82] The decision of Ground J. in *Livent Inc., Re* (1998), 42 O.R. (3d) 501 (Ont. C.J., Gen. Div.), although distinguishable on its facts, provides some support for this conclusion. Livent cancelled various scheduled performances of its theatrical productions. At para. 7, the Court described the principal issue as:

> ... whether the contract between the Ticket Holders and Livent directly, or through its agent Ticketmaster Canada Inc. ... is covered by the [*Consumer*

> *Protection Act*, R.S.O. 1990, c. C. 31] and accordingly whether the Ticket Holders have the right to a refund pursuant to s. 20 of the CPA and whether a trust of the moneys paid by them for tickets for future performances is established in their favour pursuant to s. 9(2) of the Regulation under the CPA.

[83] The Court continued at para. 8:

> The issue is not whether the Ticket Holders are in law entitled to a refund. Clearly, whether one categorizes the contract between the Ticket Holders and Livent as a purchase of services to be performed at a later date or the purchase of a right to attend a specific performance at a theatre at a later date, if such performance does not take place, there is a total failure of consideration and, subject to any enforceable provision in the contract between Livent and the ticket holder to the contrary, and I have been referred to no such provision, the ticket holder is entitled to rescission of the contract and to the return of the moneys paid for the ticket. This contractual right to a return of the purchase price of the ticket however simply constitutes the Ticket Holders as unsecured creditors of Livent whose rights must be dealt with in the plan ultimately proffered by Livent pursuant to this CCAA application. Their status as unsecured creditors is acknowledged by Livent.

[84] Ground J. concluded that the contracts entered into between the ticket holders and Livent were not executory contracts for the purchase of services within the meaning of the CPA and that accordingly no statutory trust in favour of the ticket holders applied.

[85] The Court went on to reject the alternative argument that a constructive trust was created in favour of the ticket holders.

[86] At para. 16, after citing *Soulos* for the proposition that the constructive trust is imposed by law not only to remedy unjust enrichment, but also to prevent persons from retaining property that in "good conscience" they should not be permitted to retain, the Court continued:

> It appears to me that, in the case at bar, there is a clear juristic reason for the receipt and retention of the ticket sale proceeds by Livent. In addition, I do not think the relationship between Livent and the Ticket Holder, being a commercial relationship and not involving issues of maintaining the integrity of trust-like relationships, is such that the court should conclude that in good conscience Livent should be found to be holding the ticket sale proceeds in trust for the Ticket Holders.

[87] The Ontario Court of Appeal dismissed the appeal from Ground J.'s judgment, but confined its analysis to the ticket holders' statutory rights: *Livent Inc., Re* (1999), 46 O.R. (3d) 458.

[88] Here, as in *Livent*, the relationships between the ticket holders and Ticketfly, and between Ticketfly, Huka and PMFLP were commercial, and the Services Agreement provided a clear juristic reason for the debtors to receive and retain the ticket sale proceeds.

[89] In their submissions, the applicants referred to *Noh v. Plaza 88 Developments Ltd.*, 2010 BCSC 1491, aff'd on appeal, 2011 BCCA 461, where the court emphasized that the existence of a contract is not the end point of the "juristic reason" analysis. In *Noh*, Myers J., at para. 55, stated:

> ... Where a valid and enforceable contract requires the plaintiff to benefit the defendant, the contract is, no doubt, a sufficient juristic reason for the enrichment. On the other hand, where the benefit is bestowed outside the scope of the contract, or where a contract has failed for lack of consideration or frustration, the contact might not constitute a sufficient juristic reason.

[90] Here, the Services Agreement required Ticketfly, through its Canadian subsidiary, Ticketfly Canada, to benefit the debtors by remitting the net ticket sale proceeds as directed by Huka, and later, by Huka and/or 111 B.C. Ltd. While the cancellation of the Festival resulted in a failure of consideration for the ticket holders, they were left with their remedies of either seeking a refund of the ticket price, or claiming as unsecured creditors, against the debtors' estate.

[91] Accordingly, the applicants have failed to establish the elements required for imposition of a constructive trust based on unjust enrichment.

Constructive trust for debtor misconduct

[92] In *Creditfinance Securities Ltd. (Re)*, 2011 ONCA 160, where the Ontario Court of Appeal upheld the imposition of a constructive trust to remedy the debtor's fraud, the Court emphasized that the test for proving the existence of a constructive trust in bankruptcy proceedings is high. A constructive trust will ordinarily be

imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct (at para. 33). While a constructive trust may be ordered in bankruptcy proceedings to remedy unjust enrichment, the prerequisite is that the bankrupt obtained the property through misconduct. The court must also find that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct (at para. 37).

[93] Constructive trust is a discretionary remedy. The court, in exercising its discretion in bankruptcy proceedings, must consider the interests of other creditors besides those of the wrongdoer and his or her victim: *Creditfinance* at para. 44.

[94] Similarly, in *Transtrue Vehicle Safety Inc. v. Werenka*, 2015 ABQB 197, the court held:

> **27** The standard of proving a constructive trust in a bankruptcy proceeding is very high. It is available in extraordinary cases where finding otherwise would result in a commercial immorality by unjustly enriching the general body of creditors. It also requires that the bankrupt obtained the property through misconduct: *Ascent Ltd, Re* (2006), 18 CBR (5th) 269 (Ont SCJ); *Credifinance Securities Ltd*, 2011 ONCA 160, 74 CBR (5th) 161 at para 26; *Re McKinnon*, 2006 NBQB 108.
>
> **28** In *Grant v Ste Marie (Estate of)*, 2005 ABQB 35 (*Grant*) Slatter J (as he then was) explains the premise for this high threshold (at para 17):
>
> > A constructive trust in a bankruptcy may give one claimant a priority over others. The importance of a trust is obviously that it gives the claimant a proprietary remedy, which is especially of importance when the defendant is insolvent: D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989), 68 Can. Bar Rev. 315, at pg. 321. In many cases a plaintiff with a merely personal claim will recover nothing, whereas a plaintiff with a proprietary claim will be able to recover specific identifiable assets. As Paciocco states at pg. 322:
> >
> > > Concern has been expressed by a number of authors that this result is not always justified. It violates the basic policy that "insolvency should create equality in creditors", that "property . . . in liquidation should be applied in satisfaction of its liabilities pari passu". This policy has such appeal that it has been speculated that, had statutory regimes not been created to implement it, equity would have developed rules relating to the equal distribution of assets. It seems that the force of this policy focuses the burden of persuasion squarely on those

> who would give priority to remedial constructive trust beneficiaries. (Footnotes Omitted)

[95] A constructive trust may be imposed, with the consequent disruption of the scheme of distribution under the *BIA*, where it is necessary to remedy debtor misconduct and thereby avoid commercial immorality. In *Ascent Ltd. (Re)*, [2006] O.J. No. 89 (Ont. S.C. In Bankruptcy), the debtor had engaged in misconduct by disobeying a court order to set aside money and to hold that money in trust for the appellant. The Court held Ascent had been unjustly enriched by its misconduct. The Court considered the effect of the imposition of a remedial constructive trust on the general creditors of the estate, but concluded that it was "appropriate to do injustice to the *BIA* in order to do justice to commercial immorality" and to prevent an unjust enrichment (at para. 17).

[96] Here, the applicants must establish misconduct on the part of the debtors in obtaining the ticket sale proceeds that would warrant the imposition of a constructive trust as a matter of good conscience in order to avoid commercial immorality.

[97] The debtors have not engaged in fraud nor have they failed or refused to obey a court order.

[98] The applicants contend the debtors engaged in misconduct by authorizing the sale of tickets to gauge interest in the 2017 Festival when they must have known there was substantial uncertainty about whether the Festival would proceed.

[99] From January through April 2017, the Canadian Investors sought to remove Huka as the Festival producer and to acquire control of the general partner. Huka was unwilling to relinquish its role as the producer of the Festival. By April 20, 2017, following the mediation, 111 B.C. Ltd. replaced Twisted Tree as the new general partner of PMFLP.

[100] Despite the ongoing dispute concerning management and control of the Festival, the Canadian Investors made *bona fide* efforts to proceed with the 2017 Festival. As the Trustee has reported, between April 19 and April 28, 2017, Ticketfly

released approximately $4.1 million of February 2017 ticket pre-sales. Of that amount, $3.2 million was applied to pay artist deposits, vendor deposits, producer fees and sales tax payable. The remaining balance of approximately $900,000 was deposited to bank accounts held by PMFLP.

[101] PMFLP continued, albeit unsuccessfully, to attempt to attract new investors.

[102] These activities are consistent with the debtors making an honest and persistent effort to stage the 2017 Festival, which continued until May 16, 2017, when the directors of 111 B.C. Ltd. determined that PMFLP lacked the necessary funds to proceed and decided to make the assignments in bankruptcy.

[103] The applicants say the debtors' estates were enriched by the use of some ticket sale proceeds to pay obligations of the Festival outstanding from 2016. PMFLP dispersed $873,690 from the 2017 ticket sale proceeds to pay outstanding expenses from the 2016 Festival. The Trustee has advised that amount included $563,001 for GST owing and $304,018 for production expenses paid to key vendors to ensure their continued involvement with the 2017 Festival. I am unable to say those expenditures were imprudent, let alone wrongful. Again, the applicants have not shown that the payment of these outstanding expenses from the 2016 Festival offends commercial morality or would otherwise justify the court's intervention by the imposition of a constructive trust over the remaining ticket sale proceeds.

[104] The applicants submit the debtors ought to have immediately terminated ticket sales on May 16, 2017 when they decided to make the assignments into bankruptcy. The applicants suggest the debtors acted wrongfully in permitting ticket sales to continue until May 18, 2017, when the Trustee was appointed and stopped further ticket sales. However, as the Trustee points out, the debtors have not received any funds from Ticketfly for ticket sales made between May 16 and 18, 2017. Ticketfly Canada continues to retain the proceeds of those sales.

[105] The evidence adduced on this application falls short of establishing bad faith or other misconduct on the part of the debtors that would provide the basis for

imposition of a constructive trust on the ticket sale proceeds retained by the debtors' estates.

[106] In short, the applicants have not shown misconduct on the part of either PMFLP or 111 B.C. Ltd. in obtaining the ticket sale proceeds. The debtors' estates have not been unjustly enriched, nor do other extraordinary circumstances exist that call for the imposition of a constructive trust to remedy an injustice. In this instance, the imposition of a constructive trust would preclude the debtors' creditors, including vendors and suppliers, from any significant recovery in the bankruptcy proceedings.

[107] In light of my conclusion that the applicants are not entitled to a constructive trust for either unjust enrichment or debtor misconduct, it is unnecessary to decide whether the ticket sale proceeds, although co-mingled with other funds, constitute specific, identifiable property capable of being subject to a constructive trust.

Conclusion

[108] The application of Ticketfly and Ticketfly Canada, by their assignee Pandora, for an order declaring that the ticket sale proceeds are held by the Trustee pursuant to a constructive trust in favour of the ticket purchasers or any party subrogated to their position is dismissed, as is the balance of the relief sought by the applicants on this application.

"PEARLMAN J."

Tab 20

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Ontario
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

In the Matter of the Bankruptcy of
Steven Mathew White, of the City of Toronto, in the
Province of Ontario

Estate No.: 31-428403

-and-

In the Matter of the Bankruptcy of
Marla White, of the City of Toronto, in the
Province of Ontario

Estate No.: 31-442550

October 20, 2006

Appearances: Irving Marks -for Moving Party
Cara Shamess

Fred Tayar -for Respondent

Heard: September 15, 2006

Reasons

[1] This was an appeal by Caicos Building and Loan Corporation ("Caicos"), pursuant to s. 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

[2] On March 21, 2006, Caicos delivered two Proofs of Claim (Property), one in each of the Estates of Steven Mathew White and Marla White. These were responded to by Zeifman Partners Inc., trustee in bankruptcy for both estates, (the "Trustee"), with

Notices of Dispute. Caicos appeals from said Notices of Dispute. The appeals proceeded on the same material, and it was agreed that as the facts in each appeal are identical, the submissions in and disposition of each appeal would also be identical. Accordingly, these Reasons apply to each Estate noted above.

Facts

[3] Caicos is an offshore corporation. Its principals include two brothers, Timothy Kempe and William Kempe ("Timothy" and "William" or the "Kempes" collectively).

[4] The Kempes have, as a long time friend, one Michael Rothfeld ("Rothfeld"). The Kempes, individually and collectively, have been friends with Rothfeld for at least 20 years.

[5] In early 2002, Rothfeld revealed to the Kempes that he was then primarily in the business of sourcing investors for Steven White ("Steven"), and had been for some time. Rothfeld also advised the Kempes that he had, for the four-year period prior to that, been investing both his own money and that of his spouse's family with Steven. Rothfeld had, apparently, been investing the sum of $10,000,000.00 with Steven, with great success in terms of financial reward. Rothfeld also, at that time, and throughout 2002, described Steven as a uniquely skilled investor and that investing with Steven was an opportunity to earn a high rate of return with no risk to the invested principal.

[6] By March, 2003, the Kempes had become convinced that such an investment as had been described by Rothfeld was right for their company, Caicos, and agreed to invest US$500,000.00. The Kempes, in their materials herein, make it abundantly clear that they believed that they were investing this money with Rothfeld *and* Steven. The Kempes also make it clear in their materials that they caused Caicos to make the investment in reliance upon the Kempes' relationship of trust with Rothfeld; Rothfeld's representations to them regarding Steven and his skills and position with ScotiaMcLeod; and the terms of the investment itself.

[7] With respect to the actual investment and its terms, the promissory note obtained by Caicos in exchange for its US$500,000.00 is reproduced in the materials. In essence, it is a term loan by Caicos to Rothfeld and a corporation known as Eyerock Holdings Inc. ("Eyerock"). The note from Rothfeld and Eyerock, to Caicos, was due on or before September 22, 2003, and bore interest at 15% per annum, calculated monthly, not in advance.

[8] The stated reason for the loan being made by Caicos to Rothfeld and Eyerock, and not to Steven, is that the Kempes were advised, by their long time, trusted friend, Rothfeld, that he would be handling the non-resident withholding tax due on the interest payment on behalf of Steven, given that Caicos is a British West Indies corporation.

[9] The evidence indicates that the same day that the Eyerock note was given, and funds advanced by Caicos to Eyerock, a note was given to Eyerock by Steven, also in the

amount of US$500,000.00, on more or less identical terms, but bearing interest at an annual rate of 18%. Apparently the Kempes had been advised that Rothfeld would be earning 3% per annum for introducing them to the investment.

[10] No particular form or vehicle appears to have been specified for the investment of the Caicos money. There is certainly no evidence on the appeal that the advance of funds by Caicos to Eyerock and Rothfeld was on condition of it flowing through to Steven. The cross-examination of Timothy on his affidavit indicates that he, and Caicos, were of the understanding that Eyerock was a company owned by Rothfeld, and his "partner" Steven.

[11] The closing of the above described transactions took place March 25, 2003, at the offices shared by Rothfeld and Steven. According to the evidence, and it seems that the appellant has taken great pains to set this out, Timothy met Steven only briefly on the day of closing. The meeting took place only because Rothfeld, with whom Timothy expected to close the transaction, it being, as he has testified and I so find, a transaction that he and Caicos thought was being entered into with Rothfeld and Rothfeld's "partner" Steven, was late. As well, the appellant has very clearly set out that William met Steven directly on only two occasions over the course of the year long period from when Rothfeld first broached the subject of this investment to the March 25, 2003, closing date. Nowhere in the materials does Caicos or the Kempes, on its behalf, indicate that Caicos was induced to invest as a result of any representations of Steven. All of the representations appear, and I so find, to have come to Caicos and its principals from Rothfeld. The interaction between Timothy and Steven on the closing date was, I find, brief, and only served to have Steven reiterate that which Rothfeld had already told the Kempes, and which had already induced them to cause Caicos to make the investment.

[12] Shortly after the closing date, Caicos and its principals discovered that Steven had lost his position with ScotiaMcLeod, and became concerned with the safety of the investment. Contact was had with Rothfeld, who seemed just as concerned. Although not explained in the materials, Caicos seemed most concerned with the financial demise of Steven, perhaps fueled by certain media reports concerning Steven's direct investors who had been left holding the proverbial bag. Given the lengths to which the Kempes and Caicos have gone to make it clear that they invested with and on the representations of Rothfeld, I am not at all sure why they were concerned with Steven's financial failure. Their debt was still due, and not yet been called or matured, from Eyerock and Rothfeld. No evidence was led to indicate that those two parties were not or are not able to honour the Eyerock/Rothfeld note, other than as may be inferred from the Statement of Claim filed, against, *inter alia*, Eyerock.

[13] In any event, concerned they were, and were apparently able to determine that the sum of US$500,000.00 was deposited to Steven's joint account with his now bankrupt spouse, Marla White ("Marla"), at The Toronto-Dominion Bank, (the "TD Account"). Said deposit was made scant days after Caicos advanced that amount to Eyerock, and Eyerock in turn advanced a like amount to Steven. Caicos concludes from this series of transactions that such of the US$500,000.00 as was left in the TD Account, on a rateable basis as determined by recent deposits to the TD Account, was property of Caicos in the

hands of the bankrupts, Steven and Marla, and now in the possession of the Trustee. It is on that basis that the Proofs of Claim (Property) were advanced, and these appeals launched.

Issues

[14] Caicos argues that it is entitled to succeed as a property claimant under s. 81 BIA on the basis of constructive trust, and the use of tracing principles to follow what it claims is its money in the TD Account by following or tracing it through Eyerock's hands into Steven's hands, where it was at the time of bankruptcy. Caicos does not argue express or legal trust in respect of the funds.

[15] Constructive trust being an equitable remedy, requiring an exercise of discretion by the Court, is it appropriate that this Court find a constructive trust in favour of Caicos over all or any of the funds in the TD Account?

Analysis

[16] Caicos is clear in its position – it claims status as beneficiary of a constructive trust. As indicated above, that is an equitable remedy. Before delving further into the analysis of the requirements to be met to find such a trust, it is important to acknowledge that the facts in this matter cry out for equitable relief, on their face. Caicos, albeit a sophisticated lender, lent money, in the honest belief that it would be repaid. It does not appear to have been repaid, although it might, in fact, have other remedies yet available to it to recover its funds. That said, it is clear, at least for the purposes of these appeals, that Steven is a rogue, and that he was likely involved in some sort of a ponzi scheme, which collapsed just as Caicos entered the scene. Caicos has no apparent legal remedy against the funds in the TD Account, and equity will always try to make right what legal remedies cannot.

[17] It is clear, in Canada, that a constructive trust may be founded on both the older English principles of constructive trust, and the unjust enrichment principles classically enunciated in *Pettkus v. Becker*, [1980] 2 S.C.R. 834. That this proposition is true is clearly set out in a more recent decision of the Supreme Court of Canada – *Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214, at para. 25.

[18] Turning first to the constructive trust as found in the English authorities, and which is still the law of our Dominion and of our Province, what is a constructive trust? It is, at best, vaguely defined, and seems to be the quintessence of equity in that it changes its shape and appearance as is required to give effect to what has been called good conscience, or in an insolvency setting, commercial morality. I find that *Soulos* provides us with a good picture of this nebulous concept, at para. 29:

> "Good conscience as the unifying concept underlying constructive trust has attracted the support of many jurists. Edmund Davis L.J. suggested that the concept of a "want of probity" in the person upon whom the

> constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts": Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2), [1969] 2 Ch. 276 (C.A.). Cardozo J. similarly endorsed the unifying theme of good conscience in Beatty v. Guggenheim Exploration Co., 122 N.E. 378 (1919), at p. 380:
>
> > A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. [Emphasis added.]"

[19] A constructive trust is a way for equity to accomplish its goal of righting a legal wrong. The Supreme Court having, in *Pettkus*, set out the requirements for the use of a constructive trust where unjust enrichment has occurred, set out in *Soulos* four conditions for the use of constructive trust to remedy wrongful conduct, other than as may have resulted in an unjust enrichment. The two are not mutually exclusive, and the former often results in the latter. Those conditions, at para. 45 of *Soulos*, are:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
> (4) There must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of the intervening creditors must be protected.

[20] Applying these considerations to the case at bar, I am not convinced that there has been sufficient wrongful conduct to engage the Court's conscience, and impose a constructive trust.

[21] Firstly, while Steven no doubt owed a duty or obligation to use his supposedly unique skill and expertise to wisely invest monies lent to him for that purpose, and if his activities are found to have been fraudulent, he would certainly have failed in that obligation, he did not owe it to Caicos. At best he owed it to Eyerock, but it has not advanced a Proof of Claim (Property).

[22] Similarly, with respect to the second condition, Steven did not acquire the asset in question (the funds in the TD Account) as a result of activities in breach of his obligation to either Eyerock or Caicos (if he even had any obligation to Caicos). He acquired the funds in the lawful carrying out of the contract with Eyerock to borrow said funds, and

return them at a later date with interest. Both Eyerock and Steven (and, for that matter Caicos) intended Steven to have the funds, at least until he further put them to use to earn a return. However, in all honesty, neither Eyerock nor Caicos would have had any interest in what Steven did with the funds, so long as he repaid them on time with interest. He could lawfully have left them on deposit in the TD Account, and paid the interest from his personal funds, if he so desired. Nothing in either promissory note, or any of the evidence as to Caicos' understanding of the investment bound or obligated Steven to do anything other than receive the funds and repay them with interest in six months time. Even the allegations that he was to deposit them to his personal account with ScotiaMcLeod do not persuade me otherwise, as I see no material difference to the facts if they were in his deposit account with The Toronto-Dominion Bank or ScotiaMcLeod when his financial carousel stopped turning.

[23] Turning to the third condition, I do not find any evidence of a legitimate reason for Caicos to seek a proprietary remedy here, other than to bootstrap itself ahead of the other creditors of Steven and Marla, and otherwise upset the scheme of orderly distribution of the BIA. This does not engage the Court's conscience.

[24] Fourthly, I find that the intervening insolvency is a factor which would render the imposition of a constructive trust unjust. As I did in *Re Ascent* (2006), 18 C.B.R. (5th) 269, I have considered the principles of commercial morality, and the decision of Winkler J, as he then was, in *Brown & Collett Ltd., Re* (1996), 11 E.T.R. (2d) 164 (O.G.D. [Commercial List]). Notwithstanding, I distinguish the case at bar from *Re Ascent*, and do not find it appropriate to alter the BIA scheme of distribution, even if the other factors had been found by me, which they are not.

[25] Turning to unjust enrichment as a ground for imposition of constructive trust, I do not find that Caicos meets the test there either.

[26] It is by now trite law that unjust enrichment requires three elements: i) an enrichment of the defendant; ii) a corresponding deprivation of the plaintiff; and iii) the lack of a juristic reason for this state of affairs.

[27] There is no doubt that Steven was enriched by the amount of US$500,000.00, and that Caicos has suffered a deprivation of like amount. I do not find that the amounts correspond, however, due to the intervention of Eyerock.

[28] Caicos argues that Eyerock was merely a conduit for tax purposes. However, that flies in the face of its own evidence as to the import placed upon its relationship with Rothfeld and Rothfeld's, not Steven's, representations about Steven and the investment. It does not lie in Caicos' mouth, in my view, for it also to claim, when convenient, that Eyerock and Rothfeld are but conduits between it and Steven. The more so when Caicos has provided no evidence, other than the barely legible back of its negotiated draft in favour of Eyerock, that its money was even the same money as Eyerock advanced to Steven. Even that evidence only indicates that the draft may have been deposited to the same bank account as the Eyerock cheque to Steven was drawn upon, not that the funds

flowed through thereto. Section 81(3) BIA makes it very clear, for very good policy reasons, that the onus in this matter is on Caicos. I do not accept the argument that Caicos could not have obtained evidence from Eyerock relating to the flow of funds allegedly through it from Caicos to Steven. I do not accept this for two reasons: the evidence of the relationship between the principals of Caicos and the principal of Eyerock (who turned over certain transaction evidence in April, 2003, immediately upon being asked for it); and s. 163(2) BIA. Caicos argued that it could not obtain evidence under s. 163(2) BIA because the Trustee not only rejected its Proof of Claim (Property), but also rejected its claim as an unsecured creditor of Steven and Marla. The section clearly indicates that it is available not only to the Superintendent and creditors but to other interested persons, and there was no evidence that such a motion had been rejected by the Court. Section 163(2) BIA would have permitted a request of the Court to examine Rothfeld under oath to determine the flow of funds through Eyerock's account.

[29] In order to succeed on unjust enrichment, the Court would have to pierce the paper veil of this transaction. I have considered this at some length. I recognize that equity exists to permit such a piercing, if the Court is convinced that that is necessary to give effect to what the intention of the parties was or if good conscience requires it to right a wrong or to accomplish what legal remedies cannot. I simply cannot conclude, on the evidence before me, that any of those apply.

[30] I am satisfied that Caicos intended to lend the money not to Steven directly, but to him in such a manner as to engage liability for the loan upon the long time friend of its principals – Rothfeld, and his company. Even though Timothy thought that Eyerock was owned by both Rothfeld and Steven, Caicos was careful, I find, to ensure that not only Eyerock, but Rothfeld personally would be liable to it on the loan. I draw an adverse inference from the failure to adduce evidence that the Caicos money actually flowed through the account of Eyerock in any manner. For all this Court can determine, Eyerock may have kept Caicos' funds for its own purposes. After all, the evidence indicates that Rothfeld and his family were lending amounts to Steven in the many millions of dollars. It might not even have lent the Caicos funds to Steven, but its own funds. There is simply no evidence on the point, despite the statutory burden on Caicos in this appeal.

[31] I should also indicate that I have considered the argument on the issue of whether or not Caicos needs to establish a trust in its favour over the funds in Eyerock's hands in order to trace them to the TD Account, in the event that I conclude, as I have, that a constructive trust with Steven as the trustee is not appropriate. In applying the same rationale as above, I do not find Eyerock to have engaged in wrongful conduct sufficient to support the imposition of a constructive trust. In fact, no wrongdoing is alleged by Caicos against it or Rothfeld anywhere in the materials. I also do not find that unjust enrichment exists in the relationship between Eyerock/Rothfeld and Caicos, for the very simple reason that, as numerous authorities have established, including *Re Ascent*, the existence of a debtor-creditor relationship is juristic reason for enrichment and deprivation flowing from that relationship. The parties expect to be respectively enriched and deprived for at least the period contemplated for the credit granting. Eyerock is not the constructive, or other, trustee of Caicos. It is, subject to any defenses it may have on

its note, clearly the debtor of Caicos, and there is no trust imposed on the funds in Eyerock's hands which Caicos could argue follows the funds into the hands of Steven, if it was even proved herein that those funds so flowed. It was not, as indicated above.

[32] Finally, in coming to my decision herein, I have also kept in mind not only the considerations mentioned in paragraph 16, above, but the fact also, as argued by counsel for Caicos, that to permit the US$500,000.00 in the TD Account to remain with the Trustee for the benefit of the creditors will result in a continuance of the ponzi scheme. Steven will have managed, in other words, to extract a further sum from yet another party to fund his previous borrowings and "investments". However, this has not persuaded me that it is any more equitable to place this burden on any other creditor. After all, it is the nature of such a house of cards that, inevitably, someone is the last one to advance funds to the rogue, just before it all falls apart. In my view, the BIA is the most equitable scheme for distributing the assets of these two bankrupts. The more so when I consider the evidence that Caicos has no direct claim on Steven, and still retains all of its legal and other claims against Eyerock and Rothfeld.

[33] For all of those reasons, I do not find it appropriate to exercise my discretion and find or impose a constructive trust in this matter. I find that for the purposes of this appeal, Caicos is a creditor of Eyerock and Rothfeld, and not of Steven, and to allow it to obtain a proprietary right to a significant sum, to the exclusion of other creditors would not, in itself, be equitable

[34] Although not necessary to decide the appeal, I will deal also with the submission of counsel for the Trustee that Part XII BIA provides a code for dealing with the insolvency of a securities firm, as defined therein, and ousts the law of trust for other than "customer named securities" in such an insolvency. With the greatest of respect to counsel, while that may be so, there is no evidence before me to conclude that Steven, although registered to sell securities, was carrying on business as a securities firm, as defined in Part XII BIA. The transaction in question certainly involved a security as defined therein, the definition including, as it does, "notes", but he was not engaged in the buying and selling of these notes, and there is no evidence as to what he did with the funds. In a pure ponzi scheme, as alleged in argument, he might simply having been paying out old loans with new loans, with or without a skimming off the top for himself. It is conceivable that there were not even any underlying investments. Accordingly, I would not have dismissed the appeal on the basis of this argument. I do not need, therefore, to address Mr. Marks' concerns that this point was not raised in the Notices of Dispute filed by the Trustee herein.

[35] Finally, I would add that given my finding on the imposition of a constructive trust, it is not necessary to deal with the submissions of the availability of the equitable remedy of tracing to follow the funds through Eyerock's hands into the TD Account, or the submissions on the appropriate division of the TD Account to satisfy such a trust claim.

[36] The appeals are dismissed. The parties are free to appear in front of me on the issue of costs, either in writing, or on a date to be arranged by them with the Court office.

Scott W. Nettie
Registrar in Bankruptcy

qp.

Tab 21

Court of Queen's Bench of Alberta

Citation: Investit Financial Inc. v. Ingersoll 10 Mission Development Ltd., 2006 ABQB 231

Date: 20060324
Docket: 0501 08250, 0501 17701
Registry: Calgary

BETWEEN:

Action 0501 08250

Investit Financial Inc.

Applicant
(Plaintiff)

- and -

Ingersoll 10 Mission Development Ltd. and the Colonnade on 4th Inc.

Defendants

- and -

Graham Construction and Engineering Inc.

Respondent

AND BETWEEN

Action No. 0501 17701

Investit Financial Inc. and 382188 Alberta Ltd.

Applicants

and

Stephen Verhoeff, Paul Verhoeff, Scott Dykes and Joe Stafinski

Respondents

06 093 096

Reasons for Judgment
of the
Honourable Mr. Justice Dennis G. Hart

Introduction

[1] These are two special applications which were ordered to be heard together. They each involve a caveat which has been filed on title to a real estate project which was commenced in or about November, 2003 on lands located on the east side of 4th Street SW in the vicinity of 20th and 21st Avenues, here in the City of Calgary.

[2] In Action No. 0501 08250 ("the Graham action") the caveat was filed by Graham Construction and Engineering Inc. ("Graham") claiming an interest in the lands on the basis of a constructive trust. By order dated December 6, 2005, Master Alberstat discharged the Graham caveat. The present application is an appeal of that order.

[3] In Action No. 0501 17701 ("the Investit action") the caveat was filed by four investors who hold debentures issued by the original developer Ingersoll 10 Mission Development Ltd. ("Ingersoll") claiming an interest in the lands pursuant to a right of first refusal granted to them under a certain agreement dated June 25, 2005 ("the Standstill agreement"). The application before me was brought by the current registered owner of the lands and an affiliated company seeking discharge of the Verhoeff caveat.

The Graham Action

[4] Graham was the general contractor on the project. Its contract was with Ingersoll for the construction of a two storey underground parkade and an eight storey building for a contract price of $12.2 million.

[5] After it commenced the work Graham began making requests of Ingersoll to provide evidence that financial arrangements had been made to enable it to be paid.

[6] By letter dated June 14, 2004, the financial controller on the project advised Graham that a mortgage of $6.5 million had been approved and registered on title. The letter further stated that out of these proceeds $3.5 million had been "earmarked" for Graham. The sum of $500,000 was to be directed to discharge a lien which Graham had filed and the remaining $3 million was to cover Graham's costs for the next three months. The letter went on to say that it was expected that a first mortgage of $9.5 million would soon be in place, the majority of which would be "earmarked" for Graham's contract.

[7] In alleged reliance upon these representations Graham continued its work on the project.

[8] Graham continued, however, to press its request for further assurances that it would be paid. On June 22, 2004 it sent such a letter to the project financial controller. On July 6, 2004 it followed up with a fax. On September 17, 2004 it sent a letter to Ingersoll complaining that reasonable evidence of the requisite arrangements had still not been provided, and requesting further specific assurances with respect to two months future construction costs. No specific response to this letter was received, although "verbal assurances" as to the availability of funds were provided on September 21 and 22, 2004.

[9] By letter to Ingersoll dated November 3, 2004 Graham threatened to stop work on November 12, 2004 unless specific payment conditions were met. Again, the response was vague and non-committal yet Graham continued to work.

[10] Eventually, on January 21, 2005 after further promised financing arrangements did not materialize, Graham stopped work on the project. It filed a lien against the project and commenced action in Queen's Bench to enforce the lien on March 3, 2005. On May 4, 2005 it formally terminated its contract with Ingersoll and on July 19, 2005 it commenced another action in Queen's Bench claiming constructive trust and fraud. On November 4, 2005 it registered a caveat against the project lands based on these claims. On December 6, 2005, Master Alberstat directed that the caveat be discharged from title.

[11] The seminal issue on this application is whether Graham has an interest in the project lands by virtue of a constructive trust. If it does - the caveat stands. If not, the learned Master was correct in ordering it removed. The onus is on the caveator to put forward a "prima facie claim" to an interest in the land.

[12] Graham clearly places great reliance upon the June 14, 2004 letter as a basis for the constructive trust along with the principles set forth by the Supreme Court of Canada in *Soulos* v. *Korkontzilas* 146 D.L.R. (4th) 214.

[13] In my view it is clear that the letter of June 14, 2004 does not support Graham's claim. It is not, on its face, an express declaration of trust. It is simply a transmittal of information with certain representations which appear to have been honoured.

[14] The letter accurately confirmed that a second mortgage of $6.5 million had been approved and registered on title. It represented that some $500,000 would be allocated to the removal of Graham's existing lien. This was done. It further represented that $3 million had been "earmarked" to cover the next three month's construction costs. These costs were covered. There was no representation that costs beyond this three month period would be protected.

[15] Graham's own conduct in persistently pursuing Ingersoll and its agents for further assurances after the June 14, 2004 letter weighs heavily against its position that a trust had been created and that it protected Graham beyond the three month period.

[16] In the circumstances of this case I am not persuaded that Graham has demonstrated fraud, unjust enrichment or any other wrongful conduct upon which a constructive trust could be supported. I would distinguish the *Soulos* case on its facts. Nor has the principle of " knowing receipt" been shown to apply since no trust proceeds have been established.

[17] In my view, Graham was aware from the outset that it was not in a fully secured position and took persistent steps, for sound business reasons, to obtain protection. It continued to work at its own risk and cannot now complain of a breach of trust to lever itself into a form of security which it failed or neglected to achieve through arms length negotiation.

[18] In the result, Graham's appeal is dismissed with costs payable to the Respondent in accordance with Schedule C including reasonable disbursements.

The Investit Action

[19] This application is brought by the current registered owner of the project lands, 382188 Alberta Ltd. ("382") and its affiliated predecessor in title Investit Financial Inc. ("Investit") seeking removal of the Respondent's caveat ("the Verhoeff caveat").

[20] The central issue is whether or not the transfer of title from Investit to its affiliate 382 triggered a right of first refusal (ROFR) held by the Respondents.

[21] The Respondents were among some 74 investors who had advanced an aggregate of $5.4 million to Ingersoll in exchange for debentures. These debentures were secured by a mortgage which was registered on title to the project lands.

[22] After foreclosure actions were commenced by a number of other mortgagees a committee was formed to represent the interests of the investors secured by the Respondent's mortgage. The four Respondents are members of that committee (the "Committee").

[23] The Committee opposed the foreclosure actions and later entered into a written agreement on June 28, 2005 with an agent of Investit (the "Standstill Agreement") under which, in consideration for its promise not to oppose the foreclosure actions of Investit and another mortgagee, Investit and two related companies undertook to market the project and give the Committee a ROFR to purchase it if it was going to be sold to any third party purchaser. The agreement further provided that after August 31, 2005 the Committee had a ROFR to purchase the project for a sum equal to certain defined "Priority Costs" if the project was going to be sold for less than such costs or if Investit's agent intended to take over and develop the project.

[24] Investit's final order for foreclosure was granted on September 15, 2005. Shortly thereafter the Committee was advised that it would soon be served with a notice under the Standstill Agreement to the effect that Investit intended to take over and develop the project unless the Committee exercised its ROFR to purchase it for the defined Priority Costs.

[25] On November 1, 2005 Investit registered its final order for foreclosure along with a transfer of title to 382, its affiliate. The stated consideration for this transfer was $7.1 million. Investit did not provide notice of this transfer to the Committee. Upon learning of the transaction the Committee registered its caveat on November 21, 2005 claiming its ROFR.

[26] The issue is whether or not the transfer from Investit to 382 triggered the Committee's ROFR.

[27] It is common ground that the two companies are closely related. 382 is controlled by the sole shareholder and director of Investit. She is the sole director and officer of 382 and 100% of the voting shares of 382 are held by another company in which she owns 100% of the voting shares.

[28] Although it is not entirely clear why the transfer was made, the reason put forward most prominently is that it was for the purpose of "segregating" Investit's trust obligations to its beneficial owners/investors.

[29] In my view the reason for the transfer is not of particular relevance. What is relevant is the Standstill Agreement and its provisions relating to the triggering of the Committee's ROFR.

[30] The ROFR is set out at Schedule Three to the Standstill Agreement. Under paragraph 1 of the Schedule, written notice to the Committee is required "immediately" upon receiving an offer to purchase "from *any* third party purchaser" (emphasis added). On its face this in very broad language.

[31] Investit takes the position that from a fair reading of the whole of the agreement it becomes clear that a transfer to a wholly controlled affiliated company, with no change in beneficial ownership, was never intended to be caught by the requirements of paragraph 1. Further, it argues that the paragraph is predicated upon receipt of an offer to purchase and there was no such offer associated with the transfer to 382, only a direct transfer between affiliated companies.

[32] In *Apex* v. *Ceco* [2005] A. J. No. 1215 Justice Brooker of this Court dealt with the issue of a non-arm's length transfer avoiding a ROFR. He concluded that if the parties had intended to exclude associated or related or non-arm's length entities from ROFR provisions they could have done so expressly. In the absence of so doing the term "third party" should attract its natural interpretation, that is, a third party to the agreement, whether or not affiliated or associated or related to a party to the agreement.

[33] I come to the same conclusion here. I am fortified in this conclusion by the phrase "if ... the Third Party is a bona fide arm's length purchaser" which appears in paragraph 3 of Schedule Three. The parties obviously intended to qualify "Third Party" in the context of paragraph 3 but

chose not to do so in paragraph 1, leaving the term "any third party purchaser" to attract its plain and ordinary meaning.

[34] As to the lack of a formal offer to purchase I again adopt the reasoning in *Apex* through which Justice Brooker found that there had been a "sale" within the meaning of the relevant ROFR provisions even though it was affected through a corporate re-organization and was arguably no more than an internal assignment.

[35] In my view the same is true in the present case in relation to a formal offer to purchase. There was clearly a notional offer to purchase associated with the transfer to 382 and Investit cannot avoid its consequences to defeat the ROFR. I find this to be so despite Investit's claim that there has been no change in beneficial ownership. Again, if the parties had intended to exclude a transfer where there is no change of beneficial ownership they could have done so. See also *Calcrude et al* v. *Langevin Resources et al* (2003) A.B.Q.B. 1051 paras. 71 through 74.

[36] In the result, I find that the transfer from Investit to 382 triggered the ROFR. The application to remove the Verhoeff caveat is accordingly denied with costs to the Respondents in accordance with Schedule C including reasonable disbursements.

Heard on the 9th day of March, 2006.
Dated at the City of Calgary, Alberta this 24th day of March, 2006.

Dennis G. Hart
J.C.Q.B.A.

Appearances:

Clarence Hookenson
for the Investit Financial Inc. and
382188 Alberta Ltd.

Jeffrey D. Vallis, Q.C.
for Graham Construction & Engineering Inc.

Barry R. Crump
for the Stephen Verhoeff, Paul Verhoeff, Scott Dykes and Joe Stafinski

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SCHEDULE "B"

Tab 1

Trustee may apply to court for directions

- **34 (1)** A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

Tab 2

Disposition of Motion

37.13 (1) On the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,

(a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or

(b) where the proceeding is an application, order that it be heard at such time and place as are just. R.R.O. 1990, Reg. 194, r. 37.13 (1).

(2) A judge who hears a motion may,

(a) in proper case, order that the motion be converted into a motion for judgment; or

(b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 37.13 (2).

(3) Where on a motion a judge directs the trial of an issue, subrules 38.10 (2) and (3) (issue treated as action) apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 37.13 (3).

Exception, motions in estate matters

(4) Clause (2) (b) and subrule (3) do not apply to a motion under Rule 74, 74.1 or 75. O. Reg. 484/94, s. 7; O. Reg. 111/21, s. 4.

Tab 3

Trustee to be receiver

16(4) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the court, and the court may on his application enforce the acquisition or retention accordingly.

Tab 4

Property of bankrupt

- **67 (1)** The property of a bankrupt divisible among his creditors shall not comprise
    - **(a)** property held by the bankrupt in trust for any other person;
    - **(b)** any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
    - **(b.1)** goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
    - **(b.2)** prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
    - **(b.3)** without restricting the generality of paragraph (b), property in a *registered retirement savings plan*, a *registered retirement income fund* or a *registered disability savings plan*, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

  but it shall comprise

    - **(c)** all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
        - **(i)** is not subject to the operation of this Act, or
        - **(ii)** in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
    - **(d)** such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

AYERSWOOD DEVELOPMENT COPRORATION Respondent (Appellant)	and	BDO CANADA LIMITED as trustee for the estate of SIRIUS CONCRETE INC. Applicant (Respondent)

Court of Appeal File No. C70020
Court File No. 35-2481393

ONTARIO COURT OF APPEAL

Proceeding originally commenced at London

RESPONDENT'S BOOK OF AUTHORITIES

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