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JUDICIAL CENTRE	CALGARY	JUDICIAL CENTRE OF CALGARY
APPLICANT	THIRD EYE CAPITAL CORPORATION	
RESPONDENTS	OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163 ALBERTA INC., 1859821 ALBERTA INC., AIR DALLAIRE LTD., OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC., OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.	
DOCUMENT	**BOOK OF AUTHORITIES OF THE APPLICANT, THIRD EYE CAPITAL CORPORATION**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	STIKEMAN ELLIOTT LLP Barristers & Solicitors 4300 Bankers Hall West, 888-3rd Street S.W., Calgary, Canada T2P 5C5 **Attention: Joseph Reynaud / Nathalie Nouvet / Sarah Graham** jreynaud@stikeman.com / nnouvet@stikeman.com / sgraham@stikeman.com Tel: (514) 397-3019/ (403) 266-9072 Fax: (403) 266-9034 Lawyers for the Applicant, Third Eye Capital Corporation File No.: 120536-1037	

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

> contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

Court of Queen's Bench of Alberta

Citation: Bank of Montreal v. Calgary West Hospitality Inc., 2011 ABQB 293

Date: 20110429
Docket: 0903 12151
Registry: Edmonton

Between:

Bank of Montreal

Plaintiff

- and -

Calgary West Hospitality Inc., Gamehost Limited Partnership, Gamehost Management Inc., Darcy Will and David Will

Defendants

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

I. Introduction

[1] A consent receivership order granted on August 13, 2009 (the Receivership Order) appointed Deloitte & Touche Inc. the receiver and manager (Receiver) of the assets and undertakings of Calgary West Hospitality Inc. (Calgary West).

[2] There are two interconnected applications now before the court:

1. The Defendants' application for leave to commence litigation (Cause of Action) against the Calgary Exhibition and Stampede Limited (CES), which they say they are entitled to pursue at their own cost and for their own benefit under an agreement made with the Plaintiff Bank of Montreal

(BMO). The Receiver and BMO oppose the application on the basis that there is potential value in the Cause of Action, which should be monetized for the benefit of the creditors of Calgary West.

2. The Receiver's application for directions concerning marketing the Cause of Action. The Receiver suggests a closed auction involving BMO, the Defendants and CES. The Defendants oppose the application, urging that any bidding process for the Cause of Action should exclude BMO and CES.

II. Background

[3] The Defendant Calgary West is a private company that was involved in the operation of a casino on the Calgary Stampede grounds. The casino and grounds are owned by CES. BMO provided a commercial debt facility to Calgary West, secured by assignments of rents and leases and a charge against all of its present and after acquired property, including "choses in action of every kind or nature." The Defendants Gamehost Limited Partnership, Darcy Will and David Will all gave limited guarantees of Calgary West's obligations to BMO. The Defendant Gamehost Management Inc. is the general partner of Gamehost Limited Partnership. After February or March 2009, Calgary West's account was under the management of BMO's special accounts handling unit.

[4] On July 27, 2009, Calgary West informed BMO that it could no longer fund casino operations and intended to cease operations by August 7, 2009 - two days before the opening of the Calgary Stampede.

[5] BMO commenced action against the Defendants on August 6, 2009. It claims that Calgary West owed it $41,245,554.80 at the time.

[6] Counsel for BMO and the Defendants started negotiating a form of receivership order while their clients engaged in simultaneous settlement discussions that included Calgary West proposing to "hand over the casino keys" to BMO and to waive the notice requirement under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and the guarantors proposing a payment on the guarantees in satisfaction of their obligations.

[7] The following is a summary of the pertinent events (taken in part from certain "without prejudice" correspondence relating to the settlement discussions entered into evidence on this application by BMO, without objection by the Defendants):

(a) On July 31, 2009, the Defendants offered to resolve matters with BMO in part by making a deferred $20,500,000 cash payment in satisfaction of the guarantors' obligations, entering into a management agreement with the receiver, co-operating with the receiver, and sharing with BMO in any surplus at the end of the receivership.

(b) On August 6, 2009, BMO responded with a counter-proposal that referred to a receiver and potential for a management agreement with the receiver, but pointing out that any surplus would be paid to other creditors in priority to the Defendants.

(c) On August 10, 2009, BMO's counsel presented a draft receivership order to Defendants' counsel that provided in clause 3(j) of the order for the usual power of a receiver to prosecute, defend and settle litigation. That provision also required the receiver to investigate the Cause of Action and to report to the court on its investigation on notice to BMO and the Defendants if it chose not to seek court approval to sue CES.

(d) Defendants' counsel responded on August 10, 2009 by e-mail (the letter is incorrectly dated July 30, 2009) seeking a change to clause 3(j) (the Requested Change) to "…reflect that the Defendants are at liberty, at their cost, to pursue the claim against Calgary Exhibition & Stampede Limited in the event that the Receiver elects not to do so..."

(e) The Defendants made another settlement offer on August 11, 2009 for $20,500,000 to be paid by the guarantors by installments, the last of which would occur by September 20, 2009. This offer also spoke of a management agreement with the receiver.

(f) BMO's counsel responded on August 11, 2009, accepting the money payment offered by the guarantors and offering this comment about the proposed management agreement: "…BMO cannot fetter the discretion of the Court and the entering into any Management Agreement by Deloitte & Touche would be subject to Court approval. That said, if BMO, as the largest creditor of Calgary West and Deloitte, as the Receiver support entering into a Management Contract with your client's management company, we are hopeful that the Court would be persuaded that entering into a Management Contract was in the best interests of all parties." Aspects of BMO's letter of August 6th referencing the receivership also were incorporated by reference.

(g) On August 12, 2009, a revised draft receivership order incorporating the Requested Change was circulated by counsel for BMO to counsel for the Alberta Gaming and Liquor Commission, Deloitte & Touche, the Defendants and CES (the August 12th Draft). Clause 3(j) of the August 12th Draft read, in part:

> …In respect to potential for commencement for proceedings as against (CES), the Receiver shall investigate the commencement of such proceedings and shall report to this Court in respect thereto upon notice to BMO and the Defendants and in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants <u>shall be authorized to commence such proceedings</u>. <u>The Receiver shall not settle or compromise any claim against CES without first obtaining the approval of the Defendants and failing such approval, the Order of this Court</u>." [Emphasis added.]

(h) Deloitte & Touche's counsel indicated that leave of the court would be required before the Defendants could pursue the Cause of Action. On being advised of that, Defendants' counsel sent a letter to BMO's counsel on August 12th (the "August 12th Letter") saying:

> You have advised that the solicitor for the Receiver has requested a further change to paragraph 3(j) of the Receivership Order. I do not see the need for the change. However, I also do not see the need for incurring additional costs for the Receiver's solicitor to attend in Court to argue the matter. It does not make economical sense. Having said this, please provide me with a revised form of Receivership Order that includes the change requested for the solicitor for the Receiver.

(i) The August 12th Draft was amended to reflect the Receiver's request, signed by the Defendants' counsel, and returned to BMO's counsel later in the day on August 12, 2009.

(j) The Receivership Order was granted on August 13, 2009. The relevant portion of clause 3(j) of the Receivership Order reads as follows:

> …In respect to potential for commencement for proceedings as against (CES), the Receiver shall investigate the commencement of such proceedings and shall report to this Court in respect thereto upon notice to BMO and the Defendants and in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants <u>may seek leave of the Court to commence such proceedings. The Receiver shall not settle or compromise any claim against CES without first obtaining the approval of the Defendants and falling such approval, the Order of this Court</u>." [Emphasis added.]

(k) The guarantors' settlement with BMO was concluded in October 2009. Monies were paid and releases given.

(l) Since its appointment, the Receiver has carried out its mandate, including operating the casino while it was being marketed, and investigating the proposed litigation. A broad marketing effort resulted in sale of the casino for nine million dollars to corporate and trust vehicles controlled by CES. [The Receiver's Third Report to the Court indicates that it had been proposed that concurrent with the sale, CES would acquire all or a portion of the debt and security held by BMO over Calgary West's present and after acquired property. It is unknown whether that occurred.] The sale was approved by the court in May 2010.

(m) Even with the monies paid on the guarantees and the net proceeds from the casino sale, BMO has sustained a shortfall of more than thirty million dollars. The Receiver reported in May 2010 that it anticipated there would be no funds available for distribution to the unsecured creditors.

[8] The Receiver has not sought the approval of the court to pursue the Cause of Action against CES itself. As a result, the present cross-applications have been brought. The Cause of Action is a chose in action which, subject to any agreement between BMO and the Defendants and the effect of clause 3(j) of the Receivership Order, is captured by the security made in BMO's favour.

III. The Issues

[9] The interconnected issues in relation to the cross-applications are:

A. Should the Defendants be granted leave to pursue the Cause of Action at their own cost and for their own benefit?

B. If not, how should the Receiver realize on the value of the Cause of Action?

IV. The Parties' Positions

[10] The Defendants assert that it would be unfair and constitute a miscarriage of justice to deny them leave to pursue the Cause of Action at their own cost and for their own benefit, since BMO agreed that they could do so.

[11] Alternatively, they argue that if leave is denied and the Cause of Action is put to auction, BMO and CES should be excluded from the bidding process; BMO because of the alleged agreement and CES because it is not a known creditor of Calgary West.

[12] BMO contends that the wording of clause 3(j) of the Receivership Order is sufficient evidence of it having reserved the right to argue against the Defendants being allowed to pursue the Cause of Action if the Receiver elected not to do so itself. BMO takes the position that there was no agreement between it and the Defendants. It says that it did not require a consent receivership order as a condition of the settlement with the guarantors and was merely deferring decision-making. It says that it only consented to the final Receivership Order and that the August 12th Draft was just that, a draft. It asserts that it has not released its security in the Cause of Action and wants to bid on it.

[13] The Receiver submits that the Defendants' leave application supports a finding that the Cause of Action is an asset of some value that should not be given away for free. It contends that even if the alleged agreement between BMO and the Defendants exists, it cannot override the Receiver's fiduciary duty to maximize recovery for the creditors or derogate from the court's jurisdiction. The Receiver wants to put the Cause of Action to a bidding process involving the Defendants, CES and BMO as the "most interested" parties.

V. Analysis

A. Should the Defendants be Granted Leave to Pursue the Cause of Action at Their Own Cost and for their Own Benefit?

[14] The Defendants' leave application hinges on whether they can establish in this summary hearing that they should be allowed to pursue the Cause of Action at their own cost and for their own benefit because:

1. all interested parties agreed that they could do so; or

2. the Cause of Action has no value for the estate; or

3. there is some reason why the estate should not benefit from realizing on the value of the Cause of Action.

1. <u>Is there an agreement by all interested parties?</u>

[15] The Defendants contend that BMO agreed that they could pursue the Cause of Action at their own cost and for their own benefit if the Receiver elected not to do so, as evidenced by the August 12th Draft.

[16] However, while the Cause of Action remains the property of Calgary West and while BMO has security in the Cause of Action, neither has control over that property. It is the Receiver which has possession and control over the Cause of Action. There is no dispute that the Receiver refused to agree to the August 12th Draft and insisted that the Defendants would have to seek court approval to commence the litigation.

[17] The Defendants do not allege any agreement on the part of the Receiver to consent to their leave application. Indeed, Victor Kroeger, who swore an affidavit on behalf of the Receiver, deposed that at no time was the Receiver a party to any agreement with the Defendants or any other party to the effect that the Defendants could proceed, for their own benefit, with a claim against CES should the Receiver elect not to pursue such a claim.

[18] Even if BMO did enter into the agreement alleged by the Defendants, that agreement would bind only those two parties. At most, BMO could have agreed to compromise only its own position, not that of Calgary West's other creditors. If the implication of the alleged agreement is that BMO would relinquish its security in the Cause of Action or not take any benefit from it, the Cause of Action would remain the property of the Defendants. That property would still fall under the receivership and should be available to benefit the other creditors. The Defendants do not allege that Calgary West's other creditors agreed that the Defendants could pursue the Cause of Action if the Receiver decided not to do so.

[19] The Receivership Order speaks for itself. The language of clause 3(j) is clear. Leave is required before the Defendants can pursue the Cause of Action. For their own reasons and based on their own perceptions of the consequences, the Defendants agreed to that language. It is a valid, subsisting and binding order. It is also a sensible order as it properly recognizes and preserves the functions of the Receiver and the court.

[20] A court-appointed receiver is an officer of the court with fiduciary obligations to the estate (*Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53). A court appointed receiver is not subject to control by the party appointing it or by anyone other than the court.

[21] The Receiver here has not sought the approval of the court to pursue the Cause of Action at the expense of the estate, but rather is proposing a limited sales process which it believes could result in the estate obtaining maximum value and realization on the Cause of Action.

2. <u>Does the Cause of Action have some value for the estate?</u>

[22] I agree with the Receiver that the Defendants' leave application and BMO's support for the Receiver's proposal to allow the Defendants, BMO and CES to bid on the Cause of Action are evidence that the Cause of Action has some value. As a result, the potential exists for the creditors to benefit from a sale of this property.

[23] Having investigated the Cause of Action, the Receiver has elected not to pursue it. Presumably, if the Receiver was of the view that the Cause of Action might have a value of over 30 million dollars, it would have decided otherwise.

[24] As BMO is Calgary West's principal secured creditor (unless its security has been assigned to CES) and as it is still owed over 30 million dollars, the reality is that it is the only creditor which could benefit from the proceeds received from a sale of the Cause of Action, unless the Defendants can prove that BMO agreed to relinquish its security in that asset and/or agreed not to take any benefit from the Cause of Action, in which case the other creditors of Calgary West might receive a benefit.

3. <u>Is there some reason why the estate should not benefit from realizing on the value of the Cause of Action?</u>

[25] No contractual, equitable or other reason has been cited by the Defendants why its creditors, other than BMO, should not benefit from a sale of the Cause of Action.

[26] The Defendants may have a cause of action against BMO if they can prove that the bank impliedly agreed not to contest their leave application. However, that need not be decided now. The Defendants can file a statement of claim against BMO if they choose to do so.

[27] The Defendants contend that the court should not allow a process that could result in BMO reneging on its agreement to allow them to pursue the Cause of Action at their own cost and for their own benefit.

[28] I agree that it would be inequitable to allow BMO (and presumably any assignee of its security in the property of Canada West) to participate in the bidding and/or to benefit from a sale of the Cause of Action if the Defendants can prove that BMO expressly or impliedly agreed not to do so. That issue can be addressed in relation to the Receiver's application. However, as I have stated previously, even if the Defendants can prove the alleged agreement with BMO, that agreement cannot prejudice the rights of other creditors.

[29] The Defendants' application for leave to pursue the Cause of Action at their own cost and for their own benefit is denied.

B. How Should the Receiver Realize on the Value of the Cause of Action?

1. <u>Bidding process</u>

[30] Section 247 of the *BIA* specifies that a receiver must act honestly and in good faith and deal with the property of the insolvent company in a commercially reasonable manner.

[31] The Receiver here is of the view that more can be realized for the estate by putting the Cause of Action up for bidding by the Defendants and CES (the most interested parties to the proposed litigation) and by BMO (the "most interested" creditor), than by pursuing the Cause of Action itself at the expense of the estate.

[32] There is case law which supports the Receiver's proposal to put the Cause of Action up for bids. In ***Re Katz*** (1991), 6 C.B.R. (3d) 211 (Ont. Ct. (Gen. Div.)), Farley J. considered an application to set aside the sale of a lawsuit by a trustee in bankruptcy who had sold a piece of litigation after seeking sealed bids from the only two likely bidders, the "parties friendly to the two sides of the action." The highest and successful bidder was a company owned by the defendants to the litigation, which beat out the bankrupt. Mr. Justice Farley observed that the result of the sale was a settlement of the lawsuit for the price of the assignment, concluding that the process and result were legitimate.

[33] Farley J. compared (at para. 5) the trustee's duty to that of a receiver. Citing ***Royal Bank of Canada v. Soundair Corporation*** (1991), 4 O.R. (3d) 1 (C.A.)), he considered the following to be factors relevant to assessing the propriety of a receiver's action in selling assets:

(i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(ii) the interests of all parties;

(iii) the efficacy and integrity of the process; and

(iv) whether there has been unfairness in the working out of the process.

[34] In my view, these considerations also apply to a receiver's intended sale process.

[35] There are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern (as on an application to approve a sale completed by a receiver) should be whether the process is reliable, transparent, efficient, fair and one which guards the parties' interests.

[36] The Defendants do not suggest that the proposed bidding process would constitute champerty and maintenance. Given the commercial interests at stake, I agree (***1239745 Ontario Ltd. v. Bank of America Canada***, ([1999] 0.J. No. 3178 at para. 67 (S.C.J.) (QL)). They simply take the position that neither BMO nor CES should participate in the bidding. They offer no alternatives, presumably as they wish to be the only bidder.

[37] Like Farley J. in ***Re Katz***, I consider the process of calling for tenders one that invites fairness (at para.12). A bid process or auction involving the only directly interested parties, the Defendants, CES and BMO would provide an efficient and commercially reasonable approach to

monetizing the asset. The question is whether it would be fair and one which guards the parties' interests.

2. <u>Who should be invited to participate?</u>

[38] The Defendants argue that it would make no sense to include CES in the bidding process. However, as the intended defendant in the Cause of Action, CES may well have an interest in bidding as a sale to it would constitute a settlement of the lawsuit.

[39] BMO, assuming it has not assigned its security to some other entity, is the principal secured creditor of Canada West and has an interest in recovering as much as possible on the debt owed to it.

[40] As previously stated, the Defendants urge that it would be unfair to allow BMO (and presumably any assignee of its security in the property of Canada West) to participate in the bidding and/or to benefit from a sale of the Cause of Action since it agreed that the Defendants could pursue the Cause of Action for their own benefit if the Receiver elected not to do so. The Defendants, in bringing their own application and in opposing BMO's right to bid on the Cause of Action, in essence are seeking a form of summary judgment.

[41] It is helpful in framing the analysis to consider the following principles governing summary judgment:

1. The party who applies for summary judgment bears the evidentiary burden of proving all facts necessary to establish its claim on a balance of probabilities (***Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.***, 2003 ABCA 298, 339 A.R. 165); ***Bank of Montreal v. Kalin*** (1992), 131 A.R. 397 (C.A.)). The evidentiary burden then shifts to the other party to prove that there is a genuine issue for trial, although the ultimate burden remains with the moving party.

2. It must be beyond doubt that no genuine issue for trial exists ***(Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.***, 2010 ABCA 126 at para. 14, citing ***Tottrup v.Clearwater (Municipal District No. 99)***, 2006 ABCA 380 at paras. 9-10, 401 A.R. 88).

3. If the outcome of the case depends on the interpretation of a statute or document or some other issue of law arising from undisputed facts, the test is whether the issue of law can fairly be decided on the record before the court. It may be necessary to have a full trial if the legal issue is unsettled, complex or fact dependent, in order to provide a proper foundation for the decision (***Tottrup*** at para. 11).

[42] As to consideration for the agreement alleged by the Defendants, David Will, one of the Defendant guarantors and a director of Calgary West, deposed that:

> At the same time as the proposed Consent Receivership Order the Defendants proposed a settlement on the Guarantees which was accepted by the Plaintiff. The settlement included a Consent Receivership Order as well as the payment of $20,500,00.00 on the Guarantees. However, included in this settlement was the agreement of the Bank of Montreal that the Defendants could proceed with a claim for their own benefit, against the Calgary Exhibition and Stampede Limited in the event that the Receiver elected not to do so.

[43] While it is not entirely clear, this statement seems to suggest that it was a condition of the Defendants' agreement to consent to a receivership order and to reach a settlement on the guarantees that BMO would allow the Defendants to pursue the Cause of Action for their own benefit if the Receiver elected not to do so.

[44] The "without prejudice" correspondence entered into evidence does not disclose an express requirement by BMO for a consent receivership order as a condition of its settlement with the guarantors, nor an express requirement by the guarantors that the Defendants be allowed to pursue the Cause of Action as a condition of their settlement with the bank. However, there were repeated references to receivership that began with the Defendants' opening offer of July 31, 2009 and continued until the parties' attentions turned to drafting the receivership order.

[45] BMO contends that a consent receivership order was not a condition of BMO's settlement with the Defendants, but rather arose from Calgary West's notification of its intention to "hand over the keys" to BMO and its advice that BMO could "continue operations under its security."

[46] David Ross, the lead special accounts manager at BMO assigned to this loan, swore an affidavit in opposition to the Defendants' application. In questioning on that affidavit, he confirmed that settlement discussions with the guarantors and discussions concerning a consent receivership order were being held within the same time frame. However, he denied that the two were a package deal. He reluctantly acknowledged that he had had "no objection" to the Defendants' Requested Change, but later added that the August 12th Draft was a draft order which had to be agreed to by other counsel.

[47] As to the terms of the alleged agreement, the Defendants maintain that BMO's August 12th Draft included their Requested Change and accurately reflects the intentions of BMO and the Defendants and what actually was agreed to by them. It stresses that it was the Receiver and not BMO which sought amendment of clause 3(j).

[48] On August 10, 2009, counsel for the Defendants requested an amendment to the initial draft of the receivership order to "…reflect that the Defendants are at liberty, at their cost, to pursue the claim against Calgary Exhibition & Stampede Limited in the event that the Receiver

elects not to do so...” No mention was made of who was to receive the benefit if the Cause of Action was successfully litigated.

[49] The August 12th Draft stated: “... in the event that the Receiver does not seek the approval of the Court to commence such proceedings, some or all of the Defendants shall be authorized to commence such proceedings...” Again, no mention was made of who was to receive the benefit of pursuing the Cause of Action. Nor was mention made as to who would bear the cost of the litigation.

[50] In its submissions, BMO states that: “[o]n August 12, 2009, the Receivership Order was revised to reflect the changes requested by RMRF to paragraph 3(j) and was circulated ... for comment and agreement thereto.” At most then, BMO appears to be acknowledging that the August 12th Draft was intended to reflect the Requested Change that the Defendants be at liberty, at their cost, to pursue the Cause of Action.

[51] Murray Sutherland, a special accounts manager with BMO, deposed that:

1. Before the Receivership Order, BMO deferred making a decision about who would benefit from the proposed litigation as it was unnecessary to do so earlier;

2. Clause 3(j) of the Receivership Order allowed the parties to defer their decisions and advance all available arguments on a leave application;

3. There was no discussion about selling the proposed litigation before the Receivership Order or about BMO releasing its security in it.

4. BMO never entered into the agreement alleged by the Defendants.

[52] BMO is a sophisticated lender. It involved its special accounts branch and veteran insolvency counsel to deal with the Defendants and this receivership. Given the experience of those involved, I would have expected BMO to respond to the Defendants’ Requested Change with a clear statement that it wished to defer any decision on who should benefit from the Cause of Action, if that in fact was its intention. Instead, BMO’s counsel prepared and circulated the August 12th Draft, which incorporated the Requested Change. In doing so, BMO ran the risk that the Receiver would agree to the August 12th Draft. If BMO’s counsel had no objection to the Defendants’ Requested Change but questioned whether the Receiver might, why was that not communicated clearly? If BMO was concerned about fettering the court’s discretion and the need for court approval, why did it not provide for that in the April 12th Draft?

[53] I note that in communications dated August 11, 2009, the Defendants sought a management contract with the receiver as part of the settlement. BMO’s counsel responded, advising that BMO could not agree as it would fetter the court’s jurisdiction and that court approval was needed. He went on to say “…we are hopeful that the Court would be persuaded

that entering into a Management Contract was in the best interests of all parties." This is an unequivocal statement of position. If BMO had decided that it could not accede to the Defendants' Requested Change without the receiver's approval and, ultimately, court approval, it is surprising that it did not make a similarly clear statement of position. Rather, BMO's counsel simply circulated the August 12th Draft.

[54] BMO's explanation for the August 12th Draft, the position which it now takes, and the conflict in the evidence with respect to consideration for the alleged agreement raise questions of credibility, which cannot be determined summarily. In my view, there is a genuine issue for trial as to whether there was an agreement (aside from any reflected in the Receivership Order) between the Defendants and BMO concerning the Defendants' pursuit of the Cause of Action and, if there was such an agreement, what the express and implied terms of that agreement were.

[55] I am directing a trial of those issues. Counsel are to appear before me within the next 30 days in order to discuss the manner of proceeding.

[56] Should BMO be precluded from bidding on the Cause of Action in the interim? The tripartite test for an injunction is whether the applicant can demonstrate: (1) there is a serious question to be tried; (2) the applicant would suffer irreparable harm if the stay were refused; and (3) the balance of convenience favours the stay: ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321; ***RJR-MacDonald Inc. v. Canada (A.G.)***, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385; ***Harper v. Canada (Attorney General)***, 2000 SCC 57; [2000] 2 S.C.R. 764.

[57] I have already concluded that there is a serious issue to be tried. The parties did not make submissions on the other parts of the tripartite test. Given that there may be a limitation period approaching in terms of the Cause of Action, I conclude that it would be more appropriate as an interim measure to direct the Receiver to file a claim in respect to the Cause of Action in order to preserve the rights of the Defendants and BMO. The Cause of Action can be put up for bidding after the trial of the issues between the Defendants and BMO, if appropriate. If no bids are received, the Receiver may discontinue the litigation. The Receiver may apply to the court for directions as to whether the estate or some other party should be responsible for any costs incurred by the Receiver in commencing the action.

[58] The Receiver and BMO are to have their costs of the Defendants' leave application. If the parties cannot agree on costs of the Receiver's application, they may speak to me on issue within the next 30 days.

Heard on the 24th day of March, 2011.
Dated at the City of Edmonton, Alberta this 29th day of April, 2011.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Richard J. Cotter Q.C.
for the Bank o Montreal

Douglas N. Tkachuk
for Gamehost Limited Partnership, Gamehost Management Inc., Darcy Will and David Will

Steven H. Leitl
for Deloitte & Touche Inc.

CITATION: Montrose Mortgage Corporation v. Kingsway Arms Ottawa, 2013 ONSC 6905
COURT FILE NO.: CV-13-10298-00CL
DATE: 20131106

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Montrose Mortgage Corporation Ltd., Applicant

AND:

Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc., Kingsway Arms (Carleton Place) Inc., Respondents

BEFORE: D. M. Brown J.

COUNSEL: J. Dietrich, for the Applicant

R. Jaipargas, for the proposed Receiver, Grant Thornton Limited

HEARD: November 5, 2013

REASONS FOR DECISION

I. Application for approval of a "pre-pack" credit bid sale in a proposed receivership

[1] Montrose Mortgage Corporation Ltd. applied for (i) an order appointing Grant Thornton Limited ("GTL") as receiver and manager of all assets, undertakings and properties of Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc. and Kingsway Arms (Carleton Place) Inc. (collectively the "Debtors"), as well as (ii) an order approving a purchase and sale agreement between the Receiver and 2391766 Ontario Inc. dated October 16, 2013, together with a related vesting order. The proposed sale essentially involved an indirect credit bid by the debtors' main secured creditor, Montrose, which was acting on the loans to the Debtors as agent for GMF Nominee Inc. ("Greystone").

[2] On November 5, 2013, I granted and signed the orders sought. These are my reasons for so doing.

II. Material facts

[3] The Debtors operated four retirement residences which werer home to about 351 residents and employed 220 employees. The Debtors were beneficially owned by several limited partnerships. Service of the application was made on those beneficial owners. Counsel for a number of the beneficial owners sent an email to applicant's counsel on November 4, 2013,

advising that he had no instructions to appear at the hearing to oppose the relief requested; no other beneficial owner appeared.

[4] The Debtors were operated by three related management companies: Kingsway Arms Management (Villa Orleans/St. Joseph) Inc., Kingsway Arms Management (at Walden Village) Inc. and Kingsway Arms Management (at Carleton Place) Inc. In its November 1, 2013 Supplemental Report Grant Thorton stated that the Property Managers had executed an agreement which contemplated the termination of the property management agreements upon the issuance of the Approval and Vesting Order.

[5] As of August 31, 2013, the Debtors owed Montrose close to $36 million. Montrose had made demands for payment and had given *BIA* s. 244 notices back in March and December, 2012. As well, Montrose delivered notices of sale under the *PPSA* and *Mortgages Act*. The evidence disclosed that the Debtors were unable to repay or service that debt and were in default of the terms of the loans. Independent counsel to GTL delivered opinions that Montrose's security was valid and enforceable subject to the customary qualifications and assumptions.

[6] In February, 2012, Montrose appointed GTL as monitor to review and report on the financial and operational condition of the Debtors. With Montrose's support, in March, 2012 one of the Debtors retained John A. Jenson Realty Inc. as listing agent to market, ultimately, each of the four retirement residences.

[7] The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt. In the first half of this year a more substantial offer emerged which resulted in the execution of a letter of intent, but the transaction did not proceed because the purchaser was unable to secure adequate financing.

[8] Montrose obtained appraisals of the retirement residences from a professional appraiser, Altus Group Limited, and, in the case of the Carleton Place Retirement Residence, an additional appraisal from CBRE Limited. The Altus Group appraisals gave two valuation opinions for each property: one on an "as is" basis, and the other on a "stabilized" occupancy basis. I have reviewed those appraisals. Given that the occupancy rates for three of the residences were below the 80% level, with one at 57%, and Carleton Place was 88% occupied, I agreed with the submissions of the applicant that the "as is" basis valuations presented a more accurate picture of fair market value at this juncture.

[9] In light of the failure of the marketing process to elicit satisfactory offers for the properties, Montrose applied for the appointment of a receiver over the properties in order to effect a credit bid sale for them. Greystone incorporated the Purchaser who proposed to acquire each Debtor's assets charged by Montrose's security for an amount equivalent to the total amount of all indebtedness owing to Montrose and to assume the prior ranking Desjardins Prior Charge of the Villa Orleans Retirement Residence. In addition, the Purchaser would assume the

leasehold interest of the land on which the St. Joseph Retirement Residence is located; the landlord is the National Capital Commission. At the time of the hearing neither Desjardins nor the NCC had provided their formal consents to the proposed assumptions, but both indicated that they were processing Montrose's request. Under the terms of the proposed sale, the Purchaser assumed the risk of securing those consents.

III. Analysis

[10] "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation.[1] In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek*[2] and *Royal Bank v. Soundair Corp.*,[3] respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:

> Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:
>
> > [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.[4]

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

[11] In the present case, I was satisfied from the evidence filed by Montrose that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thereby ensuring a place to live for the residents and maintaining current levels of employment. The record revealed a professional and prolonged effort to elicit interest in the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior

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[1] *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91 (S.C.J.)
[2] (1996), 40 C.B.R. (3d) 274 (Gen. Div., Commercial List)
[3] (1991), 4 O.R. (3d) 1 (C.A.)
[4] *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 89 C.B.R. (5th) 78 (S.C.J.), para. 30.

secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.

[12] Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.

[13] Montrose asked for an order sealing large portions of the applicant's main affidavit and the confidential appendices to the GTL report on the basis of commercial sensitivity. I granted a sealing order which would remain in place until the earlier of the closing of the proposed sale or the further order of this court.

[14] Finally, Montrose filed a USB key containing an electronic copy of its application materials, for which I thank it. I would observe that although I was able to read the materials on the USB key, I was not able to edit them because they were in "imaged" form. I would remind counsel that the Commercial List's *Guidelines for Preparing and Delivering Electronic Documents requested by Judges* require parties to perform Optical Character Recognition (OCR) within PDF to enable text searching. "Imaged", rather than "OCR'd" documents are of much less use to judges. I would encourage the Commercial List Bar to continue their efforts to train their administrative staffs to follow the scanning directions contained in the *Guidelines*.

D. M. Brown J.

Date: November 6, 2013

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)**

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **D. Bish, for the Applicant, Tool-Plas**

T. Reyes, for the Receiver, RSM Richter Inc.

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD
& RELEASED: **SEPTEMBER 29, 2008**

ENDORSEMENT

[1] This morning, RSM Richter Inc. (“Richter” or the “Receiver”) was appointed receiver of Tool-Plas, (the “Company”). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

[4] Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers – namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

[5] Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

[6] Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

[7] The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

[8] The only substantial condition to the transaction is the requirement for an approval and vesting order.

[9] The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

[10] The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

[11] The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

[12] Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

MORAWETZ J.

DATE: October 24, 2008

Pro Swing Inc. *Appellant*

v.

Elta Golf Inc. *Respondent*

Indexed as: Pro Swing Inc. *v.* Elta Golf Inc.

Neutral citation: 2006 SCC 52.

File No.: 30529.

2005: December 15; 2006: November 17.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Private international law — Foreign judgments — Recognition and enforcement of foreign non-monetary judgments — Whether common law should be changed to permit enforcement of foreign non-monetary judgments — Considerations relevant to recognition and enforcement of such judgments or orders.

Pro Swing manufactures and sells customized gold clubs and golf club heads. It owns the Trident trademark in the U.S. Elta Golf carries on business in Ontario, and it offered for sale on its Website goods bearing marks which resembled Trident. Pro Swing filed a complaint in Ohio for trademark infringement. The parties entered into a settlement agreement, which was endorsed by a consent decree of the U.S. District Court. The decree enjoined Elta Golf from purchasing, marketing or selling golf clubs or golf club components bearing the Trident mark or confusingly similar variations. In 2002, Pro Swing brought a motion for contempt of court alleging that Elta Golf had violated the consent decree, and a contempt order was issued. Pro Swing then filed in the Ontario Superior Court of Justice a motion for recognition and enforcement of the consent decree and the contempt order. The motions judge held that non-money foreign judgments can be enforced and declared the consent decree valid and enforceable in Ontario. She also found that the contempt order was restitutionary in nature and that parts of that order were duplicative of the consent decree and were not final, and concluded that the portions not offending the finality requirement could be severed. She recognized the severed portions of the contempt order and declared them to be

Pro Swing Inc. *Appelante*

c.

Elta Golf Inc. *Intimée*

Répertorié : Pro Swing Inc. *c.* Elta Golf Inc.

Référence neutre : 2006 CSC 52.

N° du greffe : 30529.

2005 : 15 décembre; 2006 : 17 novembre.

Présents : La juge en chef McLachlin et les juges Bastarache, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit international privé — Jugements étrangers — Reconnaissance et exécution d'un jugement non pécuniaire étranger — Y a-t-il lieu de modifier la common law pour permettre l'exécution d'un jugement non pécuniaire étranger? — Considérations pertinentes pour la reconnaissance et l'exécution d'un jugement ou d'une ordonnance de cette nature.

Pro Swing fabrique et vend des bâtons de golf et des têtes de bâton de golf sur mesure. Aux États-Unis, elle est propriétaire de la marque de commerce Trident. Elta Golf, une entreprise ontarienne, a offert en vente sur son site Internet des articles revêtus de marques ressemblant à Trident. Pro Swing l'a poursuivie en Ohio pour contrefaçon de sa marque de commerce. Les parties ont conclu une transaction qu'une cour fédérale de district a entérinée dans un jugement sur consentement. Le jugement interdit à Elta Golf d'acheter, de commercialiser ou de vendre des bâtons de golf ou des composants de bâton de golf revêtus de la marque Trident ou d'une variante créant de la confusion avec elle. En 2002, une ordonnance pour outrage au tribunal a été rendue après que Pro Swing en eut fait la demande au motif qu'Elta Golf avait transgressé le jugement sur consentement. Pro Swing a ensuite saisi la Cour supérieure de justice de l'Ontario d'une requête visant à faire reconnaître et exécuter le jugement sur consentement et l'ordonnance pour outrage au tribunal. La juge des requêtes a conclu qu'un jugement non pécuniaire étranger pouvait être exécuté et elle a déclaré le jugement sur consentement valide et exécutoire en Ontario. Elle a par ailleurs statué que l'ordonnance pour outrage au tribunal était de nature réparatoire et que certains enforceable. The Court of Appeal set aside the motions judge's decision, concluding that both foreign orders were not enforceable in Ontario because they were ambiguous in respect of material matters, in particular on the critical issue of the scope of the extraterritorial application of these orders.

de ses éléments faisaient double emploi avec le jugement sur consentement et n'étaient pas définitifs. Elle a conclu que les éléments qui respectaient l'exigence du caractère définitif pouvaient être dissociés. Elle a reconnu les éléments dissociés de l'ordonnance pour outrage et les a déclarés exécutoires. La Cour d'appel a annulé sa décision et conclu que les deux jugements étrangers n'étaient pas exécutoires en Ontario, car ils étaient ambigus sous certains rapports importants, en particulier pour ce qui était de la question cruciale de leur portée extraterritoriale.

Held (McLachlin C.J. and Bastarache and Charron JJ. dissenting): The appeal should be dismissed.

Arrêt (la juge en chef McLachlin et les juges Bastarache et Charron sont dissidents) : Le pourvoi est rejeté.

Per LeBel, Deschamps, Fish and Abella JJ.: The traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments should be changed. Such a change requires a cautious approach and must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system. A departure from the common law rule will necessarily affect both commercial activity and judicial assistance in an era of large-scale cross-border commerce, e-commerce and cross-border litigation and will open the door to equitable orders such as injunctions, which are key to an effective modern-day remedy. In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. Consequently, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether to enforce one. [14-16] [30-31]

Les juges LeBel, Deschamps, Fish et Abella : La règle de common law classique voulant qu'un jugement étranger ne puisse être reconnu et exécuté que s'il est pécuniaire et définitif devrait être modifiée. Une telle mutation doit être le fruit d'une démarche prudente et s'accompagner de l'octroi au tribunal national du pouvoir discrétionnaire de tenir compte de certains éléments afin que le jugement ne porte pas atteinte à l'intégrité du système de justice canadien. En cette ère de généralisation du commerce transfrontalier, du commerce électronique et des litiges transfrontaliers, la modification de la règle de common law aura nécessairement une incidence sur l'activité commerciale et la collaboration judiciaire et elle ouvrira la porte à des ordonnances en equity (comme l'injonction) qui sont indispensables à des solutions adaptées aux besoins contemporains. Dans l'examen des considérations propres à la reconnaissance et à l'exécution d'une ordonnance en equity, le tribunal peut s'inspirer des critères issus d'autres mécanismes de collaboration judiciaire fondés sur la courtoisie. Pour l'heure, il suffit de souligner la nécessité de tenir compte de la souplesse qui imprègne l'equity. Les conditions auxquelles peut être reconnu et exécuté un jugement étranger peuvent donc être résumées de façon générale : il doit avoir été rendu par un tribunal compétent, être définitif et être d'une nature telle que la courtoisie commande son exécution. La notion de courtoisie n'exige pas que le tribunal saisi accorde une aide plus grande à un justiciable étranger qu'à un justiciable national et le tribunal canadien peut exercer le pouvoir discrétionnaire qui sous-tend l'ordonnance en equity pour décider de l'exécuter ou non. [14-16] [30-31]

Here, the consent decree and the contempt order are not enforceable in Ontario. These orders are problematic from many points of view. The contempt order is quasi-criminal in nature, and a Canadian court will not enforce a penal order, either directly or indirectly. While

En l'espèce, le jugement sur consentement et l'ordonnance pour outrage au tribunal ne sont pas exécutoires en Ontario. Ils sont problématiques sous de nombreux rapports. L'ordonnance pour outrage au tribunal a un caractère quasi pénal, et les tribunaux canadiens the U.S. distinguishes between civil and criminal contempt orders, in Canada, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification. The gravity of a contempt order in Canada is underscored by the criminal law protections afforded to the person against whom such an order is sought and by the sanction that person faces, which could include imprisonment. The "public law" element of a declaration of contempt and the opprobrium attached to it eclipse the impact of a simple restitutionary award. Furthermore, when faced with the need to interpret the law, the receiving court must ensure that no conflict results from the nature attributed to the order after the enforcement judgment is rendered. In the case of a contempt order, because of the different approaches in the U.S. and Canada, the conflict is real. Courts should not expose litigants to consequences to which they would not be exposed under the foreign law. Aware of their limitations, receiving courts should use their discretion to refrain from enforcing orders that subject Canadian litigants to unforeseen obligations. [34-36] [49-51] [62]

If injunctive relief is to be enforced, its territorial scope has to be specific and clear. Here, the intended territorial scope of the injunctive relief in the consent decree is uncertain. In the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide. Moreover, the contempt order imposes an obligation to account for all sales, even sales that may fall outside the scope of Pro Swing's trademark protection. To interpret the contempt order as applying outside the U.S. would offend the principle of territoriality. Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. [25] [56-58] [62]

On the issue of the appropriate remedy and the use of judicial resources, it is unclear that recognition and enforcement of the judgment is the appropriate tool amongst the various judicial assistance mechanisms or that the matter is an appropriate one for lending judicial assistance in the form requested. Letters rogatory might have been a more useful means to obtain the evidence

refuseront d'exécuter, directement ou non, une ordonnance pénale. Alors que, en matière d'outrage, le droit américain distingue l'ordonnance civile de l'ordonnance pénale, le droit canadien considère que l'ordonnance pour outrage au tribunal est avant tout la déclaration qu'une partie a transgressé une ordonnance judiciaire. Par conséquent, une requête pour outrage au tribunal ne peut être réduite à un moyen de faire pression sur un débiteur défaillant ou d'être indemnisé d'un préjudice. Les mesures de protection que prévoit le droit pénal au bénéfice de la personne visée par une telle requête et la sanction dont celle-ci est passible (ce qui peut comprendre l'emprisonnement) attestent la gravité d'une condamnation pour outrage au tribunal au Canada. L'élément « droit public » de la déclaration d'outrage au tribunal et l'opprobre qui découle de celle-ci éclipsent les conséquences d'une simple ordonnance de réparation. De plus, lorsqu'il lui faut interpréter le droit, le tribunal saisi doit veiller à ce qu'une fois l'exécution ordonnée, la qualification du jugement ne donne lieu à aucun conflit. Dans le cas d'une ordonnance pour outrage au tribunal, il y aura bel et bien conflit, car son interprétation diffère en droits américain et canadien. Le tribunal saisi ne doit pas exposer un justiciable à des conséquences qui ne pouvaient découler du droit étranger. Conscient de ses limites, il doit, dans l'exercice de son pouvoir discrétionnaire, s'abstenir d'exécuter un jugement qui soumet le justiciable canadien à des obligations imprévues. [34-36] [49-51] [62]

Lorsqu'il s'agit d'exécuter une injonction, la portée territoriale ne doit faire aucun doute. En l'occurrence, la portée territoriale de l'injonction contenue dans le jugement sur consentement est incertaine. Comme l'entente ne dit pas explicitement qu'elle s'applique à l'échelle internationale, on ne peut conclure avec certitude que le jugement sur consentement s'applique partout dans le monde. En outre, l'ordonnance pour outrage prévoit l'obligation d'établir le nombre d'articles vendus, même lorsque la vente peut ne pas bénéficier de la protection de la marque de Pro Swing. Conclure que l'ordonnance pour outrage s'applique à l'extérieur des É.-U. irait à l'encontre du principe de territorialité. L'extraterritorialité et la courtoisie ne sauraient pallier l'absence de protection d'une marque à l'étranger. [25] [56-58] [62]

En ce qui concerne la réparation appropriée et l'utilisation des ressources judiciaires, il n'est pas évident que parmi les mécanismes variés de collaboration judiciaire, la reconnaissance et l'exécution du jugement soit celui qui convient, ni que l'affaire se prête à la forme de collaboration judiciaire sollicitée. La commission rogatoire aurait peut-être été préférable pour recueillir les required by the American judge to finalize the damage award in the contempt proceeding in the U.S. Further, a court may also consider whether the matter merits the involvement of the Canadian court. Here, there is a concern that the judicial machinery could be deployed only to find that Pro Swing's debtor is insolvent. When the circumstances give rise to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the matter is worth going forward with. [45-47] [62]

éléments de preuve dont avait besoin le juge américain pour déterminer le montant des dommages-intérêts et mettre fin à l'instance pour outrage au tribunal engagée aux É.-U. De plus, le tribunal peut aussi se demander si l'affaire justifie l'intervention d'un tribunal canadien. En l'espèce, on peut craindre que l'appareil judiciaire ne soit mis à contribution que pour constater l'insolvabilité de Pro Swing. Lorsque les circonstances soulèvent des interrogations légitimes quant à l'affectation des ressources judiciaires, il incombe au justiciable de convaincre le tribunal qu'il vaut la peine d'accéder à sa demande. [45-47] [62]

Finally, there are public policy concerns regarding parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure. Courts should be mindful of the quasi-constitutional nature of the protection of personal information. [59-60]

Enfin, certaines parties de l'ordonnance pour outrage au tribunal mettent en cause l'ordre public en ce qu'elles exigent une communication de renseignements personnels interdite à première vue. Les tribunaux doivent tenir compte du caractère quasi constitutionnel de la protection des renseignements personnels. [59-60]

Accordingly, in the case at bar, to refuse to enforce the consent decree and the contempt order is an appropriate exercise of equitable discretion and amounts to allowing the Ohio court to continue the proceedings with the judicial assistance of the Ontario courts, but to a lesser extent than has been requested. [63]

Le refus d'exécuter le jugement sur consentement et l'ordonnance pour outrage constitue donc en l'espèce un exercice approprié du pouvoir discrétionnaire que confère l'equity et il permet la poursuite de l'instance devant la cour de l'Ohio avec la collaboration des tribunaux ontariens, mais dans une moins grande mesure que celle sollicitée. [63]

Per McLachlin C.J. and Bastarache and Charron JJ. (dissenting): The common law should be extended to permit the enforcement of foreign non-money judgments in appropriate circumstances. The common law must evolve in a way that takes into account the important social and economic forces that shape commercial and other kinds of relationships. That evolution must take place both incrementally and in a principled way, taking into account, in the context of foreign non-money judgments, the underlying principles of comity, order and fairness. [66] [78-79]

La juge en chef McLachlin et les juges Bastarache et Charron (dissidents) : La common law devrait être assouplie pour permettre l'exécution d'un jugement non pécuniaire étranger à certaines conditions. La common law doit évoluer en phase avec les importantes forces sociales et économiques qui façonnent les rapports commerciaux et autres. Cette évolution doit se faire de façon graduelle et raisonnée, eu égard, dans le cas des jugements non pécuniaires étrangers, aux principes sous-jacents de courtoisie, d'ordre et d'équité. [66] [78-79]

A court enforcing a foreign judgment is enforcing the obligation created by that judgment. In principle, it should not look beyond the judgment to the merits of the case. While different non-money remedies and different circumstances will raise different considerations, for the purposes of this case, there are three categories of restrictions on the recognition and enforcement of foreign non-money judgments that should be considered. First, with respect to the general requirements for enforcement, a foreign non-money judgment will not be enforced if the issuing court did not properly take jurisdiction, or if fairness considerations render such enforcement inadvisable or unjust. The existing defences of fraud, public policy and natural justice are designed to guard against unfairness in its most

Le tribunal appelé à exécuter un jugement étranger donne effet à l'obligation créée. Il doit en principe s'abstenir d'examiner le fond de l'affaire. Même si des réparations non pécuniaires différentes et des circonstances différentes feront intervenir des considérations différentes, trois conditions d'exécution d'un jugement non pécuniaire étranger devraient être considérées pour statuer sur le présent litige. Premièrement, en ce qui concerne les exigences générales, un jugement non pécuniaire étranger ne sera exécuté que si le tribunal d'origine avait compétence et qu'aucune considération liée à l'équité ne rend son exécution inopportune ou injuste. Les moyens de défense actuels fondés sur la fraude, l'ordre public et la justice naturelle se veulent un rempart contre les formes d'injustice les plus recognizable forms. Second, courts should decline to enforce foreign non-money orders that are not final and clear. Where finality is concerned, a foreign order must establish an obligation that is complete and defined; as regards clarity, an order must be sufficiently unambiguous to be enforced. A decision not to enforce on the grounds of lack of finality or clarity would have to be based on concerns apparent on the face of the order or arising from the factual or legal context. Mere speculation would not suffice. Third, Canadian courts will not enforce a foreign penal law or judgment, either directly or indirectly. [87-92] [95-101]

manifestes. Deuxièmement, le tribunal ne doit exécuter un jugement non pécuniaire étranger que s'il est définitif et clair. Pour qu'un jugement étranger soit définitif, l'obligation qu'il crée doit être complète et définie. En ce qui concerne sa clarté, il doit être suffisamment certain pour que son exécution puisse avoir lieu. Le caractère non définitif ou l'ambiguïté doivent ressortir du jugement même ou découler du contexte factuel ou juridique de l'affaire pour que soit justifié le refus d'exécuter le jugement. Une simple conjecture ne suffit pas. Troisièmement, un tribunal canadien n'exécutera une décision ou une disposition pénale étrangère ni directement ni indirectement. [87-92] [95-101]

Here, the motions judge's decision should be restored. Elta Golf conceded that the general requirements for enforcement are met. The consent decree and the portions of the contempt order the motions judge held to be enforceable in Ontario were final. The orders were complete and in no need of future elaboration. The hypothetical possibility of the need for future court supervision should not preclude the recognition of a foreign order. The orders were also sufficiently clear. In particular, an examination of the content of the consent decree and the contempt order reveals no ambiguities about their extraterritorial application. Lastly, while foreign criminal contempt orders are clearly penal and cannot be enforced by Canadian courts, the same should not be said of foreign civil contempt orders. A distinction between civil and criminal contempt exists in Canada and there is nothing penal about the contempt order in this case. The terms of the order are designed to reinforce the consent decree and to provide Pro Swing with restitution for Elta Golf's violations. The motions judge found that the contempt order was restitutionary in nature, not penal. That conclusion is unassailable. [104-116]

Dans la présente affaire, la décision de la juge des requêtes devrait être rétablie. Elta Golf a concédé que les exigences générales étaient respectées. Le jugement sur consentement et les éléments de l'ordonnance pour outrage au tribunal que la juge des requêtes a tenus pour exécutoires en Ontario étaient définitifs. Les jugements étaient complets et ne nécessitaient aucune précision ultérieure. La possibilité théorique qu'une supervision judiciaire soit nécessaire ne doit pas faire obstacle à la reconnaissance d'un jugement étranger. Par ailleurs, les jugements sont suffisamment clairs. Plus particulièrement, l'examen du jugement sur consentement et de l'ordonnance pour outrage au tribunal ne révèle aucune ambiguïté quant à leur portée extraterritoriale. Enfin, l'ordonnance étrangère pour outrage criminel est clairement pénale et ne peut être exécutée par un tribunal canadien, mais il ne devrait pas en aller de même de l'ordonnance étrangère pour outrage civil. Le droit canadien établit une distinction entre une ordonnance civile et une ordonnance criminelle en matière d'outrage et, en l'espèce, l'ordonnance pour outrage au tribunal ne comporte aucun élément pénal. Ses dispositions visent à renforcer le jugement sur consentement et à réparer le tort que les violations d'Elta Golf ont causé à Pro Swing. La juge des requêtes a conclu que l'ordonnance pour outrage au tribunal avait un caractère réparatoire et non pénal. Cette conclusion est inattaquable. [104-116]

While parts of the contempt order may raise privacy concerns, to bring up this issue at this stage when it was never argued before this or any other court would amount to an inappropriate transformation of the proceedings. In any event, if the offending parts of the contempt order cannot be enforced for public policy reasons, they can be severed. The public policy issue therefore should not determine the outcome of this appeal. [121]

Même si des éléments de l'ordonnance pour outrage au tribunal peuvent être problématiques en ce qui concerne la protection des renseignements personnels, aborder cette question maintenant, alors qu'elle n'a été soulevée ni devant la Cour ni devant les juridictions inférieures transformerait indûment l'instance. Quoi qu'il en soit, si des raisons d'ordre public empêchent l'exécution de ces éléments, ceux-ci peuvent être dissociés. La question de l'ordre public ne saurait donc être déterminante pour l'issue du présent pourvoi. [121]

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APPEAL from a judgment of the Ontario Court of Appeal (Moldaver, Gillese and Blair JJ.A.) (2004), 71 O.R. (3d) 566, [2004] O.J. No. 2801 (QL), setting aside an order of Pepall J. (2003), 68

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Moldaver, Gillese et Blair) (2004), 71 O.R. (3d) 566, [2004] O.J. No. 2801 (QL), qui a infirmé une ordonnance de la juge

O.R. (3d) 443, 30 C.P.R. (4th) 165, [2003] O.J. No. 5434 (QL). Appeal dismissed, McLachlin C.J. and Bastarache and Charron JJ. dissenting.

Raymond F. Leach and *Janet A. Allinson*, for the appellant.

No one appeared for the respondent.

The judgment of LeBel, Deschamps, Fish and Abella JJ. was delivered by

Deschamps J. — Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the Internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalization of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The Court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling. But such changes must be made cautiously. Although I recognize the need for a new rule, it is my view that this case is not the right one for implementing it.

I. Background and Judicial History

The appellant, Pro Swing Inc., manufactures and sells customized golf clubs and golf club heads. It owns the Trident trademark in the U.S. On April 27, 1998, Pro Swing filed a complaint against eight defendants for trademark infringement in the United States District Court for the Northern District of Ohio Eastern Division ("Ohio court"). The respondent, Elta Golf Inc., an Ontario resident, was named as a defendant. In the action, Pro Swing alleged that Elta was offering and selling golf clubs or golf club heads on its Web site under the infringing trademark Rident. On July 6, 1998, in Ontario, Mr. Frank Lin, as president of Elta, signed a declaration in which he stated that he now knew of Pro Swing's trademark. He declared that he had

Pepall (2003), 68 O.R. (3d) 443, 30 C.P.R. (4th) 165, [2003] O.J. No. 5434 (QL). Pourvoi rejeté, la juge en chef McLachlin et les juges Bastarache et Charron sont dissidents.

Raymond F. Leach et *Janet A. Allinson*, pour l'appelante.

Personne n'a comparu pour l'intimée.

Version française du jugement des juges LeBel, Deschamps, Fish et Abella rendu par

La juge Deschamps — Aujourd'hui, les opéra- 1
tions commerciales requièrent une attention immédiate et des solutions efficaces. L'Internet rend plus aigu encore le besoin de disposer d'outils adéquats. Certes, les frontières définissent encore la compétence et l'identité nationales, mais la mondialisation du commerce et la libre circulation des personnes et des biens en réduisent l'importance. Le système de droit et de justice est au service de la société, et non l'inverse. En l'espèce, on demande à la Cour de modifier la common law. Les arguments favorables à la modification de la règle de common law qui fait obstacle à l'exécution des jugements non pécuniaires sont convaincants. Mais pareille modification doit être apportée avec circonspection. Je reconnais qu'une nouvelle règle s'impose, mais j'estime que la présente affaire ne se prête pas à son application.

I. Contexte et historique judiciaire

L'appelante, Pro Swing Inc., fabrique et vend 2
des bâtons de golf et des têtes de bâton de golf sur mesure. Aux États-Unis, elle est propriétaire de la marque de commerce Trident. Le 27 avril 1998, elle a intenté devant la Cour fédérale du District nord de l'Ohio, division de l'est (la « cour de l'Ohio ») une poursuite en contrefaçon de marque de commerce contre huit défenderesses, dont l'intimée Elta Golf Inc., une société ontarienne. Dans son action, Pro Swing a allégué que, sur son site Internet, Elta offrait en vente et vendait des bâtons de golf ou des têtes de bâton de golf portant la marque contrefaite Rident. Le 6 juillet 1998, le président d'Elta, M. Frank Lin, a signé en Ontario une déclaration dans laquelle il disait maintenant connaître l'existence de

three golf clubs or golf club heads bearing the mark Rident, that he had never sold any and that he would discontinue advertising and distributing the clubs or club heads. The declaration was incorporated into a settlement agreement which stated that Pro Swing relied on the representations of Elta as to the use of Rident on golf clubs or golf club heads. Elta further represented in the agreement that it had discontinued marketing or using golf clubs or golf club heads bearing the mark Trident, Rident, Riden or Trigoal, and it undertook not to purchase, sell or use club components bearing those marks or a confusingly similar mark without the authorization of Pro Swing. It also undertook to deliver to Pro Swing's counsel any clubs or golf club heads and marketing material in its possession, and to modify its Web page. On July 28, 1998, a consent decree was endorsed by Matia J. of the Ohio court (see Appendix A).

la marque de Pro Swing. Il ajoutait qu'Elta avait en sa possession trois bâtons de golf ou têtes de bâton de golf de marque Rident, qu'elle n'en avait vendu aucun et qu'elle cesserait d'en faire la promotion et la distribution. Cette déclaration a été intégrée à la transaction intervenue entre les parties, qui précisait que Pro Swing se fondait sur les affirmations d'Elta concernant l'emploi de la marque Rident en liaison avec des bâtons de golf ou des têtes de bâton de golf. Elta a de plus indiqué dans la transaction qu'elle avait cessé de commercialiser ou d'utiliser des bâtons de golf ou des têtes de bâton de golf portant les marques Trident, Rident, Riden ou Trigoal. Elle s'est engagée à ne pas acheter, vendre ou utiliser, sans l'autorisation de Pro Swing, tout article de golf revêtant l'une ou l'autre de ces marques ou une marque semblable créant de la confusion avec elles. Elle s'est en outre engagée à remettre à l'avocat de Pro Swing les bâtons de golf ou les têtes de bâton de golf ainsi que le matériel promotionnel en sa possession et à modifier son site Internet. Le 28 juillet 1998, le juge Matia de la cour de l'Ohio a entériné l'accord des parties en rendant un jugement sur consentement (annexe A).

3 On December 20, 2002, Pro Swing filed a motion for contempt of court, alleging that Elta had violated the consent decree by failing to surrender the items and by advertising and selling club heads. Pro Swing filed a declaration stating that an investigator had purchased two golf club heads on the Internet, one bearing the Trident and the other the Rident mark, for delivery in Ohio. On February 25, 2003, after finding that Elta had violated the consent decree, Matia J. issued a contempt order (see Appendix B).

Le 20 décembre 2002, Pro Swing a présenté une requête pour outrage au tribunal au motif qu'Elta avait transgressé le jugement sur consentement en omettant de remettre les articles et en faisant la promotion et la vente des têtes de bâton de golf. Elle a produit une déclaration sous serment indiquant qu'un enquêteur avait acheté sur Internet deux têtes de bâton de golf devant être livrées en Ohio, l'une portant la marque Trident et l'autre, la marque Rident. Le 25 février 2003, après avoir conclu qu'Elta avait contrevenu au jugement, le juge Matia a rendu une ordonnance pour outrage au tribunal (annexe B).

4 As the Superior Court judge noted, the orders overlap to a certain extent ((2003), 68 O.R. (3d) 443). The relevant elements are as follows:

Comme l'a fait remarquer la juge de la Cour supérieure de justice ((2003), 68 O.R. (3d) 443), le jugement sur consentement et l'ordonnance pour outrage au tribunal se chevauchent. En voici les éléments pertinents :

1. an injunction prohibiting Elta from purchasing, marketing, selling or using golf clubs or components bearing Pro Swing's trademark or any

1. Elta se voit interdire d'acheter, de commercialiser, de vendre ou d'utiliser des bâtons de golf ou des composants de bâton de golf portant la

confusingly similar variations of it (consent decree, at para. 7; contempt order, at para. 2);

2. an order that Elta surrender and deliver all infringing clubs and/or components in its possession, along with any advertising, packaging, promotional or other materials, to counsel for Pro Swing (consent decree, at para. 8; contempt order, at para. 6);

3. an order for an accounting of all infringing golf clubs and/or components sold since the consent decree (contempt order, at para. 3);

4. an order for compensatory damages based on profits derived through sales of infringing goods since the consent decree (contempt order, at para. 4);

5. an order for costs and attorney's fees against Elta (contempt order, at para. 5);

6. an order that Elta provide the names of and contact information for the suppliers and purchasers of infringing goods, and that it pay the costs of a corrective mailing (contempt order, at paras. 7 and 8); and

7. an order that Elta recall all counterfeit and infringing goods (contempt order, at para. 9).

In June 2003, Pro Swing filed in the Ontario Superior Court of Justice a motion for recognition and enforcement of the consent decree and the contempt order. Elta objected that the two judgments could not be recognized or enforced because they did not meet the common law requirements of being final judgments *in personam* for a fixed sum of money and that the contempt order was excluded from recognition and enforcement because it was quasi-criminal in nature.

marque de commerce de Pro Swing ou toute variante créant de la confusion (jugement sur consentement, par. 7; ordonnance pour outrage au tribunal, par. 2);

2. Elta se voit enjoindre de remettre à l'avocat de Pro Swing tous bâtons ou composants contrefaits en sa possession, ainsi que tout article promotionnel, d'emballage ou autre (jugement sur consentement, par. 8; ordonnance pour outrage au tribunal, par. 6)

3. Elta se voit enjoindre d'établir le nombre de bâtons de golf ou de composants de bâton de golf non autorisés vendus après l'inscription du jugement sur consentement (ordonnance pour outrage au tribunal, par. 3);

4. Elta se voit ordonner de payer des dommages-intérêts fondés sur les profits tirés de la vente d'articles non autorisés après l'inscription du jugement sur consentement (ordonnance pour outrage au tribunal, par. 4);

5. Elta se voit ordonner de payer les frais de justice et les honoraires d'avocat de Pro Swing (ordonnance pour outrage au tribunal, par. 5);

6. Elta se voit enjoindre de communiquer les noms et les coordonnées des fournisseurs et des acheteurs d'articles non autorisés et de payer les frais d'envoi d'un rectificatif (ordonnance pour outrage au tribunal, par. 7 et 8);

7. Elta se voit ordonner de rappeler tous les articles contrefaits et non autorisés (ordonnance pour outrage au tribunal, par. 9).

En juin 2003, Pro Swing a déposé en Cour supérieure de justice de l'Ontario une requête visant à faire reconnaître et exécuter le jugement sur consentement et l'ordonnance pour outrage au tribunal. Elta s'oppose à la requête au motif que les exigences de la common law ne sont pas respectées. Selon elle, les jugements ne sont pas *in personam* et définitifs et ne portent pas sur une somme déterminée. De plus, l'ordonnance pour outrage au tribunal est de nature quasi pénale. 5

6 While acknowledging that the traditional common law rule required that the judgment be for a fixed sum of money, the Superior Court judge found that the latest jurisprudence opened the way for a relaxation of the rule. She found it clear from the terms of the consent decree that extraterritorial application was intended. She declared the consent decree valid and enforceable in Ontario. On the contempt order, she was of the view that it was restitutionary in nature and engaged a dispute between private parties. She found that parts of the contempt order were duplicative of the consent decree and were not final, and concluded that the portions not offending the finality requirement could be severed. She recognized paras. 3, 7, 8 and 9 of the contempt order and declared them to be enforceable.

Après avoir reconnu que la règle de common law classique exige que le jugement porte sur une somme déterminée, la juge de la Cour supérieure de justice conclut que la jurisprudence la plus récente ouvre la voie à un assouplissement. Elle estime en outre qu'il ressort du libellé du jugement sur consentement que les parties ont voulu lui conférer une portée extraterritoriale. Elle déclare le jugement valide et exécutoire en Ontario. En ce qui concerne l'ordonnance pour outrage au tribunal, elle opine qu'elle est de nature réparatoire et qu'elle a été rendue dans le cadre d'un litige opposant des parties privées. Après avoir constaté que certains de ses éléments font double emploi avec le jugement sur consentement et ne sont pas définitifs, elle conclut que les éléments qui respectent l'exigence du caractère définitif peuvent être dissociés. Elle reconnaît les paragraphes 3, 7, 8 et 9 de l'ordonnance pour outrage au tribunal et les déclare exécutoires.

7 Elta appealed the Superior Court's judgment, asking for its reversal. Pro Swing cross-appealed, asking for recognition and enforcement of the entire contempt order. The Court of Appeal stated that it was inclined to agree that the "time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments" ((2004), 71 O.R. (3d) 566, at para. 9), quoting the following passage from *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1098:

> The world has changed since the above rules [concerning the recognition and enforcement of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

Elta interjette appel du jugement de la Cour supérieure de justice et Pro Swing forme un appel incident en vue de faire reconnaître et déclarer exécutoire l'ordonnance pour outrage au tribunal en entier. La Cour d'appel convient [TRADUCTION] « que le moment est propice au réexamen des règles applicables à la reconnaissance et à l'exécution des jugements non pécuniaires étrangers » ((2004), 71 O.R. (3d) 566, par. 9), citant à l'appui un extrait de l'arrêt *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, p. 1098 :

> Le monde a évolué depuis que les règles précitées [relatives à la reconnaissance et à l'exécution des jugements étrangers] ont été formulées dans l'Angleterre du XIX^{e} siècle. Les moyens modernes de déplacement et de communication font ressortir le caractère purement local d'un bon nombre de ces préoccupations du XIX^{e} siècle. Le monde des affaires fonctionne dans une économie mondiale et on parle à juste titre de communauté internationale même si le pouvoir politique et juridique est décentralisé. Il est maintenant devenu impérieux de faciliter la circulation des richesses, des techniques et des personnes d'un pays à l'autre. Dans ces circonstances, il apparaît opportun de réexaminer nos règles relatives à la reconnaissance et à l'exécution des jugements étrangers.

8 However, the Court of Appeal found that the orders were not "sufficiently certain in [their]

La Cour d'appel conclut toutefois que le jugement et l'ordonnance ne sont pas suffisamment terms" to be enforced, giving as an example the issue of extraterritoriality it qualified as critical. The Court of Appeal also noted that Pro Swing could have taken action in Ontario based on the settlement agreement, or for infringement of its trademark rights if such rights extended to Canada. As well, the court was of the view that Pro Swing could have instituted proceedings to obtain the information it required to provide to the Ohio judge the proposed damage award contemplated in the contempt order. The Court of Appeal allowed the appeal and dismissed the cross-appeal. Pro Swing was granted leave to appeal to this Court.

clairs pour être susceptibles d'exécution, notamment en ce qui concerne l'extraterritorialité, un aspect qu'elle qualifie de crucial. Elle fait remarquer que Pro Swing aurait pu intenter une action en Ontario sur le fondement de la transaction ou pour l'atteinte aux droits conférés par sa marque de commerce si de tels droits existent également au Canada. Elle ajoute que Pro Swing aurait pu exercer un recours pour obtenir les renseignements dont elle a besoin pour proposer au juge de l'Ohio le projet concernant les dommages-intérêts prévus dans l'ordonnance pour outrage au tribunal. L'appel a été accueilli, et l'appel incident rejeté. Pro Swing est autorisée à se pourvoir devant notre Cour.

9

Two issues are raised in this appeal: whether foreign non-money judgments can be recognized and enforced, and whether such a change to the existing common law rule entails additional considerations reflecting the new needs created by expanding judicial assistance to foreign countries and litigants in this way. This last issue is not formally raised by the appellant, but it is inherently linked to the departure from the traditional rule. To allow for the recognition and enforcement of non-money orders will open the door to a number of equitable orders. The crux of this issue is to determine the considerations relevant to the recognition and enforcement of such orders.

Le présent pourvoi soulève deux questions : un jugement non pécuniaire étranger peut-il être reconnu et exécuté et, dans l'affirmative, ce changement à la règle de common law exige-t-il que l'on tienne compte d'autres considérations liées aux nouveaux besoins qui découleront alors de la plus grande collaboration judiciaire avec les pays et les justiciables étrangers? Cette dernière question n'a pas été formellement soulevée par l'appelante, mais elle est intrinsèquement liée à la dérogation éventuelle à la règle classique. Permettre la reconnaissance et l'exécution de jugements non pécuniaires ouvrira la voie à un certain nombre d'ordonnances en equity. Il s'agit donc essentiellement de déterminer quelles considérations sont pertinentes pour la reconnaissance et l'exécution de telles ordonnances.

II. Traditional Common Law Rule

II. Règle de common law classique

10

The traditional common law rule is clear and simple. In order to be recognizable and enforceable, a foreign judgment must be "(a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and (b) final and conclusive, but not otherwise" (*Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75 (footnotes omitted)). Similarly, J.-G. Castel and J. Walker, in *Canadian Conflict of Laws* (6th ed. (loose-leaf)), at para. 14.6, state that "[a] foreign judgment *in personam* given by a court of competent jurisdiction is enforceable

La règle de common law classique est claire et simple. Pour qu'un jugement étranger puisse être reconnu et exécuté, il doit être [TRADUCTION] « a) relatif à une dette ou à une somme déterminée (autre qu'une somme payable au titre d'une taxe ou d'une forme d'imposition apparentée ou d'une amende ou autre pénalité; et b) définitif » (*Dicey and Morris on the Conflict of Laws* (13e éd. 2000), vol. 1, règle 35, p. 474-475 (notes omises)). De même, dans *Canadian Conflict of Laws* (6e éd. (feuilles mobiles)), au par. 14.6, J.-G. Castel et J. Walker signalent [TRADUCTION] « que le jugement étranger *in personam* d'un tribunal compétent n'est exécutoire provided that it is final and conclusive, and for a definite sum of money."

11 The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms. Professor Vaughan Black explains the consequences of the recognition and enforcement of a money judgment at common law in "Enforcement of Foreign Non-money Judgments: *Pro Swing v. Elta*" (2006), 42 *Can. Bus. L.J.* 81, at p. 89:

> That is, [the Canadian court] always uses its own rules on such matters as the availability of garnishment, the effect of garnishment on employment, the effect of a payment into court, the date of conversion from a foreign currency into the local money, and the proper procedures for seizure and attachment. Likewise, even when enforcing a money judgment from [a foreign court, the Canadian court] employs its own exemptions legislation, its own rules for controlling competition among judgment creditors, and its own rules on post-judgment interest. In short, when a Canadian court recognizes a foreign judgment that says that the defendant must pay the plaintiff a sum of money, that foreign judgment is simply *evidence* of a debt. The recognizing court goes about collection (or limiting collection) of that debt in its own way. [Emphasis in original.]

12 As this Court confirmed in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72, absent evidence of fraud or of a violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered.

13 It is significant that, under the traditional common law rule, the recognition and enforcement of a money judgment does not require an interpretation of the foreign law, nor does it reach deeply into the structure of the domestic court's justice system, since the money obligation created by the foreign judgment is sufficient evidence to enforce it in the

que s'il est définitif et que s'il porte sur une somme déterminée. »

Le jugement étranger constate une dette. Tout ce dont le tribunal d'exécution a besoin est la preuve de la compétence du tribunal étranger, du montant du jugement et de son caractère définitif. Le tribunal d'exécution peut alors prêter son concours au justiciable étranger en lui donnant accès aux mécanismes d'exécution internes. Dans son article intitulé « Enforcement of Foreign Non-money Judgments : *Pro Swing v. Elta* » (2006), 42 *Rev. can. dr. comm.* 81, p. 89, le professeur Vaughan Black explique les conséquences de la reconnaissance et de l'exécution d'un jugement pécuniaire étranger en common law :

> [TRADUCTION] Autrement dit, [le tribunal canadien] applique toujours ses propres règles en ce qui concerne, par exemple, la possibilité d'une saisie-arrêt et l'effet de cette mesure sur l'emploi, l'effet d'une consignation au tribunal, la date de la conversion en monnaie nationale et la procédure applicable en matière de saisie. De même, pour exécuter un jugement pécuniaire rendu par [un tribunal étranger, le tribunal canadien] a recours à ses propres règles relatives à l'insaisissabilité, à l'ordre de priorité des créanciers et à l'intérêt postérieur au jugement. Bref, lorsqu'un tribunal canadien reconnaît un jugement étranger selon lequel le défendeur doit verser une somme au demandeur, le jugement étranger ne fait que *constater* une dette. Le tribunal d'exécution veille au recouvrement de la dette (ou à la limitation de ce recouvrement) selon ses propres règles. [En italique dans l'original.]

Notre Cour l'a confirmé dans l'arrêt *Beals c. Saldanha*, [2003] 3 R.C.S. 416, 2003 CSC 72, à défaut d'une preuve de fraude, de manquement à la justice naturelle ou d'atteinte à l'ordre public, le tribunal d'exécution n'examine pas les règles substantielles et procédurales du ressort étranger dans lequel a été rendu le jugement dont l'exécution est demandée au Canada.

Qui plus est, suivant la règle de common law classique, la reconnaissance et l'exécution d'un jugement pécuniaire n'exigent pas l'interprétation du droit étranger et n'impose pas un lourd fardeau au système de justice du ressort d'exécution étant donné que l'obligation pécuniaire créée par le jugement étranger constitue une preuve suffisante pour

Canadian justice system. Care must thus be taken not to lose sight of the limited impact the common law rule has on our justice system. Judicial assistance under the new rule will move beyond triggering mechanisms necessary to collect a debt. The separation of judicial systems is thus likely to be altered, since a domestic court enforcing a foreign non-money judgment may have to interpret and apply another jurisdiction's law. Professor Black illustrates this by way of the following example (at p. 89):

> A [foreign court] might issue an injunction which spells out in great detail what, when and how a defendant must do (or refrain from doing) something. If [a Canadian court] recognizes such an injunction then the courts in [the foreign country] have been permitted to reach deeply into the enforcement regime of [Canada]. It is the original [foreign order] (albeit confirmed by [a Canadian court]) that will control what the defendant must and must not do in [Canada]. Of course, if the defendant in [Canada] fails to comply with the order then any contempt proceedings in [Canada] will be conducted in accordance with [Canadian] procedure. But apart from that, when [a Canadian court] agrees to enforce an injunction issued by a court in [a foreign country], then [the foreign country] is dictating and controlling the enforcement process in [Canada], something that does not occur when [the Canadian court] enforces a foreign money judgment.

14 To depart from the fixed-sum component of the traditional common law rule will open the door to equitable orders such as injunctions, which are key to an effective modern-day remedy. The recognition and enforcement of equitable orders will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt.

15 I agree that the time is ripe to revise the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments. However, such a change must be accompanied by a judicial discretion enabling the

son exécution au Canada. Il faut donc se rappeler que la règle de common law a une incidence limitée sur notre système de justice. Si elle est modifiée, l'assistance judiciaire dépassera le simple enclenchement des mécanismes de recouvrement. Le cloisonnement des systèmes judiciaires pourra ainsi être compromis puisque le tribunal national appelé à exécuter un jugement non pécuniaire étranger pourra devoir interpréter et appliquer les règles de droit d'un autre ressort. Le professeur Black donne l'exemple suivant (p. 89) :

> [TRADUCTION] Le [tribunal étranger] pourrait décerner une injonction énonçant avec force détails ce que le défendeur doit faire (ou s'abstenir de faire), à quel moment et de quelle manière. Le [tribunal canadien] qui reconnaît une telle injonction permet aux tribunaux du [ressort étranger] de s'insinuer profondément dans le système [canadien] d'exécution des jugements. C'est le jugement étranger [initial] (confirmé par [un tribunal canadien]) qui déterminera ce que doit faire et ne doit pas faire le défendeur au [Canada]. Évidemment, si le défendeur omet de respecter le jugement [au Canada], toute instance en outrage au tribunal engagée au [Canada] sera instruite selon la procédure [canadienne]. Cela mis à part, lorsqu'[un tribunal canadien] accepte d'exécuter l'injonction décernée par un tribunal [étranger], les règles applicables dans [le ressort étranger] déterminent et encadrent la procédure d'exécution au [Canada], ce qui n'est pas le cas lorsque [le tribunal canadien] exécute un jugement pécuniaire étranger.

La dérogation à l'exigence de la règle de common law classique selon laquelle le jugement doit porter sur une somme déterminée ouvrira la porte à des ordonnances en equity (comme l'injonction) qui sont indispensables à des solutions adaptées aux besoins contemporains. La reconnaissance et l'exécution d'ordonnances en equity exigera du tribunal d'exécution qu'il recherche un équilibre entre la réserve et l'intervention, ce qu'il n'a pas à faire lorsqu'il enclenche seulement les mécanismes d'exécution dont il dispose pour assurer le recouvrement d'une dette.

Je conviens que le moment est propice à la révision de la règle de common law classique voulant que seul un jugement pécuniaire étranger définitif puisse être reconnu et exécuté. Toutefois, une telle révision doit s'accompagner de l'octroi au domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system.

tribunal national du pouvoir discrétionnaire de tenir compte de certains éléments afin que le jugement ne porte pas atteinte à l'intégrité du système de justice canadien.

III. Case for Changing the Common Law Rule

III. Les arguments en faveur de la modification de la règle de common law

16 I have read the Chief Justice's reasons, and I agree that there is a compelling rationale for a change in the common law requirement. However, it must be recognized that a departure from the common law rule will necessarily affect both commercial activity and judicial assistance in an era of large-scale cross-border commerce, e-commerce and cross-border litigation.

J'ai pris connaissance des motifs de la Juge en chef et je conviens qu'il est tout à fait justifié de modifier l'exigence de la common law. Toutefois, force est d'admettre qu'en cette ère de généralisation du commerce transfrontalier, du commerce électronique et des litiges transfrontaliers, la modification de la règle de common law aura nécessairement une incidence sur l'activité commerciale et la collaboration judiciaire.

17 For these reasons, it is important to bear in mind the need to proceed cautiously in implementing any change. Professor Black recognizes that the principles of comity, order and fairness articulated in *Morguard* favour the recognition and enforcement of foreign non-money judgments, but he tempers his observation by noting the need to develop a careful and nuanced approach that attends to the features of non-money orders. In the same vein, Professor Jeff Berryman, in "Cross-Border Enforcement of Mareva Injunctions in Canada" (2005), 30 *Adv. Q.* 413, underscores the fact that equitable remedies are context-dependent and subject to amendment at the time of enforcement; he maintains that they do not lend themselves well to simply being endorsed by Canadian courts.

C'est pourquoi il faut se rappeler que toute réforme doit être menée avec prudence. Le professeur Black reconnaît que les principes de courtoisie, d'ordre et d'équité énoncés dans l'arrêt *Morguard* militent en faveur de la reconnaissance et de l'exécution des jugements non pécuniaires étrangers. Il insiste toutefois sur la nécessité d'une démarche prudente et nuancée qui tient compte des caractéristiques d'un jugement non pécuniaire. Dans le même ordre d'idées, dans son article intitulé « Cross-Border Enforcement of Mareva Injunctions in Canada » (2005), 30 *Adv. Q.* 413, le professeur Jeff Berryman souligne que l'ordonnance en equity est fonction du contexte et susceptible de modification en cours d'exécution. À son avis, elle se prête mal à la simple homologation par un tribunal canadien.

18 On a more general note, a number of law professors and practitioners have commented on the enforcement of foreign judgments and have insisted on the need to adapt the possible defences and to redefine the approach to comity to ensure that foreign judgments do not conflict with domestic law. Professor Adrian Briggs, in "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004), 8 *SYBIL* 1, comments positively on the *Morguard* test as applied to international law but questions whether the acceptance of new bases of jurisdictional competence should

Plusieurs professeurs de droit et avocats se sont prononcés plus généralement sur la question de l'exécution des jugements étrangers. Ils ont insisté sur la nécessité d'adapter les moyens de défense possibles et de revoir l'application du principe de la courtoisie, de sorte que les jugements étrangers n'entrent pas en conflit avec le droit interne. Dans son article intitulé « Crossing the River by Feeling the Stones : Rethinking the Law on Foreign Judgments » (2004), 8 *SYBIL* 1, le professeur Adrian Briggs se montre favorable au critère de l'arrêt *Morguard* appliqué en droit international, mais se demande si aux entail the development of new defences tailored specifically to them. Similarly, Professor Jeffrey Talpis and Joy Goodman, in "A comity of errors", *Law Times*, vol. 14, No. 2, January 20, 2003, at p. 7, suggest that the public policy defence should be widened to allow a court to refuse to enforce a judgment that is manifestly unreasonable under the law of the domestic forum. Finally, Professor Janet Walker, in "*Beals v. Saldanha*: Striking the Comity Balance Anew" (2002), 5 *Can. Int'l Law.* 28, stresses that the "requirements of comity as they are reflected in the rules for enforcing foreign judgments are changing along with the circumstances in which they operate" (p. 29).

nouveaux fondements de la compétence du tribunal devraient correspondre de nouveaux moyens de défense. Dans la même veine, dans leur article intitulé « A comity of errors », *Law Times*, vol. 14, nº 2, 20 janvier 2003, p. 7, le professeur Jeffrey Talpis et Joy Goodman proposent d'étendre la portée du moyen de défense fondé sur l'ordre public afin que le tribunal puisse refuser d'exécuter un jugement manifestement déraisonnable suivant la loi du for d'exécution. Enfin, dans l'article intitulé « *Beals v. Saldanha* : Striking the Comity Balance Anew » (2002), 5 *R.C.D.I.* 28, la professeure Janet Walker souligne que les [TRADUCTION] « exigences de la courtoisie qui sous-tendent les règles régissant l'exécution des jugements étrangers évoluent en fonction du contexte » (p. 29).

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In summary, most of the commentators are not against finding new ways to adjust the law to suit modern realities, but they insist on the need for a cautious approach. As Briggs puts it, at p. 22: "It cannot be right to make radical changes to [jurisdiction] while supposing that this has no impact on the [defences]. . . . [I]ncremental, intuitive, coherent, development is what common law does best, and is how the common law conflict of laws works best."

Bref, la plupart des observateurs ne s'opposent pas à la recherche de nouveaux moyens d'adapter le droit aux réalités actuelles, mais ils insistent sur la nécessité de le faire avec prudence. Comme le dit Briggs (à la p. 22) : [TRADUCTION] « On ne saurait modifier radicalement [les règles en matière de compétence] en supposant que cela n'a pas d'incidence sur les [moyens de défense]. [. . .] [L]'évolution graduelle, intuitive et cohérente est la plus grande qualité de la common law et elle assure l'efficacité du droit international privé. »

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Morguard has led the way to developing the common law to better serve the interests of all litigants, foreign and domestic. The need to move towards a rule more flexible than a total bar is compelling. However, the change must be made having regard to issues that the old rule was not concerned with. The instant case provides an opportunity to consider how the rule against enforcing non-monetary judgments can be changed in the context of equitable orders, like injunctions, and how the specific nature of such orders makes it necessary to view enforcement from a new perspective.

L'arrêt *Morguard* a ouvert la voie à l'évolution de la common law au bénéfice de tous les justiciables, étrangers et nationaux. Il importe certes de privilégier une règle plus souple que l'interdiction absolue. Toutefois, la modification doit tenir compte de considérations que ne soulevait pas l'application de l'ancienne règle. Le présent pourvoi nous offre l'occasion de nous demander comment la règle interdisant l'exécution d'un jugement non pécuniaire peut être modifiée dans le cas d'une ordonnance fondée sur l'equity, telle l'injonction, et comment la nature spécifique de l'ordonnance en equity exige que l'on considère l'exécution sous un angle nouveau.

IV. Nature of Equitable Judgments

IV. Nature de l'ordonnance en equity

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A change in the traditional common law rule will be as important as was the passage, for the purpose of establishing jurisdiction over a

La modification de la règle de common law classique sera tout aussi importante que l'a été, aux fins de déterminer la compétence d'un tribunal à defendant, from the service or attornment of the defendant requirement to the real and substantial connection test. The latter test is flexible and its formulation has allowed it to be applied in various and evolving circumstances. Similarly, the change from the traditional common law rule to the recognition and enforcement of foreign non-money judgments should be accompanied by the incorporation of flexible factors that reflect the specific, and varied nature of equitable orders.

l'égard d'un défendeur, la substitution du critère du lien réel et substantiel à celui de l'acceptation de la signification ou de l'acquiescement par le défendeur. Le nouveau critère est souple et sa formulation a permis de l'appliquer dans des contextes divers et en évolution. De même, le passage de la règle de common law classique à la reconnaissance et à l'exécution des jugements non pécuniaires étrangers devrait s'accompagner de l'établissement de critères souples reflétant la nature particulière et variée des ordonnances en equity.

22 At common law, the typical remedy is an award for damages. However, a wide range of equitable remedies are available, and they take various forms. Their commonality is that they are awarded at the judge's discretion. Judges do not apply strict rules, but follow general guidelines illustrated by such maxims as "Equity follows the law", "Delay defeats equities", "Where the equities are equal the law prevails", "He who comes to equity must come with clean hands" and "Equity acts *in personam*" (*Hanbury & Martin Modern Equity* (17th ed. 2005), at paras. 1-024 to 1-036, and I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (6th ed. 2001), at p. 6). The application of equitable principles is largely dependent on the social fabric. As Spry puts it:

> . . . the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise. [p. 6]

En common law, la réparation habituelle est une ordonnance de payer un montant d'argent. L'equity offre pour sa part une grande variété de mesures de réparation pouvant revêtir diverses formes. Elles ont en commun de relever du pouvoir discrétionnaire du tribunal, lequel n'applique pas de règles strictes, mais des principes généraux qu'expriment certaines maximes comme [TRADUCTION] « l'equity respecte la loi », « le retard (injustifié) exclut l'appel à l'equity », « lorsque les droits en présence sont équivalents, le droit strict est applicable », « celui qui invoque l'equity doit être sans reproche lui-même » et « l'equity contraint la personne » (*Hanbury & Martin Modern Equity* (17e éd. 2005), par. 1-024 à 1-036, et I. C. F. Spry, *The Principles of Equitable Remedies : Specific Performance, Injunctions, Rectification and Equitable Damages* (6e éd. 2001), p. 6). L'application des principes de l'equity dépend en grande partie du tissu social. Comme le dit Spry :

> [TRADUCTION] . . . les maximes de l'equity sont importantes, car elles reflètent la qualité morale des principes qui ont présidé non pas à la formulation de règles rigides et immuables, mais à la détermination, selon des fondements moraux reconnus, du caractère équitable ou juste du comportement des parties. Cette qualité morale demeure, ce qui explique en grande partie l'adoption par les tribunaux de principes généraux pouvant s'appliquer avec souplesse aux nouvelles situations qui se présentent. [p. 6]

23 The traditional rule does not leave any room for discretion as regards such considerations or forms of relief. In contrast, equitable orders are crafted in accordance with the specific circumstances of each case. The most relevant equitable remedies for the purposes of the present case are specific

La règle classique ne laisse aucune latitude aux tribunaux en ce qui concerne ces considérations ou ces mesures de réparation. Par contraste, l'ordonnance rendue en equity est conçue pour s'adapter aux circonstances de l'espèce. Pour les besoins du présent pourvoi, les ordonnances qui présentent performance, that is, an order by the court to a party to perform its contractual obligations, and the injunction, that is, an order to a party to do or refrain from doing a particular act.

Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources. This factor is discussed by R. J. Sharpe, in *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at para. 7.480:

> From this perspective, the supervision concern differs from other criteria determining the availability of specific relief. It is based not upon the weighing of relative advantage and disadvantage to the parties but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damage awards do hold certain advantages. A money judgment is final and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. This fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern. The cost to society of providing the resources necessary to implement specific performance decrees is properly considered by the court when weighing the advantages the specific relief might otherwise offer.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62, a case in which the judge retained jurisdiction to

le plus d'intérêt sont l'exécution en nature, où le tribunal enjoint à une partie d'exécuter son obligation contractuelle, et l'injonction, où il enjoint à une partie de faire quelque chose ou de s'en abstenir.

Malgré sa souplesse et sa spécificité, au Canada, l'ordonnance de réparation obéit à des principes généraux. Son libellé doit être clair et spécifique. L'intéressé doit savoir exactement ce qu'il lui faut accomplir pour s'y conformer, car le tribunal n'exerce habituellement pas de contrôle ou de supervision sur son exécution. Alors que l'exigence de la spécificité est justifiée par la possibilité d'une requête pour outrage au tribunal en cas de non-exécution, la supervision judiciaire entraîne souvent de nouvelles instances et l'affectation de ressources judiciaires. Dans *Injunctions and Specific Performance* (2e éd. (feuilles mobiles)), par. 7.480, R. J. Sharpe se penche sur la question : 24

> [TRADUCTION] Dans cette optique, la préoccupation liée à la supervision judiciaire se distingue d'autres critères jouant dans l'accessibilité d'une mesure de réparation en particulier. Elle découle de la mise en balance non pas des avantages et des désavantages relatifs pour les parties, mais des avantages de la justice assurée par une mesure particulière et des coûts de l'administration de la justice pour la société. L'indemnisation a des avantages que n'a pas une mesure de réparation spécifique. Un jugement pécuniaire est définitif et son exécution ressortit aux services administratifs du tribunal, et non à ses services judiciaires. Les frais d'exécution sont en grande partie assumés par les parties. Une ponction sur les ressources judiciaires est beaucoup plus probable dans le cas d'une ordonnance d'exécution en nature. Plus l'exécution est complexe et se prolonge, plus il est probable que d'autres instances devront être engagées pour déterminer si le défendeur a respecté ses obligations. La longueur et la complexité des instances ainsi que la nécessité de demandes répétées aux tribunaux peuvent soulever des préoccupations légitimes. Les tribunaux prennent dûment en compte le coût pour la société des ressources nécessaires au respect d'une ordonnance d'exécution en nature lorsqu'ils soupèsent les avantages que la mesure de réparation spécifique offre par ailleurs.

L'affaire *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, [2003] 3 R.C.S. 3, 2003 CSC 62, où le juge s'était réservé le droit de supervise compliance with an order enjoining the Government of Nova Scotia to use its best efforts to provide French language facilities and programs, demonstrates the possible extent of judicial involvement where injunctive relief is ordered. This burden on the judicial system may be justified in the context of the constitutional protection afforded to linguistic minorities, but may not be warranted when the cost is not proportionate to the importance of the order. The Latin maxim *de minimis non curat praetor* conveys the long-established rule that claims will be entertained only if they are important enough to warrant the expenditure of public resources.

superviser l'exécution d'une ordonnance enjoignant au gouvernement de la Nouvelle-Écosse de faire de son mieux pour fournir des établissements et des programmes d'enseignement de langue française, montre jusqu'où peut aller l'intervention du tribunal qui accorde une injonction. Il peut être justifié que le tribunal s'engage de la sorte pour protéger les droits constitutionnels d'une minorité linguistique, mais non lorsque les coûts occasionnés sont disproportionnés à l'importance de l'ordonnance. La maxime latine *de minimis non curat praetor* (des petites choses le préteur ne se soucie pas) exprime la règle de longue date selon laquelle une demande n'est entendue que si son importance justifie l'affectation de ressources publiques.

25 Equally important concerns can be raised by other types of orders, like anti-suit injunctions, and search or freezing orders. The question of their territorial scope is highly relevant. In *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, the Court refused to give extraterritorial effect to provincial statutes. The frontiers of the foreign state are the very reason why its judgments need to be recognized and enforced abroad. Should the orders not be assessed to ensure that their form is compatible with domestic law? Under the traditional rule, the issue of clarity and specificity is not a concern, but if injunctive relief is to be enforced, its territorial scope has to be specific and clear. Canadian residents should not be made subject to unforeseen obligations from a foreign court or to orders in a form unknown to Canadian courts. This issue goes not to the jurisdiction of the foreign court, but either to the framing of new conditions for recognition and enforcement or to new defences.

D'autres types d'ordonnance peuvent soulever des interrogations tout aussi importantes, telles l'injonction contre les poursuites, l'ordonnance de perquisition ou l'ordonnance de blocage. La question de leur portée territoriale est fort pertinente. Dans les arrêts *Unifund Assurance Co. c. Insurance Corp. of British Columbia*, [2003] 2 R.C.S. 63, 2003 CSC 40, et *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, notre Cour a refusé de reconnaître la portée extraterritoriale de lois provinciales. C'est l'existence même de frontières qui fait qu'un jugement doit être reconnu dans un autre ressort pour y être exécuté. Ne devrait-on pas s'assurer de la compatibilité du jugement avec le droit interne? Suivant la règle classique, la question de la clarté et de la spécificité ne se pose pas, mais lorsqu'il s'agit d'exécuter une injonction, la portée territoriale ne doit faire aucun doute. Un résident canadien ne devrait pas être assujetti à une obligation imprévue par un tribunal étranger ni soumis à une ordonnance revêtant une forme inconnue des tribunaux canadiens. Ce n'est pas tant la compétence du tribunal étranger qui est en cause, mais la formulation de nouveaux critères de reconnaissance et d'exécution ou l'établissement de nouveaux moyens de défense.

V. Considerations Particular to Equitable Orders

V. Considérations propres à l'ordonnance en equity

26 Under the traditional common law rule, courts have relied on the notion of comity to justify the

Selon la règle classique, les tribunaux se sont appuyés sur la notion de courtoisie pour justifier la recognition and enforcement of foreign judgments. But it is worth noting that in *Morguard*, the Court took a balanced approach to comity. In that case, La Forest J. first referred to (at p. 1096):

> . . . the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

He adopted the more complete formulation of the concept of comity (at p. 1096) developed by the U.S. Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895), at p. 164:

> . . . the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Comity is a balancing exercise. The relevant considerations are respect for a nation's acts, international duty, convenience and protection of a nation's citizens. Where equitable orders are concerned, courts must take care not to emphasize the factor of respect for a nation's acts to the point of imbalance. An equitable order triggers considerations of both convenience for the enforcing state and protection of its judicial system. I mention these two considerations because they will be of particular relevance in the present case.

Under the traditional rule, once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced. In the case of an equitable order, it is at this stage that considerations specific to the particular nature of such orders should be contemplated. If the particular concerns raised by equitable orders are considered by the judge at the stage of determining whether the order is suitable for enforcement, they

reconnaissance et l'exécution de jugements étrangers. Il convient toutefois de signaler que dans l'arrêt *Morguard*, notre Cour a abordé cette notion de manière nuancée. Dans un premier temps, à la p. 1096 de ses motifs, le juge La Forest se reporte à :

> . . . la nature véritable de la notion de courtoisie, qui ne consiste pas seulement à respecter les volontés d'un État souverain étranger, mais à tenir compte de la commodité, même de la nécessité, d'adopter une théorie de ce genre dans un monde où le pouvoir juridique est partagé entre plusieurs États souverains.

Il reprend (à la p. 1096) la formulation plus complète de la notion de courtoisie adoptée par la Cour suprême des États-Unis dans l'arrêt *Hilton c. Guyot*, 159 U.S. 113 (1895), p. 164 :

> [TRADUCTION] . . . la reconnaissance qu'une nation accorde sur son territoire aux actes législatifs, exécutifs ou judiciaires d'une autre nation, compte tenu à la fois des obligations et des convenances internationales et des droits de ses propres citoyens ou des autres personnes qui sont sous la protection de ses lois.

L'application de la notion de courtoisie est un exercice de pondération. Les éléments à considérer sont le respect des actes de l'autre État, les obligations et les convenances internationales et la protection des citoyens du ressort d'exécution. Dans le cas d'une ordonnance en equity, le tribunal ne doit pas accorder au respect des actes de l'autre État une importance excessive au point de rompre l'équilibre. Une ordonnance en equity requiert la prise en compte des intérêts de l'État où l'exécution est demandée et la protection de son système judiciaire. Je mentionne ces deux considérations, car elles sont particulièrement pertinentes en l'espèce. 27

Selon la règle classique, une fois établie la compétence du tribunal d'exécution, le demandeur doit démontrer qu'il remplit les conditions de la reconnaissance et de l'exécution du jugement. Dans le cas d'une ordonnance en equity, c'est à ce stade qu'on doit prendre en compte les considérations qui lui sont propres. Lorsque, au moment de déterminer si l'ordonnance est susceptible d'exécution, le tribunal se penche sur les considérations qui lui sont propres, il ne sera habituellement pas nécessaire de 28 will not ordinarily need to be raised again at the defence stage. The traditional defences relating to the merits or to procedure, which are summarized in *Beals*, should not be different for equitable orders than for common law judgments. However, there might be other considerations, such as laches, that would make it inequitable to enforce a foreign judgment. Such considerations should not generally entail revisiting the merits of the case.

les soulever à nouveau à l'étape de la contestation. Les moyens de défense traditionnels touchant au fond ou à la procédure, qui sont résumés dans l'arrêt *Beals*, ne devraient pas varier selon qu'il s'agit d'une ordonnance en equity ou d'un jugement fondé sur la common law. Toutefois, d'autres considérations, comme le manque de diligence, pourraient faire en sorte qu'il soit inéquitable d'exécuter un jugement étranger. Ces considérations ne requièrent généralement pas l'examen de l'affaire au fond.

29 The present case does not require the consideration of defences particular to the nature of equitable orders. Thus, I do not have to expand on Major J.'s *dictum* in *Beals* that the evolution of private international law may require the creation of new defences (para. 42). The existing defences do not need to be broadened for the purposes of the case at bar. Similarly, the finality requirement, which is indispensable, although more complex in the context of an equitable order than in that of a common law order, could be the object of further commentary. However, these topics need not be fully addressed in the present case. Revisiting the defences and defining the finality requirement in the context of equitable orders are better left for another day.

Le présent pourvoi ne fait pas appel à l'examen des moyens de défense liés à la nature particulière d'une ordonnance en equity. Par conséquent, point n'est besoin de commenter la remarque du juge Major dans l'arrêt *Beals*, à savoir que l'évolution du droit international privé pourrait commander la création de nouveaux moyens de défense (par. 42). Le présent dossier ne requiert pas d'élargir les moyens de défense existants. De même, l'exigence du caractère définitif — incontournable, mais plus complexe dans le cas d'une ordonnance en equity que dans celui d'un jugement fondé sur la common law — pourrait faire l'objet de remarques additionnelles. Cependant, il n'est pas nécessaire d'approfondir ces questions pour les besoins du présent pourvoi. Mieux vaut attendre une autre affaire soulevant la question des moyens de défense ou celle de l'exigence du caractère définitif dans le contexte d'une ordonnance fondée sur l'equity.

30 In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. *Forum non conveniens* and letters rogatory are mechanisms that, like the enforcement of foreign judgments, rely on comity. For these mechanisms, as for the enforcement of equitable orders, the balancing exercise of comity requires a careful review of the relief ordered by the foreign court. This review ensures that the Canadian court does not extend judicial assistance if the Canadian justice system would be used in a manner not available in strictly domestic litigation. It could be tempting to use form over substance as the distinctive criterion. However, the distinction between form and substance can sometimes be elusive or even misleading. In

Dans l'examen des considérations propres à la reconnaissance et à l'exécution d'une ordonnance en equity, le tribunal peut s'inspirer des critères issus d'autres mécanismes de collaboration judiciaire fondés sur la courtoisie. À l'instar de l'exécution d'un jugement étranger, le *forum non conveniens* et la commission rogatoire reposent sur la notion de courtoisie. L'exercice de pondération qui s'impose à leur égard, tout comme pour l'exécution d'une ordonnance en equity, exige un examen attentif de la mesure ordonnée par le tribunal étranger. Il s'agit alors de faire en sorte que le tribunal canadien refuse son aide s'il en résulterait une utilisation du système de justice inadmissible au Canada. L'on pourrait être tenté de s'en remettre à la forme plutôt qu'au fond pour trancher la question. Or, la distinction entre la forme et le fond peut parfois être considering the order it is asked to enforce, the domestic court should instead scrutinize the impact of the order. Relevant considerations may thus include the criteria that guide Canadian courts in crafting domestic orders, such as: Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her? Is the order limited in its scope and did the originating court retain the power to issue further orders? Is the enforcement the least burdensome remedy for the Canadian justice system? Is the Canadian litigant exposed to unforeseen obligations? Are any third parties affected by the order? Will the use of judicial resources be consistent with what would be allowed for domestic litigants?

insaisissable, voire trompeuse. Le tribunal interne doit plutôt s'attacher aux répercussions de l'ordonnance dont l'exécution est demandée. Au nombre des considérations pertinentes pourraient donc figurer celles que prennent en compte les tribunaux canadiens pour formuler leurs propres ordonnances. Le tribunal d'exécution peut donc se poser les questions suivantes. Le libellé de l'ordonnance est-il suffisamment clair et spécifique pour que le défendeur sache ce qu'on attend de lui? La portée de l'ordonnance est-elle délimitée et le tribunal d'origine a-t-il le pouvoir de rendre d'autres ordonnances? L'exécution du jugement est-elle la solution la moins onéreuse pour le système de justice canadien? Le justiciable canadien s'expose-t-il à une obligation imprévue? Des tiers seront-ils touchés par l'ordonnance? Les ressources judiciaires seront-elles utilisées comme elles le seraient à l'égard de justiciables canadiens?

The evolution of the law of enforcement does not require me, at this point, to develop exhaustively the criteria a court should take into account. As cases come up, appropriate distinctions can be drawn. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.

L'évolution du droit en matière d'exécution de jugements n'exige pas, pour le moment, qu'on développe de façon exhaustive les critères que le tribunal doit prendre en considération. Lorsqu'une affaire s'y prêtera, les distinctions qui s'imposent pourront être établies. Pour l'heure, il suffit de souligner la nécessité de tenir compte de la souplesse qui imprègne l'equity. Les conditions auxquelles peut être reconnu et exécuté un jugement étranger peuvent cependant être résumées de façon générale : il doit avoir été rendu par un tribunal compétent, être définitif et être d'une nature telle que la courtoisie commande son exécution. La notion de courtoisie n'exige pas que le tribunal saisi accorde une aide plus grande à un justiciable étranger qu'à un justiciable national. Il est loisible au tribunal canadien d'exercer le pouvoir discrétionnaire qui sous-tend l'ordonnance en equity pour décider de l'exécuter ou non. 31

VI. Application to the Case at Bar

A. *Preliminary Comments*

I reviewed the facts at the beginning of these reasons and need not expand on them save to mention the peculiar circumstances in which the case proceeded in this Court. Elta's factum was due on

VI. Application à la présente espèce

A. *Remarques préliminaires*

Les faits sont relatés au début des présents motifs et il n'est pas nécessaire que j'y revienne, si ce n'est pour faire état des circonstances particulières de l'instance devant notre Cour. Elta devait 32

September 7, 2005. On October 17, 2005, Elta's attorney filed a notice of withdrawal and on October 26, Mr. Frank Lin, who signed the 1998 declaration for Elta, informed the Registrar that the company's "financial circumstances" did not permit it to incur further legal fees. He confirmed the information by fax on a sheet of paper bearing no letterhead. The hearing proceeded *ex parte*, a circumstance that could not have been foreseen when leave was granted.

33 Since equity is about ethics and the prevention of unconscionable conduct, it may be tempting to spring into action to remedy conduct by Elta that looks like blatant defiance of the law and the judicial system. However, care must be taken to ensure that the law and the justice system are not harmed by engaging them too quickly in a manner that accommodates only one aspect of comity. Three issues are relevant to determining whether the orders rendered in this case meet the conditions for recognition and enforcement. The first, raised by Elta, relates to the quasi-criminal nature of a contempt order, the second to the burden on the judicial system and the third to the extraterritorial nature of the orders. In addition, I feel bound to say a few words concerning the public policy defence. While it might have been possible to resolve some of the issues had Elta appeared before the Court, its absence, and the reasons given for its absence, reinforce my conclusion that the circumstances do not lend themselves well to the recognition and enforcement of the orders.

B. *Quasi-Criminal Nature of the Contempt Order*

34 It is well established that Canadian courts will not enforce a penal order, either directly or indirectly (Castel and Walker, at para. 8.3). This point is pertinent only to the recognition and enforcement of the contempt order. The Superior Court judge reasoned that the contempt order was restitutionary in nature and engaged a dispute between private parties (para. 17). This narrow view of contempt of court conflicts with Matia J.'s finding that, "[b]ased

produire son mémoire le 7 septembre 2005. Or, le 17 octobre 2005, son avocat a déposé un avis de désistement puis, le 26 octobre, M. Frank Lin, le signataire de la déclaration sous serment établie au nom d'Elta en 1998, a informé la Registraire que la « situation financière » de la société ne lui permettait pas d'engager d'autres frais de justice, ce qu'il a confirmé par télécopieur sur du papier sans en-tête. L'audience s'est déroulée *ex parte*, ce que la Cour n'avait manifestement pas envisagé lorsqu'elle avait autorisé le pourvoi.

Étant donné que l'éthique et la prévention du comportement abusif sous-tendent l'equity, on pourrait être tenté d'intervenir pour sanctionner ce qui paraît être, de la part d'Elta, un mépris flagrant du droit et du système judiciaire. Toutefois, il faut se garder de porter atteinte à ceux-ci en les mettant trop hâtivement à contribution d'une manière qui ne tient compte que d'un seul volet du principe de la courtoisie. Trois éléments importent pour déterminer si le jugement et l'ordonnance en cause peuvent être reconnus et exécutés. Le premier, soulevé par Elta, est la nature quasi pénale de l'ordonnance pour outrage au tribunal, le deuxième, les ressources judiciaires requises et le troisième, la portée extraterritoriale du jugement et de l'ordonnance. De plus, j'estime qu'il me faut aborder la question du moyen de défense fondé sur l'ordre public. Même s'il aurait été possible de régler certaines questions en litige si Elta s'était présentée devant nous, son absence et les motifs invoqués pour la justifier me confortent dans la conclusion que les circonstances de l'espèce ne sont pas propices à la reconnaissance et à l'exécution du jugement et de l'ordonnance.

B. *Nature quasi pénale de l'ordonnance pour outrage au tribunal*

Il est bien établi que les tribunaux canadiens refuseront d'exécuter, directement ou non, une ordonnance pénale (Castel et Walker, par. 8.3), ce qui n'est pertinent que pour la reconnaissance et l'exécution de l'ordonnance pour outrage au tribunal. La juge de la Cour supérieure de justice a conclu que celle-ci était de nature réparatoire et avait été rendue dans le cadre d'un litige opposant des parties privées (par. 17). Cette conception étroite de l'outrage au tribunal upon these violations, Elta Golf is in contempt of this Court" (A.R., at p. 102), and with this Court's finding in *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065:

> The penalty for contempt of court, even when it is used to enforce a purely private order, still involves an element of "public law", in a sense, because respect for the role and authority of the courts, one of the foundations of the rule of law, is always at issue. [p. 1075]

In *Vidéotron*, the Court opted for a unified approach to the nature of the contempt of court order, thus setting aside the distinction between the civil and criminal aspects that prevails in the United States: *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), at p. 441.

In Canadian law, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification. The gravity of a contempt order is underscored by the criminal law protections afforded to the person against whom such an order is sought. Not only is that person not compellable (*Vidéotron*, at p. 1078) but he or she is not competent to act as a witness for the prosecution: *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4; *P.-A.P. v. A.F.*, [1996] R.D.J. 419 (C.A.). The significance of a contempt order is also evident from the sanction faced by the offender. In Canada, an individual in contempt of court can be committed to jail (see Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 60.11) or may face the imposition of any other sanction available for a criminal offence, such as a fine or community service: *Westfair Foods Ltd. v. Naherny* (1990), 63 Man. R. (2d) 238 (C.A.). Thus, both the process used to issue a declaration of contempt and the sanction bear the imprint of criminal law.

The "public law" element of a declaration of contempt and the opprobrium attached to it eclipse

contredit la conclusion du juge Matia selon laquelle, [TRADUCTION] « [vu] ces manquements, Elta Golf est coupable d'outrage à ce tribunal » (d.a., p. 102). Elle contredit également la conclusion de notre Cour dans l'arrêt *Vidéotron Ltée c. Industries Microlec Produits Électroniques Inc.*, [1992] 2 R.C.S. 1065 :

> La sanction de l'outrage au tribunal, même lorsqu'elle sert à assurer l'exécution d'une ordonnance purement privée, comporte toujours un élément de « droit public », en quelque sorte, car elle met toujours en jeu le respect du rôle et de l'autorité des tribunaux, un des fondements de l'État de droit. [p. 1075]

Dans cet arrêt, la Cour a opté pour une approche uniforme de la nature de l'ordonnance pour outrage au tribunal, écartant ainsi la distinction entre le civil et le pénal qui subsiste aux États-Unis : voir *Gompers c. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), p. 441.

En droit canadien, une ordonnance pour outrage au tribunal est avant tout une déclaration qu'une partie a transgressé une ordonnance judiciaire. Par conséquent, une requête pour outrage au tribunal ne peut être réduite à un moyen de faire pression sur un débiteur défaillant ou d'être indemnisé d'un préjudice. Les mesures de protection que prévoit le droit pénal au bénéfice de la personne visée par une telle requête attestent la gravité d'une condamnation pour outrage au tribunal. Non seulement cette personne n'est pas contraignable (*Vidéotron*, p. 1078), mais elle n'est pas habile à témoigner pour la poursuite : *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, art. 4; *P.-A.P. c. A.F.*, [1996] R.D.J. 419 (C.A.). L'importance d'une telle ordonnance ressort également de la peine dont est passible le contrevenant. Au Canada, l'outrage au tribunal est sanctionné par l'emprisonnement (voir les *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, règle 60.11) ou toute autre peine pouvant être infligée relativement à une infraction criminelle, comme l'amende ou le service à la collectivité : *Westfair Foods Ltd. c. Naherny* (1990), 63 Man. R. (2d) 238 (C.A.). Tant la procédure menant à la déclaration que la sanction portent donc l'empreinte du droit pénal. 35

L'élément « droit public » de la déclaration d'outrage au tribunal et l'opprobre qui découle de 36 the impact of a simple restitutionary award. As a matter of principle, the quasi-criminal nature of the contempt order precludes the enforcement of such orders in Canada.

37 The Superior Court judge did not acknowledge the differences between the Canadian and American views on contempt. She ignored the declaration of contempt, expunged the duplicative parts from the contempt order and declared only the new injunctive relief to be recognizable and enforceable. I am not satisfied that it was appropriate to reconfigure the order in this way.

38 The reconfiguration led the court to attribute to the contempt order a nature different from the usual nature of such orders in Canada. To sidestep the difficulty by severing the order hardly addresses the argument based on the quasi-criminal nature of the order and is a course to be avoided. Severance requires the receiving court to consider the merits of the order and risks affecting its substance. Even if severance does not distort the purpose of the order, it tests the limits of the enforcing court's familiarity with the foreign law, a topic discussed below.

39 Because of their criminal component, contempt orders should not be enforceable in Canada. I note, on this issue, that according to K. MacDonald, in "A New Approach to Enforcement of Foreign Non-Monetary Judgments" (2006), 31 *Adv. Q.* 44, at p. 56, citing the *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987), Part IV, ch. 8, § 481, the U.S. courts, while allowing the recognition of judgments granting injunctions, will not generally enforce such orders. According to this view, neither the consent decree nor the reconfigured contempt order would be enforced in the U.S.

C. *Integrity of the Justice System*

40 In choosing a remedy, a court of equity must consider whether the remedy is appropriate. Such is

celle-ci éclipsent les conséquences d'une simple ordonnance de réparation. La nature quasi pénale de l'ordonnance pour outrage au tribunal empêche en principe son exécution au Canada.

La juge de la Cour supérieure de justice n'a pas reconnu la difficulté de concilier la conception canadienne de l'outrage au tribunal avec l'approche américaine. Elle a fait abstraction de la déclaration d'outrage, a retranché les passages faisant double emploi et n'a déclaré susceptible de reconnaissance et d'exécution que l'injonction nouvelle en résultant. Je ne crois pas qu'il convenait de reconfigurer ainsi l'ordonnance.

La reconfiguration a amené le tribunal à attribuer à l'ordonnance pour outrage au tribunal une nature différente de celle qu'on lui confère habituellement au Canada. Contourner la difficulté en recourant à la dissociation ne règle pas la question de la nature quasi pénale de l'ordonnance et doit évidemment être évité. La dissociation exige du tribunal saisi qu'il se penche sur le bien-fondé de l'ordonnance, au risque d'intervenir sur le fond. Même si la dissociation ne modifie pas l'objet de l'ordonnance, elle met à l'épreuve les limites de la connaissance du droit étranger par le tribunal d'exécution, ce sur quoi je reviendrai.

Vu sa composante pénale, l'ordonnance pour outrage au tribunal ne devrait pas être susceptible d'exécution au Canada. À cet égard, je note que dans son article intitulé « A New Approach to Enforcement of Foreign Non-Monetary Judgments » (2006), 31 *Adv. Q.* 44, p. 56, citant *Restatement of the Law (Third) : The Foreign Relations Law of the United States* (1987), partie IV, ch. 8, § 481, K. MacDonald estime que même s'ils reconnaissent les injonctions, les tribunaux américains ne les exécutent généralement pas. Suivant son analyse, ni le jugement sur consentement ni l'ordonnance pour outrage au tribunal reconfigurée ne seraient susceptibles d'exécution aux États-Unis.

C. *L'intégrité du système de justice*

Avant d'accorder une mesure de réparation, y compris une injonction, le tribunal statuant en the case when deciding whether to issue an injunction. Judicial economy is one of the many considerations the court must evaluate. In private international law, this concern is addressed in the principle of comity. As mentioned above, comity concerns not only respect for a foreign nation's acts, international duty and convenience, but also the protection of a nation's citizens and domestic values.

equity doit se demander si elle est appropriée. L'économie des ressources judiciaires est l'un des nombreux éléments dont il doit tenir compte. En droit international privé, cette considération est prise en compte dans l'application de la notion de courtoisie. Je rappelle que la courtoisie se soucie non seulement du respect des actes de l'autre État ainsi que des obligations et des convenances internationales, mais également de la protection des citoyens et des valeurs du ressort d'exécution.

41

In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, the Court recognized that prejudice to a party is relevant to the choice of forum. Similarly, if a plaintiff has a choice between courses of action and one of these is less burdensome for the receiving court, he or she can rightly be asked to take the less burdensome one.

Dans l'arrêt *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, notre Cour a reconnu que le préjudice infligé à une partie importe dans le choix du tribunal. De même, lorsque plusieurs recours s'offrent à une partie et que l'un d'eux est moins onéreux pour le tribunal saisi, on peut légitimement exiger que la partie opte pour ce dernier.

42

On the issue of the use of judicial resources, the Court of Appeal stated that the denial of recognition and enforcement did not leave Pro Swing without a remedy. It in fact mentioned two other possible courses of action for Pro Swing to take: a separate action and letters rogatory. The first would be burdensome for Pro Swing and would not give full faith and credit to the Ohio judgment. However, letters rogatory should have been considered.

En ce qui concerne l'utilisation des ressources judiciaires, la Cour d'appel a dit que le refus de reconnaître et d'exécuter l'ordonnance ne laissait pas Pro Swing sans recours. De fait, elle a mentionné deux autres avenues possibles : l'action distincte et la commission rogatoire. La première solution serait onéreuse pour Pro Swing et ne reconnaîtrait pas pleinement la valeur de l'ordonnance de la cour de l'Ohio. La commission rogatoire, par contre, aurait dû être envisagée.

43

Letters rogatory are used to obtain evidence in the form of testimony, statements or documents for use in proceedings before foreign courts: *Canada Evidence Act*, s. 46, and Ontario *Evidence Act*, R.S.O. 1990, c. E.23, s. 60. This form of judicial assistance, like the recognition and enforcement of foreign orders and *forum non conveniens*, rests on the principle of comity: *District Court of the United States, Middle District of Florida v. Royal American Shows, Inc.*, [1982] 1 S.C.R. 414.

La commission rogatoire sert à recueillir des éléments de preuve — témoignages, déclarations ou documents — qui seront utilisés dans le cadre d'une instance devant un tribunal étranger : *Loi sur la preuve au Canada*, art. 46, et *Loi sur la preuve* de l'Ontario, L.R.O. 1990, ch. E.23, art. 60. Tout comme la reconnaissance et l'exécution d'une ordonnance étrangère et l'exception du *forum non conveniens*, cette forme de collaboration judiciaire repose sur le principe de la courtoisie entre les États : *District Court of the United States, Middle District of Florida c. Royal American Shows, Inc.*, [1982] 1 R.C.S. 414.

44

Letters rogatory are allowed by virtue of s. 46 of the *Canada Evidence Act* and applicable provincial legislation. One of the requirements is that a

La commission rogatoire est prévue à l'art. 46 de la *Loi sur la preuve au Canada* et aux dispositions applicables des lois provinciales. L'une des proceeding be pending before the Ohio court: *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Re International Association of Machinists & Aerospace Workers and Qantas Airways Ltd.* (1983), 149 D.L.R. (3d) 38 (Ont. H.C.J.). In this case, the proceeding may be considered to be pending before the Ohio court because the very reason the order is rendered is to enable Pro Swing to return before Matia J. to determine the damage award.

exigences est que l'affaire soit pendante devant la cour de l'Ohio : *Zingre c. La Reine*, [1981] 2 R.C.S. 392; *Re International Association of Machinists & Aerospace Workers and Qantas Airways Ltd.* (1983), 149 D.L.R. (3d) 38 (H.C.J. Ont.). On peut considérer que l'affaire est pendante devant la cour de l'Ohio parce que le juge Matia a justement rendu l'ordonnance afin que Pro Swing se présente à nouveau devant lui pour faire déterminer le montant des dommages.

45 Subject to their being duly obtained, letters rogatory may be viewed as a useful means to obtain the evidence required by Matia J. to finalize the damage award in the contempt proceeding in Ohio. This course of action would have the benefit of avoiding duplication of the enforcement proceedings in Ontario with those in Ohio. Moreover, letters rogatory are truly incidental to the proceedings, which is how the Superior Court judge characterized the parts of the contempt order she agreed to recognize and enforce.

Pour autant qu'elle soit régulièrement obtenue, la commission rogatoire peut être considérée comme un bon moyen de recueillir les éléments de preuve dont a besoin le juge Matia pour déterminer le montant des dommages-intérêts et mettre fin à l'instance pour outrage au tribunal engagée en Ohio. Cette avenue permettrait d'éviter que la procédure d'exécution en Ontario fasse double emploi avec celle engagée en Ohio. En outre, la commission rogatoire est véritablement incidente à l'instance, une caractéristique dont s'est servie la juge de la Cour supérieure de justice pour qualifier les parties de l'ordonnance pour outrage au tribunal qu'elle a accepté de reconnaître et d'exécuter.

46 In addition to considering alternate means to reach a particular outcome, a court may consider whether the matter merits the involvement of the Canadian court. The receiving court's willingness to extend its judicial resources may depend on the importance of the case compared to the damage the plaintiff would suffer if his or her request were refused. In the present case, given the facts that the consent agreement was concluded on the basis of only three golf clubs or golf club heads, that only two golf club heads were purchased in the investigation and that Elta chose not to appear owing to "financial circumstances", there is a concern that the judicial machinery could be deployed only to find that Pro Swing's debtor is insolvent.

Non seulement le tribunal peut-il envisager un autre moyen d'atteindre le résultat voulu, mais il peut se demander si l'affaire justifie l'intervention d'un tribunal canadien. La décision du tribunal saisi de donner ou non accès à ses ressources judiciaires peut dépendre de l'importance de l'affaire au regard du préjudice que subirait le demandeur en cas de refus. Étant donné que la transaction intervenue entre les parties ne vise que trois bâtons de golf ou têtes de bâton de golf, que seulement deux têtes de bâton de golf ont été achetées par l'enquêteur et qu'Elta a choisi, en raison de sa « situation financière », de ne pas se présenter à l'audience, on peut craindre que l'appareil judiciaire ne soit mis à contribution que pour constater l'insolvabilité de Pro Swing.

47 True, it would encourage deceit, fraud and similar misconduct if courts were systematically to require litigants to demonstrate the damage they would suffer should enforcement be denied. Nevertheless, when the circumstances give rise

Il est vrai que les tribunaux encourageraient le recours à la tromperie, à la fraude et à d'autres comportements répréhensibles s'ils exigeaient systématiquement du justiciable qu'il fasse la preuve du préjudice qu'il subirait si l'exécution du jugement to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the matter is worth going forward with.

The appropriateness of using local judicial resources is a factor included in the convenience aspect of the principle of comity. It does not allow judges to determine whether the order is correct, but provides minimal protection for our justice system.

D. *Familiarity With the Foreign Law*

I alluded earlier to the problem of interpreting a foreign order in light of Canadian law, which might be different from the foreign law. When faced with the need to interpret the law, the receiving court must ensure that no conflict results from the nature attributed to the order after the enforcement judgment is rendered.

In the case of a contempt order, because of the different approaches in the U.S. and in Canada, the conflict is real. In the U.S., according to *Gompers*, a civil contempt order is remedial only and is issued for the benefit of the complainant. However, if the same contempt order is recognized and enforced in Canadian law, it becomes a Canadian contempt order that has a quasi-criminal nature and exposes the offender to imprisonment.

Differences in laws might trigger different obligations. It is important that the receiving court does not have to venture into uncertain territory to interpret orders whose terms are based on rules with which the court is not familiar. Also, courts should not expose litigants to consequences to which they would not be exposed under the foreign law. Aware of their limitations, receiving courts should use their discretion to refrain from enforcing orders that subject Canadian litigants to unforeseen obligations.

était refusée. Néanmoins, lorsque les circonstances soulèvent des interrogations légitimes concernant l'affectation des ressources judiciaires, il incombe au justiciable de convaincre le tribunal qu'il vaut la peine d'accéder à sa demande.

48 L'opportunité d'affecter des ressources judiciaires est un élément inhérent au volet du principe de la courtoisie touchant aux intérêts du pays où l'exécution est demandée. Cette considération ne permet pas au tribunal de se prononcer sur le bien-fondé de l'ordonnance, mais elle assure un minimum de protection à notre système judiciaire.

D. *Connaissance du droit étranger*

49 J'ai déjà fait allusion à la difficulté d'interpréter un jugement étranger selon le droit canadien, qui peut différer du droit étranger. Lorsqu'il lui faut interpréter le droit, le tribunal saisi doit veiller à ce qu'une fois l'exécution ordonnée, la qualification du jugement ne donne lieu à aucun conflit.

50 Dans le cas d'une ordonnance pour outrage au tribunal, il y aura bel et bien conflit, car son interprétation diffère en droits américain et canadien. Aux États-Unis, suivant l'arrêt *Gompers*, une ordonnance pour outrage au tribunal au civil n'est qu'une mesure de réparation accordée au bénéfice du demandeur. Or, si elle est reconnue et exécutée au Canada, elle devient une ordonnance canadienne pour outrage au tribunal revêtant un caractère quasi pénal et rendant le contrevenant passible d'emprisonnement.

51 Des différences sur le plan du droit peuvent emporter des obligations différentes. Il importe que le tribunal saisi ne s'aventure pas en territoire inconnu pour interpréter une ordonnance fondée sur des règles avec lesquelles il n'est pas familiarisé. Il ne doit pas non plus exposer un justiciable à des conséquences qui ne pouvaient découler du droit étranger. Conscient de ses limites, le tribunal saisi doit, dans l'exercice de son pouvoir discrétionnaire, s'abstenir d'exécuter un jugement qui expose le justiciable canadien à des obligations imprévues.

E. *Extraterritoriality*

52 The Superior Court was of the view that the wording of the consent decree made it clear that extraterritoriality was intended by the parties. However, the judge did not comment on the contempt order. The Court of Appeal found both orders unclear as to the scope of their extraterritorial application. The issue is important both because the transactions were made over the Internet and because the trademark was protected only in the U.S.

53 Extraterritoriality is a long-recognized concern not only because a law normally applies solely in the jurisdiction where it is enacted, but also because courts lack familiarity with foreign justice systems. Courts will tend to find solutions to limit spheres of conflict. In *Hunt*, a Quebec statute was found not to prevent the enforcement of a B.C. order. In *Unifund*, an Ontario statute was held not to apply to a B.C. corporation. In *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, the Court was of the view that a *Mareva* injunction should have been refused because the assets in question were not at risk when moved to Quebec.

54 This Court commented on the particular nature of an Internet transaction in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45. It stated that "a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, 'is both here and there'" (para. 59).

55 Truly, when Mr. Frank Lin signed the declaration stating that he had three golf clubs or golf club heads in inventory and agreed to surrender them to Pro Swing's counsel, he must have understood that an eventual incorporation of the settlement

E. *Extraterritorialité*

La Cour supérieure de justice a jugé qu'il ressortait du jugement sur consentement que les parties avaient voulu lui conférer une portée extraterritoriale, mais elle ne s'est pas prononcée sur la portée de l'ordonnance pour outrage au tribunal. La Cour d'appel a estimé pour sa part que l'application extraterritoriale n'était manifeste ni dans le cas du jugement sur consentement ni dans celui de l'ordonnance pour outrage au tribunal. La question est importante, car les opérations ont été effectuées sur Internet et la marque de commerce était protégée aux États-Unis seulement.

L'extraterritorialité est depuis longtemps un sujet de préoccupation. Non seulement une loi ne s'applique-t-elle habituellement que dans le ressort de son adoption, mais les tribunaux ne sont pas familiarisés avec les systèmes de justice étrangers. Les tribunaux privilégieront donc la solution qui limite le risque de conflit. Dans l'arrêt *Hunt*, notre Cour a conclu que la loi québécoise en cause n'empêchait pas l'exécution d'une ordonnance de la Colombie-Britannique. Dans l'arrêt *Unifund*, elle a jugé que la loi ontarienne en cause ne s'appliquait pas à une société de la Colombie-Britannique. Dans l'arrêt *Aetna Financial Services Ltd. c. Feigelman*, [1985] 1 R.C.S. 2, elle a statué que l'injonction *Mareva* aurait dû être refusée vu l'absence d'un risque de perte si les biens en question étaient transférés au Québec.

Dans l'arrêt *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Assoc. canadienne des fournisseurs Internet*, [2004] 2 R.C.S. 427, 2004 CSC 45, notre Cour s'est prononcée sur la nature particulière d'une opération sur Internet, affirmant qu'« une télécommunication effectuée à partir d'un pays étranger vers le Canada ou à partir du Canada vers un pays étranger "se situe à la fois ici et à l'autre endroit" » (par. 59).

En vérité, lorsque M. Frank Lin a signé la déclaration dans laquelle il disait avoir en stock trois bâtons de golf ou têtes de bâton de golf et acceptait de les remettre à l'avocat de Pro Swing, il a dû comprendre que si la transaction était entérinée par agreement into a consent decree could bind him to deliver goods located in Ontario.

le tribunal, il pourrait être tenu de remettre les articles se trouvant en Ontario.

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However, the same extraterritorial application cannot be said of the orders contained in the consent decree and the contempt order that enjoined him from purchasing and selling the material. Since the trademark protection is the one recognized in the U.S. and the Internet transaction took place in both Ohio and Ontario, the transaction can be said to have occurred in Ohio. The Internet component does not transform the U.S. trademark protection into a worldwide one. Whether Elta could, by consent, have agreed to such an extension is a matter of interpretation. The Superior Court found the terms clear, but the Court of Appeal found them doubtful. In my view, in the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide.

Toutefois, les éléments du jugement sur consentement et de l'ordonnance pour outrage au tribunal lui interdisant d'acheter et de vendre les articles en question ne sauraient avoir la même portée extraterritoriale. La marque de commerce protégée étant celle reconnue aux États-Unis et l'opération sur Internet ayant été effectuée en Ohio et en Ontario, on peut dire de l'opération qu'elle a eu lieu en Ohio. L'utilisation d'Internet ne confère pas à la marque de commerce protégée aux États-Unis une protection à l'échelle mondiale. La question de savoir si Elta a pu consentir à un tel accroissement de la protection est matière à interprétation. La Cour supérieure de justice a jugé la transaction claire, alors que la Cour d'appel l'a jugée équivoque. Selon moi, comme l'entente ne dit pas explicitement qu'elle s'applique à l'échelle internationale, on ne peut conclure avec certitude que le jugement sur consentement s'applique partout dans le monde.

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In addition to prohibiting the purchase and sale of designated material, the contempt order enjoins Elta "to make an accounting to Pro Swing of all golf club and/or golf club components it has sold which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree . . . [and to] include a sworn statement of account of all gross and net income derived from sales of TRIDENT and RIDENT golf clubs or golf club components . . .". It imposes an obligation to account for all sales, even sales that may fall outside the scope of Pro Swing's trademark protection. To interpret the contempt order as applying outside the U.S. would offend the principle of territoriality.

De plus, non seulement l'ordonnance pour outrage au tribunal interdit l'achat et la vente de certains articles, mais elle prévoit qu'Elta [TRADUCTION] « établira [à l'intention de Pro Swing] le nombre de bâtons de golf ou de composants de bâton de golf qu'elle a vendus depuis l'inscription du jugement sur consentement sous la marque TRIDENT ou RIDENT [. . .] [et] y joindra une déclaration sous serment indiquant les produits brut et net tirés de la vente de bâtons de golf ou de composants de bâton de golf TRIDENT et RIDENT . . . ». L'obligation vise toutes les ventes, même celles pouvant ne pas bénéficier de la protection de la marque de Pro Swing. Conclure que l'ordonnance pour outrage au tribunal s'applique à l'extérieur des États-Unis irait à l'encontre du principe de territorialité.

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Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. The Internet poses new challenges to trademark holders, but equitable jurisdiction cannot solve all their problems. In the future, when considering cases that are likely to result in proceedings in a foreign jurisdiction, judges will no doubt be alerted to the need to be clear as regards

L'extraterritorialité et la courtoisie ne sauraient pallier l'absence de protection d'une marque à l'étranger. Le recours à Internet pose de nouveaux défis aux titulaires de marques de commerce, et l'equity ne peut résoudre tous les problèmes. À l'avenir, lorsqu'ils seront saisis d'une affaire susceptible d'avoir des ramifications à l'étranger, les tribunaux seront sans doute sensibilisés à la territoriality. Until now, this was not an issue because judgments enforcing trademark rights through injunctive relief were, by nature, not exportable.

nécessité de statuer clairement sur la territorialité. Le problème ne s'était pas encore posé car, en raison de sa nature, l'injonction visant l'exécution d'un droit conféré par une marque de commerce n'était pas exportable.

F. *Public Policy Defence*

F. *Moyen de défense fondé sur l'ordre public*

59 Elta did not raise a public policy defence. However, public policy and respect for the rule of law go hand in hand. Courts are the guardians of Canadian constitutional values. They are sometimes bound to raise, *proprio motu*, issues relating to public policy. An obvious example of values a court could raise *proprio motu* can be found in *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7. In that case, the Court took Canada's international commitments and constitutional values into consideration in deciding to confirm a direction to the Minister to make a surrender subject to assurances that the death penalty would not be imposed. Public policy and constitutional requirements may also be at stake when the rights of unrepresented third parties are potentially affected by an order. In the case at bar, over and above the concerns articulated by the Court of Appeal and the defences raised by Elta, there are, in my view, concerns with respect to parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure.

Elta n'a pas invoqué de moyen de défense fondé sur l'ordre public. Cependant, ordre public et respect de la règle de droit vont de pair. Les tribunaux sont les gardiens des valeurs constitutionnelles canadiennes. Ils sont parfois tenus de soulever de leur propre chef des questions touchant à l'ordre public. Dans l'affaire *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7 — un bon exemple des valeurs qu'un tribunal peut soulever d'office —, notre Cour a pris en compte les engagements internationaux et les valeurs constitutionnelles du Canada pour confirmer l'ordonnance intimant au ministre de ne procéder à l'extradition que si l'assurance lui était donnée que la peine de mort ne serait pas infligée. Ordre public et exigences constitutionnelles peuvent aussi entrer en jeu lorsque l'ordonnance risque de porter atteinte aux droits d'un tiers non représenté. En l'espèce, au-delà des préoccupations de la Cour d'appel et des moyens de défense invoqués par Elta, je suis d'avis que certaines parties de l'ordonnance pour outrage au tribunal soulèvent des interrogations du fait qu'elles exigent une communication de renseignements personnels susceptible à première vue d'être interdite.

60 The quasi-constitutional nature of the protection of personal information has been recognized by the Court on numerous occasions: *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13, at para. 28; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, at para. 24; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66. In *Burns*, the Court required assurances that our constitutional protections would be extended to individuals found on Canadian soil; in the same way, courts should be mindful of the values that merit constitutional or quasi-constitutional protection. In light of the

La Cour a reconnu à maintes reprises le caractère quasi constitutionnel de la protection des renseignements personnels : *Cie H.J. Heinz du Canada ltée c. Canada (Procureur général)*, [2006] 1 R.C.S. 441, 2006 CSC 13, par. 28; *Lavigne c. Canada (Commissariat aux langues officielles)*, [2002] 2 R.C.S. 773, 2002 CSC 53, par. 24; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66. Dans l'arrêt *Burns*, elle a exigé l'assurance que les personnes trouvées en sol canadien bénéficieraient de nos garanties constitutionnelles; de la même manière, les tribunaux doivent tenir compte des valeurs justifiant une protection constitutionnelle ou quasi constitutionnelle. Vu le quasi-constitutional status attributed to privacy, the order enjoining Elta to provide all credit card receipts, accounts receivable, contracts, etc. could be problematic. The range of documents is wide and most of them contain personal information that might be protected.

caractère quasi constitutionnel de la protection des renseignements personnels, l'ordonnance enjoignant à Elta de communiquer les encaissements sur carte de crédit, les comptes débiteurs, les contrats, etc. pourrait être problématique. Les documents sont variés et la plupart d'entre eux renferment des renseignements personnels susceptibles d'être protégés.

Because no submissions were made on this point, we do not know if there is any information or evidence relevant to applicable exceptions. The documents contain personal information that may *prima facie* be protected for the benefit not of the person from whom disclosure is sought, but of the persons to whom the information belongs. This is but an example of public policy considerations that judges must consider before agreeing to recognize and enforce a judgment on a foreign country's behalf.

Aucune observation n'ayant été formulée à ce sujet, nous ignorons si un renseignement ou un élément de preuve se rapporte aux exceptions applicables. Les documents renferment des renseignements personnels qui, à première vue, sont susceptibles d'être protégés au bénéfice non pas de la personne appelée à les communiquer, mais des personnes à qui ils appartiennent. Ce n'est qu'un exemple de considération liée à l'ordre public dont le tribunal doit tenir compte avant de reconnaître et d'exécuter un jugement étranger. 61

G. *Summary*

G. *Résumé*

In summary, the orders are problematic from many points of view. The contempt order is quasi-criminal in nature and the intended territorial scope of the injunctive relief in the consent order is uncertain. Moreover, it is unclear that recognition and enforcement of the judgment is the appropriate tool amongst the various judicial assistance mechanisms or that the matter is an appropriate one for lending judicial assistance in the form requested. Additional concerns relating to the potential violation of privacy rights should also be addressed.

En résumé, le jugement et l'ordonnance sont problématiques sous de nombreux rapports. L'ordonnance pour outrage au tribunal a un caractère quasi pénal et la portée territoriale de l'injonction contenue dans le jugement sur consentement est incertaine. En outre, il n'est pas évident que parmi les mécanismes variés de collaboration judiciaire, la reconnaissance et l'exécution du jugement soit celui qui convient, ni que l'affaire se prête à la forme de collaboration judiciaire sollicitée par Pro Swing. Par ailleurs, des questions se posent en ce qui concerne la violation éventuelle du droit à la vie privée. 62

The list of problems is long, too long to use the courts' equitable jurisdiction to accommodate Pro Swing. In *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), Blair J.A. stated that the courts had the choice of throwing up their hands in despair or protecting the public against impugned conduct. In the case at bar, the choice is not as clear, as this is an instance where a court's refusal to enforce the orders cannot be equated with an abdication of its duties. To refuse to enforce the orders is an appropriate exercise of equitable

La liste des obstacles est longue, trop longue pour qu'un tribunal exerce sa compétence en equity au bénéfice de Pro Swing. Dans l'arrêt *Barrick Gold Corp. c. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), le juge Blair a indiqué que les tribunaux avaient le choix de baisser les bras ou de protéger le public contre le comportement reproché. En l'espèce, le choix n'est pas si simple; le refus du tribunal d'exécuter l'ordonnance n'équivaut pas à l'inexécution de ses obligations. Ce refus constitue un exercice approprié du pouvoir discrétionnaire que 63 discretion and amounts to allowing the Ohio court to continue the proceedings with the judicial assistance of the Ontario courts, but to a lesser extent than has been requested.

confère l'equity. Il permet la poursuite de l'instance devant la cour de l'Ohio avec la collaboration des tribunaux ontariens, mais dans une moins grande mesure que celle sollicitée.

VII. Conclusion

VII. Conclusion

64 Private international law is developing in response to modern realities. The real and substantial connection test and the enforcement of equitable relief granted in foreign countries are but two examples of its evolution. The Internet puts additional pressure on the courts to reach out to the same extent as the Web. At the same time, courts must be cautious to preserve their nation's values and protect its people. The time is ripe to change the common law rule against the enforcement of foreign non-monetary judgments, but, owing to problems with the orders the appellant seeks to have enforced, the Court cannot accede to its request.

Le droit international privé évolue en fonction des réalités modernes. Le critère du lien réel et substantiel et l'exécution d'ordonnances en equity rendues à l'étranger ne sont que deux exemples de cette évolution. L'Internet incite en outre les tribunaux à conférer à leurs interventions une portée comparable à la sienne. Mais, en même temps, les tribunaux doivent assurer la protection des valeurs et des citoyens de leur pays. Certes, le moment est propice pour modifier la règle de common law interdisant l'exécution d'un jugement non pécuniaire étranger, mais le jugement et l'ordonnance dont l'appelante sollicite l'exécution présentent des difficultés qui empêchent la Cour d'accéder à sa demande.

65 For these reasons, I would dismiss the appeal.

Pour ces motifs, je suis d'avis de rejeter le pourvoi.

The reasons of McLachlin C.J. and Bastarache and Charron JJ. were delivered by

Version française des motifs de la juge en chef McLachlin et des juges Bastarache et Charron rendus par

THE CHIEF JUSTICE (dissenting) —

LA JUGE EN CHEF (dissidente) —

1. Introduction

1. Introduction

66 This case requires the Court to consider whether the common law should be extended to permit the enforcement of foreign non-money judgments and, if so, in what circumstances. I would hold that these judgments are enforceable in appropriate circumstances. On application to these facts, I would conclude that the motions judge did not err in enforcing parts of the order of an Ohio court.

Y a-t-il lieu d'assouplir la common law pour permettre l'exécution d'un jugement non pécuniaire étranger et, dans l'affirmative, à quelles conditions? Je suis d'avis qu'un tel jugement peut être exécuté à certaines conditions et, au vu des faits de l'espèce, que la juge des requêtes n'a pas eu tort d'ordonner l'exécution de certains éléments de l'ordonnance d'une cour de l'Ohio.

2. Facts

2. Les faits

67 The appellant, Pro Swing Inc., is the owner of the Trident trademark for a type of golf club. Its trademark is registered in the United States, where

L'appelante, Pro Swing Inc., est propriétaire de la marque de commerce Trident employée en liaison avec un type de bâton de golf. La marque it carries on business. The respondent, Elta Golf Inc., carries on business in Toronto, Ontario. In the course of that business, it offered for sale on its Website goods bearing marks which resembled Trident.

In April 1998, Pro Swing filed a complaint against Elta Golf for trademark infringement and dilution, use of a counterfeit mark, unfair competition, and deceptive trade practices. The complaint was filed in the United States District Court for the Northern District of Ohio Eastern Division.

In July 1998, the parties entered into a settlement agreement. It was endorsed by a consent decree of the court, signed by both parties. The consent decree acknowledged that Pro Swing was the owner of the Trident trademark and enjoined Elta Golf from purchasing, marketing, selling or using golf clubs or golf club components bearing that mark or confusingly similar variations. The order stated that the court would retain jurisdiction over the parties for purposes of enforcement and the parties agreed not to contest the jurisdiction of the U.S. courts in any action to enforce the settlement.

In December 2002, Pro Swing learned that Elta Golf was violating the consent decree and launched a civil contempt proceeding to enforce it and to obtain compensation for damages sustained. Elta Golf was served but did not respond. On February 25, 2003, the Ohio court found Elta Golf in contempt of court and confirmed the injunction. It also awarded compensatory damages to Pro Swing based on Elta Golf's profits and ordered Elta Golf to provide an accounting to the plaintiff for purposes of calculating these damages. Again, the court ordered Elta Golf to deliver up offending material, provide names and addresses of suppliers and purchasers to the plaintiff, and recall all counterfeit and infringing golf clubs or golf club components. Again, the U.S. court stated it retained jurisdiction to enforce the consent decree and contempt order. Finally, it

est déposée aux États-Unis, où l'appelante exploite son entreprise. L'intimée, Elta Golf Inc., est établie à Toronto, en Ontario et, dans l'exercice de ses activités, elle a offert en vente, sur son site Internet, des articles portant des marques ressemblant à Trident.

Au mois d'avril 1998, devant la Cour fédérale du District nord de l'Ohio, division de l'est, Pro Swing a poursuivi Elta Golf pour contrefaçon et dilution de marque de commerce, emploi d'une marque contrefaite, concurrence déloyale et pratiques commerciales trompeuses. 68

Au mois de juillet 1998, les parties ont conclu une transaction que la cour a entérinée dans un jugement sur consentement auquel elles ont toutes deux apposé leur signature. Le jugement reconnaît le droit de propriété de Pro Swing sur la marque de commerce Trident et interdit à Elta Golf d'acheter, de commercialiser, de vendre ou d'utiliser des bâtons de golf ou des composants de bâton de golf portant cette marque ou une marque semblable créant de la confusion avec elle. Il précise en outre que la cour demeure compétente pour les besoins de son exécution, et les parties conviennent de ne pas contester la compétence des tribunaux des États-Unis dans toute instance engagée pour faire respecter la transaction. 69

En décembre 2002, Pro Swing a appris qu'Elta Golf contrevenait au jugement et, afin de faire respecter celui-ci et d'être indemnisée du préjudice subi, elle a intenté une action civile pour outrage au tribunal. Même si l'action lui a été signifiée, Elta Golf n'y a pas donné suite. Le 25 février 2003, la cour de l'Ohio a condamné Elta Golf pour outrage au tribunal et confirmé l'injonction. Elle a également accordé à Pro Swing des dommages-intérêts compensatoires fondés sur les profits d'Elta Golf et ordonné à cette dernière de comptabiliser ses profits afin que la demanderesse puisse établir le montant de l'indemnité. Encore une fois, la cour a ordonné à Elta Golf de remettre les produits en cause, de communiquer à la demanderesse les noms et adresses de ses fournisseurs et de ses acheteurs et de rappeler tous les bâtons de golf ou composants de bâton de golf contrefaits et non autorisés. Elle a rappelé 70 awarded Pro Swing costs against Elta Golf subject to accounting.

71 Elta Golf did not comply with this order. As a result, Pro Swing was unable to provide the Ohio court with its proposed damage award or costs bill.

3. Legal History

72 In 2003, Pro Swing commenced these proceedings in Ontario, asking the court to recognize and enter the 1998 consent decree and the 2003 contempt order. In response, Elta Golf filed a defence arguing that the U.S. orders could not be recognized and enforced in Canada because they were not final judgments for a fixed sum of money. Elta Golf raised two principal issues relating to the two U.S. orders:

1. Is the consent decree of July 28, 1998 unenforceable in Ontario in that it is in the nature of injunctive relief and not for a fixed sum of money?

2. Is the order of February 25, 2003 unenforceable in Ontario as it is not in the nature of a final order and is penal in nature?

73 The motions judge, Pepall J., reviewed the jurisprudence and concluded that there was no reason in principle why non-money judgments of foreign courts should not be enforced ((2003), 68 O.R. (3d) 443). In her view, the principles enunciated in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, apply equally to monetary and non-money judgments. She noted that Elta Golf conceded that the 1998 Ohio decree met the general requirements of *Morguard*. The only issue was whether the common law requirement of a fixed sum had been abrogated by *Morguard* and subsequent decisions. She concluded that it had not, but that the principles espoused in *Morguard* permitted the

qu'elle demeurait compétente pour l'exécution du jugement sur consentement et de l'ordonnance pour outrage au tribunal. Enfin, elle a condamné Elta Golf aux dépens, leur montant devant être établi après comptabilisation des profits.

Elta Golf ne s'est pas conformée à cette ordonnance, de sorte que Pro Swing n'a pu communiquer à la cour de l'Ohio le montant auquel elle estimait avoir droit à titre de dommages-intérêts ni présenter son mémoire de frais.

3. Historique judiciaire

En 2003, Pro Swing a engagé la présente instance en Ontario pour obtenir la reconnaissance et l'inscription du jugement sur consentement de 1998 et de l'ordonnance pour outrage au tribunal de 2003. Elta Golf a fait valoir en défense que ces décisions états-uniennes ne pouvaient être reconnues et exécutées au Canada parce qu'il ne s'agissait pas de jugements définitifs portant sur une somme déterminée. Voici les deux questions principales qu'elle a soulevées :

1. Le jugement sur consentement du 28 juillet 1998 est-il inexécutoire en Ontario du fait qu'il s'agit d'une injonction et qu'il n'a pas pour objet une somme déterminée?

2. L'ordonnance du 25 février 2003 est-elle inexécutoire en Ontario du fait qu'elle n'est pas définitive et qu'elle revêt un caractère pénal?

Après examen de la jurisprudence, la juge des requêtes a conclu qu'aucune raison de principe ne s'opposait à l'exécution d'un jugement non pécuniaire étranger et que les préceptes énoncés dans l'arrêt *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, s'appliquaient au jugement pécuniaire comme au non pécuniaire ((2003), 68 O.R. (3d) 443). Signalant qu'Elta Golf avait reconnu que le jugement de 1998 satisfaisait aux exigences générales de l'arrêt *Morguard*, la juge Pepall a estimé que la seule question à trancher était celle de savoir si cet arrêt et les décisions subséquentes avaient supprimé l'exigence de la common law que le jugement porte sur une somme déterminée. Elle requirement to be relaxed or removed depending on the circumstances of the case. As a result, she held that in principle the orders might be enforceable in Canada. The motions judge then examined whether the orders in question were final and conclusive. She concluded that the 1998 decree was final and conclusive, noting that it reflected a settlement between the parties and that "[b]y its terms, it is clear that extraterritorial application was intended" (para. 16). By contrast, aspects of the February 2003 order were left outstanding and could not be enforced. However, the general declaration and the orders for an accounting and the provision of names, information and recalled clubs and components were, in her opinion, final and enforceable in Ontario.

a conclu que tel n'était pas le cas, mais que les principes dégagés dans l'arrêt *Morguard* permettaient l'assouplissement de l'exigence ou sa suppression eu égard aux circonstances en l'espèce. Elle a donc statué que le jugement et l'ordonnance pouvaient en principe être exécutés au Canada. Se demandant ensuite s'ils étaient définitifs, elle a conclu que le jugement de 1998 l'était puisqu'il constatait une transaction et qu'[TRADUCTION] « [i]l ressort de son libellé que les parties ont voulu lui conférer une portée extraterritoriale » (par. 16). À l'opposé, certains éléments de l'ordonnance de février 2003 restaient à déterminer et ne pouvaient donc être exécutés. La juge a statué que le jugement déclaratoire général et les ordonnances de dénombrement, de comptabilisation, de communication de noms et de renseignements et de rappel de bâtons et de composants étaient définitifs et susceptibles d'exécution en Ontario.

Elta Golf appealed, on grounds that the motions judge had erred in concluding that non-money foreign orders could be enforced. The Court of Appeal agreed with the motions judge "that the time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments" ((2004), 71 O.R. (3d) 566, at para. 9). However, it held that the orders in this case could not be enforced because they were ambiguous in that "the scope of the extra-territorial application of the foreign orders is unclear" (para. 11).

Elta Golf a interjeté appel de la décision en soutenant que la juge des requêtes avait eu tort de conclure qu'un jugement non pécuniaire étranger pouvait être exécuté. La Cour d'appel a convenu avec la juge des requêtes [TRADUCTION] « que le moment était propice au réexamen des règles applicables à la reconnaissance et à l'exécution des jugements non pécuniaires étrangers » ((2004), 71 O.R. (3d) 556, par. 9), mais elle a estimé que les jugements en cause n'étaient pas susceptibles d'exécution à cause de l'ambiguïté découlant de [TRADUCTION] « leur portée extraterritoriale incertaine » (par. 11). 74

Pro Swing appeals to this Court. It endorses the view of the law taken by the courts below that non-money foreign judgments may be enforceable. It takes issue, however, with the Court of Appeal's conclusion that the orders in this case could not be enforced because the extraterritorial application of the orders was unclear. Elta Golf did not appear on the proceedings before this Court.

Pro Swing se pourvoit devant notre Cour. Elle adhère au point de vue des juridictions inférieures selon lequel un jugement non pécuniaire étranger peut être exécuté. Elle conteste cependant la conclusion de la Cour d'appel voulant que les jugements en cause ne soient pas susceptibles d'exécution parce que leur portée extraterritoriale n'est pas manifeste. Elta Golf n'a pas comparu dans le cadre du présent pourvoi. 75

4. Analysis

Three questions arise. The first is whether Canadian courts can recognize and enforce foreign

4. Analyse

Trois questions se posent. D'abord, un tribunal canadien peut-il reconnaître et exécuter un 76 non-money judgments. If the answer to this question is affirmative, the question arises of when it is appropriate to recognize and enforce such judgments. Finally, the principles developed must be applied to the foreign orders at issue to determine whether they can be enforced in Ontario.

jugement non pécuniaire étranger? Dans l'affirmative, quelles conditions doivent être remplies? Enfin, les principes dégagés doivent être appliqués au jugement et à l'ordonnance rendus à l'étranger pour décider s'ils sont susceptibles d'exécution en Ontario.

4.1 *Recognition of Foreign Non-Money Judgments*

4.1 *Reconnaissance d'un jugement non pécuniaire étranger*

77 The traditional common law position is that foreign judgments are recognizable and enforceable only if they meet two conditions. First, they must be for a definite sum of money. Second, they must be final and conclusive. These requirements ensure that in ordinary cases the merits of foreign judgments are not considered by an enforcing court. Barring exceptional concerns, a court's focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself.

La règle de common law classique assujettit à deux conditions la reconnaissance et l'exécution d'un jugement étranger. Premièrement, celui-ci doit avoir pour objet une somme déterminée. Deuxièmement, il doit être définitif. Ces exigences évitent au tribunal d'exécution de se pencher sur le fond. Sauf circonstances exceptionnelles, le tribunal s'attache à l'obligation créée par le jugement étranger, et non aux dispositions de droit substantiel et procédural qui sous-tendent celui-ci.

78 In *Morguard*, La Forest J. discussed the need to ensure that the evolution of the common law keeps pace with the acceleration, intensification, and nature of cross-border social and economic activity. He noted:

> The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. [p. 1098]

In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, La Forest J. further described rigidity in this area of the law as resting on an "outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness" (pp. 321-22). The common law must evolve in a way that takes

Dans l'arrêt *Morguard*, le juge La Forest s'est penché sur la nécessité de faire en sorte que la common law évolue en phase avec l'accélération, l'intensification et la nature des activités sociales et économiques transfrontalières :

> Le monde a évolué depuis que les règles précitées ont été formulées dans l'Angleterre du XIX^{e} siècle. Les moyens modernes de déplacement et de communication font ressortir le caractère purement local d'un bon nombre de ces préoccupations du XIX^{e} siècle. Le monde des affaires fonctionne dans une économie mondiale et on parle à juste titre de communauté internationale même si le pouvoir politique et juridique est décentralisé. Il est maintenant devenu impérieux de faciliter la circulation des richesses, des techniques et des personnes d'un pays à l'autre. Dans ces circonstances, il apparaît opportun de réexaminer nos règles relatives à la reconnaissance et à l'exécution des jugements étrangers. [p. 1098]

Dans l'arrêt *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, il a ajouté que, dans ce domaine du droit, la rigidité reposait sur une « conception périmée du monde qui mettait l'accent sur la souveraineté et l'indépendance, souvent au détriment de l'équité » (p. 321-322). La common law doit évoluer en tenant compte into account the important social and economic forces that shape commercial and other kinds of relationships.

des importantes forces sociales et économiques qui façonnent les rapports commerciaux et autres.

79 That evolution must take place both incrementally and in a principled way. Although the enforcement of money judgments across provincial boundaries raises unique considerations and constitutional dimensions, the underlying principles of comity, order and fairness must apply both interprovincially and internationally. As Major J. noted in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72, "[t]he principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law" (para. 27). These principles do not exclude the enforcement of non-monetary judgments from another country. At the same time, comity, which requires respect for the legitimate sovereignty of others and for the needs created by relationships that "involve a constant flow of products, wealth and people across the globe", may favour it: *Hunt*, at p. 322.

Cette évolution doit se faire de façon graduelle et raisonnée. Bien que l'exécution interprovinciale des jugements pécuniaires fasse intervenir des considérations particulières et comporte des aspects constitutionnels, les principes sous-jacents de courtoisie, d'ordre et d'équité doivent s'appliquer tant dans le contexte international que d'une province à l'autre. Comme l'a signalé le juge Major dans l'arrêt *Beals c. Saldanha*, [2003] 3 R.C.S. 416, 2003 CSC 72, « [l]es principes d'ordre et d'équité garantissent la sûreté des opérations qui doit sous-tendre la notion moderne de droit international privé » (par. 27). Ces principes n'écartent pas l'exécution d'un jugement non pécuniaire rendu dans un autre pays. De plus, comme elle exige le respect de la souveraineté légitime des autres États et des besoins créés par des relations qui « impliquent une circulation constante de produits, de richesses et de personnes partout dans le monde », la courtoisie peut militer en sa faveur : *Hunt*, p. 322.

80 A number of law reform agencies have recognized the need for a more flexible approach to the enforcement of foreign non-money judgments. While the present case concerns the enforcement of U.S. orders, the common law prohibition on such enforcement also applies between the Canadian provinces, reinforcing the need for its reconsideration.

Des organismes de réforme du droit ont reconnu qu'une plus grande souplesse s'imposait quant à l'exécution d'un jugement non pécuniaire étranger. La présente affaire porte sur des jugements états-uniens, mais la règle de common law faisant obstacle à leur exécution s'applique également au jugement provenant d'une autre province canadienne, ce qui en justifie d'autant plus le réexamen.

81 At the interprovincial level, proposals for reconsideration of the rule have been advanced. The Uniform Law Conference of Canada proposed two statutes that would allow for the enforcement of non-money judgments within Canada: the *Uniform Enforcement of Canadian Decrees Act* (1997) and the *Uniform Enforcement of Canadian Judgments and Decrees Act* (1997). In an introductory comment to both proposed statutes, the Uniform Law Conference explained that:

Des éléments de réforme ont été proposés relativement à l'exécution d'un jugement rendu dans une autre province. La Conférence pour l'harmonisation des lois au Canada a proposé l'adoption de deux textes législatifs permettant l'exécution des jugements non pécuniaires à la grandeur du pays : la *Loi uniforme concernant l'exécution des décisions canadiennes* (1997) et la *Loi uniforme sur l'exécution des décisions et jugements canadiens* (1997). Dans le commentaire présentant les deux projets de loi, la Conférence a donné l'explication suivante :

Apart from legislation that addresses particular types of orders, there is no statutory scheme or common law principle which permits the enforcement in one province of a non-money judgment made in a different province. This is in sharp contrast to the situation that prevails with respect to money judgments which have a long history of enforceability between provinces and states both under statute and at common law. With the increasing mobility of the population and the emergence of policies favouring the free flow of goods and services throughout Canada, this gap in the law has become highly inconvenient. UECJDA [*Uniform Enforcement of Canadian Judgments and Decrees Act*] provides a rational statutory basis for the enforcement of non-money judgments between the Canadian provinces and territories.

Uniform Law Conference of Canada: Commercial Law Strategy (2005 (loose-leaf)), Tab 7, p. 3)

82 The British Columbia Law Institute recommended the adoption of the *Uniform Enforcement of Canadian Judgments and Decrees Act* (or, alternatively the *Uniform Enforcement of Canadian Decrees Act*) in its *Report on the Enforcement of Non-money Judgments from Outside the Province* (August 1999). The Report cited the following passage from *Morguard* as an illustration of the existing deficiencies in Canadian private international law:

It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

(Report, at p. 4; *Morguard*, at pp. 1102-3)

83 Finally, with respect to *all* non-Quebec judgments, the *Civil Code of Québec*, S.Q. 1991, c. 64, does not distinguish between money judgments and non-money judgments in its recognition

Mises à part les lois qui visent certains types d'ordonnance, aucun régime législatif ni principe de common law ne permet l'exécution, dans une province, d'un jugement non pécuniaire rendu dans une autre province. La situation est fort différente en ce qui a trait aux jugements pécuniaires qui sont depuis longtemps exécutés entre les provinces et les États tant en vertu des lois que de la common law. Compte tenu de la mobilité croissante de la population et de l'apparition de politiques favorables à la libre circulation des biens et des services à travers le Canada, cette lacune du droit est devenue extrêmement gênante. La LUSEDJC [*Loi uniforme sur l'exécution des décisions et jugements canadiens*] offre une base législative logique à l'exécution des jugements non pécuniaires entre les provinces et les territoires canadiens.

Conférence pour l'harmonisation des lois au Canada : Stratégie du droit commercial (2005 (feuilles mobiles)), onglet 7, p. 3)

Dans son rapport recommandant l'adoption de la seconde loi (sinon de la première), le British Columbia Law Institute reproduit le passage suivant de l'arrêt *Morguard*, qui fait état des lacunes actuelles du droit international privé canadien :

Il semble anarchique et injuste qu'une personne puisse se soustraire à des obligations juridiques qui ont pris naissance dans une province simplement en déménageant dans une autre province. Pourquoi un demandeur devrait-il être tenu d'intenter une action dans la province où le défendeur réside présentement, quels que soient les inconvénients et le coût que cela puisse entraîner et quelle que soit la mesure dans laquelle l'opération pertinente peut avoir un lien avec l'autre province? Et pourquoi la possibilité de faire exécuter le jugement dans le ressort devrait-elle être l'élément déterminant du choix du tribunal par le demandeur?

(*Report on the Enforcement of Non-money Judgments from Outside the Province* (août 1999), p. 4; *Morguard*, p. 1102-1103)

Enfin, les dispositions du *Code civil du Québec*, L.Q. 1991, ch. 64, relatives à la reconnaissance et à l'exécution de *tout* jugement non québécois ne distinguent pas entre le jugement pécuniaire et le and enforcement provisions, although the finality requirement has been maintained:

3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

. . .

(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

These developments establish that the absolute common law ban on the enforcement of all foreign non-money judgments may no longer be useful and should be reconsidered.

A final question is whether abolition of the rule against recognition and enforcement of foreign non-money judgments satisfies the principles this Court has recognized on the development of the common law. As a general rule, the common law must evolve to take into account societal changes, but that evolution must proceed incrementally: *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 666.

The possibility of enforcing foreign non-money judgments would represent an incremental change in the common law of Canada. The principled approach to recognition of foreign monetary judgments in cases such as *Morguard* and *Beals* invites application of the same principles to non-money judgments in order to preserve the consistency and logic of this body of the law. Lower courts have discussed the need to modify the traditional ban on enforcement of foreign non-money judgments or have suggested that the law may have already moved in that direction: *Uniforêt Pâte Port-Cartier Inc. v. Zerotech Technologies Inc.*, [1998] 9 W.W.R. 688 (B.C.S.C.); *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para. 77. Provincial law reform agencies have done detailed studies on the issue and the Province of Quebec already permits recognition and enforcement. Loosening the common law strictures on enforcement is arguably a small and necessary step in the development of the common law in this area. On the other hand, the matter is complex and difficult,

jugement non pécuniaire, mais elles exigent toujours qu'ils soient définitifs :

3155. Toute décision rendue hors du Québec est reconnue et, le cas échéant, déclarée exécutoire par l'autorité du Québec, sauf dans les cas suivants :

. . .

2º La décision, au lieu où elle a été rendue, est susceptible d'un recours ordinaire, ou n'est pas définitive ou exécutoire;

Vu cette évolution, la règle de common law écar- 84
tant toute exécution d'un jugement non pécuniaire étranger pourrait ne plus avoir son utilité et devoir être reconsidérée.

Enfin, il faut se demander si l'abolition de la 85
règle interdisant la reconnaissance et l'exécution d'un jugement non pécuniaire étranger obéit aux principes établis par la Cour quant à l'évolution de la common law. En règle générale, la common law doit évoluer avec les changements sociaux, mais peu à peu : *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 666.

La possibilité d'exécuter un jugement non pécu- 86
niaire étranger représenterait une modification graduelle de la common law canadienne. La démarche raisonnée que la Cour a adoptée à l'égard des jugements pécuniaires dans les arrêts *Morguard* et *Beals*, par exemple, appelle, par souci de cohérence et de logique, l'application des mêmes principes aux jugements non pécuniaires. Des tribunaux inférieurs se sont interrogés sur la nécessité de modifier la règle classique écartant l'exécution des jugements non pécuniaires étrangers ou ont laissé entendre que le droit s'était peut-être déjà engagé dans cette voie : *Uniforêt Pâte Port-Cartier Inc. c. Zerotech Technologies Inc.*, [1998] 9 W.W.R. 688 (C.S.C.-B.); *Barrick Gold Corp. c. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), par. 77. Des organismes provinciaux de réforme du droit ont étudié la question de manière approfondie, et le Québec autorise déjà la reconnaissance et l'exécution de ces jugements. L'assouplissement des règles en la matière peut être considéré comme un élément infime et nécessaire de l'évolution de la common

as attested to by the fact that reform proposals have not produced legislative reform. Acceptance of the possibility of recognizing and enforcing foreign non-monetary judgments is an incremental step. At the same time, care must be taken to ensure that recognition is confined to cases where it is appropriate and does not create undue problems for the legal system of the enforcing state or unfair results for the parties. Caution is in order.

law. Par contre, le sujet demeure complexe et délicat, comme l'atteste le fait que la réforme législative proposée est restée lettre morte. Admettre la possibilité de reconnaître et d'exécuter les jugements non pécuniaires étrangers procède d'une démarche progressive. Toutefois, la reconnaissance ne doit intervenir que si elle est indiquée et elle ne doit pas causer de difficultés excessives au système de justice du ressort d'exécution ni avoir de conséquences injustes pour les parties. La prudence est de mise.

87 The time has come to permit the enforcement of foreign non-money orders where the general principles of *Morguard* are met and other considerations do not render recognition and enforcement of the foreign judgment inadvisable or unjust.

Le temps est venu de permettre l'exécution des jugements non pécuniaires étrangers lorsque sont respectés les principes généraux formulés dans l'arrêt *Morguard* et que d'autres considérations ne rendent pas leur reconnaissance et leur exécution inopportunes ou injustes.

4.2 *The Requirements for Enforcement of Foreign Non-Money Judgments*

4.2 *Conditions d'exécution d'un jugement non pécuniaire étranger*

88 If foreign non-money judgments may sometimes be enforceable, the next question is when that will be appropriate. This is not a simple matter. As Professor Vaughan Black cautions, "[a]ny move to enforce foreign non-money orders requires caution and close attention to the unique features of such remedies": "Enforcement of Foreign Non-money Judgments: *Pro Swing v. Elta*" (2006), 42 *Can. Bus. L.J.* 81, at p. 96. Different non-money remedies and different circumstances will raise different considerations.

Si un jugement non pécuniaire étranger peut parfois être exécutoire, il faut se demander à quelles conditions. Ce n'est pas une mince affaire. Le professeur Vaughan Black appelle à la circonspection : [TRADUCTION] « Toute évolution vers l'exécution des jugements non pécuniaires étrangers doit se faire avec prudence et grande attention à leurs caractéristiques particulières » : « Enforcement of Foreign Non-money Judgments : *Pro Swing v. Elta* » (2006), 42 *Rev. can. dr. comm.* 81, p. 96. Des réparations non pécuniaires différentes et des circonstances différentes feront intervenir des considérations différentes.

89 Before discussing the considerations applicable in this case, it may be useful to reiterate the theoretical basis for the recognition and enforcement of foreign judgments. While established in the context of money judgments, the theory also applies to the enforcement of non-money judgments. The foreign court order is seen as creating a new obligation on the defendant. In the case of a money judgment, this is a debt. In the case of a non-money judgment, it is a different sort of obligation. A court enforcing a foreign judgment is enforcing the obligation created by that judgment. In principle, it should not

Avant d'aborder les considérations applicables en l'espèce, il convient de rappeler le fondement théorique de la reconnaissance et de l'exécution des jugements étrangers. Bien qu'il ait été établi en fonction des jugements pécuniaires, ce fondement vaut pour les jugements non pécuniaires. Le jugement d'un tribunal étranger rend le défendeur débiteur d'une obligation nouvelle. Dans le cas d'un jugement pécuniaire, l'obligation consiste à payer une somme, et dans celui d'un jugement non pécuniaire, elle est de nature différente. Le tribunal appelé à exécuter un jugement étranger donne effet look beyond the judgment to the merits of the case. It enforces the obligation created by the foreign judgment by its own machinery. As confirmed in *Beals*, as long as the foreign court properly has jurisdiction to adjudicate the dispute, absent evidence of fraud or a judgment contrary to natural justice or public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction. All the enforcing court needs is proof of the foreign order; its own legal mechanisms take over from there. This can be understood as the principle of the separation of judicial systems.

à l'obligation créée et doit en principe s'abstenir de se pencher sur le fond de l'affaire. Il donne effet à l'obligation créée par le jugement étranger en recourant à ses propres mécanismes. Comme la Cour l'a confirmé dans l'arrêt *Beals*, du moment que le tribunal étranger peut dûment connaître du litige, il n'a pas à se soucier du droit substantiel ou procédural du ressort étranger, sauf preuve d'une fraude ou jugement contraire à la justice naturelle ou à l'ordre public. Il a seulement besoin de la preuve du jugement étranger, ses propres mécanismes juridiques prenant alors le relai. Tel est le principe du cloisonnement des systèmes judiciaires.

The first category of restrictions on the recognition and enforcement of foreign non-money judgments should flow from the general enforcement requirements set out in *Morguard*. These ensure that jurisdiction was properly taken by the issuing court and that there are no general fairness considerations that should require the court to hesitate before enforcing the foreign judgment. As noted in *Beals*, the existing defences of fraud, public policy and natural justice are designed to guard against unfairness in its most recognizable forms. Although designed to apply to money judgments, these requirements must also be applicable in cases involving non-money remedies. They are narrowly drawn and limited to particular cases where unfairness is clear. Both in the case of money and non-money judgments, they are non-exhaustive and may be supplemented in extraordinary circumstances: *Beals*, at paras. 41-42.

La première condition pour la reconnaissance et 90
l'exécution des jugements non pécuniaires étrangers devrait découler des exigences générales établies dans l'arrêt *Morguard*, à savoir que le tribunal d'exécution s'assure que le tribunal d'origine avait compétence et qu'aucune considération liée à l'équité en général ne s'oppose à l'exécution du jugement étranger. Comme la Cour l'a signalé dans l'arrêt *Beals*, les moyens de défense fondés sur la fraude, l'ordre public et la justice naturelle se veulent un rempart contre les formes d'injustice les plus manifestes. Même s'ils ont été établis pour les jugements pécuniaires, ils valent également pour les jugements non pécuniaires. Leur portée est limitée et ils ne s'appliquent que dans certains cas où l'injustice est flagrante. Que le jugement soit pécuniaire ou non, ils ne sont pas exhaustifs et d'autres moyens peuvent s'y ajouter dans des circonstances exceptionnelles : *Beals*, par. 41-42.

The second category of restrictions on the recognition and enforcement of foreign non-money judgments should relate to finality and clarity. These twin requirements are based on the principles of judicial economy and the separation of judicial systems, which themselves stem from comity, order and fairness. Finality and clarity are distinct concepts. The first requires completeness; the second lack of ambiguity. However, in practice they may overlap. An order that is not final is likely to be unclear and vice versa.

La deuxième condition pour la reconnaissance 91
et l'exécution des jugements non pécuniaires étrangers devrait se rapporter au caractère définitif et à la clarté. Cette double exigence repose sur le principe de l'économie des ressources judiciaires et celui du cloisonnement des systèmes judiciaires, qui découlent eux-mêmes des principes de courtoisie, d'ordre et d'équité. Le caractère définitif et la clarté sont des notions distinctes. La première exige le règlement intégral du litige et la seconde, l'absence d'ambiguïté. Mais, en pratique, elles peuvent se chevaucher. Un jugement non définitif a toutes les chances de n'être pas clair, et vice-versa.

92 The related requirements of finality and clarity should ensure that the function of enforcing courts will be limited to enforcement of the obligation created by the foreign order and will not include re-litigation of the issues considered by the issuing court. On the level of principle, an attempt to enforce an order that is not final and clear will almost invariably amount to the inappropriate assumption of jurisdiction by the enforcing court over the dispute. It is settled law that the enforcing court does not consider the merits of the foreign decision, absent fraud, violation of natural justice or violation of public policy. On the practical level, it may be difficult for the enforcing court to supervise an incomplete or unclear order. Difficulties may stem from the enforcing judge's unfamiliarity with the foreign law and its procedures or from the cost burden on the enforcing court. An order that is not final may be changed by the foreign court, with the result that the enforcing court finds itself enforcing something that is no longer an obligation in the foreign country. Finally, an enforcing court should not be obliged to re-litigate foreign disputes or use valuable resources to duplicate what would be best done in the originating jurisdiction. For these reasons, courts should decline to enforce foreign non-money orders that are not final and clear.

Ces exigences connexes devraient faire en sorte que le tribunal s'en tienne à l'exécution de l'obligation créée par le jugement étranger et s'abstienne de réexaminer les questions réglées par le tribunal d'origine. Sur le plan des principes, le tribunal qui tente d'exécuter un jugement ambigu ou non définitif s'attribue presque toujours à tort compétence sur le litige. Or, il est bien établi en droit que le tribunal d'exécution n'examine pas le bien-fondé de la décision étrangère, sauf fraude, manquement à la justice naturelle ou atteinte à l'ordre public. Sur le plan pratique, il peut avoir du mal à superviser l'exécution d'un jugement incomplet ou ambigu en raison de sa non-familiarisation avec les règles de droit et de procédure étrangères ou du fardeau financier que cela lui impose. Un jugement non définitif est susceptible d'être modifié par le tribunal étranger, auquel cas le tribunal d'exécution se trouve à faire respecter une obligation qui n'existe plus dans le pays étranger. Enfin, le tribunal d'exécution ne devrait pas avoir à instruire le litige étranger à nouveau non plus qu'à affecter ses précieuses ressources pour refaire ce que le tribunal d'origine était plus à même d'accomplir. Pour ces motifs, le tribunal doit refuser d'exécuter un jugement non pécuniaire étranger qui n'est pas définitif et clair.

93 The related requirements of finality and clarity should thus be seen as flowing from the theory by which foreign judgments are enforced. What is enforced, as discussed, is an obligation created by the foreign court, not the rights or responsibilities that gave rise to it. Finality and clarity will ensure that this distinction is respected. Requiring that the order to be enforced be final and clear also makes practical sense. Where supervision would be particularly difficult for the enforcing court and where the issuing court could engage in supervision much more efficiently, judicial economy suggests that it would be appropriate to decline to enforce.

On devrait donc considérer que ces exigences connexes — le caractère définitif et la clarté — procèdent du fondement théorique de l'exécution des jugements étrangers. L'objet de l'exécution, on l'a vu, est l'obligation créée par le tribunal d'origine, et non les droits ou les obligations dont elle découle. Le caractère définitif et la clarté seront exigés pour assurer le respect de cette distinction, mais ils auront aussi une utilité d'ordre pratique. Lorsque la supervision sera particulièrement difficile pour le tribunal d'exécution et qu'il sera beaucoup plus efficient que le tribunal d'origine s'en charge, l'économie des ressources judiciaires pourrait commander le refus de l'exécution.

94 The B.C. Supreme Court decision in *Uniforêt* rejected enforcement of a foreign non-money order for lack of finality. At issue was the enforceability of a Quebec arbitration award that ordered Zerotech, a B.C. company, to give Uniforêt access

Dans la décision *Uniforêt*, la Cour suprême de la Colombie-Britannique a refusé d'exécuter une ordonnance non pécuniaire étrangère qu'elle ne jugeait pas définitive. La question était de savoir si une sentence arbitrale to documents and allow it to make copies. After reviewing the judgments in *Morguard*, *Hunt* and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, Clancy J. opined at para. 26 that "[t]here is no principled reason why judgments other than monetary judgments should not be recognized and enforced." Clancy J. nevertheless declined to enforce the order because it violated the finality requirement in that it was lacking in precision and would have required variation or addition before it could be enforced. Clancy J. stated: "If clarification or variation is required, particulars of how that must be done is a matter to be decided by the arbitrators or by the Superior Court of Quebec, not by this court" (para. 28). Similarly, art. 3155(2) of the *Civil Code of Québec* does not permit enforcement if the decision ". . . is not final or enforceable at the place where it was rendered".

95 Finality demands that a foreign order establish an obligation that is complete and defined. The obligation need not be final in the sense of being the last possible step in the litigation process. Even obligations in debt may not be the last step; orders for interest and costs may often follow. But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in need of future elaboration.

96 Clarity, which is closely related to finality, requires that an order be sufficiently unambiguous to be enforced. Just as the enforcing court cannot be asked to supplement the order, so it cannot be asked to clarify ambiguous terms in the order. The obligation to be enforced must clearly establish what is required of the judicial apparatus in the enforcing jurisdiction.

97 Clarity means that someone unfamiliar with the case must be able to ascertain what is required to meet the terms of the order. Sometimes the judge who made the order is the best person to determine whether its terms have been fulfilled. For example, Rule 60.11 of the Ontario *Rules of Civil Procedure*,

québécoise ordonnant à Zerotech, une entreprise de la Colombie-Britannique, de donner à Uniforêt l'accès à des documents et de lui permettre d'en tirer des copies, était susceptible d'exécution. Après analyse des arrêts *Morguard*, *Hunt* et *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, le juge Clancy a dit qu'[TRADUCTION] « aucune raison de principe ne s'oppose à la reconnaissance et à l'exécution d'un jugement non pécuniaire » (par. 26). Il a néanmoins refusé l'exécution de l'ordonnance au motif qu'elle n'était pas définitive, car elle manquait de précision et aurait dû être modifiée ou complétée au préalable. Il a ajouté : [TRADUCTION] « Si des précisions ou des modifications sont nécessaires, la manière dont elles doivent être apportées ressortit à l'arbitre ou à la Cour supérieure du Québec, et non à notre cour » (par. 28). De même, le par. 3155(2) du *Code civil du Québec* ne permet pas l'exécution d'une décision qui, « au lieu où elle a été rendue [. . .] n'est pas définitive ou exécutoire ».

Pour qu'un jugement étranger soit définitif, l'obligation qu'il crée doit être complète et définie. Elle n'a pas à intervenir à la toute dernière étape possible de la procédure judiciaire. Même l'obligation de payer une somme peut ne pas constituer l'étape ultime puisqu'elle peut être suivie d'une ordonnance fixant les intérêts et les dépens. L'obligation créée par le jugement étranger doit être arrêtée et définie. Le tribunal d'exécution ne peut être appelé à l'augmenter ou à la réduire. Le jugement doit être complet et ne pas nécessiter de précision ultérieure.

Étroitement liée au caractère définitif, la clarté exige que le jugement soit suffisamment certain pour que l'exécution puisse avoir lieu. Pas plus qu'il ne peut être appelé à compléter un jugement, le tribunal d'exécution ne peut avoir à en clarifier les éléments ambigus. L'obligation doit établir clairement la démarche attendue de l'appareil judiciaire du ressort d'exécution.

Un jugement est clair lorsqu'une personne non familiarisée avec l'affaire peut déterminer ce qu'exige son respect. Dans certains cas, il arrive que le juge qui l'a rendu soit la personne la plus apte à déterminer s'il a été respecté. Par exemple, la règle 60.11 des *Règles de procédure civile*

R.R.O. 1990, Reg. 194, provides that a contempt order to enforce an order requiring a party to do an act or refrain from doing an act "may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made". This reflects the view that before finding a person in contempt — a serious imputation — the judge who made the order should assess the infringing conduct to be sure that it merits the sanction. This point is taken up by J.-G. Castel and J. Walker in *Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, who posit that "[i]t stands to reason that the court that makes an order requiring a party to perform a contract or to deliver goods may be in a unique position to know whether the terms of the order have been met" (p. 14-21). A court asked to enforce a foreign judgment of this type would have to assess whether questions may arise as to what constitutes compliance with the obligation. If there is a real risk that such questions may arise, enforcement of the judgment may be inappropriate.

de l'Ontario, R.R.O. 1990, Règl. 194, énonce que l'ordonnance pour outrage visant à obtenir l'exécution forcée d'une ordonnance enjoignant à une personne de faire quelque chose ou de s'en abstenir « ne peut être rendue que sur motion présentée à un juge dans l'instance au cours de laquelle l'ordonnance a été rendue ». Ainsi, avant de déclarer une personne coupable d'outrage au tribunal — ce qui a des répercussions sérieuses —, le juge qui a rendu le jugement examine le comportement reproché pour s'assurer que la sanction est justifiée. Dans *Canadian Conflict of Laws* (6^{e} éd. (feuilles mobiles)), vol. 1, J.-G. Castel et J. Walker renchérissent en affirmant : [TRADUCTION] « Il tombe sous le sens que le tribunal qui a enjoint à une partie d'exécuter un contrat ou de livrer des marchandises peut être le mieux placé pour déterminer si son ordonnance a été respectée » (p. 14-21). Le tribunal appelé à exécuter un jugement étranger de cette nature aurait à déterminer s'il existe un risque véritable que les intéressés se demandent en quoi consiste le respect de l'obligation, auquel cas l'exécution pourrait ne pas être indiquée.

98 Having discussed the requirements of finality and clarity and the rationale that supports them, I turn to how they may be assessed. A court should not refuse to enforce a foreign non-monetary judgment merely because there is a theoretical possibility that questions may arise in the course of enforcement. The hypothetical possibility that enforcement may require active supervision is not enough to permit a court to decline enforcement. A decision not to enforce on the grounds of lack of finality or clarity would have to be based on concerns apparent on the face of the order or arising from the factual or legal context. As elsewhere in the law, mere speculation would not suffice.

Après avoir examiné le caractère définitif et la clarté ainsi que la raison d'être de ces exigences, je passe aux modalités de leur application. Un tribunal ne saurait refuser d'exécuter un jugement non pécuniaire étranger simplement parce qu'il est théoriquement possible que des questions se posent en cours d'exécution. La possibilité théorique que l'exécution nécessite une supervision active ne justifie pas un refus. Le caractère non définitif ou l'ambiguïté devraient ressortir du jugement même ou découler du contexte factuel ou juridique de l'affaire pour que le refus soit justifié. Comme dans d'autres domaines du droit, une simple conjecture ne suffirait pas.

99 Deschamps J. suggests that the equitable nature of injunctions and other non-monetary judgments may require Canadian courts to revisit the meaning of the finality requirement and recognize new defences. She highlights the potential costs of supervising equitable orders. I agree that judicial economy is a legitimate consideration (see para. 93). But judicial economy should not

Selon la juge Deschamps, le fait que l'injonction et les autres ordonnances non pécuniaires sont fondées sur l'equity pourrait exiger des tribunaux canadiens qu'ils réexaminent la condition du caractère définitif et reconnaissent d'autres moyens de défense. Elle souligne le coût éventuel de la supervision d'une ordonnance en equity. Je conviens que l'économie des ressources be overemphasized. In recent years, courts have taken an active approach, imposing orders requiring supervision when necessary. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, is the best-known example, but search orders and freezing orders are part of the same general trend (see generally R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at paras. 1.260-1.490).

judiciaires doit entrer en ligne de compte (voir le par. 93 des présents motifs), mais il ne faudrait pas lui accorder trop d'importance. Ces dernières années, les tribunaux ont adopté une attitude active en rendant des ordonnances prévoyant la supervision au besoin. L'affaire *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, [2003] 3 R.C.S. 3, 2003 CSC 62, est l'exemple le plus connu, mais l'ordonnance de perquisition ou de blocage participe de cette tendance générale. (voir de façon générale R. J. Sharpe, *Injunctions and Specific Performance* (2e éd. (feuilles mobiles)), par. 1.260-1.490).

100 Orders with penal consequences would constitute a third type of restriction on the enforcement of non-money judgments. It is generally accepted that Canadian courts will not enforce a foreign penal law or judgment, either directly or indirectly. As Castel and Walker explain:

> A penal law is a law that imposes a punishment for a breach of a duty to the state — as opposed to a remedial law, which secures compensation for a breach of a duty owed to a private person. . . . Liability that is restitutionary in nature and that is not imposed with a view to punishment of the party responsible is not regarded as penal in nature. [Footnotes omitted; p. 8-2.]

It is for each state to impose its own punishments, penalties and taxes, and other states are not obliged to help them. When we move to penal orders, we move out of the realm of private international law and into public law. As a result, Canadian courts will not entertain an action for the enforcement of a foreign penal, revenue, or other public law, nor will they enforce a foreign judgment ordering the payment of taxes or penalties that gives effect to the sovereign will of a foreign power.

L'absence de conséquences pénales constituerait une troisième condition pour l'exécution d'un jugement non pécuniaire étranger. Il est généralement entendu qu'un tribunal canadien n'exécutera une décision ou une disposition pénale étrangère ni directement ni indirectement. Castel et Walker expliquent :

> [TRADUCTION] Une disposition pénale sanctionne le manquement à une obligation envers l'État, alors qu'une disposition réparatoire prévoit l'indemnisation d'un particulier pour le manquement à une obligation dont il était créancier. [. . .] L'obligation qui est de nature réparatoire et qui n'est pas imposée dans un but de sanction n'est pas tenue pour pénale. [Notes en bas de page omises; p. 8-2.]

Il appartient à chaque État d'imposer ses propres sanctions, pénalités et taxes, sans l'aide des autres États. L'ordonnance pénale ne ressortit pas au droit international privé, mais au droit public. Il s'ensuit qu'un tribunal canadien n'entendra pas la demande d'application d'une disposition de droit public (pénale, fiscale ou autre) étrangère non plus qu'il n'exécutera un jugement étranger ordonnant le paiement d'une taxe ou d'une pénalité conformément à la volonté souveraine d'une puissance étrangère.

101 For the purpose of this case, the three classes of restrictions on enforcement of non-money judgments discussed above should suffice. It may be that as the law develops other types of problems will be recognized. However, that can be left for future cases.

Ces trois conditions d'exécution d'un jugement non pécuniaire étranger devraient suffire pour statuer sur le présent litige. Avec l'évolution du droit, d'autres problèmes pourront voir le jour, et les tribunaux se prononceront en temps et lieu.

4.3 *Application*

102 The motions judge granted a declaration that the 1998 consent decree was valid and enforceable in Canada.

103 More particularly, the motions judge accepted the following terms of the 2003 Ohio contempt order as enforceable in Canada:

1. An accounting by Elta Golf to Pro Swing for profits on all golf clubs sold bearing the Trident or Rident marks;
2. Provision by Elta Golf to Pro Swing of names and contact information of Elta Golf's suppliers of the Trident and Rident golf clubs;
3. Provision by Elta Golf to Pro Swing of the names and addresses of each purchaser of the Trident and Rident golf clubs or components since entry of the Consent Decree;
4. Recall by Elta Golf and delivery to Pro Swing of all counterfeit and infringing golf clubs or golf club components bearing Trident or Rident marks or confusingly similar designations.

The motions judge refused to enforce other parts of the February 2003 order on the ground that they were not final and conclusive in nature. The issue is whether the motions judge erred in these conclusions.

104 Elta Golf's first defence was that all the relief should have been refused on the ground that foreign non-money judgments are not enforceable at common law. As discussed above, the common law prohibition on enforcement of such judgments must be replaced by a principled approach which may permit the enforcement of foreign non-money judgments in appropriate circumstances. Elta Golf conceded that the general requirements for enforcement set out in *Morguard* are met here. Elta Golf's argument based on the common law rule against enforcement should therefore be rejected.

4.3 *Application aux faits de l'espèce*

La juge des requêtes a déclaré le jugement sur consentement de 1998 valide et susceptible d'exécution au Canada.

Plus particulièrement, elle a jugé exécutoires au Canada les éléments suivants de l'ordonnance pour outrage au tribunal rendue en Ohio en 2003 :

1. la comptabilisation, par Elta Golf, à l'intention de Pro Swing, des profits tirés de la vente de tous les bâtons de golf portant la marque Trident ou Rident;
2. la communication par Elta Golf à Pro Swing des noms et des coordonnées de ses fournisseurs de bâtons de golf Trident ou Rident;
3. la communication par Elta Golf à Pro Swing des noms et des adresses des acheteurs de bâtons de golf ou de composants de bâton de golf Trident ou Rident depuis l'inscription du jugement sur consentement;
4. le rappel par Elta Golf de tous les bâtons de golf et composants de bâton de golf contrefaits et non autorisés portant la marque Trident ou Rident ou toute variante créant de la confusion avec elles, et leur remise à Pro Swing.

La juge des requêtes a refusé l'exécution des autres éléments de l'ordonnance de février 2003 au motif qu'ils n'étaient pas définitifs. Il nous faut décider si elle a eu tort de tirer pareilles conclusions.

Elta Golf fait d'abord valoir en défense que la demande aurait dû être rejetée en entier, car la common law n'admet pas l'exécution d'un jugement non pécuniaire étranger. Or, nous l'avons vu, cette interdiction doit faire place à une démarche raisonnée permettant l'exécution à certaines conditions. Elta Golf a concédé que les exigences générales issues de l'arrêt *Morguard* étaient respectées en l'espèce. Son argumentation fondée sur la règle de common law devrait donc être rejetée.

Elta Golf's second defence was that the orders should not be enforced because they were penal in nature. The motions judge rejected this defence on the ground that the orders were restitutionary in nature since they engaged a private dispute between the parties and sought to compensate the wronged party. In my view, this conclusion is unassailable.

Deuxièmement, Elta Golf soutient que l'ordonnance pour outrage ne devrait pas être exécutée parce qu'elle est de nature pénale. La juge des requêtes a rejeté ce moyen, estimant que l'ordonnance était de nature réparatoire puisqu'elle avait été rendue dans le cadre d'un litige privé opposant les parties et visait à indemniser la partie lésée. À mon avis, cette conclusion est inattaquable. 105

I respectfully disagree with Deschamps J.'s characterization of the contempt order as "penal". This Court has long maintained a distinction between civil and criminal contempt orders. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, it was held at p. 943 that "[t]he purpose of criminal contempt was and is punishment for conduct calculated to bring the administration of justice by the courts into disrepute. On the other hand, the purpose of civil contempt is to secure compliance with the process of a tribunal including, but not limited to, the process of a court" (Sopinka J. dissenting, but not on this point).

En toute déférence, je ne puis être d'accord avec la juge Deschamps lorsqu'elle qualifie de « pénale » l'ordonnance pour outrage au tribunal. Notre Cour a longtemps fait une distinction entre une ordonnance civile et une ordonnance criminelle en matière d'outrage. Dans l'arrêt *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901, elle a dit à la p. 943 : « L'outrage criminel vise, encore aujourd'hui, à punir la conduite qui, délibérément, déconsidère l'administration de la justice par les cours. D'autre part, l'objectif de l'outrage civil est d'assurer la conformité à la procédure d'un tribunal dont, notamment, celle d'une cour de justice » (le juge Sopinka, dissident, mais pas sur ce point). 106

Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc., [1992] 2 S.C.R. 1065, which Deschamps J. cites as authority for the "unified approach" to contempt orders, is clearly distinguishable. *Vidéotron* dealt with the possibility of imprisonment for contempt under the Quebec *Code of Civil Procedure* and the guarantees against compulsory self-incrimination under the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*. In my view, *Vidéotron* stands for the principle that persons cited for contempt are entitled to constitutional procedural protections *vis-à-vis* state coercion. It does not transform the private, restitutionary or compensatory aspects of a civil contempt order into public law.

Par ailleurs, une distinction s'impose d'avec l'arrêt *Vidéotron Ltée c. Industries Microlec Produits Électroniques Inc.*, [1992] 2 R.C.S. 1065, où, selon la juge Deschamps, notre Cour aurait opté pour une « approche uniforme » des ordonnances pour outrage au tribunal. Dans cette affaire, le *Code de procédure civile* du Québec exposait le contrevenant à l'emprisonnement tandis que la *Charte canadienne des droits et libertés* et la *Charte des droits et libertés de la personne* du Québec le protégeaient contre l'auto-incrimination forcée. À mon avis, cet arrêt établit que la personne assignée pour outrage au tribunal a droit aux garanties procédurales constitutionnelles contre la coercition exercée par l'État. Il ne fait pas ressortir au droit public les aspects droit privé, réparation ou indemnisation de l'ordonnance pour outrage. 107

Foreign criminal contempt orders are clearly penal and cannot be enforced by Canadian courts. The same should not be said of foreign civil contempt orders. When a foreign court issues a

L'ordonnance étrangère pour outrage criminel est clairement pénale et ne peut être exécutée par un tribunal canadien, mais il ne devrait pas en être de même de l'ordonnance étrangère pour outrage 108 contempt order to secure compliance with a private remedy flowing from a private dispute, the order does not necessarily contain a "penal" aspect that should preclude enforcement by Canadian courts. Some foreign orders for "civil" contempt could nevertheless contain penal elements sufficient to disqualify them from enforcement by Canadian courts; in other cases, the penal elements could be severable, allowing Canadian courts to enforce the private elements only. The development of these principles can be left for future cases.

civil. L'ordonnance que rend un tribunal étranger pour faire respecter une réparation privée accordée à l'issue d'une instance privée n'a pas nécessairement un aspect « pénal » faisant obstacle à son exécution par un tribunal canadien. Une ordonnance étrangère pour outrage « civil » pourrait néanmoins renfermer suffisamment d'éléments pénaux pour empêcher son exécution au pays. Dans certains cas, ces éléments pourraient être dissociés, permettant ainsi l'exécution des seuls éléments privés. Ces principes pourront être développés dans des affaires ultérieures.

109 There is nothing penal about the contempt order in this case. The terms of the order are designed to reinforce the consent decree and to provide Pro Swing with restitution for Elta Golf's violations. The motions judge held that the contempt order was restitutionary rather than penal. The Court of Appeal did not interfere with this holding, and I see no reason to do so now.

En l'espèce, l'ordonnance pour outrage au tribunal ne comporte aucun élément pénal. Ses dispositions visent à renforcer le jugement sur consentement et à réparer le tort que les violations d'Elta Golf ont causé à Pro Swing. La juge des requêtes a conclu que l'ordonnance pour outrage au tribunal avait un caractère réparatoire et non pénal. La Cour d'appel n'a pas modifié cette conclusion, et je ne vois aucune raison de le faire.

110 The next issue concerns the finality and clarity of the orders held to be enforceable in Ontario. The motions judge rejected parts of the U.S. order on this ground, but found other portions sufficiently clear and complete and thus enforceable. The Court of Appeal reversed this decision, finding that the orders were too ambiguous:

Se pose ensuite la question du caractère définitif et clair du jugement et de l'ordonnance tenus pour exécutoires en Ontario. La juge des requêtes a écarté certains éléments de l'ordonnance au regard de cette double exigence, mais elle a conclu que d'autres étaient suffisamment clairs et complets pour être exécutés. La Cour d'appel a infirmé cette décision au motif que les jugements étaient trop ambigus :

> In our view, the foreign orders in question are ambiguous in respect of material matters. For example, the critical issue of the scope of the extra-territorial application of the foreign orders is unclear. Do the foreign orders mean that the appellant is enjoined from purchasing, marketing, selling or using infringing golf clubs within the jurisdiction of the U.S. District Court, or do they mean that the appellant is enjoined from doing those things anywhere in the world? [para. 11]

> [TRADUCTION] À notre avis, les jugements étrangers en question sont ambigus sous certains rapports importants. Par exemple, leur application extraterritoriale — question cruciale — n'est pas claire. L'interdiction qu'ils font à l'appelante d'acheter, de commercialiser, de vendre ou d'utiliser des bâtons contrefaits et non autorisés vaut-t-elle dans le ressort de la Cour fédérale de district ou partout dans le monde? [par. 11]

Elta Golf did not appear before us to defend the Court of Appeal's conclusion. In my view, the record supports the findings of the motions judge, and the Court of Appeal was wrong to reverse her decision.

Elta Golf n'a pas défendu devant nous la conclusion de la Cour d'appel. Selon moi, le dossier étaye les conclusions de la juge des requêtes, et la Cour d'appel a eu tort d'infirmer sa décision.

Finality, as discussed above, refers not to whether the order represents the ultimate step in the proceeding, but rather to whether the order is incomplete and not in need of future elaboration. This was how the motions judge understood it: "A domestic court does not wish to be faced with enforcing a foreign judgment that is later changed" (para. 18).

I am satisfied that the portions of the judgment that the motions judge held to be enforceable in Ontario are final in this sense. The orders for the accounting and the production of records, names, golf clubs and golf club components represent complete and finite obligations. It would be impossible to add more precision. As discussed above, finality does not mean that no further steps can be taken. Compliance with the order for an accounting and production of records might lead the United States court to issue an order quantifying damages, for example. However, this does not detract from the finality and certainty of the orders as enforced in Canada.

If Elta Golf were to refuse to comply with a final order enforceable in Ontario, the remedy would be an application for an order that Elta Golf is in contempt of court. In theory, issues could arise as to whether the accounting or production is complete. This in turn could involve the Ontario courts in supervising the accounting or production. On the other hand, the prevalence of cross-border commerce suggests that in the absence of an indication that the accounting or production of names, records and goods may raise problems, the order for enforcement of the foreign order should not be refused.

Throughout these proceedings, Elta Golf has never suggested that accounting or production will pose difficulties, and has confined its defence to more general points. In these circumstances, the hypothetical possibility of the need for future court supervision should not preclude the recognition of the foreign order. There is therefore no reason to displace the motions judge's conclusions

111 Je le répète, pour être définitif, un jugement n'a pas à intervenir à l'étape finale de l'instance; il doit plutôt être complet et ne nécessiter aucune précision ultérieure. Voici comment la juge des requêtes l'entendait : [TRADUCTION] « Un tribunal national ne veut pas entreprendre l'exécution d'un jugement étranger qui sera modifié par la suite » (par. 18).

112 Je suis d'avis que les éléments du jugement qui, selon la juge des requêtes, étaient susceptibles d'exécution en Ontario, sont définitifs en ce sens. L'ordonnance de dénombrement, de comptabilisation, de communication de documents et de noms et de remise de bâtons de golf et de composants de bâton de golf créent des obligations complètes et définies. Il serait impossible de les préciser davantage. Je le rappelle, le fait qu'un jugement est définitif ne veut pas dire qu'aucune autre démarche ne peut être entreprise. Le respect de l'ordonnance de dénombrement, de comptabilisation, de communication et de remise pourrait, par exemple, amener une cour états-unienne à rendre une ordonnance fixant le montant des dommages-intérêts. Or, cela ne change rien au caractère définitif et certain des jugements exécutés au Canada.

113 Si Elta Golf refusait de se conformer à un jugement définitif exécutoire en Ontario, Pro Swing devrait demander une déclaration d'outrage au tribunal. Théoriquement, la question pourrait se poser de savoir si l'ordonnance de dénombrement, de comptabilisation, de communication ou de remise a été intégralement respectée, de sorte que les tribunaux ontariens pourraient devoir contrôler l'exécution. Cependant, l'ampleur du commerce transfrontalier donne à penser que faute de difficultés appréhendées à cet égard, l'exécution du jugement étranger ne devrait pas être refusée.

114 À aucune étape de l'instance Elta Golf n'a fait valoir que le dénombrement, la comptabilisation, la communication ou la remise serait problématique, et sa défense a porté sur des points plus généraux. Dans ces circonstances, la possibilité théorique qu'une supervision judiciaire soit nécessaire ne doit pas faire obstacle à la reconnaissance du jugement étranger. Il n'y a donc pas lieu d'infirmer

that the portions of the order she accepted were final.

115 The motions judge also found the order to be sufficiently clear. On the question of its territorial scope, she held: "By its terms, it is clear that extraterritorial application was intended" (para. 16). The Court of Appeal disagreed and found that ambiguity in the orders on this point made them unenforceable. Pro Swing argues that this conclusion is not supported by the record and that Elta Golf understood that the consent decree was intended to be enforced extraterritorially. As Elta Golf did not appear before this Court, we are left to evaluate the Court of Appeal's conclusion on the basis of the record and the findings of the motions judge.

116 An examination of the content of the consent decree and the contempt order reveals no ambiguities about their extraterritorial application. First, the decree is cast in general terms. There are no explicit limits on the territory in which it applies, and nothing to suggest such limits were contemplated. Second, the orders were premised on the operation of an Ontario-based Website by Elta Golf and so can be seen as pre-supposing extraterritorial application. Finally, and most compelling, the terms include the surrender of Elta Golf's offending inventory and all promotional, packaging or other materials containing the mark in question or confusingly similar marks. These terms only make sense if the prohibition was meant to be universal in application. An outright surrender of inventory and marketing materials is incompatible with sales of any kind, not simply with sales within a particular jurisdiction. These considerations undermine the Court of Appeal's conclusion that the order was ambiguous.

117 My colleague Deschamps J. acknowledges the extraterritoriality of the orders requiring Elta Golf to surrender inventory, but she declines to infer this same extraterritoriality in the orders enjoining Elta

la conclusion de la juge des requêtes selon laquelle les éléments qu'elle a accepté d'exécuter étaient définitifs.

La juge des requêtes a également conclu que le jugement était suffisamment clair et, au sujet de sa portée territoriale, qu'[TRADUCTION] « il ressort de son libellé que les parties ont voulu lui conférer une portée extraterritoriale » (par. 16). La Cour d'appel a différé d'avis et estimé que l'ambiguïté des jugements sur ce point faisait obstacle à leur exécution. Pro Swing soutient que la preuve au dossier n'étaye pas une telle conclusion et qu'Elta Golf savait que les parties avaient voulu conférer au jugement sur consentement une portée extraterritoriale. Elta Golf n'ayant pas comparu devant nous, force est de soupeser la conclusion de la Cour d'appel à la lumière du dossier et des conclusions de la juge des requêtes.

L'examen du jugement sur consentement et de l'ordonnance pour outrage au tribunal ne révèle aucune ambiguïté quant à leur portée extraterritoriale. Premièrement, le jugement sur consentement est rédigé en termes généraux. Il ne limite pas expressément le territoire dans lequel il s'applique et aucun élément ne donne à penser qu'une limitation territoriale a été envisagée. Deuxièmement, puisque les jugements tenaient compte du fait qu'Elta Golf exploitait un site Internet en Ontario, leur application extraterritoriale peut être présumée. Enfin et surtout, ils prévoient la remise du stock d'articles non autorisés d'Elta Golf, ainsi que de son matériel de promotion, d'emballage et autre portant la marque en question ou une marque semblable créant de la confusion avec elle. Ces exigences n'ont de sens que si l'interdiction a une portée universelle. La restitution complète du stock et du matériel de promotion est incompatible avec toute vente, et non seulement avec celle réalisée dans un territoire donné. Ces considérations militent contre la conclusion de la Cour d'appel selon laquelle le jugement est ambigu.

Ma collègue la juge Deschamps reconnaît la portée extraterritoriale de l'obligation d'Elta Golf de remettre son stock, mais non celle de l'interdiction d'acheter ou de vendre des articles contrefaits

Golf from purchasing and selling the infringing goods. For the injunction to apply extraterritorially, Deschamps J. would require "explicit terms making the settlement agreement a worldwide undertaking" (para. 56). There is no need for such an artificially high standard when a plain reading of the decree makes its extraterritoriality sufficiently clear.

It might be argued that the words "any other confusingly similar designations" are ambiguous. To be sufficiently clear, however, an order need not describe in detail every hypothetical violation of its terms. There is no argument before us that determining confusingly similar designations raises difficulties in this case. As already noted, enforcement concerns must be apparent on the face of the order or arise from the factual or legal context. No such concerns exist here.

It may be that the Court of Appeal was concerned that the contempt order was founded on a violation of a U.S. trademark, raising questions about whether that trademark extends to Canada. However, this issue is resolved by the terms of the order itself. As noted above, the order is clearly enforceable in Canada. None of the restrictions on enforcement apply. The principle of separation of judicial systems discussed above prevents the court in the enforcing jurisdiction, Ontario, from entering into the substantive merits of the case that led to the consent decree. Except in cases of fraud or where a judgment is contrary to natural justice or public policy, the court considering the issue of the enforcement of a foreign judgment cannot look behind its terms: *Beals*.

Finally, I address briefly the public policy concerns raised by Deschamps J. This Court has upheld the quasi-constitutional nature of privacy legislation as it applies to federal government authorities: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, at para. 24. It is unclear whether the same status should be accorded to legislation governing information collected by private organizations

ou non autorisés. À son avis, pour que l'injonction ait une portée extraterritoriale, il faudrait que « l'entente [dise] explicitement qu'elle s'applique à l'échelle internationale » (par. 56). Une norme aussi arbitrairement stricte n'est pas nécessaire lorsqu'il est suffisamment clair, à la simple lecture, que le jugement a une portée extraterritoriale.

118 On pourrait soutenir que l'expression [TRADUCTION] « toute variante créant de la confusion avec elles » est ambiguë. Or, pour qu'elle soit suffisamment claire, une ordonnance n'a pas à prévoir en détail toute possibilité de manquement à ses dispositions. Aucune des parties ne prétend que cette expression pourrait être source de difficultés en l'espèce. Je le répète, tout problème d'application doit ressortir de l'ordonnance même ou découler du contexte factuel ou juridique. Aucun problème d'application n'est appréhendé dans le présent dossier.

119 L'ordonnance pour outrage se fondant sur la contrefaçon d'une marque de commerce étatsunienne, la Cour d'appel a pu craindre que se pose la question de l'opposabilité de la marque au Canada. Toutefois, le libellé même du jugement règle la question. Je l'ai déjà dit, le jugement est clairement susceptible d'exécution au Canada. Aucune des conditions prévues ne fait obstacle à son exécution. Le principe du cloisonnement des systèmes judiciaires mentionné précédemment empêche le ressort d'exécution — en l'espèce l'Ontario — d'examiner le fond de l'affaire ayant donné lieu au jugement sur consentement. Sauf fraude ou jugement contraire à la justice naturelle ou à l'ordre public, le tribunal appelé à exécuter un jugement étranger ne peut aller au-delà de son libellé : *Beals*.

120 Enfin, je ferai de brèves remarques sur les considérations relatives à l'ordre public soulevées par la juge Deschamps. Notre Cour a confirmé la nature quasi constitutionnelle des dispositions protégeant les renseignements personnels relevant des institutions fédérales : *Lavigne c. Canada (Commissariat aux langues officielles)*, [2002] 2 R.C.S. 773, 2002 CSC 53, par. 24. On peut se demander si les dispositions législatives visant les renseignements

such as Elta Golf. In this regard, I would note s. 7(3)(*c*) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, which allows private organizations to disclose personal information without the knowledge or consent of the individual if this disclosure is "required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records".

121 I agree with Deschamps J. that "the order enjoining Elta to provide all credit card receipts, accounts receivable, contracts, etc. could be problematic" (para. 60). To raise this issue at this stage however, when it was never argued before this or any other court, would amount to an inappropriate transformation of the proceedings. Furthermore, a majority of this Court has held that the public policy defence should be given a narrow application: *Beals*, at para. 75, *per* Major J. It may be necessary to revisit this holding in the context of the enforcement of non-monetary judgments, but it is not necessary to do so here. Finally, if the offending parts of the contempt order cannot be enforced for public policy reasons, they can be severed. The public policy issue therefore should not determine the outcome of this appeal.

122 I conclude that the Court of Appeal erred in holding that the portions of the orders enforced by the motions judge could not be enforced in Ontario because of ambiguity about the scope of their extraterritorial application.

5. Conclusion

123 For the foregoing reasons, I would allow the appeal, reverse the decision of the Court of Appeal and reinstate the decision of the motions judge.

recueillis par une organisation privée comme Elta Golf devraient aussi être qualifiées de quasi constitutionnelles. Je me reporte à cet égard à l'al. 7(3)*c*) de la *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, ch. 5, qui permet à une organisation privée de communiquer des renseignements personnels à l'insu et sans le consentement de l'intéressé lorsque la communication « est exigée par assignation, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de documents ».

Je partage l'avis de la juge Deschamps que « l'ordonnance enjoignant à Elta de communiquer les encaissements sur carte de crédit, les comptes débiteurs, les contrats, etc. pourrait être problématique » (par. 60), mais j'estime qu'aborder cette question maintenant, alors qu'elle n'a été soulevée ni devant nous ni devant les juridictions inférieures transformerait indûment l'instance. En outre, notre Cour a statué à la majorité que les moyens de défense fondés sur l'ordre public doivent être appliqués de manière restrictive : *Beals*, par. 75, le juge Major. Il se peut qu'il faille revoir cette décision en ce qui concerne l'exécution d'un jugement non pécuniaire, mais il n'est pas nécessaire de le faire en l'espèce. Enfin, si des raisons d'ordre public empêchent l'exécution de certaines dispositions de l'ordonnance pour outrage, celles-ci peuvent être dissociées. La question de l'ordre public ne saurait donc être déterminante pour l'issue du présent pourvoi.

Je conclus que la Cour d'appel a eu tort de statuer que les éléments exécutés par la juge des requêtes ne pouvaient l'être en Ontario en raison de la portée extraterritoriale incertaine des jugements.

5. Conclusion

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et de rétablir la décision de la juge des requêtes.

APPENDIX A

Consent Decree

Upon consideration of the parties' consent to judgment being entered against defendant Elta Golf Inc. ("ELTA") in this matter, NOW THEREFORE, IT IS STIPULATED AND AGREED by and between plaintiff Pro Swing, Inc. ("PRO SWING") and defendant ELTA that in connection with the settlement of this action, ELTA agrees to the following:

1. PRO SWING is the owner of U.S. Trademark Registration No. 1,941,922 for the mark TRIDENT in international class 28 which issued on December 19, 1995 (hereinafter referred to as the "MARK") for use in conjunction with golf clubs which it sells throughout the United States of America and overseas;

2. The MARK is valid and through use has come to identify PRO SWING as the source for golf clubs bearing the MARK;

3. ELTA has previously, without consent of PRO SWING, used and advertised golf clubs and/or golf club heads bearing the name RIDENT, a confusingly similar variation of the MARK;

4. ELTA has represented to PRO SWING the nature and extent of its use and advertising of golf clubs and/or golf club heads bearing the name RIDENT including the quantities in inventory or purchased from Third Parties, if any;

5. PRO SWING is, in entering this settlement, relying upon the representations of ELTA as to its use of RIDENT on golf clubs and/or golf club heads which representations are material hereto.

6. Each party will bear its own costs and attorney's fees. The Court shall retain jurisdiction over the parties for the purpose of enforcing this consent decree. The parties agree not to contest jurisdiction in any action in this Court to enforce this settlement.

7. ELTA is enjoined from purchasing, marketing, selling or using golf clubs or golf club components bearing the MARK or other confusingly similar variations of the MARK, including but not limited to RIDENT, RIDEN and/or TRIGOAL, other than on golf clubs or golf club components purchased by ELTA from PRO SWING or its authorized distributors.

ANNEXE A

Jugement sur consentement

[TRADUCTION]

Vu le consentement des parties à ce que jugement soit rendu en l'espèce contre la défenderesse Elta Golf Inc. (« ELTA »), la demanderesse Pro Swing Inc. (« PRO SWING ») et la défenderesse ELTA CONVIENNENT que, pour le règlement du litige qui les oppose, ELTA adhère à ce qui suit.

1. PRO SWING est titulaire aux États-Unis de la marque de commerce TRIDENT portant le n^{o} 1,941,922, catégorie internationale 28, depuis le 19 décembre 1995 (ci-après la « MARQUE »), pour emploi en liaison avec des bâtons de golf qu'elle vend aux États-Unis et à l'étranger.

2. La MARQUE est valide et son utilisation a fait de PRO SWING le fournisseur des bâtons de golf qui en sont revêtus.

3. ELTA a, par le passé et sans l'autorisation de PRO SWING, utilisé et annoncé des bâtons de golf ou des têtes de bâton de golf portant le nom RIDENT, une variante créant de la confusion avec la MARQUE.

4. ELTA a informé PRO SWING de la nature et de l'étendue de son utilisation et de sa promotion des bâtons de golf ou des têtes de bâton de golf portant le nom RIDENT, y compris le nombre d'articles en stock ou achetés à des tiers, le cas échéant.

5. Pour conclure la présente transaction, PRO SWING se fonde sur les déclarations d'ELTA concernant l'emploi de la marque RIDENT en liaison avec des bâtons de golf ou des têtes de bâton de golf, et ces déclarations sont déterminantes à cet égard.

6. Chacune des parties supporte ses frais de justice et honoraires d'avocat. La Cour demeure compétente à l'égard des parties pour ce qui est de l'exécution du jugement sur consentement. Les parties s'engagent à ne pas contester sa compétence dans toute instance engagée pour faire respecter la présente transaction.

7. Il est interdit à ELTA d'acheter, de commercialiser, de vendre ou d'utiliser des bâtons de golf ou des composants de bâton de golf portant la MARQUE ou toute variante créant de la confusion avec elle, notamment RIDENT, RIDEN ou TRIGOAL, sauf s'il s'agit de bâtons de golf ou de composants de bâton de golf qu'elle a achetés à PRO SWING ou à ses distributeurs autorisés.

8. Within ten (10) days of execution of this order ELTA will surrender and deliver to PRO SWING's counsel, postage prepaid, all infringing golf clubs and/or golf club components, if any, (TRIDENT, RIDENT, RIDEN and/or TRIGOAL) in its possession, along with all copies of any advertising, packaging, promotional or other materials, if any, containing the MARK or any confusingly similar mark, including but not limited to RIDENT, RIDEN and/or TRIGOAL.

9. This consent decree is binding upon the parties, as well as their respective shareholders, directors, officers, employees, representatives, agents, predecessors, successors, parents, subsidiaries, affiliates, assigns, and all other related business entities.

In consideration of the foregoing and conditioned upon compliance by defendant ELTA with the various terms and provisions of the settlement provided for above, this action shall be discontinued and dismissed with prejudice only with respect to defendant ELTA.

APPENDIX B

Contempt Order

Based upon the foregoing findings and conclusions, IT IS ORDERED that:

1. The Consent Decree entered on July 31, 1998 remains in full force and effect, and the Court retains jurisdiction to enforce the Consent Decree and this Order.

2. Elta Golf is again permanently enjoined from purchasing, marketing, selling or using golf clubs or golf club components which bear the TRIDENT mark, or any other confusingly similar designations, including but not limited to RIDENT, RIDEN and/or TRIGOAL, other than golf clubs or golf club components purchased by Elta Golf from Pro Swing.

3. Elta Golf is to make an accounting to Pro Swing of all golf clubs and/or golf club components it has sold which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree. Elta Golf shall provide this accounting to Pro Swing within fourteen (14) days from the date of this Order. The accounting shall include a sworn statement of account of all gross and net income derived from sales of TRIDENT and RIDENT golf clubs or golf club components, together with all business and accounting records relating to these sales, since the

8. Dans les dix (10) jours de la signature du présent jugement, ELTA fera parvenir à l'avocat de PRO SWING, port payé, tous bâtons de golf ou composants de bâton de golf contrefaits (portant la marque TRIDENT, RIDENT, RIDEN ou TRIGOAL) en sa possession, ainsi que tout article promotionnel, d'emballage ou autre revêtu de la MARQUE ou d'une marque semblable créant de la confusion avec elle, notamment RIDENT, RIDEN ou TRIGOAL.

9. Le jugement sur consentement lie les parties ainsi que leurs actionnaires, administrateurs, dirigeants, employés, représentants, mandataires, prédécesseurs, successeurs, sociétés mères, filiales, sociétés affiliées, cessionnaires et autres entreprises apparentées.

En contrepartie de ce qui précède et à condition que la défenderesse ELTA respecte les dispositions de la présente transaction, la demanderesse se désiste de son action et celle-ci est rejetée définitivement vis-à-vis de la seule défenderesse ELTA.

ANNEXE B

Ordonnance pour outrage au tribunal

[TRADUCTION]

Vu les conclusions qui précèdent, la COUR ORDONNE ce qui suit.

1. Le jugement sur consentement inscrit le 31 juillet 1998 demeure applicable, et la Cour demeure compétente pour l'exécuter ainsi que la présente ordonnance.

2. Elta Golf se voit à nouveau interdire en permanence d'acheter, de commercialiser, de vendre ou d'utiliser des bâtons de golf ou des composants de bâton de golf portant la marque TRIDENT ou toute variante créant de la confusion avec elle, notamment RIDENT, RIDEN ou TRIGOAL, sauf s'il s'agit de bâtons de golf ou de composants de bâton de golf qu'elle a achetés à Pro Swing.

3. Elta Golf établira le nombre de bâtons de golf ou de composants de bâton de golf qu'elle a vendus depuis l'inscription du jugement sur consentement sous la marque TRIDENT ou RIDENT ou toute variante créant de la confusion avec elles. Elle communiquera cette information à Pro Swing au plus tard quatorze (14) jours après le prononcé de la présente ordonnance. Elle y joindra une déclaration sous serment indiquant les produits brut et net tirés de la vente de bâtons de golf ou de composants de bâton de golf TRIDENT et RIDENT depuis l'inscription du jugement sur consentement jusqu'à ce

entry of the Consent Decree to present, including but not limited to:

a. records of all sales, credit card receipts, accounts receivable and contracts for all sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks;

b. records of all expenses related to all sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks; and,

c. any and all balance sheets, profit and loss statements, cash flow reports or other accounting reports or summaries.

4. Pro Swing is hereby awarded compensatory damages based upon the profits derived by Elta Golf through its sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree. Pro Swing shall provide its proposed damage award to the Court after Elta Golf's compliance with the accounting requirements set forth in Section III(3) of this Order.

5. Pro Swing is hereby awarded costs and attorneys fees incurred herein. Plaintiff shall submit a cost bill and fee petition within fourteen (14) days of entry of the money judgment set forth in Section III(4) of this Order.

6. Elta Golf is to surrender for destruction, all golf clubs or golf club components which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation. Elta Golf shall forward these golf clubs or golf club components to Pro Swing's counsel (Hahn Loeser & Parks LLP, 1225 West Market Street, Akron, Ohio 44313-7188) within fourteen (14) days from the date of this Order.

7. Elta Golf is to provide Pro Swing with the names and all contact information of Elta Golf's suppliers of the TRIDENT and RIDENT golf club components. Elta Golf shall provide this information within fourteen (14) days from the date of this Order.

8. Elta Golf is to provide Pro Swing with the names and addresses of each purchaser of the TRIDENT and RIDENT golf clubs or golf club components sold by Elta Golf since the entry of the Consent Decree. Elta Golf shall provide this information within fourteen (14) days from the date of this Order. Elta Golf is to pay

jour, ainsi que tous les documents comptables se rapportant à ces ventes, y compris :

a. les registres des ventes, des encaissements sur carte de crédit, des comptes débiteurs et des contrats pour la vente de bâtons de golf ou de composants de bâton de golf portant la marque TRIDENT ou RIDENT;

b. le relevé des dépenses relatives aux ventes de bâtons de golf ou de composants de bâton de golf portant la marque TRIDENT ou RIDENT;

c. les bilans, états des résultats, états des flux de trésorerie et autres rapports et relevés comptables.

4. Pro Swing se voit accorder des dommages-intérêts compensatoires dont le montant se fonde sur les profits tirés de la vente par Elta Golf, depuis l'inscription du jugement sur consentement, de bâtons de golf ou de composants de bâton de golf portant la marque TRIDENT ou RIDENT ou toute variante créant de la confusion avec elles. Une fois qu'Elta Golf aura satisfait aux exigences de dénombrement et de comptabilisation énoncées au paragraphe 3 de la partie III de la présente ordonnance, Pro Swing communiquera à la Cour le montant auquel elle estime avoir droit à titre de dommages-intérêts.

5. Pro Swing a droit au paiement de ses frais de justice et de ses honoraires d'avocat dans la présente instance. Elle soumettra un mémoire de frais et demandera sa taxation au plus tard quatorze (14) jours après l'inscription du jugement pécuniaire figurant au paragraphe 4 de la partie III de la présente ordonnance.

6. Elta Golf remettra, pour destruction, tous les bâtons de golf ou composants de bâton de golf revêtus de la marque TRIDENT ou RIDENT ou de toute variante créant de la confusion avec elles. Elle les fera parvenir à l'avocat de Pro Swing (Hahn Loeser & Parks LLP, 1225 West Market Street, Akron, Ohio 44313-7188) au plus tard quatorze (14) jours après la présente ordonnance.

7. Au plus tard quatorze (14) jours après la présente ordonnance, Elta Golf communiquera à Pro Swing les noms et les coordonnées de ses fournisseurs de composants de bâton de golf de marque TRIDENT et RIDENT.

8. Au plus tard quatorze (14) jours après la présente ordonnance, Elta Golf communiquera à Pro Swing les noms et les adresses de chacun des acheteurs à qui elle a vendu depuis l'inscription du jugement sur consentement des bâtons de golf ou des composants de bâton de golf de marque TRIDENT et RIDENT. Elle paiera à

Pro Swing the costs of a corrective mailing to each of these consumers.

9. Elta Golf is to recall all counterfeit and infringing golf clubs or golf club components which bear the TRIDENT and RIDENT marks, or any other confusingly similar designation. Elta Golf shall forward all such golf clubs or golf club components to Pro Swing's counsel within fourteen (14) days of the receipt of each of these items.

Appeal dismissed, McLachlin C.J. *and* Bastarache *and* Charron JJ. *dissenting.*

Solicitors for the appellant: Siskind, Cromarty, Ivey & Dowler, London.

Pro Swing les frais d'envoi d'un rectificatif à chacun de ces acheteurs.

9. Elta Golf rappellera les bâtons de golf ou composants de bâton de golf contrefaits et non autorisés portant la marque TRIDENT et RIDENT ou toute variante créant de la confusion avec elles. Elle les fera parvenir à l'avocat de Pro Swing au plus tard quatorze (14) jours après la réception de chacun d'eux.

Pourvoi rejeté, la juge en chef McLachlin *et les juges* Bastarache *et* Charron *sont dissidents.*

Procureurs de l'appelante : Siskind, Cromarty, Ivey & Dowler, London.

COURT OF APPEAL OF NEW BRUNSWICK

186/04/CA

IN THE COURT OF APPEAL
OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF the Bankruptcy of
St. Anne Nackawic Pulp Company Ltd.

BETWEEN:

LOGISTEC STEVEDORING (ATLANTIC) INC.

(Respondent) APPELLANT

-and-

A.C. POIRIER & ASSOCIATES INC.,
Trustee in Bankruptcy of St. Anne Nackawic
Pulp Company Ltd.

(Applicant) RESPONDENT

Logistec Stevedoring (Atlantic) Inc. v. A.C. Poirier & Associates Inc., 2005 NBCA 55

CORAM:
The Honourable Justice Turnbull
The Honourable Justice Deschênes
The Honourable Justice Robertson

Appeal from a decision of
the Court of Queen's Bench:
December 21, 2004

Appeal heard:
March 22, 2005

Judgment rendered:
June 2, 2005

Reasons for judgment by:

LA COUR D'APPEL
DU NOUVEAU-BRUNSWICK

SIÉGEANT EN MATIÈRE DE FAILLITE ET D'INSOLVABILITÉ

DANS L'AFFAIRE DE la faillite de
St. Anne Nackawic Pulp Company Ltd.

ENTRE :

LOGISTEC STEVEDORING (ATLANTIC) INC./
LOGISTEC ARRIMAGE (ATLANTIQUE) INC.

(Intimée) APPELANTE

- et -

A.C. POIRIER & ASSOCIATES INC.,
syndique de faillite de St. Anne Nackawic
Pulp Company Ltd.

(Requérante) INTIMÉE

Logistec Stevedoring (Atlantic) Inc./ Logistec Arrimage (Atlantique) Inc. c. A.C. Poirier & Associates Inc., 2005 NBCA 55

CORAM :
L'honorable juge Turnbull
L'honorable juge Deschênes
L'honorable juge Robertson

Appel d'une décision de
la Cour du Banc de la Reine :
le 21 décembre 2004

Appel entendu :
le 22 mars 2005

Jugement rendu :
le 2 juin 2005

Motifs de jugement :

The Honourable Justice Robertson

Concurred in by:
The Honourable Justice Turnbull
The Honourable Justice Deschênes

Counsel at hearing:

For the appellant:
D. Leslie Smith, Q.C.

For the respondent:
G. Patrick Gorman, Q.C.

THE COURT

The appeal is allowed and the order dated January 7, 2005 set aside. The application for declaratory and ancillary relief is dismissed. The appellant is entitled to costs of $3,000 throughout.

L’honorable juge Robertson

Souscrivent aux motifs :
L’honorable juge Turnbull
L’honorable juge Deschênes

Avocats à l’audience :

Pour l’appelante :
D. Leslie Smith, c.r.

Pour l’intimée :
G. Patrick Gorman, c.r.

LA COUR

Accueille l’appel et annule l’ordonnance datée du 7 janvier 2005. La demande en vue d’obtenir un jugement déclaratoire et des mesures de redressement accessoires est rejetée. L’appelante a droit à des dépens afférents à la première instance et à l’appel, lesquels sont fixés à 3 000 $.

The following is the judgment rendered by

ROBERTSON, J.A.

[1] We are asked to decide whether the application judge erred in holding that a $500,000 payment made by an insolvent debtor to one of its creditors qualifies as a fraudulent preference within the meaning of s. 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA). In my respectful view, the application judge erred. Specifically, he failed to ask whether the impugned payment was made with the "dominant intent" of preferring one creditor over the others. When that test is applied to the facts of the present case, it is evident that the debtor harboured no such intent. Admittedly, the creditor in receipt of the payment received a "preference in fact", but that is not a sufficient basis for declaring the payment a fraudulent preference. As will be explained, s. 95 has no application in circumstances where the insolvent debtor is effecting a payment with a view to generating income to be applied against the debts of both secured and unsecured creditors. This remains true even if it were unrealistic to expect that the unsecured creditors would share in the income generated.

[2] The essential facts are as follows. Until September 15, 2004, St. Anne Nackawic Pulp Company Ltd. had been operating a pulp mill in Nackawic, New Brunswick. That corporation is a wholly owned subsidiary of St. Anne Industries Ltd. St. Anne Industries is also the primary secured creditor of St. Anne Pulp under a registered general security agreement, the validity of which is being challenged in other proceedings. Finally, St. Anne Industries is a wholly owned subsidiary of Parsons & Whittemore Inc. of New York. On September 15, 2004, St. Anne Pulp made a voluntary assignment in bankruptcy. A trustee was appointed on that date, but later replaced by the respondent, A.C. Poirier & Associates Inc. Prior to the bankruptcy, it was customary for St. Anne Pulp to transport its pulp to Saint John where it was stored in a dockside warehouse belonging to the appellant, Logistec Stevedoring (Atlantic) Inc. Logistec was also responsible for loading of pulp onto ships and trucks. On September 14, 2004, one day prior to the filing for bankruptcy, Logistec was informed by St. Anne

Pulp that it would be ceasing operations but that it wanted to ensure that the 10,800 tonnes of pulp, being presently stored in Logistec's warehouse, would be released and loaded onto two ships that were to arrive in Saint John on or about September 18, 2004. As well, one shipment was to be effected by truck. In response, Logistec asserted that it possessed a warehouseman's lien on the goods and refused to release and load any pulp unless it received prior payment, in full, with respect to past due accounts. Logistec informed St. Anne Pulp that it was owed $562,574.72 plus amounts not yet posted to the account. Initially, Logistec demanded payment from anyone other than St. Anne Pulp in order to avoid the possibility of someone alleging the payment was a fraudulent preference. Eventually, Parsons & Whittemore agreed to indemnify Logistec in the event the payment from St. Anne Pulp to Logistec was successfully challenged. The impugned payment was made on September 14, 2004. The next day St. Anne Pulp made a voluntary assignment in bankruptcy. On the same date, St. Anne Industries appointed a receiver under the terms of its security agreement. On September 16, 2004, Logistec determined that a further $232,945.91 would be needed to settle the account. The receiver paid this amount with funds drawn on St. Anne Pulp's bank account, over which St. Anne Industries had taken security. As of September 27, 2004, all the pulp in the warehouse had been shipped.

[3] On December 10, 2004, the respondent trustee filed an application for a declaration that the $562,574.72 payment was fraudulent and void under s. 95 of the BIA. Correlatively, the trustee sought judgment for that amount. On December 21, 2004, the application was heard. On the same date the application judge granted the relief requested. His decision is now reported at [2004] N.B.J. No. 477 (Q.B.) (QL). The reasons for judgment address two issues. The first was whether the application proceedings should be converted into an action. On this issue, the application judge ruled in favour of the trustee. Although Logistec pursued this issue on appeal, there is no need to convert this matter into an action. The only factual matter which the parties failed to resolve concerns the extent to which the $500,000 payment related to work already performed, as opposed to work to be performed. However, that factual determination is only relevant if the payment in question were declared a fraudulent preference, in which

case part of the payment may have been valid. As I find that the payment in question does not constitute a fraudulent preference, there is no need to dwell on the first issue. As to the second issue, I turn to s. 95. At the relevant time, ss. 95(1) and (2) read as follows:

95. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors is, where it is made, incurred, taken or suffered within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date the insolvent person became bankrupt, both dates included, deemed fraudulent and void as against the trustee in the bankruptcy.

(2) Where any conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.

95. (1) Sont tenus pour frauduleux et inopposables au syndic dans la faillite tout transport ou transfert de biens ou charge les grevant, tout paiement fait, toute obligation contractée et toute instance judiciaire intentée ou subie par une personne insolvable en faveur d'un créancier ou d'une personne en fiducie pour un créancier, en vue de procurer à celui-ci une préférence sur les autres créanciers, s'ils surviennent au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement.

(2) Lorsqu'un tel transport, transfert, charge, paiement, obligation ou instance judiciaire a pour effet de procurer à un créancier une préférence sur d'autres créanciers, ou sur un ou plusieurs d'entre eux, il est réputé, sauf preuve contraire, avoir été fait, contracté, intenté, payé ou subi en vue de procurer à ce créancier une préférence sur d'autres créanciers, qu'il ait été fait ou non volontairement ou par contrainte, et la preuve de la contrainte ne sera pas recevable pour justifier pareille transaction.

[Note that the wording of ss. 95(1) and 95(2) was amended, effective December 15, 2004, but those changes have no effect on the disposition of this case.]

[4] The law is settled with respect to the interpretation and application of s. 95 of the BIA. In order for a payment to a creditor to qualify as a fraudulent preference three conditions precedent must be met: (1) the payment must have been made within three

months of bankruptcy; (2) the debtor must have been insolvent at the date of the payment; and (3) as a result of the payment the creditor must have in fact received a preference over other creditors (see *Re Van der Liek* (1970), 14 C.B.R.(N.S.) 229 (Ont. H.C.J.).

[5] Once the three conditions precedent have been met, a presumption arises that the payment was made "with a view to giving that creditor a preference over the other creditors." However, it is a rebuttable presumption. In that regard, the courts have interpreted the above-quoted phrase as placing an onus on the creditor to establish that the debtor's dominant intent was not to prefer that creditor. The genesis of the dominant intent test is invariably traced to the following passage in *Re Van der Liek*, at pages 231-32:

> When the trustee has proved these three essentials, he need proceed no further and the onus is then on the creditor to satisfy the court, if he can, that there was no intent on the part of the debtor to give a preference. If the creditor can show on the balance of probabilities that the dominant intent of the debtor was not to prefer the creditor but was some other purpose, then the application will be dismissed, but if the creditor fails to meet the onus, then the trustee succeeds.

[6] Certain factors may or not be relevant to the task of ascertaining the debtor's dominant intent. Based on the Supreme Court's decision in *Hudson v. Benallack*, [1976] 2 S.C.R. 168, it is settled law that the creditor's knowledge of the debtor's insolvency at the time of the payment is an irrelevant consideration. On the other hand, it is relevant that the corporate debtor knew of its insolvency at the date of the payment. If the debtor is related to the creditor the payment will be scrutinized with greater care and suspicion. However, it is no defence to an allegation of fraudulent preference that the creditor exerted pressure on the insolvent debtor to secure the payment. According to s. 95(2), pressure is no longer a ground for upholding a transaction which is otherwise preferential within the meaning of s. 95(1). Finally, as the dominant intent test is an objective one, we need not be concerned with the subjective intent of the insolvent debtor

at the time of the payment. The requisite intent will be drawn from all of the relevant circumstances, as opposed to the debtor's personal ruminations. See generally Lloyd W. Houlden & Geoffrey B. Morawetz, *Bankruptcy & Insolvency Law of Canada*, looseleaf (Toronto: Carswell, 1992) at 4-66 to 4-67, 4-79.

[7] Returning to the facts of the present case, the parties agree that conditions precedent (1) and (2) have been met. However, Logistec argues that it was not the beneficiary of a preference in fact and, therefore, s. 95 has no application. A concise and accurate statement of the law as to the relationship between the concept of preference in fact and dominant intent is found in *Re Norris* (1996), 193 A.R. 15 at para. 16 (C.A.):

> In considering this section, it is well to keep in mind the distinction between preference in fact and fraudulent preference as that latter is defined in the **Act**. There can be no doubt in this case that Revenue Canada received a preference in fact from the payment of tax made by this debtor on November 25, 1992. Its debt was paid where the debt owing to other ordinary creditors were not. What would render that preference in fact a fraudulent one under s. 95 is the accompanying intent of the insolvent debtor who in the face of imminent bankruptcy is moved to prefer or favour, before losing control over his assets, a particular creditor over others who will have to wait for and accept as full payment their rateable share on distribution by the Trustee in the ensuing bankruptcy. It is called fraudulent because it prejudices other creditors who will receive proportionately less, or nothing at all, and upsets the fundamental scheme of the **Act** for equal sharing among creditors. That accompanying intent to favour one creditor over another is what makes a preference in fact a fraudulent preference and is referred to in the cases as the "dominant intent". …

[8] In my view, Logistec's argument would have been persuasive had the impugned payment related solely to work or services to be performed in regard to the pulp that was being stored in Logistec's warehouse at the time of the payment. In other words, had the entire $500,000 payment related to the storage and shipping of the 10,800 tonnes of pulp in Logistec's warehouse, Logistec's argument would have been well

founded. The situation would be no different had Logistec sold St. Anne Pulp a piece of machinery within the three months preceding the bankruptcy and St. Anne Pulp paid in cash. Such a payment would not qualify as a preference, but rather as a purchase and sale made in the ordinary course of business. However, counsel for Logistec conceded that part of the $500,000 was to be applied against amounts already owing for work undertaken in the past. In these circumstances, Logistec did receive a preference in fact when contrasted with St. Anne Pulp’s other creditors who were also awaiting payment of their outstanding accounts. That said, the mere establishment of a preference in fact does not lead to the conclusion that the payment qualifies as a fraudulent preference within the meaning of s. 95 of the BIA. What we are left with is a rebuttable presumption that the payment in question so qualifies.

[9] Logistec bore the onus of establishing that St. Anne Pulp’s dominant intent was not to prefer Logistec over the other creditors. Alternatively stated, the onus was on Logistec to establish that St. Anne Pulp’s dominant intent was to achieve a purpose other than to prefer Logistec. Regrettably, the application judge did not address that issue. For this reason, this court must draw the necessary inference from the primary findings of fact, as found by the application judge. Those facts are not in dispute.

[10] St. Anne Pulp’s dominant intent may be formulated in at least one of four ways. First, it can be argued that it intended to bestow a preference on Logistec over the other creditors. This is the position of the trustee in bankruptcy. Second, it can be argued that St. Anne Pulp made the payment in order to honour its contractual obligations to its customers who had purchased the pulp and, hence, to ensure that the goods were duly shipped. This is the position of Logistec. The third and fourth characterizations flow from the second. Third, it can be argued that St. Anne Pulp’s dominant intent was to generate income in the form of accounts receivable. Moneys collected would be applied against amounts owing to creditors and in the order of priority established at law. Fourth, it can be argued that St. Anne Pulp’s dominant intent was to maximize St. Anne Industries’ recovery on its secured debt. This characterization is a logical extension of the reality that, as the primary secured creditor, St. Anne Industries is entitled to the proceeds arising from the sale of inventory in priority to the unsecured creditors. If it can be fairly

said that St. Anne Pulp's dominant intent falls within either the second, third or fourth formulations, it is my view that the payment in question does not qualify as a fraudulent preference under s. 95 of the BIA. I so find. My formal reasoning is as follows.

[11] At common law and even after passage of the *Statute of Elizabeth* in 1570 (fraudulent conveyances) there was no impediment against an insolvent debtor preferring one creditor over another. The question of why a debtor would prefer one creditor over another goes to the question of the debtor's underlying motive, which text writers point out is irrelevant to the issue of dominant intent. Admittedly, it is easy to blur the legal distinctions often drawn between motive, intent, purpose or object. Be that as it may, one cannot help but ask why a debtor would prefer one creditor over another. In some cases the answer is self-evident. The common law allowed an insolvent debtor to engage in selective generosity by paying first those he liked most. Thus, payment to a creditor who is a family member or friend is more apt than not to qualify as a fraudulent preference within the meaning of s. 95 of the BIA: see *Craig (Trustee of) v. Devlin Estate* (1989), 63 Man.R. (2d) 122 (C.A.). Ironically, there is also a reported case in which the debtor allegedly made the payment to a non-related creditor (Revenue Canada) in order to prefer a creditor who was a close but distant relative: see *Norris (Re)*. But even if there is no close relationship between the debtor and the preferred creditor, the payment may be caught by s. 95. For example, where the payment is made to a creditor with respect to an indebtedness that had been guaranteed by the debtor's spouse, the payment has been held to be a fraudulent preference: see *Royal Bank of Canada v. Roofmart Ontario Ltd.* (1990), 74 O.R. (2d) 633 (C.A.) and also *Re Royal City Chrysler Plymouth Limited* (1998), 38 O.R. (3d) 380 (C.A.).

[12] As a general observation, it is evident that the cases in which the creditor has been unable to rebut the presumption arising under s. 95 of the BIA generally involve two factual patterns. First, the insolvent debtor and the creditor in receipt of the payment are somehow related (e.g., family members). Second, the payment to an arm's length creditor has the subsidiary effect of conferring an unjustified benefit or advantage on the insolvent debtor or a family member. While these factual patterns are not exhaustive, it is clear that the facts of the present case do not support a finding that St. Anne Pulp's

dominant intent was to prefer Logistec over the other creditors. But that is not the end of the matter. It is still necessary to isolate, by inference, St. Anne Pulp's dominant intent. In my view, its ultimate goal was to generate income from its accounts receivable, the proceeds of which would be applied first against the debt owing to St. Anne Industries, the primary secured creditor. In brief, St. Anne Pulp's dominant intent was to maximize the amount that the receiver would recover on behalf of St. Anne Industries from the sale of the existing inventory. Does this inference support the allegation of fraudulent preference under s. 95 of the BIA? In my view, it does not for two reasons. First, s. 95 speaks of fraudulent preference in terms of the creditor who received the payment. In this case, it was Logistec who received the payment, not St. Anne Industries. Second, and more importantly, St. Anne Industries cannot be accused of obtaining a fraudulent preference when as a matter of law it is entitled to a preference as a secured creditor of St. Anne Pulp. It is St. Anne Industries that has priority over the unsecured creditors by virtue of its security agreement. St. Anne Industries is to be paid first. If the income generated resulted in a surplus that surplus would be shared pro-rata amongst the unsecured creditors. The fact that St. Anne Pulp made the impugned payment to Logistec with a view to generating income which would be applied first against the debt owing to the secured creditor, St. Anne Industries, and then against amounts owing to the unsecured creditors, cannot be regarded as a valid basis on which to declare the payment to Logistec a fraudulent preference.

[13] My understanding of the law is that in circumstances where an insolvent debtor pays one creditor at the expense of another for purposes of carrying on business, the payment will more likely than not be deemed not to constitute a fraudulent preference within the meaning of s. 95 of the BIA. I need only refer to two cases in support of this proposition. In *Davis v. Ducan Industries Ltd.* (1983), 45 C.B.R. (N.S.) 290 (Alta. Q.B.) the bankrupt was a manufacturer of recreational vehicles. The creditor who received the questionable payment was a supplier of parts that the debtor used in its business. The supplier refused to continue to do business with the debtor unless payments were made towards its large outstanding account. Less than three months before the bankruptcy, the debtor made payments to the supplier. Once the debtor became bankrupt,

another creditor challenged this transaction as a fraudulent preference. The court found that the dominant intent of the bankrupt in making the payments to the supplier was to secure supplies to continue to run its business and not to give the creditor a preference. Similarly, in *Econ Consulting Ltd. (Trustee of) v. Deloitte, Haskins & Sells* (1985), 31 Man.R. (2d) 313 (C.A.) the bankrupt made a payment of $10,000 to accountants in respect of an outstanding account sixteen days prior to making an assignment in bankruptcy. The debtor's income tax returns were due and the accountants required the payment before they would prepare income tax returns for the debtor. The Court of Appeal cited this finding of the application judge with approval:

> I am satisfied that Econ made this payment not to give a preference to Deloitte but to get what it needed and required, i.e. its income tax returns prepared. I think that Deloitte would not have received payment if it had not been necessary for Econ to do so in order to persuade Deloitte to do the work that had to be done.

[14] Under Canadian law, if a creditor refuses to perform an act for an insolvent debtor, such as delivering goods or preparing income tax returns, unless its existing account is paid in full or in part, and the account is so paid in order to have the act performed, the transaction will not be deemed a fraudulent preference. This is because the debtor made the payment, not for purposes of preferring the creditor, but rather to obtain the performance of an act which is consistent with what is expected of someone who is acting in the ordinary course of business: see Houlden & Morawetz at 4-79 to 4-80.

[15] I admit that in the present case St. Anne Pulp did not make the payment for purposes of carrying on its pulp business in the long term. The impugned payment was made one day prior to St. Anne Pulp's voluntary assignment in bankruptcy. In the interim, however, it was entitled to carry on business albeit for a day. The truth of the matter is that St. Anne Pulp was acting in the best interests of all concerned when it made the payment to Logistec. Let me explain.

[16] It would have been irresponsible for either St. Anne Pulp, the trustee or the privately appointed receiver to allow the inventory of pulp to sit in Logistec's warehouse. St. Anne Pulp had entered into binding contracts for the sale of this product. The goods had to be shipped, otherwise St. Anne Pulp would have been in breach of its contractual obligations and liable for any consequential damages. When completed, those contracts generated income for St. Anne Pulp. The net amount invoiced on the three contracts in question was $1.3 million (U.S.), $2.3 million (U.S.) and $300,000 (Cdn.). Together, the shipment of the pulp generated more than $4.6 million (Cdn.) in accounts receivable. That amount is net of the $800,000 paid to Logistec to ensure the shipment of the pulp ($562,574.72 + $232,945.91 = $795,520.63). In effect, for every $1 paid to Logistec, St. Anne Pulp generated at least $5 in accounts receivable. In addition, by fulfilling the pulp contracts, future pulp sales might not otherwise be jeopardized if the trustee or the receiver decided to operate St. Anne Pulp pending a disposition of the mill.

[17] What the trustee fails to appreciate is that although a debtor is insolvent, it is entitled to carry on in the ordinary course of business even if only for a day, so long as it is acting in a commercially reasonable manner and, therefore, in the best interests of all concerned. As well, the trustee appears to be proceeding on the mistaken assumption that prior to the voluntary assignment in bankruptcy any moneys held in St. Anne Pulp's bank account could be used only for purposes of effecting a settlement of all debts on a pro-rata basis. The reality is that if anyone possessed a priority with respect to moneys in St. Anne Pulp's bank account, it was St. Anne Industries under its general security agreement. That security extended not only to St. Anne Pulp's accounts receivable and inventory, but also to all moneys held on St. Anne Pulp's account. It is out of that bank account that the receiver paid Logistec $232,000 in order to secure shipment of the pulp. Had St. Anne Pulp not made the payment to Logistec on September 14, 2004, here is what would have happened. On the following day, the newly appointed receiver would have seized the moneys held in St Anne Pulp's bank account. From that account the receiver would have paid the full amount owing to Logistec, for both past and present work. As it happens, the fact that a substantial payment was made one day prior to the bankruptcy is of no moment. Finally, I should point out that the payment to Logistec will

work to the benefit of the unsecured creditors in the event St. Anne Industries' security agreement is successfully challenged and declared invalid. The income generated by that payment ($5 for every $1 paid to Logistec) would become available to all unsecured creditors.

[18] At first blush the "optics" of this case cast a long shadow over the actions of St. Anne Pulp, St. Anne Industries and, ultimately, Parsons & Whittemore. It is understandable that Logistec was adamant that it receive an indemnity from Parsons & Whittemore with respect to the possibility the payment in question would be successfully challenged as a fraudulent preference under s. 95 of the BIA. The fact that the payment was made one day prior to the voluntary assignment in bankruptcy, and that both Logistec and St. Anne Pulp were aware of the latter's insolvency, threw suspicion over the transaction. However, when properly viewed, the transaction made good commercial sense. There is no doubt that St. Anne Industries was the true beneficiary of St Anne Pulp's payment to Logistec. But no one can complain of the preferential treatment being accorded that secured creditor. The preference arises as a matter of the security contract and is sanctioned by both the common law and the BIA.

[19] For these reasons, I would allow the appeal, set aside the order dated January 7, 2005 and dismiss the application for declaratory and ancillary relief. The appellant is entitled to costs of $3,000 throughout.

J.T. ROBERTSON, J.A.

WE CONCUR:

WALLACE S. TURNBULL, J.A.

ALEXANDRE DESCHÊNES, J.A.

CITATION: Tucker v. Aero Inventory (UK) Limited, 2011 ONSC 4223
COURT FILE NO.: 09-8456-00CL
DATE: 20110818

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF JAMES ROBERT TUCKER, RICHARD HEIS AND ALLAN WATSON GRAHAM OF KPMG LLP, AS JOINT ADMINISTRATORS, Applicants

AND IN THE MATTER OF AERO INVENTORY (UK) LIMITED and AERO INVENTORY PLC, Respondents

APPLICATION UNDER SECTION 46 AND FOLLOWING OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: MORAWETZ J.

COUNSEL: Orestes Pasparakis, Evan Cobb and Vasuda Sinha, for the Trustee

Sean F. Dunphy, Alexander D. Rose and Kathryn Esaw, for Air Canada

John Porter, for Lloyds TSB Commercial Finance Limited

ENDORSEMENT

[1] KPMG Inc., as Trustee in Bankruptcy (the "Trustee") for Aero Inventory (UK) Limited and Aero Inventory plc (together, "Aero") brings this motion to have certain transactions (the "October Transactions") entered into between Aero and Air Canada declared void pursuant to s. 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("*BIA*"). The Trustee seeks the return of value in the amount of U.S. $75 million from Air Canada (the "Preference Proceeds").

[2] A threshold issue has been identified. The Trustee takes the position that the Preference Proceeds, once recovered, would be subject to the rights of Aero's secured creditors. Air Canada takes the position that any proceeds resulting from this preference motion should only benefit Aero's unsecured creditors.

[3] Therefore, at this point, the central issue is a question of law: are the proceeds of a preference action under s. 95 of the *BIA* subject to the rights of secured creditors?

[4] In addition to the direction sought with respect to the priority of the Preference Proceeds, Air Canada also seeks an order regularizing the proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"), the parallel proceedings under the *BIA* and the preference motion.

BACKGROUND INFORMATION

[5] In its factum, Air Canada has provided an account of the events leading up to the October Transactions. In view of the threshold question of law, in my view, it is premature to focus on the facts in respect of the October Transactions. A brief overview of the background is, however, helpful, to put matters into context.

[6] On November 11, 2009, Administration proceedings in respect of Aero were commenced in the High Court of Justice of England and Wales (Chancery Division, Companies Court) (the "Foreign Proceedings"). Messrs. Tucker, Heis and Graham of KPMG LLP were appointed as joint administrators (the "Administrators") of Aero.

[7] On the same day, this court recognized the appointment of the Administrators as foreign representatives of Aero (the "Foreign Representatives") under Part IV of the *CCAA*.

[8] Aero reported that its secured creditors would face a shortfall of approximately £150 million, while its unsecured creditors, who are owed approximately £60 million, would receive virtually nothing at all.

[9] Following the November 11, 2009 filings, the Foreign Representatives met with Air Canada and discussed, *inter alia*, the October Transactions. From the Foreign Representatives' standpoint, a concern arose that the October Transactions might constitute an unlawful preference.

[10] The October Transactions arose out of a relationship between Air Canada and Aero in respect of maintenance required for Air Canada's aircraft. In December 2008 Air Canada and Aero executed an agreement (the "Line Maintenance Agreement") under which Aero became Air Canada's exclusive supplier for practically all of its Category 3 Inventory used for line maintenance.

[11] In early 2009, Aero and Air Canada entered into an agreement (the "January Purchase Agreement") under which Aero sold to Air Canada a pool of Category 3 Inventory. Over the course of the year, Aero was expected to purchase parts from this pool of inventory.

[12] In return, Air Canada provided Aero with nine U.S. $10 million principal Bills of Exchange (#1 – 9) and one similar Bill of Exchange (#10) for approximately U.S. $10.7 million (collectively, the "Bills of Exchange"). Each of the Bills of Exchange was payable to Aero and drawn on Air Canada. Air Canada contends that with the exception of transfers of the Bills of Exchange to Deutche Forfait (which never, in fact, occurred), the January Purchase Agreement required Air Canada's consent to any transfer of the Bills of Exchange.

[13] Air Canada contends that Aero ultimately failed to comply with the most significant provisions of the January Purchase Agreement. Ultimately, Aero and Air Canada reached an agreement under which certain Bills of Exchange were delivered back by Aero to Air Canada. It is this series of transactions as between Aero and Air Canada that the Trustee refers to as the October Transactions.

[14] In January 2010, the Foreign Representatives brought a motion to assign the Aero companies into bankruptcy expressly "for the purpose of pursuing a preference action under s. 95(1) or 96(1) of the *BIA*. On January 22, 2010, the court authorized the Administrators to assign Aero into bankruptcy and temporarily lifted the stay for that purpose (the January 2010 "Order").

[15] In seeking the January 22, 2010 Order, the Administrators advised the court that they wished to assign Aero into bankruptcy to preserve the right to pursue any reviewable preferences that may have taken place during the statutory review period prescribed by the *BIA*. The Administrators further advised that their security searches had revealed two secured creditors, Lloyds (asserting a general security interest in Aero's assets) and Air Canada.

[16] On February 4, 2010, the Trustee reported that although no claims process had been conducted, all creditors had been advised of the Administrators' view that the secured creditors would suffer a significant shortfall and that there would be no funds available for distribution to unsecured creditors. The Trustee further reported its expectation that the secured creditors' security would extend to any funds generated from a preference claim under ss. 95 or 96 of the *BIA*.

[17] The Trustee also reported that, in light of the expectation that there would be no recoveries to unsecured creditors, it saw no value in incurring the expense associated with the discharge of its statutory obligations under the *BIA*.

[18] On February 4, 2010, the Trustee filed a motion seeking to dispense with certain obligations of the Trustee under the *BIA*. The court granted the order sought by the Trustee (the "February 2010 Order"). Air Canada did not oppose the relief sought. The court issued the February 2010 Order in the *CCAA* proceedings extending the time period for the Trustee to perform its statutory obligations under the *BIA* (including convening a meeting of creditors and holding a vote of the unsecured creditors) until further order. The February 2010 Order further authorized the Administrators to provide direction to, and supervise the Trustee in pursuing the contemplated preference motion, subject to the review of the court.

[19] On April 27, 2010, the Trustee brought a motion in the *CCAA* proceedings seeking a declaration that the October Transactions between Air Canada and Aero constituted a preference within the meaning of s. 95(1) of the *BIA*.

[20] On June 30, 2010, the Trustee filed a report which included opinions from independent counsel on the validity and enforceability of the security held by a syndicate of secured lenders (the "Lenders") over Aero's assets.

[21] Aero financed its business with the U.S. $500 million revolving facility which it obtained from the Lenders. The Lenders hold:

(a) a general security interest and fixed mortgage over all the personal property of Aero in Canada, which has been duly registered; and

(b) a deed of Hypothec also duly registered in the Province of Quebec.

THE ISSUES

[22] Three issues need to be determined on this threshold motion:

(a) Whether secured creditors are entitled to assert priority over the proceeds of a preference action. Put another way, can the Trustee pursue the preference action solely on behalf of, and for the benefit of, a secured creditor?

(b) Is the preference motion properly brought within the *CCAA* proceedings, or should it be reconstituted in the bankruptcy proceedings?

(c) Should the February 2010 Order be varied to provide that the Trustee has to comply with certain obligations under the *BIA*?

[23] As the Trustee points out in its factum, on several occasions, Canadian courts have had to consider whether a secured creditor has the right to assert its priority claim over the proceeds of a preference action. The Trustee acknowledges the body of jurisprudence appears unclear, inconsistent and conflicting.

[24] It is the Trustee's position that jurisprudence and policy considerations underlying the *BIA* lead to the conclusion that the Preference Proceeds should be paid over to the Lenders by the Trustee.

[25] Air Canada, not surprisingly, takes a different position. Air Canada does not contest the Trustee's ability to pursue preference claims in the bankruptcy proceedings. However, Air Canada takes the position that the Trustee cannot pursue a preference claim as an advocate for Lloyds or for Lloyd's exclusive benefit.

THE PARTIES' POSITIONS

1. Are secured creditors entitled to assert priority over the proceeds of a preference action and can the Trustee pursue a preference action solely on behalf of, and for the benefit of, a secured creditor?

Air Canada's Position

[26] Air Canada takes the position that a trustee cannot pursue a preference action where the proceeds would accrue to the sole benefit of a secured creditor as to do so is inconsistent with the

jurisprudence holding that fraudulent preferences that do not benefit unsecured creditors cannot be pursued. Instead, the right to pursue a fraudulent preference action is a statutory right of the trustee only, and where appropriate to pursue, such preferences are only void as against the trustee, such that the recovered property accrues to the benefit of the general body of unsecured creditors. Finally, Air Canada submits that the proposed preference action is inconsistent with the role of a trustee.

The purpose of a preference action

[27] Air Canada submits that the purpose of a preference action is to allow for the equal distribution of the debtor's assets among the general body of creditors such that a trustee cannot pursue a preference action for the sole benefit of a secured creditor.

[28] Further, the purpose of s. 95 of the *BIA* is to ensure that the debtor's money is divisible equally among unsecured creditors, subject to the priorities in s. 136 of the *BIA*. In support of this proposition, counsel to Air Canada cites the Supreme Court of Canada in *Hudson v. Benallack*, [1976] 2 S.C.R. 168 at p. 175, where it is noted that the purpose of preference actions is to put all creditors on an equal footing.

[29] Counsel further submits that s. 95 of the *BIA* permits a trustee to challenge the debtor's transactions occurring on the eve of bankruptcy, as such transactions reduce the money available for distribution to creditors and presumably fail to treat all of the creditors equally. Conversely, where there would be no benefit to unsecured creditors from the pursuit of a preference action, the Trustee may not undertake a preference action.

[30] In this case, the Trustee's position is that the proceeds of the preference action accrue to the benefit of the secured creditor. Counsel to Air Canada submits that this would not constitute a benefit to the general body of creditors such that this action cannot be pursued. Instead, secured creditors' rights are to be exercised outside of bankruptcy as a function of their security agreement and provincial law: *BIA*, ss. 69.3, 70(1), 136(1) and 141.

[31] Air Canada takes the position that the jurisprudence is replete with examples of the courts declining to allow a trustee to pursue a preference action where the proceeds would accrue to the sole benefit of secured creditors.

[32] Air Canada submits that in *Ex parte Cooper* (1875), L.R. 10 Ch. App 510 (Div. Ct.) at p. 511-512, the court found that the trustee ought not to pursue a preference action for the benefit of a single creditor. Instead, preference actions are to be pursued for the benefit of all creditors. In that case, a creditor alleged that he had given the debtor an advance of £2000, secured by a consignment of the debtor's shipment of currants. However, once the shipment arrived, the debtor pledged the bills of lading for that shipment to a subsequent creditor, as security for advances made by that person. The Registrar declined to order the trustee to account to the estate for the value of the currants or take the necessary steps for their recovery, but did order that the first creditor was at liberty to use the trustee's name in any proceeding against the subsequent creditor or the debtor to enforce the delivery of the currants or payment of the proceeds to him. On appeal, the Divisional Court found that the trustee's name could not be

used in a preference action by an encumbrancer, unless the secured creditor were to give up the claim on the property for the benefit of all creditors. There could be no fraudulent preference where the preference granted concerned property that did not belong to the bankrupt.

The right to bring a preference action is a statutory right of the Trustee

[33] Air Canada takes the position that the Trustee's proposed preference action is incompatible with the fact that the right to pursue a preference action is a statutory right provided solely to the Trustee and a secured creditor cannot take advantage of the Trustee's statutory right. Instead, property recovered as a result of the exercise of the Trustee's statutory right is not subject to any security interest.

[34] Counsel to Air Canada referenced *In Re Yagerphone Limited*, [1935] 1 Ch. 392 (Ch.D.) at p. 396, which counsel submits affirms the principle established in *Ex parte Cooper*. In *Re Yagerphone*, the liquidator sought to attack the provision of certain funds to a creditor, which funds were said to be subject to a debenture. The debenture holder was found to not be entitled to the proceeds of the preference action as he held a general or floating security interest in the debtor's property, rather than a fixed charge over those funds. As a result, the preference action could be pursued and the transfer was considered to be void solely as against the liquidator, with the recovered funds impressed with a trust in favour of the creditors generally.

Bennett J. stated at pp. 395-96:

> There have been two cases which establish quite clearly that, whether in bankruptcy or in the liquidation of a company, <u>a secured creditor has no right to enforce for his benefit the remedy which is given to a trustee in bankruptcy or the liquidator of the company of avoiding a payment or setting aside a transaction made or entered into with a view to preferring a creditor of the bankrupt or a company in liquidation</u>. The authorities are Ex parte Cooper and Willmott v. London Celluloid Co.
>
> Neither of these cases, as I have said, decides the point which arises on the summons. I propose to decide it in favour of the liquidators on this ground - namely, that, at the time when the securities contained in the debenture issued to H. Yager (London), Ld., crystallised, the 240l. 11s. 2d. was not the property of Yagerphone, Ld., the company which issued the debenture.
>
> ...
>
> <u>The right to recover a sum of money from a creditor who has been preferred is conferred for the purpose of benefitting the general body of creditors</u>, and I think Mr. Montgomery White was right when he said that the sum of money, when recovered by the liquidators by virtue of s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914, <u>did not become part of the general assets of</u>

> Yagerphone, Ld., but was a sum of money received by the liquidators impressed in their hands with a trust for those creditors amongst whom they had to distribute the assets of the company. [Emphasis added; Citations omitted.]

[35] Air Canada submits that the reasoning of *Re Yagerphone* was adopted in *Re Maybank Foods Inc.* (1990), 72 O.R. (2d) 93 (S.C.), and *Re Oasis Merchandising Ltd.*, [1998] Ch. 170 (C.A.). In *Re Maybank,* the respondent had conceded that the proceeds of a preference action are held in trust for the general body of creditors. Air Canada frames the distinction drawn in *Re Oasis* as between assets which were the debtor's property upon liquidation and may be subject to a charge, and those that were conveyed away to another creditor but recovered pursuant to a preference action, which are not subject to a charge. In other words, the court in *Re Oasis* drew a distinction between assets over which a secured creditor possesses a fixed charge at the time of liquidation, which are subject to the security, and assets which were conveyed to another creditor and recovered pursuant to a preference action, which were subject to a floating charge and, as such, not subject to the secured creditor's security. *Re Oasis* dealt with the proceeds of a wrongful trading claim, but the court nevertheless noted that the proceeds of preference actions are not company property, but rather, exist by virtue of liquidation and the liquidator's right of action, and are impressed with a trust in favour of the unsecured creditors. At pp. 181, the Court stated:

> Thus a right of action against directors for misfeasance which the liquidator (amongst others) can enforce under section 212 of the Act of 1986 and the fruits of such an action are property of the company capable of being charged by a debenture, because the right of action arose and was available to the company prior to the winding up. But with this can be contrasted the right of action by a liquidator, and the fruits of such an action, for fraudulent preference or fraudulent or wrongful trading, which are not the property of the company and are not caught by a debenture: see *Gough, Company Charge*s, 2nd ed. (1996), p. 122.

[36] Similarly, Air Canada notes that Millet J. in *In Re M.C. Bacon Ltd.*, [1991] Ch. 127 (Ch.D.), a case concerning whether the liquidator was entitled to recover its fees for the pursuit of a preference action, continued to apply *Re Yagerphone* to the determination of whether that preference action was properly brought so as to constitute an expense of the winding up payable out of the assets of the company. In making that determination, Millet J. noted that a preference action can only be made by a liquidator or administrator, and not a debentureholder because a debenture holder is bound by payments in the ordinary course of business even if the payment is preferential, whereas the liquidator is not. Millet J. wrote at p. 137:

> It was thus established long before 1986 that any sum recovered from a creditor who has been wrongly preferred enures for the benefit of the general body of creditors, not for the benefit of the company or the holder of a floating charge. It does not become part of the company's assets but is received by the liquidator impressed with a trust in favour of those creditors amongst whom he has to distribute the assets of the company: see In re Yagerphone Ltd. [1935] Ch. 392.

Fraudulent preferences are only void as against the trustee

[37] Counsel to Air Canada submits that fraudulent preferences under s. 95 of the *BIA* are declared to be void *as against the Trustee* and not as against any other party, including secured creditors. Property recovered pursuant to a preference action is held by the Trustee for the benefit of the general body of creditors.

[38] Air Canada submits that the judgment of Hood J. in *S-Marque Inc. v. Homburg Industries Ltd.*, [1998] N.S.J. No. 550 (S.C.) aff'd for diff't reasons [1999] N.S.J. No. 94 (C.A.), endorses this view. In that case the deficit in the security of the secured creditor could not be paid in priority from the proceeds of a preference action. Rather the secured creditor could claim for the deficit as an unsecured creditor. Hood J. reviewed the jurisprudence relating to the entitlement to the proceeds of preference actions and concluded at para. 147:

> The effect of all these decisions is that overturning a fraudulent preference puts the property back in the hands of the trustee. <u>The transaction is void as against the trustee in bankruptcy. The property does not, however, revert to the bankrupt to be available as part of the security over which a secured creditor has rights of seizure</u>. [Emphasis added.]

[39] To similar effect, Air Canada submits that the court in *Canadian Imperial Bank of Commerce v. Canotek Development Corporation* (1997), 35 O.R. (3d) 247 (C.A.) ("*Canotek*"), stated at p. 256 that "[s]ection 95 renders a fraudulent preference void as against the trustee in bankruptcy; it does not render it void as against a secured creditor".

[40] In *Canotek*, the bank held a general security agreement and chattel mortgage on the assets of F. Inc. (the debtor), which went bankrupt, but C. Corp, (the landlord of F. Inc.) levied distress against F. Inc without granting sufficient time for the tenant to rectify the situation. The court found that there was a fraudulent preference against the trustee, but not as against the bank. However, the landlord might still have rights under s. 136(1)(f) as a preferred creditor.

[41] The court rejected the bank's argument regarding the reversal of priorities, stating at p. 251:

> However, the bank says that but for the premature sale the property distrained would have been property of the bankrupt and, thus, subject to the bankruptcy. In that case, the bank argues, it would have been entitled to its security as against the trustee. In short, the bank argues that it has been deprived of the right to take advantage of the assignment in bankruptcy to gain priority in the goods and their proceeds over the trustee in bankruptcy. Since the trustee would have priority over the landlord's distraint, the bank would thus have priority over the landlord as secured creditor in the bankruptcy. This is a tail-chasing type of priority problem which must be resolved by looking at the relationship between the true parties to the dispute. In this case, the bank never did have a priority over the landlord once the landlord distrained against the goods. <u>The artificiality of</u>

> looking to the bankruptcy proceedings to give the bank something the law never intended it to have is obvious, and should not be countenanced by the court.

[42] Intriguingly, the Court while noting, at p. 256, that "[g]enerally, provincial law governs priorities between various secured creditors, and also between secured creditors and landlords", went on to state that ...outside bankruptcy the landlord prevails in facts such as these, and the incidence of bankruptcy should in no way alter this situation."[Emphasis added.]

The Trustee is an impartial officer of the court

[43] Air Canada takes the position that the Trustee's position in respect of the proposed preference action is inconsistent with its role as an impartial officer of the court submitting that a trustee should not act as an advocate for any particular class of creditors. Instead, its role is to gather in the assets of the bankrupt and divide the proceeds in accordance with the scheme of the *BIA*: See *Re Beetown Honey Products Inc.* (2003), 46 C.B.R. (4th) 195 (Ont. S.C.) at para. 22, aff'd (2004) 3 C.B.R. (5th) 204 (Ont. C.A.).

[44] Air Canada submits that in bringing this preference action, the Trustee seeks to realize a benefit solely for Lloyd's, a secured creditor. The Trustee has also failed to involve the unsecured creditors and it has failed to disclose competing considerations that might indicate that this preference action is unwarranted. While the Trustee may act for a secured creditor pursuant to s. 13.4 of the *BIA*, Air Canada contends that the record does not indicate that it has met the statutory preconditions to assisting a secured creditor. Air Canada submits that the purpose of s. 13.4 is to protect unsecured creditors' rights: See *Pratchler Agro Services Inc. (Trustee of) v. Cargill Ltd.* (1999), 11 C.B.R. (4th) 104 (Sask Q.B.) at para. 9.

[45] Section 13.4 of the *BIA* provides:

> (1) No trustee may, while acting as the trustee of an estate, act for or assist a secured creditor to assert a claim against the estate or to realize or otherwise deal with a security that the secured creditor holds, unless the trustee has obtained a written opinion from independent legal counsel that the security is valid and enforceable against the estate.
>
> (1.1) Forthwith on commencing to act for or assist a secured creditor of the estate in the manner set out in subsection (1), a trustee shall notify the Superintendent and the creditors or the inspectors
> (*a*) that the trustee is acting for the secured creditor;
> (*b*) of the basis of any remuneration from the secured creditor; and
> (*c*) of the opinion referred to in subsection (1).
>
> (2) Within two days after receiving a request therefor, a trustee shall provide the Superintendent with a copy of the opinion referred to in subsection (1) and shall also provide a copy to each creditor who has made a request therefor.

[46] Air Canada submits that the record before the court does not indicate that the Trustee has obtained a written opinion from independent legal counsel that the security in issue is valid and enforceable against the estate. There is also no evidence that the Trustee has notified the Superintendent in Bankruptcy and other creditors of such an opinion (if it exists), its intention to act for Lloyd's, or the details of any remuneration it may be receiving from the secured creditor.

The Trustee's Position

[47] The Trustee's position is that the jurisprudence is somewhat unclear, but the weight of jurisprudence favours granting the proceeds of preference action to secured creditors possessing a fixed, rather than floating charge, a finding that is reinforced by the structure of the *BIA* and the policy considerations underlying the *BIA*. As a result, the proceeds of this preference action ought to be paid to the secured creditor.

The distinction between fixed and floating charges

[48] The Trustee submits that Air Canada avoided a long-standing and obvious distinction between fixed and floating charges. Floating charges have been held to not attach to property that is the subject of a preference action. Conversely, fixed charges do: *Re Yagerphone*. This is because the secured creditor has no title when a charge is floating, yet gains priority where it is specific: *Bank of Montreal v. Innovation Credit Union*, [2010] 3 S.C.R. 3 at para. 46.

[49] Counsel to the Trustee submits that certain courts have interpreted *Re Yagerphone* overbroadly. *Re Yagerphone* concerned a dispute as to the priority as between a liquidator and a debentureholder over the proceeds of a preference action. The court held that the debentureholder's security did not attach to the assets at the time that they were transferred such that, in that case, the secured creditor had no greater claim to those assets than any other creditor.

[50] The Trustee acknowledges that *Re Maybank Foods* goes beyond the ratio in *Re Yagerphone*, yet contends that the overbroad interpretation of *Re Yagerphone* was based on a concession made by the respondent.

[51] The Trustee submits that the weight of case law favours the view that floating charges do not attach to assets recovered pursuant to a preference action; but, fixed charges do. In support of this position, the Trustee notes that: *Re M.C. Bacon Ltd.* (which found that preference action proceeds enure to the benefit of the general body of creditors) concerned a floating, rather than fixed charge; *Re Oasis* is the product of a technical reading of UK legislation; and *S-Marque Inc.* was affirmed for different reasons at the Court of Appeal, namely, that the debenture had not crystallized at the time that the asset was transferred away, such that the secured creditor was not entitled to the proceeds of a preference action. This is the same finding as the court in *Mohawk Sports Equipment* (1972), 17 C.B.R. (N.S.) 115 (Ont. S.C.), at paras. 16-17, which prevented the proceeds of a preference action being claimed by the holder of security that had not crystallized at the time of transfer.

[52] The Trustee points out that this distinction is found throughout the case law. Roy Goode in *Principles of Corporate Insolvency Law,* 3d ed. (London: Sweet & Maxwell, 2005) notes at s. 11-140:

> All these cases assume that what is recovered by the liquidator either was never the property of the chargee or ceased to be so prior to the winding up as the result of the fact that the transfer in question overrode the charge. In such a case the chargee is not entitled to use the avoidance provisions to recover what he had lost or had never had. Where however, the charge was not overridden by the transfer and the property transferred is recovered, the charge continues to attach to the recovered property. [Emphasis added]

[53] The Trustee further submits that in *N.A. Kratzmann Pty. Ltd. (In Liq.) v. Tucker (No. 2)* (1968), 123 C.L.R. 295 (Qld. C.A.), the court noted in obiter at p. 302 that "if specific property, to which a charge, validly created by the bankrupt prior to his bankruptcy, has attached prior to the time of its disposition, is subsequently recovered as a preference the trustee's title will be no higher or better than that of the bankrupt to which he has succeeded". In arriving at this conclusion, the court draws the distinction between specific property, that is subject to a charge, and over which the secured creditor will enjoy priority even if recovered pursuant to a preference, whereas property subject to a floating charge will not be subject to the charge when recovered by the trustee. The court reasoned at pp. 300-01:

> Now in bankruptcy the property of a bankrupt vests in his trustee upon the making of the sequestration order. The property which so vests is, of course, subject, in the hands of the trustee, to any charges validly created in relation to it by the bankrupt prior to the bankruptcy. The position of a secured creditor who has a charge on specific property is, of course, not in question; such property in the hands of the trustee will still remain subject to the charge. But where security has been given by a bankrupt over all of his assets and a payment to a creditor is made by him out of moneys subject to the charge and the payment is, as against the trustee, subsequently declared void as a preference the moneys paid, when recovered, will not be subject to the charge. In such a case it may be said that although the moneys paid as a preference were at the time of payment subject to the charge, the moneys recovered by the trustee are not the same moneys and that they do not, by virtue of payment to the trustee, become moneys of the bankrupt or in any way subject to the charge; when recovered they become the moneys of the trustee and his title to them does not depend upon his succession to any title which the bankrupt had. It was, we think, in this sense that Bennett J meant in the passage that we have first cited that, applying the bankruptcy rules in a winding up,
>
>> "...the sum of money, when recovered by the liquidators by virtue of s 265 of the Companies Act, 1929, and s 44 of the Bankruptcy Act 1914, did not become part of the general assets of Yagerphone Ltd, but was a sum of money received by the liquidators impressed in their hands with a trust for

> those creditors amongst whom they had to distribute the assets of the company."

> The view which we have formed is, we think, borne out by the observations of Russell L.J. concerning the decision in *Yagerphone* case where, in *N.W. Robbie & Co. Ltd. v Witney Warehouse Co. Ltd.* he said:

> "...that a claim by the liquidator for repayment to him of a fraudulent preference was not subject to the debenture-holder's charge; a statutory right in and only in the liquidator to make such a claim could never have been property of the company subject to the charge."

> It is of significance that his Lordship did not think that the decision in any such case could depend upon whether or not the charge had crystallized at the time when the payment to the creditor was made.

> The case would be otherwise, of course, where a preference consists of the disposition of specific and identifiable property subject to a charge validly created in relation thereto by a bankrupt prior to his bankruptcy and where the avoidance of the disposition affects title to such property. That this is so seems to us to be clear as a matter of principle....

> In such a case the result of the avoidance of the disposition is to revest the property in the trustee subject to the charge which the bankrupt had validly created prior to the bankruptcy. [Emphasis added; Footnotes omitted.]

The Structure of the BIA

[54] The Trustee submits that the structure of the *BIA* favours giving the proceeds of a preference action to the secured creditor. Successful preference actions render transactions void as against the trustee as per s. 95 of the *BIA*. The property then vests in the Trustee as per ss. 67 and 71 of the *BIA*. However, the Trustee takes the property subject to the rights of secured creditors pursuant to s. 71, as the Trustee cannot obtain a greater interest in the goods than that enjoyed by the bankrupt: *Giffen (Re)*, [1998] 1 S.C.R. 91 at para. 50; *Lefebvre (Trustee of)*, [2004] 3 S.C.R. 326 at para. 37. Further, the Trustee reasons that division of the estate is subject to the rights of secured creditors pursuant to s. 136 of the *BIA*. As a result, secured creditors retain priority in those assets over which they had perfected security interests.

[55] The Trustee submits that the court in *Re ASI Acoustical Supplies Inc.* (2000), 22 C.B.R.(4th) 174 (B.C.S.C.), noted that the fact that only the trustee can bring a preference action does not disturb the priority rights of creditors to the proceeds of preference actions, stating at para. 20: "[i]n any event the fact that only a Trustee can make a claim alleging *a* fraudulent preference does not change the priority position of a secured creditor.

[56] The Trustee further submits that in *Agricultural Credit Corp. of Saskatchewan v. Featherstone (Trustee of)* (1996), 145 Sask. R. 161 (Q.B.), the court recognized that "[m]onies

owing to a bankrupt, when collected by the trustee continued to be the property of the bankrupt and continue to be subject to the existing security interests. This includes monies realized through the efforts of the trustee" (citations omitted).

[57] The case of *Royal Bank of Canada v. North American Life Assurance Co. et al.*, [1996] 1 S.C.R. 325, cited by the Trustee, is not analogous, but potentially somewhat informative. The court found that s. 91 (dealing with whether settled property falls back into the estate) is subject to s. 67, insofar as s. 67 governs the disposition of assets in the estate. The court bifurcated the inquiry as follows at paras. 44, 45, 46, 48 and 49:

> In reconciling ss. 67(1)(b) and 91 BIA, it is important to remember that the general scheme through which a bankrupt's estate is divided by the trustee among creditors involves two distinct stages. First, the Act provides that an insolvent person "may make an assignment of all his property for the general benefit of his creditors" (s. 49(1)), or that creditors "may file in court a petition for a receiving order against a debtor" (s. 43(1)). At the time of the assignment or receiving order, the trustee in bankruptcy is obligated to take possession of the assets forming the estate of the bankrupt. Thus, by operation of s. 71(2), the bankrupt's property passes to and vests in the trustee…
>
> Once the bankrupt's property has passed into the possession of the trustee, the Act provides the trustee with the power to administer the estate…
>
> During the property-passing stage of bankruptcy, the trustee is empowered under s. 91 of the Act to set aside certain settlements which have reduced the size of the estate. Thus, s. 91 outlines the circumstances in which a settlement will be voidable at the behest of the trustee in bankruptcy. If a settlement is declared void against the trustee, then the settled property reverts back to the bankrupt's estate, and falls into the possession of the trustee in bankruptcy…
>
> …
>
> However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.
>
> Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset, and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s.

> 67(1)(b), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors.

[58] Counsel to the Trustee also references *Re Thorne, Ernst & Whinney Inc. and Gazzola et al.* (1989), 60 D.L.R. (4th) 590 (B.C.C.A.). In determining whether a landlord would be entitled to the proceeds of a preference action the Court of Appeal outlined the scheme of distribution as follows:

> Under the Bankruptcy Act the trustee is charged with gathering the assets of the bankrupt for the benefit of creditors and then distributing those assets pursuant to the scheme of distribution set out in s. 136 of the Act. Section 95 is in that part of the Act that deals with schemes and preferences. Pursuant to s. 95 the trustee is entitled to consider any transaction involving a creditor of the bankrupt and if that transaction occurred within three months prior to the bankruptcy, the trustee can take steps to seek to establish that the transaction be deemed fraudulent and void as against the trustee...
>
> ...
>
> In due course, depending on the claims of secured creditors and those standing in priority to the landlord under the scheme of distribution established by s. 136 of the Act, if there are sufficient assets in the estate the landlord will then receive payment pursuant to the provisions of that section.

[59] The Trustee suggests that this reasoning was endorsed in *Canotek* at p. 256 where the Court of Appeal held that provincial law governs priorities between secured creditors and landlords and the incidence of bankruptcy should not disturb the order of priority present outside bankruptcy.

The policy underlying the BIA

[60] The Trustee submits that the policy underlying the *BIA* favours giving the proceeds of the preference action to the secured creditor, as this interpretation avoids altering priorities and nullifying a secured creditor's claim to collateral simply because a debtor has dealt with those assets preferentially. Otherwise, an insolvent person could defeat secured creditors' rights by granting a preference immediately prior to bankruptcy, with the resulting proceeds flowing to the benefit of unsecured creditors. This would be inconsistent with commercial sense, which the *BIA* seeks to protect.

[61] The Trustee notes that the courts have disallowed attempts to alter priorities through unlawful means. In *Anron Mechanical Ltd. v. L'Abbe Construction (Ontario) Ltd. (Trustee of)* (1991), 5 C.B.R. (3d) 133 at para. 9 (Ont. Gen. Div.), the specific and identifiable property (traceable moneys), that had been impressed with a trust did not lose that quality simply by virtue of being recovered as fraudulent payments:

> If this were not so, a general contractor could then easily divert monies, defeat the rights of the unpaid subcontractors and thwart the whole purpose of the trust section of the Construction Lien Act. If he cannot divert the monies lawfully, as by assignment, then surely he cannot do so unlawfully, as by a fraudulent preference.

[62] The Trustee submits that the proceeds of a preference action ought to be paid in accordance with the hierarchy established in the *BIA*. Unsecured creditors do share rateably under s. 141, yet their claim is expressly subordinate to preferred creditors under s. 136, whose claim is itself subject to the rights of secured creditors.

[63] As a final point, the Trustee submits that this proposed action is not inconsistent with the role of the trustee. The trustee may act for secured creditors pursuant to s. 13.4 of the *BIA* if they have obtained a written opinion from independent legal counsel that the security is valid and enforceable. The Trustee contends that such an opinion was obtained and submitted in the Trustee's report filed on June 30, 2010.

[64] The Trustee also contends that it provided notice to the Superintendent and notified creditors before any action was taken on behalf of the lenders in accordance with the February 2010 Order. Further, it has: provided notice of its independent security opinion; posted this notice; and provided notice that it was bringing a preference action with the expectation that it would pay over the proceeds of that action to the secured creditor, Lloyds. As the Trustee is not receiving any remuneration from secured creditors, it provided no notice that it was receiving remuneration from the secured creditor. Instead, the Trustee is funded by the Foreign Representatives who have been funded to date by monies in the estate.

2. Is the preference motion properly brought within the *CCAA* proceedings, or should it be reconstituted in the bankruptcy proceedings?

[65] Air Canada submits that this preference action is improperly brought. A preference action pursuant to s. 95 of the *BIA* can only be taken in Bankruptcy proceedings or, pursuant to s. 36.1 of the *CCAA*, a monitor (appointed pursuant to s. 11.7) may pursue a preference action where a plan of compromise or arrangement has been proposed. This preference action is not brought in bankruptcy and is not brought pursuant to a plan of arrangement, while the Trustee, as an Information Officer, is unable to bring an action that is reserved to a monitor.

[66] The Trustee submits that this Court dealt with this issue in its February 2010 Order dealt with this issue, with reasons reported at 2010 ONSC 1196. It held that concurrent *BIA* and *CCAA* proceedings are contemplated by Part IV; the preference motion is brought to maximize the Debtor Company's assets; failing to allow concurrent proceedings may preclude the review of what may in fact be a preferential transaction which is contrary to public policy; Air Canada commenced and then abandoned an appeal to this motion; such that, these issues are now *res judicata*. In any event, the Trustee contends that s. 42 of the *CCAA* intends for the *CCAA* to operate in tandem with the *BIA*: *Century Services Inc. v. Canada (Attorney General),*[2010] 3 S.C.R. 379 at para. 76.

3. Should the February 2010 Order be varied to provide that the Trustee has to comply with certain obligations under the *BIA*?

[67] Air Canada notes that the February 2010 Order ought to be varied to ensure that the Trustee complies with its statutory obligations. To date, no proofs of claim have been sought from unsecured creditors, and no meeting of creditors has been convened to either consider the bankrupt's affairs, or hold a vote of the unsecured creditors to affirm the appointment of the Trustee, or substitute another trustee in its place, or to appoint inspectors to give direction to the Trustee. As a result, Air Canada submits that an order directing the Trustee to comply with its obligations under the *BIA* ought to be granted.

ADDITIONAL COMMONWEALTH JURISPRUDENCE

[68] The case of *Willmott v. London Celluloid Co.* (1886), 31 Ch. D. 425 (C.A.), appears to support the position of Air Canada, as the court held at pp. 435-36 that a preference action can only be pursued by a liquidator, while the proceeds are intended for the benefit of the general body of creditors: See also: *Re Quality Camera Co. Pty. Ltd.* (1965), 83 W.N. (Pt 1) 226 (N.S.W.S.C.); and *Bibra Lake Holdings Pty. Ltd. (in liq.) v. Firmadoor Australia Pty. Ltd.* (1992), 7 A.C.S.R. 380 (W.A.S.C.) .

[69] Further support can be found in *Wily (in his capacity as Official Liquidator of Space Made Pty. Ltd. (in liq.)) v. St. George Partnership Banking Ltd.* (1999), 161 A.L.R. 1 (F.C.A.), in which no fraudulent preference was found as the payment was *to* a secured creditor, but the Federal Court of Australia helpfully mentioned three principles applicable to that context. The first being that a debtor is entitled to prefer creditors subject to the *Statute of Elizabeth* 13 Eliz 1 c 5. The second and third principles are detailed at p. 5 as follows:

> ...in insolvency, by which I mean bankruptcy in the case of a natural person and liquidation in the case of a company, legislation provides that, <u>with certain limited exceptions, all unsecured creditors of a bankrupt or an insolvent company are to be treated equally</u>: that is, their liabilities are to be discharged rateably. This principle can be found in bankruptcy statutes dating back to 1542 (see 34 & 35 Hen 8 c 4, s 1 which was concerned with absconding debtors) and in company statutes since the Winding Up Act of 1844 (7 & 8 Vict c 111); see now s 108 of the Bankruptcy Act and s 555 of the Corporations Law.
>
> The third principle is the recognition that certain dispositions made by a debtor who subsequently becomes bankrupt, or by a company that subsequently is wound up, should be recovered and be available to meet the claims of the creditors generally. Section 122 of the Bankruptcy Act is one example of the operation of this principle. Others are to be found in the Bankruptcy Act and the Corporations Law. Many other systems of law have comparable provisions. [Emphasis added.]

[70] In *Wily*, the Court found that if there is no detriment to the unsecured creditors, there can be no preference. Consequently, it would be appear to be the case that if the proceeds of the

preference action were to be co-opted entirely to the benefit of the secured creditors there would be no resulting benefit to the unsecured creditors, thereby precluding bringing a preference action in this situation. The Court in *Wily* stated at pp. 9-10:

> If one asks whether there is less money available for the general body of creditors by reason of the three payments to the bank the answer must be a clear No. The reason is that if the payments had not been made the property available for distribution among creditors would not have increased. The bank would have been entitled to receive payment out of the property in the hands of the liquidator in priority to the other creditors. Any payment out of property that is not available to meet the debts due to the other creditors cannot confer a preference in favour of the payee. In this case then, the other creditors are not any the worse off by reason of the payments to the bank.
>
> ...
>
> the short answer to the liquidator's submission is that provisions such as s 122 are designed to protect the statutory order of priority established by the Bankruptcy Act and, when it applies in a winding up, the statutory order established by the Corporations Law, the statutory order being the right to receive payments pari passu. Section 122 is not concerned to protect the rights of a creditor who is accorded priority by some other legislation, whether State or federal. [Emphasis added.]

(See also *St. Anne Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.* (2005), 255 D.L.R. (4th) 137 (N.B.C.A.), which stands for the proposition that where a secured creditor is paid first there can be no fraudulent preference).

[71] Additionally, McPherson J.A., who expressed concurring reasons in *Starkey v. Deputy Commissioner of Taxation* (1993), 11 A.C.L.C. 558 (Qld. C.A.) stopped short of endorsing the view in *Re Yagerphone* that preference proceeds are impressed in the hands of the liquidators with a trust for unsecured creditors, but did accept that since a secured creditor cannot bring a preference action a trustee should not be allowed to bring a preference action for the sole benefit of a secured creditor. The rationale for preventing secured creditors from sharing in the benefits of a right of action of a trustee was elucidated at pp. 566-67:

> If a secured creditor may not set in motion for his own benefit a procedure for avoiding preferences that exists for the benefit of the unsecured creditors, it is a logical consequence that he should not be able to claim the proceeds of avoiding such a preference when recovered. But it is another matter to say that the liquidator holds those proceeds in trust for the unsecured creditors if what is meant by that is a 'trust' in the full sense of the word, under which the unsecured creditors are equitable owners of the assets in winding up. There is little in recent decisions to support that view of the rights of creditors….

> It is secured creditors who, under the decision in Re Yagerphone Ltd, are denied a share in the proceeds of avoiding preferences in winding up. Unlike the claimant in that case the Commissioner here is not a secured creditor with rights that are enforceable against identified property independently of winding up. [Emphasis added.]

[72] In *Bibra Lake Holdings Pty. Ltd. (in liq.)* v. *Firmadoor Australia Pty. Ltd*. (1992), 10 A.C.L.C. 726 (W.A.S.C.A.), Ipp J., in concurring reasons, held that fraudulent preferences are rendered void as against the liquidator only and the proceeds thereof do not form part of the assets of the company, writing at pp. 731:

> Moneys paid in circumstances which create an undue preference, and which are recoverable under s 451(1), are moneys which are recoverable for the benefit of the creditors and contributories. Such moneys cannot be said to have been the property of the company.
>
> ...
>
> Undue preferences are void as against liquidators, not as against companies. Section 451 confers upon liquidators the sole right to bring proceedings for the recovery of undue preferences. [Emphasis added.]

[73] Since *Re Yagerphone*, the governing UK law has been amended, including, in particular, by the 1985-86 reforms to the *Insolvency Act* (U.K.), 1986, c. 45, with the consequence that the court can now make an order to restore the *status quo ante* as if there had never been a preference. Nevertheless, despite these broadened powers, Millet J. found in *Re M.C. Bacon Ltd. (No. 2)* that *Re Yagerphone* remained applicable at p. 137:

> It was thus established long before 1986 that any sum recovered from a creditor who has been wrongly preferred enures for the benefit of the general body of creditors, not for the benefit of the company or the holder of a floating charge. It does not become part of the company's assets but is received by the liquidator impressed with a trust in favour of those creditors amongst whom he has to distribute the assets of the company: see In re Yagerphone Ltd. [1935] Ch. 392….
>
> In my judgment that is still the law, notwithstanding section 239(3) of the Act of 1986 which empowers the court on finding a voidable preference proved to make such order as it thinks fit for "restoring the position to what it would have been if the company had not given that preference," and section 241(1)(c) which empowers the court to "release or discharge . . . any security given by the company." Those powers are not intended to be exercised so as to enable a debenture holder to obtain the benefit of the proceedings brought by the liquidator.[Emphasis added.]

[74] In *Tolcher v. National Australia Bank Ltd.* (2003) 44 A.C.S.R. 727 (N.S.W.S.C.), Palmer J. found that where a settlement was paid from the estate subject to a charge in the form of a

general security agreement against all assets of the bankrupt (which was characterised as a floating charge, rather than a specific charge), the monies recovered pursuant to a preference action to impugn that settlement are not subject to the charge as the trustee's title is not dependent on the debtor's title, nor can it be in the case of a statutorily-provided right of action.

[75] Somewhat more nuanced support for Air Canada's position can be found in the case of *N.W. Robbie & Co. Ltd. v. Witney Warehouse Co. Ltd.*, [1963] 1 W.L.R. 1324 (C.A.). In that case, which had to do with whether certain debts could be set off rather than whether preference proceeds could accrue to secured creditors, Russell L.J. at p. 1338 rejected the suggestion that *Re Yagerphone* stands for the proposition that a charge cannot attach to assets acquired after the date of crystallization, noting instead that it stands for the proposition that proceeds from a liquidator's right to pursue a preference action, being a liquidator's right, cannot be property of the company subject to the charge. Russell L.J. stated at p. 1338:

> We were referred, in the course of the argument that there is no charge on the post-receivership "future assets," to a phrase in Kerr on Receivers (1963), 13th ed., p. 327, which says the charge would not attach to assets of the company acquired subsequent to the date of crystallisation." The authority cited is In re Yagerphone Ltd. The quotation, divorced from its context, is too wide to be supported, and if so divorced is not justified by that decision, which was that a claim by the liquidator for repayment to him of a fraudulent preference was not subject to the debenture-holder's charge: <u>a statutory right in and only in the liquidator to make such a claim could never have been property of the company subject to the charge</u>. [Emphasis added.]

[76] Further support can be found in the case of *Horn v. York Paper Co. Ltd.* (1991), 5 A.C.S.R. 112 (N.S.W.S.C.), McLellan J. stated at p. 113:

> Where a transaction is avoided as against a liquidator by virtue of the operation of s 451 of the Companies Code (or s 565 of the Corporations Law) the liquidator is a necessary party to proceedings for the recovery of property or money based on such avoidance: see Kent v La Communauté des Soeurs de Charité de la Providence [1903] AC 220 at 226. This is because <u>the transaction is avoided only against the liquidator, and the proceeds of recovery do not necessarily form part of the general assets of the company</u>: see; Re Quality Camera Co Pty Ltd [1965] NSWR 1330; 83 WN (Pt 1) (NSW) 226 and; N A Kratzmann Pty Ltd (in liq) v Tucker (No 2) (1968) 123 CLR 295." [Emphasis added; See also *Bibra Lake*, holding to the same effect.]

[77] In *Bayley v. National Australia Bank Ltd.* (1995), 16 A.C.S.R. 38 (Tas. S.C.), Wright J. was tasked with determining whether funds recovered via a s. 468 action under the Australian *Corporations Law* (which renders dispositions after a winding up void), as well as funds recovered pursuant to a preference action, were subject to a secured creditor's registered floating charge. Wright J. held that the disposition successfully challenged via s. 468 were void for all purposes, as if the payment had never occurred, such that the funds "remained the property of the

company at all relevant times and upon being restored to the company by the liquidator's actions became once more subject to the respondent's floating charge." Wright J. then went on to deal with the question of whether the charge attached to the assets recovered pursuant to the preference action.

[78] Wright J. held that the proceeds of a preference action were for the benefit of the general body of creditors. Wright J. noted that "unlike dispositions affected by s 468(1), preferences coming within the ambit of s 565(1) are not void in any absolute sense but are void as against the liquidator only." It was not necessary for Wright J. to decide whether this would mean that the recovered property could be said to be free and clear of any prior charges, (although it was noted that this may be true of specific property subject to a charge prior to a winding up order) since, in the circumstances of that case, the charge at issue was floating and had not crystallized prior to the liquidation proceedings, such that it did not attach to the funds that were preferred. Instead, those funds were held for the benefit of the general body of creditors. Wright J. concluded:

> ...irrespective of whether for some purposes the recovered funds may be viewed as the "property" of the company being wound up, in the present circumstances they are not property which was or could have been subject to the floating charge at the time that charge crystallised viz, the date upon which liquidation proceedings commenced. Thus, in my opinion, the fund constituted by those moneys is not available to the respondent, but is distributable to the general creditors subject only to the statutory priorities provided by the Corporations Law.

[79] The import of the words "void as against the trustee" was the subject of judicial consideration by the New South Wales Court of Appeal in *National Acceptance Corporation Pty. Ltd. v. Benson & Ors* (1988), 13 A.C.L.R. 1 (N.S.W.S.C.A.), where the Court held that the use of the word "void" in s. 368 of the Companies Code in question (which is similar to s. 468 of the Corporations Law considered in *Bayley*) "...means at least void for all purposes related or incidental to the administration of the winding up of the company" in contrast to the use of the word "void against the trustee" in their *Bankruptcy Act* which is more narrow. On this point, the Court noted that in *Commercial Bank of Australia v. Carruthers* (1964), 6 F.L.R. 247 (F.C.A.), Manning J. "held that the provision did not produce the result that the preferential payment was void against anyone else than the Trustee in Bankruptcy" (emphasis added).

[80] Andrew Keay in "The Effects of a Successful Action by a Liquidator to Avoid a Pre-Liquidation Transaction" (1996) 15 (2) U. Tasm. L. Rev. 236 notes that the Australian bankruptcy regime has changed such that now transactions are no longer said to be "void as against the liquidator" but rather "voidable", and further, recovery vests in the company. He submits at p. 241 that this is a difference without a distinction as in the U.K., where the *Insolvency Act* grants the court broad powers to void fraudulent preferences and restore the position to the *status quo ante*, the courts have continued to apply *Re Yagerphone*. For instance, in *Re M.C. Bacon Ltd. (No. 2)*, *Re Yagerphone* was again endorsed as holding that secured creditors cannot recoup the proceeds of a preference action despite a similar change in wording as Australia's under the U.K. *Insolvency Act*.

[81] In that article, Andrew Keay also notes that *Re Yagerphone* has existed for a long period of time and the government had the option to disturb this judicial practice but did not do so, nor is there evidence in the speeches of Parliament or the Explanatory Memorandum relating to the U.K. Bill that changed the U.K. *Insolvency Act* most recently that a change in judicial practice was contemplated, let alone required.

[82] In addition to Andrew Keay's comments, it should be recalled that s. 95 of the *BIA* is worded more restrictively than the U.K. or Australian preference provisions, rendering fraudulent preferences void against the trustee only.

[83] Andrew Keay does not regard reversing priorities as a problem, so much as a function of the legislative scheme itself. He writes at p. 264, in relation to the reversal of priorities:

> With respect, it appears that this argument overlooks the fact that <u>bankruptcy or liquidation changes everything</u>. While the company continues to exist, it is <u>no longer directed by directors, and it is not run for the benefit of the shareholders. A liquidator acts on behalf of the company and he or she does so for the general body of creditors. Liquidation produces a whole new set of relationships</u> and duties. While a secured creditor may argue that the general creditors are sometimes unjustly enriched by receiving the benefits of a recovery, the rebuttal to that might be that those creditors were prejudiced before liquidation because they did not receive any benefit from the voidable transaction and, in any event, they have suffered losses as a result of the liquidation. [Citations omitted; emphasis added.]

[84] It could be argued that while priorities may well be reversed, as held in the case law, this stems from the role of the trustee. The status of the trustee is tripartite: as a successor in title, as a representative of creditors and finally, and importantly, the trustee has independent status under either federal or provincial law to avoid certain transactions: *Roderick Wood, Bankruptcy and Insolvency Law* (Irwin Law: Toronto, 2009) at pp. 180-81. As such, as Professor Wood notes at p. 82 the principle that a trustee "steps into the shoes" of the bankrupt and acquires the bankrupt's property "warts and all" "does not operate where bankruptcy or other legislation gives the trustee a power to subordinate or avoid certain property rights of third parties. In such cases, the trustee may have a better right to the asset than that held by the bankrupt."

[85] This may constitute an oddity, but the danger of legislative intrusion outweighs any possible unfortunate consequences from the reversal of priorities. While the legislative measure could be an oddity, this would not be anomalous. As Professor Ian Fletcher writes in *The Law of Insolvency*, 4th ed. (London: Sweet & Maxwell, 2009) of the legislative history of British bankruptcy law at pp. 796-97 as follows:

> ...the legislative history is scarcely homogeneous, but is more accurately described as one of almost perpetual accretion and revision amid shifting socio-political influences. It must be submitted that the current position, in terms of policy and principle, is both muddled and confusing. It has resulted from the

> historic lack of a co-ordinated, thought-through approach to our law of credit, security and insolvency, amounting to a persistent failure...to address the essentially interlocking and inter-dependent nature of these vital areas. Consequently, the law has become beset by anomalies and inconsistencies, particularly concerning the operation of the pari passu principle, which are in some instances squarely at odds with commercial and social realities....

[86] However, there is also jurisprudence and commentary in support of the Trustee's position. Doyle C.J., for the majority, in *Fresjac Pty. Ltd. (In Liq, Re Campbell v. Michael Mount PPB)*, (1995), 65 S.A.S.R. 334 (S.A.S.C.), approved of *N.A. Kratzmann.* This was cited by counsel to the Trustee, and reconciled many of the prior Commonwealth cases mentioned above <u>by distinguishing the issue of who possesses the right to bring a preference action, from the issue of the entitlement to the proceeds of such actions</u>. The Court in *Fresjac* was faced with the issue of to whom the proceeds of a s. 468 action by the liquidator, which renders dispositions of property after the commencement of winding up void, accrue. Doyle C.J. noted that the purpose of this section is identical to the purpose underlying preference actions, writing at pp. 341-42 "...both have an eye to the preservation of assets, to the preservation of the *status quo*, and to a later orderly distribution of assets among creditors, <u>subject to the rights of secured creditors</u>" (emphasis added).

[87] In *Fresjac*, Doyle C.J. disagreed with Wright J.'s conclusion in *Bayley* that funds rendered void under s. 468 were at all times the property of the company and became subject to the charge once restored to the company. Doyle C.J. opined that such a characterization is artificial. The funds recovered were not the same funds, and title could not be revested, although this could occur in the case of land or identifiable chattel. Instead, the company would have a claim to recover an equivalent amount of money and its entitlement to the funds of s. 468 is a separate question from the right to impugn a transaction. Wright J.'s reliance upon the fact that a s. 468 action is "void", whereas a preference action is "void as against the liquidator" is, in Doyle C.J.'s view at p. 344, misplaced, as those words "control who may invalidate the preference, and to identify the liquidator as the person with that right, not to decide or determine who is entitled to the proceeds."

[88] In this regard, Doyle C.J.'s analytic framework is noteworthy and worth setting out. It was noted that there is a "need to distinguish between the avoiding effect of the section, the location of the right to recover property disposed of by the company in a transaction avoided by the section, and the entitlement apart from that to rely upon the avoiding effect of the section." Doyle C.J. wrote at p. 344-45:

> The preference cases indicate, in my opinion, that the right to recover property disposed of in a transaction avoided as a preference belongs to a trustee in bankruptcy or liquidator, and property recovered by the exercise of that right will not vest in a secured creditor unless the exercise of the right should cause the revesting of title in specific property subject to a security.
>
> ....

> ...the location of the right to assert voidness does not also determine the location of the right to proceeds recovered after the cancellation of a void transaction.
>
> ...
>
> The mere right to assert or rely upon voidness cannot, as a matter of logic, give rise to a right to recover the property disposed of by the void transaction.
>
> The right to recover property disposed of in a transaction voided by s 468 is not property of the company, and the proceeds of the exercise of the right do not fall to be treated as property of the company caught by pre-existing charges or security but, in my opinion, specific property the subject of a charge or security will, if recovered, again be subject to that charge or security.
>
> On this approach, the right to recover property the disposition of which is avoided by s 468 is not a right to which a charge or security will attach.
>
> In addition, in my opinion money recovered as the result of the avoidance of a preference or because a payment is void is not to be regarded as property of a company to which a charge or security can attach.
>
> These conclusions emphasise the similarity between the preference provisions and s 468, despite the difference of language (void as against the liquidator and void) and despite the difference in the stages before liquidation to which they apply and the differences in the manner in which they operate.
>
> On the other hand they avoid the oddity (as some would see it) of a better result for a secured creditor in respect of a void payment, and the oddity of a remedy conferred for the purposes of a liquidation working for the benefit of the secured creditor. I do not pretend the result which I have reached is obvious, or that the contrary arguments are lacking in substance. [Emphasis added.]

[89] In addition, in *Bank of New Zealand v. Essington Developments Pty. Ltd. & Ors,* (1991), 5 A.S.C.R. 86 (N.S.W.S.C.), it was held that a secured creditor has the benefit of a liquidator's recovery of assets *in specie* over which a secured creditor has a charge. McLelland J. wrote at pp. 89-90:

> The position of a creditor with a charge over all the assets of a company and a receiver appointed by that creditor appears to be that if as a result of the avoidance of the transactions property is recovered in specie, then that property is included in the assets of the company which are subject to the charge and which therefore are available to the receiver for the benefit of the secured creditor. On the other hand, moneys which are recovered merely because payments have been avoided as preferences do not come within the general assets of the company available for the secured creditor and the receiver, but may be utilised by the

> liquidator for the purposes of the liquidation, and in particular for the benefit of unsecured creditors. [Emphasis added.]

[90] In *Re Shapland Inc.*, [2000] B.C.C. 106 (Ch.D.), the court appears to be of the view that a trustee can pursue a preference action for which the benefits will accrue to the secured creditor (although in that case unsecured creditors would actually benefit as well) in stating at p. 110:

> Mr Goodison submitted that I should make no such order, on the ground that it would benefit only the bank, which was a secured creditor, and the power under s. 239 was conferred to benefit unsecured creditors, not secured creditors. I am very doubtful that this submission would be correct, even if the bank's claim were fully secured. However, on the facts of this case, it is not: the indebtedness of Shapland to the bank greatly exceeds the value of the property, so that a large part of the bank's claim is unsecured. Furthermore, the bank's security has been challenged, so that it would be wrong for me to proceed on the assumption that it is unquestionably a secured creditor. Lastly, the bank and the liquidator, who is financed in these proceedings by the bank, have agreed that after payment of the costs and expenses of the winding up, ten per cent of the proceeds of sale of the property are to go to unsecured creditors. Accordingly, the setting aside of the charge will benefit unsecured creditors, and the factual basis for Mr Goodison's submission is not made out. [Emphasis added.]

[91] In *The Law of Insolvency,* Professor Fletcher would appear to provide some support for the Trustee's position, in claiming that the purpose of a preference action is to restore the situation to the *status quo ante*, and that the court may make such order to achieve that purpose as it sees fit, such that the idea that the proceeds of the action are not subject to the rights of secured creditors would be put into doubt. The new broad power to strike down fraudulent preferences, declare them void, and make any order that is just, was introduced in the 1985-86 reforms to the *Insolvency Act* in England. However, as previously noted, this form of relief is not replicated in the *BIA.*

[92] Professor Fletcher also notes that the trustee's title is subject to various equities. He states at p. 246 that in the individual debtor context, whereby preferences can be declared void to restore the *status quo ante* (much like in the company debtor context), "the trustee is essentially a *successor* to such title as the bankrupt actually had at the time of his adjudication, including any limitation or imperfections in that title, and can enjoy no better position in relation to the property than did the bankrupt himself formerly" (emphasis in original; citations omitted).relying on *Johnson v. Smiley* (1853), 51 E.R. 1019 (Ch.D.); *Mapleback, Re* (1876), 4 Ch.D. 150 (C.A.); *Garrud, Re* (1880), 16 Ch.D. 552 (C.A.), per James L.J.; *Beeston, Re*, [1899] 1 Q.B. 626 (C.A.) at p. 610 per Lindley M.R.

[93] More forcefully, he states at p. 247 "[a]ll such rights as might have been exercised by third parties prior to bankruptcy may be exercised after adjudication, and no action by the trustee can be effective to gain priority over such vested rights: unless the property can be disclaimed, the rights remain undisturbed" relying on *Anderson, Re,* [1911] 1 K.B. 896 (Ch.D.).

[94] The Trustee's position is supported by additional academic literature. Rebecca Parry in "The Destination of Proceeds of Insolvency Litigation" (2002) 23(2) Comp. Law. 49, is concerned about the reversal of priorities that occurs where secured creditors cannot recoup the benefits of a preference action brought by a trustee under English law, especially given the anomaly that many preference actions could be pursued as misfeasance claims that do not give rise to the same result. This is because in the misfeasance context, amounts recovered are recoverable by secured creditors: See *Re Produce Marketing Consortium Ltd. (No. 2)*, [1989] B.C.L.C. 520 (Ch.D.); *Re Asiatic Electric Co. Pty. Ltd. (in liq.)* (1970), 92 WN (N.S.W.S.C.) at pp. 362-64. The remainder of her article deals primarily with the particular wording of the U.K. law.

[95] Lee Eng Beng in "The Avoidance Provisions of the Bankruptcy Act 1995 and their Application to Companies" (1995) Sing J. Legal Stud. 597 notes that even with respect to preferential dispositions of specific property, the right to recover the assets vests in the liquidator such that a chargee cannot be entitled to the fruits of that recovery, especially since the process itself is intended for the benefit of unsecured creditors rather than secured creditors, as the latter exist outside of the bankruptcy regime. Nonetheless, Lee Eng Beng acknowledges the rights of secured creditors to trace monies at p. 632:

> While the property which has been disposed of may have been validly charged, the fact of it being wrongfully disposed of gives rise to the chargee's right under the general law to trace against the disponee and nothing more. The rights and remedies of secured creditors are conferred by the general law and they are not to be reinforced by statutory provisions designed to provide an equitable debt collection system for unsecured creditors. Of course, <u>any right of a secured creditor which exists at general law would override any right of the liquidator or trustee in bankruptcy to proceed against the assets by virtue of any statutory provision, as the latter cannot be in a better position than the company or bankrupt, as the case may be. It follows that if a secured creditor has the right to recover the assets transferred away in breach of his security rights and the liquidator or trustee in bankruptcy recovers the assets pursuant to the statutory provisions, any recovery by the latter must be held for the benefit of the former in so far as they would have been recoverable by the secured creditor</u>. [Emphasis added.]

[96] Gerard McCormack in "Swelling Corporate Assets: Changing What is on the Menu" (2006) 6 J. Corp. L. Stud. 39 advances five reasons at pp. 56-57 for doubting the line of cases affirming *Re Yagerphone,* two of which are not peculiar to the English context:

1. *Re Yagerphone g*ives rise to the unprincipled anomaly that certain preference actions can also constitute misfeasance actions, yet only in the latter case are payments subject to the rights of secured creditors.

2. Too much emphasis is placed on the liquidator's independent status which is merely an administrative convenience. He states that "the fact that proceedings are brought

> by the liquidator or administrator might be seen as largely procedural. The liquidator or administrator are not acting in their own individual rights but rather by virtue of the office they hold in relation to a particular company. In a broad sense the proceedings are brought on behalf of the company in question." (Citations omitted; emphasis added.)

[97] Nancy Sanborn supports this interpretation, admittedly in the U.K. context. She writes in "Avoidance Recoveries in Bankruptcy: For the Benefit of the Estate or the Secured Creditor?" (1990) 90 Colum. L. Rev. 1376 at 1399-1400 supports the above authors writing:

> The proposition that all amounts recovered must be available for administrative expenses and unsecured claims and interests, without recognition of any security interest in the recovery because avoidance powers are exercised for the benefit of the estate, fails to distinguish between two separate functions of the bankruptcy process. One function is to maximize the value of the pool of assets to which all claimants and interest holders will look for payment. Transfers are avoided, then preserved or recovered, to serve this function. The estate benefits from the exercise of these powers even if a creditor possesses a security or beneficial interest in the property.
>
> A separate issue, how entitlements to the accumulated pool of assets should be allocated, should be resolved primarily by nonbankruptcy law. A secured creditor should be afforded the same protections that would have been available to it under state law if no bankruptcy had ensued. [Citations omitted].

ANALYSIS

[98] The foregoing review of jurisprudence confirms the submission of the Trustee, namely, that the jurisprudence is unclear and inconsistent. However, it seems to me that, with a consistent application of (i) insolvency principles; and (ii) personal property security principles, the jurisprudence can be reconciled.

[99] Both the Trustee and Air Canada make extensive reference to the English decision of *Re Yagerphone*. *Re Yagerphone* has been cited by some Canadian courts to stand for the proposition that secured creditors have no claim to the proceeds of a preference action.

[100] Counsel to the Trustee submits that, read properly, the holding in *Re Yagerphone* is, in fact, narrower. I agree.

[101] In *Re Yagerphone*, the court considered a priority dispute between the liquidator and a debenture holder over the proceeds of a preference action. In reaching its conclusion, the court focussed on the nature of the debenture holder's security. The court observed that at the time the preference was given, the debenture holder's charge was still floating and therefore had not attached to the assets of *Re Yagerphone*:

> On January 17, 1933, the creditor to whom the money was paid and from whom the money was recovered was a creditor Yagerphone, Ld. When Yagerphone, Ld. paid to the creditor the 240l 11 s. 2 d. that sum, in my judgment ceased to be the property of Yagerphone, Ld. The payment to that creditor could not have been attacked or impeached, unless within three months from the date of payment, the liquidation of Yagerphone, Ld. had begun, and, in my judgment, at the date when the security contained in the debenture crystallised, the sum of 240l 11 s. 2 d. was not the property of Yagerphone, Ld....

[102] As counsel to the Trustee points out, at the time the preference was given by the debtor, the assets transferred were not subject to the debenture holder's security and when the debenture holder's security was crystallized, the debtor's estate did not extend to the assets that had already been transferred on account of the preference. On this basis, the court found that the debenture holder's security did not attach to those assets when they were eventually returned to the estate.

[103] Counsel to the Trustee goes on to submit that, from a policy perspective, the holding in *Re Yagerphone* is not unreasonable, as, in particular, because the debenture holder's security was floating it had no claim to the assets. When these assets were brought back into the estate, the court's decision that all creditors share in those assets is consistent with the fact that the "fraud" occurred against all of the debtor's creditors.

[104] In *Mohawk Sports Equipment* Houlden J. (as he then was) applied *Re Yagerphone* in circumstances which involved a floating charge that had not crystallized. The court held that the proceeds "cannot be claimed by the debenture holder as it was not part of the property of the debtor company at the time the security was crystallized".

[105] Counsel to the Trustee further submits that in subsequent cases, the holding in *Re Yagerphone* has been summarized more broadly to apply to secured creditors generally. Reference was made to *Re Maybank* where at paragraph 2 the court stated:

> It is conceded by the respondent that the monies recoverable by a trustee from a creditor who has been preferred do not become part of the general assets of the bankrupt estate subject to the claims of secured creditors but rather are received by the trustee subject to a trust in favour of the creditors represented by the trustee: Re Yagerphone, Ltd. (1935) 1 Ch. 392 (Ch. D.).

[106] It is the Trustee's submission that the concession in *Maybank Foods* goes beyond the ratio in *Re Yagerphone* as the reasoning in *Re Yagerphone* does not necessarily follow the circumstances in which a secured creditor holds a fixed charge over the assets of the debtor. Counsel goes on to submit that where the secured creditor holds a fixed charge, the policy considerations are different. Unlike a floating charge, a fixed charge gives the secured creditor a property interest in the debtor's collateral that attaches at the time the charge is granted. Reference was also made to the recent decision of the Supreme Court of Canada in *Bank of Montreal v. Innovation Credit Union*, [2010] 3 S.C.R. 3, which, in turn referred to the case of

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, in which the distinction between a fixed and a floating charge was explained at para. 46:

> The critical significance of the characterization of an interest as to being fixed or floating, of course, is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral….However, if a security interest can be characterized as a fixed and specific charge, it will take priority over a subsequent statutory lien or charge; in such a case, all that the lien can attach to is the debtor's equity of redemption in the collateral….

[107] The distinction between a fixed and floating charge and considering whether the charge has crystallized is not a new concept. The issue was also live in *Maybank Foods*.

[108] In *Maybank Foods*, the respondent was a secured creditor of the estate. The estate had been engaged in three actions in Nova Scotia referred to as the Food Group Litigation, the Provisioners Litigation, and the Seaway Litigation, respectively. The trustee requested orders that the proceeds from such litigation were the property of the estate free and clear of the secured claim of the respondent.

[109] At para. 2 of the decision, Saunders J. referenced the Provisioners Litigation and the Seaway Litigation as involving claims against preferred creditors. It was in this context that the concession was made by the respondent that the monies recoverable by the trustee would not form part of the general assets of the estate.

[110] However, at para. 3 of the decision, Saunders J. addresses the claim against Food Group:

> The claim against Food Group was in respect of an account receivable. Food Group unsuccessfully defended the claim of the trustee on the basis of set-off. It was held that in the circumstances there was no mutuality, because at the time the bankrupt became indebted to Food Group, the receivable was being claimed by another secured creditor, Citibank under a crystallized charge. Upon the bankruptcy, the receivable of Food Group vested in the trustee subject to the secured claim of the predecessor in title of the respondent. Accordingly, the respondent may assert a right to the proceeds of the Food Group Litigation unless defeated by some principle or a statute. The situation is different from the other two actions where the respondent had no charge on the property being claimed by the trustee and the trustee was asserting a statutory right unavailable to the respondent. Here, the respondent has a charge on the receivable being claimed from Food Group. The trustee argued the respondent could not have successfully claimed against Food Group because Food Group would have been entitled to a set-off which in its submission made the situation analogous to the other two actions. I cannot accept that argument. The action of Citibank in crystallizing its charge foreclosed the Food Group from successfully asserting the set-off defence.

> In my opinion, the respondent who also had a charge against that asset could assert along with the trustee that set-off is not available notwithstanding the charge to the respondent may not have crystallized before the claim of Food Group against the bankrupt arose. There is, in my opinion, no basis in statute or principle preventing the respondent from claiming the net proceeds of the Food Group action.

[111] Justice Saunders endorsed the record as follows:

> Net proceeds (after deducting of costs and disbursements) of Food Group Litigation are subject to the secured claim of the respondent. Proceeds of the Provisioners Litigation and the Seaway Litigation are free and clear of such claim. The costs and disbursements with respect to the Provisioners Litigation and the Seaway Litigation should not be paid out of the assets of the estate that are subject to the secured claim of the respondent unless that claim has been satisfied in full. Costs to the trustee and to the respondent out of the estate on a solicitor-and-client basis.

[112] The distinction between a fixed charge and a floating charge was also the subject of the decision of the Nova Scotia Court of Appeal in *S-Marque*.

[113] In *S-Marque*, the Nova Scotia Supreme Court found that the proceeds of a preference action will inure to the benefit of the unsecured creditors for two reasons:

(a) first, the court relied on the decision *In Re Yagerphone*; and

(b) second, the court cited a number of decisions to the effect that only a trustee can void a preference action.

[114] The decision was affirmed on appeal but the Court of Appeal decided the priority issue for different reasons. The Court of Appeal focussed on the fact that the secured creditor held a floating charge and that the preference occurred "before the debenture crystallized". As counsel to the Trustee reasoned, as in *Mohawk Sports Equipment*, the court determined the matter on the basis that the secured creditor "never had a fixed charge on these assets when the debenture crystallized".

[115] Counsel to the Trustee submits that the court considered the priority rights of secured creditors to proceeds from a preference action and that in the 2000 British Columbia Supreme Court decision, in *Re ASI Acoustical Supplies Inc.*, the court squarely addressed the fact that only a trustee can make a claim for fraudulent preference under the *BIA*. Counsel to the Trustee submits that the court noted that, while the *BIA* gave that right to the trustee, it did not change the priority rights of creditors to the proceeds.

[116] In my view, the *ASI Acoustical* decision does not stand for the proposition put forth by counsel to the Trustee.

[117] The matter came before the court by way of an appeal by the trustee for *ASI Acoustical* from a decision of the Registrar, refusing to approve the payment to the trustee of its fees and disbursements. The Bank of Nova Scotia took security in the form of a general security and assignment of accounts receivable. The security was ultimately assigned to Mr. Willsie.

[118] Prior to bankruptcy, ASI bought materials from Winrock and owed Winrock around $56,000. Winrock then bought a substantial amount of ASI inventory. Winrock owed ASI approximately $45,000 for the inventory, but resisted payment claiming a right of "contra account". The trustee wrote to Winrock noting that a subsidiary company Hubcity owed part of the money to ASI and therefore the claim of "contra account" could not be made out. The trustee also alleged that the Winrock claim was a preference on the basis that the sole reason Winrock bought the inventory from ASI was to reduce its claim in the bankruptcy.

[119] Ultimately, the matter was settled. The position of the trustee was that the matter was settled on the basis that the purchase of inventory was a fraudulent preference under the provisions of the *BIA* and because this remedy is not available to the secured creditor, the money obtained from the settlement was an asset of the estate.

[120] The registrar held that there was no dispute that the account receivable from Winrock was covered by the security interest, and the fact that there were negotiations and the claim was eventually paid because the trustee alleged that there was a fraudulent preference, did not convert the asset into some other kind of asset not subject to the security interest. The registrar therefore found that the proceeds of the claim should not appear on the statement of receipts and disbursements as an amount available to the estate.

[121] At the hearing before Martinson J. on appeal, the creditors disputed the characterization of the transaction as a fraudulent preference. The only evidence before the registrar was that there had been an allegation of a fraudulent preference by the trustee, that no claim had been commenced by the trustee and that there was a negotiated settlement with Winrock.

[122] Justice Martinson concluded that it was open to the Registrar, based on the material before her, to conclude that the settlement monies were accounts receivable and subject to the security interest. It was in this context that the reference which was cited by counsel to the Trustee: "[i]n any event, the fact that only a trustee can make a claim alleging a fraudulent preference does not change the priority position of a secured creditor" was made.

[123] From my reading of *ASI Acoustical*, the significant point is that the court recognized that in the circumstances of that case, the fact that a fraudulent preference action had commenced, did not preclude the ability of a secured creditor to realize on security or to follow the proceeds from security in accordance with the specific security agreement.

[124] This position is again recognized in *Agricultural Credit Corp. of Saskatchewan*, where the court noted:

> Monies owing to a bankrupt, when collected by the trustee continue to be the property of the bankrupt and continue to be subject to the existing security

> interests. This includes monies realized through the efforts of the Trustee. (Holy Rosary Parish (Thorold) Credit Union Limited v. The Premier Trust Company, (1965), S.C.R. 503); Re Stadnik (Bankrupt) (1991), 90 Sask. R. 12 (QB); Re Moore (Bankrupt) (1989), 79 Sask. R. 63 (C.A.).

[125] Counsel to the Trustee submits that the conclusion of the court in *Re ASI Acoustical* is consistent with a long line of jurisprudence that holds that monies recovered by the trustee are subject to the rights of secured creditors.

[126] It seems to me that this statement is too broad. In my view, the focus has to be on whether or not the secured creditor had rights in the collateral at the time of the suspect transaction.

[127] In *Re Yagerphone,* the debenture holder's security was floating and the debenture holder had no claim to the assets recovered by the liquidation.

[128] In *Mohawk*, the floating charge had not crystallized.

[129] In *Maybank*, the court recognized that the secured creditor could have a claim, under a crystallized charge.

[130] In *S-Marque*, the secured creditor held a floating charge and the preference "occurred before the debenture crystallized".

[131] In *ASI Acoustical*, the court concluded that it was open to the registrar to conclude that the settlement monies were accounts receivable and subject to the security interest.

[132] In *Agricultural Credit Corp.*, monies owing to a bankrupt on account of shares in the Saskatchewan Wheat Pool, when collected by the trustee continued to be the property of the bankrupt and subject to the existing security interest. It was not a preference action.

[133] *Re Yagerphone* arose in the context of a regime dominated by fixed and floating charge debentures. In Ontario, since the enactment of the *Personal Property Security Act*, R.S.O. 1990, c. P-10 ("*PPSA*"), security agreement do not generally refer to fixed and floating security, but the concepts of fixed and floating charges is still recognized. (See *Bank of Montreal v. Innovation Credit Union, supra*.)

[134] Under the *PPSA* regime, the issue that has to be analyzed is whether or not the debtor had the ability to transfer the collateral charged by the security agreement to a third party free and clear of the security interest.

[135] It seems to me that, if the debtor was in a position to transfer the collateral free and clear of the interest of the secured party, the *Re Yagerphone* analysis and conclusions remains valid. Conversely, if the collateral remains subject to the claims of a secured party, the secured party may retain the ability to enforce its rights as against the collateral or any proceeds arising from the collateral.

[136] It seems to me that this outcome is consistent with the views of Doyle C.J. in *Fresjac Pty. Ltd. (In liq), Re, supra*, which are summarized at [86] – [88] above. I am in agreement with the views and conclusions set out by Doyle C.J. in that case. The outcome is also consistent with the approach of Lee Eng Beng in the emphasized part of [95]. The outcome is also consistent with the approach outlined by Gerald McCormack at [96] and by Nancy Sanborn at [97].

[137] Section 95 of the *BIA* makes it clear that a transaction that is declared to be a preference is void as against the trustee. This, in my view, makes it clear that it is the trustee that has the cause of action to declare a preference to be void. But, as stated in *Fresjac Pty. Ltd. (In Lq.), Re supra*, the issue of who possesses the right to bring a preference action does not necessarily determine entitlement to proceeds.

[138] The s. 95 cause of action remedy is designed to ensure that there is *pari pasu* treatment as between unsecured creditors. The recipient of a preferential transfer is not entitled to keep the preferential proceeds if the elements of s. 95 are proven. The subject of the preference is returned to the estate but subject to the rights of secured creditors. In the words of Lee Eng Beng at [95] above, "…if a secured creditor has the right to recover the assets transferred away in breach of his security rights and the liquidator or trustee in bankruptcy recovers the assets pursuant to the statutory provisions, any recovery by the latter must be held for the benefit of the former in so far as they would have been recoverable by the secured creditor."

[139] Ultimately, distributions of the bankrupt's estate are made pursuant to s. 136 of the *BIA* and again are preferenced with the *proviso*: "subject to the rights of secured creditors".

[140] The ability of a trustee to recover monies for the estate for the benefit of creditors is, in its entirety, subject to the rights of secured creditors. If a secured creditor still has rights in the collateral, there is nothing in the fraudulent preference remedy regime that would appear to preclude the secured creditor from exercising its rights. To the extent that the secured party has rights in the collateral and has a remedy against the collateral in the hands of the third party, such remedy and the resulting priority is not, in my view, altered because a trustee embarks on a preference action.

[141] This analysis is consistent, in my view, with the structure of the *BIA*. The *BIA* respects the rights of secured creditors. Over time, modifications have been made to the statute to harmonize it with statutes providing for remedies to secured creditors. But, the priority regime has not changed. If the secured creditor has rights to the collateral, the secured creditor takes priority over the claims of unsecured creditors.

[142] Counsel to the Trustee also referenced *Re Thorne Ernst & Whinney and Gazzola et al.* in connection with an explanation as to the interplay of the preference provisions and priority distributions. The case involved a dispute between a landlord of a bankrupt tenant and the trustee. The landlord appealed from a judgment holding that a distress levied by the landlord was fraudulent and void as a preference as against the lessee's trustee.

[143] Justice Hickson opined that under the *BIA*, the trustee is charged with gathering the assets of the bankrupt for the benefit of the creditors and then distributing those assets pursuant to the

scheme of distribution set out in s. 136 of the Act. In the context of a preference, the trustee can bring an application under s. 95 and, if successful, the landlord would be required to pay over the proceeds of the transaction to the trustee. Hickson J.A. went on to state that "in due course, depending on the claims of secured creditors and those standing in priority to the landlord under the scheme of distribution established by s. 136 of the Act, if there are sufficient assets in the estate the landlord will then receive payment pursuant to the provisions of that section".

[144] Counsel to the Trustee went on to submit that in a similar case involving a preference action against the landlord, the Court of Appeal for Ontario considered and followed *Gazzola* and, citing concurring reasons in *Gazzola*, the court noted that the preference proceeds are to be distributed in accordance with the scheme in s. 136, which is subject to the rights of secured creditors: See *Canadian Imperial Bank of Commerce v. Canotek Development Corp., supra*.

[145] In reviewing both the *Gazzola* decision and the *Canotek* decision, I do not see any finding that it is inconsistent with the views that I have expressed above. Simply put, a trustee can pursue a preference action. If the trustee recovers proceeds, they are to be distributed in accordance with s. 136. The reference "which is subject to the rights of secured creditors" restates the position that if secured creditors have rights in the collateral, such priority is to be respected by the trustee.

[146] I do not read into the words "subject to the rights of secured creditors" as putting the position of the secured creditor at an even higher level. Specifically, I do not interpret this phrase as enabling a secured party to step into and occupy the position of the trustee. The trustee's rights are established under the *BIA*. The rights of a secured creditor are provided for in security agreements and the *PPSA* and the process by which realization takes place is provided for in court orders, security agreements, the *PPSA*, and in this case, the *BIA*.

[147] Counsel to the Trustee also raises a number of policy considerations underlying the *BIA* in support of its position. Specifically, counsel submits that the proposition that unsecured creditors have priority to the proceeds of a preference action may lead to anomalous results insofar as an insolvent person could defeat the rights of a secured creditor by simply granting a preference immediately prior to assigning itself into bankruptcy. The consequences of reversing the preference would be such that the proceeds would benefit unsecured creditors. Counsel submits that it cannot be correct that by dealing with collateral in a preferential fashion, an insolvent person can alter bankruptcy priorities and nullify a secured creditor's exclusive claim to that collateral.

[148] This theme has also been recognized in certain academic writings. For example, Professor Fletcher, in *The Law of Insolvency*, provides support for the trustee's position. In stating that the purpose of a preference action is to restore the situation to the *status quo ante*, he puts into doubt the notion that the proceeds of the action are not subject to the rights of secured creditors.

[149] The answer to the concern posed by counsel to the Trustee is not easy. To some extent, secured creditors are protected by an ability to take action for recovery as a result of the

provisions of their particular security agreement. The *BIA* does not extinguish the rights of secured creditors to follow collateral if circumstances are such that it is lawful and appropriate to follow the collateral.

[150] If, for example, the transaction is out of the ordinary course of business or, if the recipient is on notice that it is an improper transaction, the secured party may very well have rights to recover the collateral or proceeds. However, if the debtor was in a position to lawfully dispose of the collateral free and clear of the security interest, and has done so, it could very well be that the only recovery for the secured creditor would be to participate in a distribution to unsecured creditors under s. 136 of the *BIA*. This, of course, would happen if the secured creditor declares part of its indebtedness to be unsecured. This outcome is a consequence, however, not of some realignment or readjustment of priorities under the *BIA*, but rather, it is a consequence of a factual scenario under which the debtor could lawfully transfer the collateral. This outcome is, in my view, consistent with the *Yagerphone* analysis.

[151] In the final analysis, I have concluded that:

(i) a trustee in bankruptcy (or a section 38 *BIA* assignee) is the only party that can bring a preference action in bankruptcy proceedings;

(ii) the proceeds recovered by the trustee are brought into the estate;

(iii) distribution under the *BIA* is subject to the rights of recovery of secured creditors;

(iv) the bringing of a preference action and the recovery of proceeds does not preclude secured creditors from pursuing whatever remedies they may have under the provisions of the security agreement and relevant statutes.

[152] There is also nothing, in my view, that would preclude a secured creditor from pursuing appropriate remedies in conjunction with the trustee pursuing its remedies. For example, at the outset of a proceeding, when investigations may not have been complete, it may be difficult to pinpoint a specific remedy. This would likely require a cooperative effort as between secured creditors and a trustee and some sort of formal agreement to recognize how matters are to be prosecuted and how proceeds of litigation are to be allocated. An example of such an arrangement is referenced in *Re Sharpland Inc., supra*.

[153] Overall, the objective of the preference action is to void preferential transactions for the benefit of creditors, while recognizing legitimate security interests.

[154] Air Canada has taken issue with the role of the Trustee in this case and makes specific reference to s. 13.4 of the *BIA* which explicitly contemplates that a trustee may act for or assist a secured creditor in certain circumstances. These submissions from counsel to Air Canada have been put forth in an effort to persuade the court that the Trustee should, in this case, be following the requirements of the *BIA*. Counsel to Air Canada also questions whether this court has the jurisdiction to allow a trustee to pursue a *BIA* preference action within the context of a *CCAA* proceeding.

[155] The *CCAA* does address the issue of preferences and transfers under value. Section 36.1(1) provides that the preferential provisions of the *BIA* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement, unless the compromise or arrangement provides otherwise.

[156] In this case, there is no compromise or arrangement that has been proposed to creditors, nor is it expected to flow from the type of proceeding that is currently before the court.

[157] This leads to a straight-forward conclusion, in my view, that the preference action should proceed under the *BIA*.

[158] However, this conclusion leads to the subject of coordination of proceedings under the *CCAA* and the *BIA*. This subject was addressed by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379.

[159] In *Century Services*, the majority noted that the *CCAA* is a flexible statute designed to preserve the value of a business as a going-concern through a court supervised re-organization. In that case, a re-organization under the *CCAA* had failed and the Crown brought a motion for payment of its statutory deemed trusts pursuant to s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15. Brenner C.J. denied the motion and allowed the assignment of the company into bankruptcy. The British Columbia Court of Appeal had found that while the Crown could not seek repayment of GST source deductions in priority to other claims during a *CCAA* or *BIA* proceeding, it could do so after the reorganization efforts had failed and prior to the commencement of a *BIA* proceeding, such that the trial judge was bound to allow the motion and apply the provisions of the *Excise Tax Act*. The majority of the Supreme Court rejected this reasoning noting at para. 47 that an interpretation giving the *Excise Tax Act* priority over the *CCAA* would result in a "strange asymmetry" which would encourage statute shopping.

[160] Justice Deschamps, writing for the majority, rejected the contention that Brenner C.J. had exceeded his authority by continuing the stay of the Crown's GST claims while temporarily lifting the general stay to allow for the assignment in bankruptcy. Section 11 of the *CCAA*, subject to certain restrictions, provides the court with broad authority to make an order that is appropriate in the circumstances – a power which is not subject to explicit temporal limitations and is buttressed by the court's inherent jurisdiction, as well as s. 20 (now s. 42) of the *CCAA*.

[161] At para. 76 of *Century Services,* it is noted that the *CCAA*'s objectives permit for a bridge between the *CCAA* and *BIA* proceedings. As recently noted by the Supreme Court of Canada regarding section 20 of the *CCAA*:

> That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament … that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. <u>Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate in tandem with other insolvency legislation, such as the *BIA*</u>.

[162] Further, Deschamps J. wrote at para. 78:

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

[163] This passage from *Century Services* clearly states, in my view, that the courts should be taking a pragmatic approach in determining issues which arise in proceedings where the *CCAA* overlaps with the *BIA*. This is one such proceeding. The overall objective should be to create a system under which the court can review transactions entered into between the debtor and creditors in the period just prior to formal insolvency proceedings. The policy should be to ensure that there is an appropriate review mechanism in place to challenge transactions that are not consistent with ordinary course activities and have had the effect of unfairly transferring value to a third party during the review period. It seems to me that the *CCAA* can operate in tandem with the *BIA* in an effort to return matters to the *status quo*.

[164] Applying the principles of *Century Services*, it seems to me, that the preference motion should proceed in the *BIA* proceedings. However, in my view, this can be accomplished by a procedural order in *CCAA* proceedings which transitions the matter to the *BIA*. There is no necessity or principled reasons to require the trustee to start from square one. This outcome is consistent with my endorsement of February 24, 2010 at paras. 29 – 32.

[165] It is also appropriate, at this time, and in view of the contemplated continuation of the preference motion, that proceedings be regularized with the Trustee taking the necessary steps to comply with its obligation under the *BIA*.

DISPOSITION

[166] In the result, a declaration shall issue to incorporate the conclusions set out at [151] which, for ease of reference, is repeated:

(i) a trustee in bankruptcy (or a Section 38 *BIA* assignee) is the only party that can bring a preference action in bankruptcy proceedings;

(ii) the proceeds recovered by the trustee are brought into the estate;

(iii) distribution under the *BIA* is subject to the rights of recovery of secured creditors;

(iv) the bringing of a preference action and the recovery of proceeds does not preclude secured creditors from pursuing whatever remedies they may have under the provisions of the security agreement and relevant statutes.

[167] I have also concluded that, if it is determined that the transaction is void as being a preference, at that point, the appropriate determination can be made as to which party, be it either the trustee or the secured party, is entitled to the proceeds. This determination should be based on whether the secured party has the right to recover the assets transferred, or any proceeds resulting from such transfer. In my view, it is premature to comment on this issue, in the circumstances of this case, as the factual record has not been fully determined.

[168] In the context of this particular case, if it is the intention of the secured party to work in conjunction with the Trustee and for the Trustee to utilize the preference provisions, the appropriate notifications should be provided in accordance with s. 13.4 of the *BIA* and the Trustee should move forward to fulfill its statutory obligations in the conduct of its administration.

[169] To the extent that further directions are required in respect of this endorsement, the parties may contact the Commercial List Office to set up a 9:30 a.m. appointment.

MORAWETZ J.

Date: August 18, 2011

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.

Fotios Korkontzilas, Panagiota Korkontzilas et Olympia Town Real Estate Limited *Appelants*

c.

Nick Soulos *Intimé*

RÉPERTORIÉ: SOULOS *c.* KORKONTZILAS

N^{o} du greffe: 24949.

1997: 18 février; 1997: 22 mai.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Fiducies et fiduciaires — Fiducie par interprétation — Mandat — Obligations fiduciaires — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

Immeuble — Réparation — Fiducie par interprétation — Mandat — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

K, un courtier en immeubles, a entamé des négociations au nom de S, son client, en vue d'acheter un immeuble commercial. Le vendeur a rejeté l'offre et présenté une contre-offre. K a rejeté la contre-offre, mais il est revenu à la charge. Le vendeur a informé K du montant qu'il accepterait, mais au lieu de transmettre cette information à S, K a pris des dispositions pour que son épouse achète l'immeuble. L'immeuble a ensuite été

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

transféré à K et à son épouse, à titre de copropriétaires. Alléguant un manquement à une obligation fiduciaire donnant lieu à une fiducie par interprétation, S a intenté une action contre K afin d'obtenir que l'immeuble lui soit transféré. Il a soutenu que l'immeuble avait une valeur particulière pour lui parce que son banquier en était le locataire et que le fait d'être le bailleur de son propre banquier était une source de prestige dans sa communauté. Il a renoncé à revendiquer des dommages-intérêts parce que la valeur marchande de l'immeuble avait diminué depuis que K l'avait acheté. Le juge du procès a conclu que K avait manqué à un devoir de loyauté envers S, mais il a statué que la fiducie par interprétation n'était pas la réparation appropriée parce que K ne s'était pas «enrichi». Dans une décision rendue à la majorité, la Cour d'appel a infirmé cette décision et ordonné le transfert de l'immeuble à S sous réserve des ajustements nécessaires.

Arrêt (les juges Sopinka et Iacobucci sont dissidents): Le pourvoi est rejeté.

Les juges La Forest, Gonthier, Cory, McLachlin et Major: La fiducie par interprétation est une institution ancienne et éclectique imposée par le droit non pas seulement pour remédier à l'enrichissement sans cause, mais aussi pour obliger des personnes se trouvant dans diverses situations à se conformer à des normes élevées en matière de confiance et de probité et les empêcher de conserver des biens qu'en toute «conscience» elles ne devraient pas être autorisées à garder. Bien qu'au cours des dernières décennies les tribunaux canadiens aient utilisé la fiducie par interprétation pour remédier à l'enrichissement sans cause, cet emploi ne devrait pas être interprété comme ayant fait disparaître du droit canadien la fiducie par interprétation dans les autres cas où l'on reconnaît depuis longtemps la possibilité d'y avoir recours. Au nom de la conscience, l'application de la fiducie par interprétation est reconnue tant pour sanctionner des conduites fautives tels la fraude et le manquement à un devoir de loyauté que pour remédier à l'enrichissement sans cause et à un appauvrissement correspondant. Bien qu'elle soit souvent imposée parce qu'il y a à la fois conduite fautive et enrichissement sans cause, la fiducie par interprétation peut aussi être accordée pour l'un ou l'autre motif.

Les conditions suivantes doivent généralement être réunies avant qu'une fiducie par interprétation fondée sur un comportement fautif puisse être imposée: 1) le défendeur doit avoir été assujetti à une obligation en *equity* relativement aux actes qui ont conduit à la possession des biens; 2) il faut démontrer que la possession des biens par le défendeur résulte des actes qu'il a ou est 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.

réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur; 3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel, soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations; et 4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire.

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.

En l'espèce, le manquement par K à son devoir de loyauté a suffi pour engager la conscience du tribunal et lui permettre de conclure à l'existence d'une fiducie par interprétation. Premièrement, K était assujetti à une obligation en *equity* relativement à l'immeuble en cause. Son omission de faire part à son client de l'information qu'il avait obtenue au nom de ce dernier quant au prix que le vendeur accepterait pour l'immeuble et l'utilisation de cette information pour acheter lui-même l'immeuble constituaient un manquement au devoir de loyauté imposé par l'*equity*. Deuxièmement, K a obtenu la possession de cet immeuble par suite des actes accomplis à titre de mandataire et du manquement à l'obligation que lui imposait l'*equity* envers S. Troisièmement, une fiducie par interprétation est nécessaire pour remédier à l'appauvrissement que S a subi en raison de son désir persistant de devenir propriétaire de l'immeuble en question. Une fiducie par interprétation est également requise dans des cas comme celui-ci pour assurer le respect du devoir de loyauté auquel sont tenus les mandataires et autres personnes occupant des postes de confiance. Enfin, il n'y a pas en l'espèce de facteurs qui rendraient inéquitable l'imposition d'une fiducie par interprétation.

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

Les juges Sopinka et Iacobucci (dissidents): La décision d'imposer une fiducie par interprétation est discrétionnaire, et à ce titre, elle doit être abordée avec retenue par les tribunaux d'appel. La décision du juge de première instance de ne pas imposer une telle réparation ne peut être annulée en appel que si l'exercice du pouvoir discrétionnaire a été fondé sur un principe erroné. Il n'a pas commis une telle erreur dans la présente cause. Le juge du procès a tenu compte de la valeur morale du comportement de K et, par conséquent, un tribunal d'appel ne peut intervenir en se fondant sur ce motif. Il était d'avis que lorsque rien ne justifie que le tribunal accorde une fiducie par interprétation ou une autre réparation, la seule valeur morale de l'acte ne suffira pas à fonder une telle décision; cet énoncé du droit est juste. Le juge du procès a le pouvoir discrétionnaire d'imposer ou non la fiducie par interprétation et l'exercice de ce pouvoir ne devrait pas dépendre du nombre des réparaloss 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.

tions possibles. En l'espèce, S a renoncé à réclamer des dommages-intérêts. Même s'il ne pouvait réclamer de dommages-intérêts compensatoires puisqu'il n'a subi aucune perte pécuniaire, S aurait pu réclamer des dommages-intérêts punitifs. Sa décision de ne pas le faire ne devrait pas jouer sur l'exercice du pouvoir discrétionnaire du juge du procès relativement à la fiducie par interprétation. Le juge du procès a également tenu compte de l'élément de dissuasion, mais il a conclu que celui-ci ne pouvait en soi justifier l'octroi d'une réparation en l'espèce.

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.

Même si l'examen en appel était justifié, la fiducie par interprétation ne s'offrait pas aux parties, vu les faits de l'espèce. Il ressort très clairement de la jurisprudence récente de la Cour qu'une fiducie par interprétation ne peut être imposée que lorsqu'il y a enrichissement sans cause. En l'espèce, il n'y a eu aucun enrichissement et, par conséquent, aucun enrichissement sans cause. L'impossibilité d'imposer une fiducie par interprétation en l'absence d'un enrichissement sans cause est compatible avec le rôle réparateur de cette fiducie, et l'analyse des principes exposés dans l'arrêt *Lac Minerals* appuie également cette règle. La dissuasion n'exige pas que l'on puisse recourir à la fiducie par interprétation même en l'absence d'un enrichissement sans cause. Malgré des considérations de dissuasion, il est vrai que le droit privé ne prévoit habituellement pas de recours en cas d'absence de perte. Les tribunaux n'ont pas jugé qu'il était nécessaire d'accorder, même en l'absence de perte, une réparation à la suite d'un manquement à une obligation en matière délictuelle ou contractuelle. Rien ne justifie que les manquements aux obligations fiduciaires reçoivent un traitement particulier à cet égard. De toute façon, l'impossibilité d'invoquer la fiducie par interprétation en l'absence d'un enrichissement sans cause n'a aucune incidence importante quant à l'élément de dissuasion. Des dommages-intérêts punitifs pourraient être imposés si l'élément de dissuasion était jugé particulièrement important, et un fiduciaire sans scrupules devra avoir à l'esprit la possibilité que, si le bien prenait de la valeur, il devrait alors payer des dommages-intérêts ou peut-être même céder le bien.

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By McLachlin J.

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Palmer, [1972] 1 W.L.R. 1286; *Neste Oy v. Lloyd's Bank Plc*, [1983] 2 Lloyd's Rep. 658; *Elders Pastoral Ltd. v. Bank of New Zealand*, [1989] 2 N.Z.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 Ltd. 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) 729; *MacMillan Bloedel Ltd. v. Binstead* (1983), 14 E.T.R. 269; *Reading v. The King*, [1948] 2 All E.R. 27, aff'd [1949] 2 All E.R. 68, 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.

The judgment of La Forest, Gonthier, Cory, McLachlin and Major JJ. was delivered by

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.

Paciocco, David M. «The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors» (1989), 68 *R. du B. can.* 315.
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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221, qui a infirmé une décision de la Cour de l'Ontario (Division générale) (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205, rejetant l'action intentée par l'intimé contre les appelants en vue d'obtenir le transfert d'un immeuble. Pourvoi rejeté, les juges Sopinka et Iacobucci sont dissidents.

Thomas G. Heintzman, c.r., et *Darryl A. Cruz*, pour les appelants.

David T. Stockwood, c.r., et *Susan E. Caskey*, pour l'intimé.

Version française du jugement des juges La Forest, Gonthier, Cory, McLachlin et Major rendu par

LE JUGE MCLACHLIN —

I

Dans le cadre du présent pourvoi, notre Cour doit déterminer si l'on peut exiger de l'agent immobilier qui a acheté pour lui-même un immeuble au sujet duquel il a entamé des pourparlers au nom d'un client, qu'il remette l'immeuble à son client même si ce dernier ne peut pas prouver qu'il a subi une perte. La question juridique à trancher est celle de savoir s'il est possible d'imposer une fiducie par interprétation à l'égard d'un immeuble en l'absence d'un enrichissement du défendeur et d'un appauvrissement correspondant du demandeur. À mon avis, cette question doit recevoir une réponse affirmative.

II

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.

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.

II

L'appelant, M. Korkontzilas, est un courtier en immeubles. L'intimé, M. Soulos, était son client. En 1984, M. Korkontzilas a repéré un immeuble commercial susceptible, selon lui, d'intéresser M. Soulos. En effet, M. Soulos était intéressé à acheter l'immeuble. Monsieur Korkontzilas a entamé des négociations au nom de M. Soulos. Il a offert une somme de 250 000 $ pour l'immeuble. Le vendeur, la Dominion Life, a rejeté l'offre et a présenté une contre-offre dans laquelle il exigeait une somme de 275 000 $. Monsieur Soulos a rejeté la contre-offre, mais il est revenu à la charge en offrant 260 000 $ ou 265 000 $. La Dominion Life a informé M. Korkontzilas qu'elle accepterait de vendre l'immeuble pour 265 000 $. Au lieu de transmettre cette information à M. Soulos comme il aurait dû le faire, M. Korkontzilas a pris des dispositions pour que son épouse, Panagiota Goutsoulas, achète l'immeuble sous le nom de Panagiot Goutsoulas. Panagiot Goutsoulas a ensuite transféré l'immeuble à Panagiota et Fotios Korkontzilas à titre de copropriétaires. Monsieur Soulos a demandé ce qu'il était advenu de l'immeuble. Monsieur Korkontzilas lui a dit de [TRADUCTION] «l'oublier», que le vendeur ne voulait plus le vendre, mais qu'il lui trouverait quelque chose de mieux. Monsieur Soulos a demandé à M. Korkontzilas s'il avait quelque chose à voir avec le changement d'idée du vendeur. La réponse de M. Korkontzilas a été négative. 2

En 1987, M. Soulos a appris que M. Korkontzilas avait acheté l'immeuble pour lui-même. Alléguant un manquement à une obligation fiduciaire donnant lieu à une fiducie par interprétation, il a intenté une action contre M. Korkontzilas afin d'obtenir que l'immeuble lui soit transféré. Il a soutenu que l'immeuble avait une valeur particulière pour lui parce que son banquier en était locataire et que le fait d'être le bailleur de son propre banquier était une source de prestige dans la communauté grecque à laquelle il appartenait. Toutefois, M. Soulos a renoncé à revendiquer des dommages-intérêts parce que la valeur marchande de l'immeuble avait, en réalité, diminué depuis que M. Korkontzilas l'avait acheté. 3

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.).

Le juge du procès a conclu que M. Korkontzilas avait manqué à un devoir de loyauté envers M. Soulos, mais il a statué que la fiducie par interprétation n'était pas la réparation appropriée parce que M. Korkontzilas avait acquis l'immeuble à sa valeur marchande et ne s'était donc pas «enrichi»: (1991), 4 O.R. (3d) 51, 19 R.P.R. (2d) 205 (ci-après cité au O.R.). La décision a été infirmée en appel, le juge Labrosse étant dissident: (1995), 25 O.R. (3d) 257, 126 D.L.R. (4th) 637, 84 O.A.C. 390, 47 R.P.R. (2d) 221 (ci-après cité au 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.

Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi. Selon moi, la doctrine de la fiducie par interprétation s'applique et exige que M. Korkontzilas transfère à M. Soulos l'immeuble acquis de manière irrégulière.

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.

La première question à trancher est celle de savoir quelles étaient les obligations de M. Korkontzilas à l'égard de M. Soulos en ce qui a trait à l'immeuble. Cette question nous ramène aux conclusions du juge du procès. Celui-ci a rejeté l'argument de M. Soulos selon lequel il existait une entente obligeant M. Korkontzilas à lui proposer en exclusivité tous les immeubles dans la région de Danforth avant de les offrir à d'autres acheteurs. Il a toutefois conclu que M. Korkontzilas était devenu le mandataire de M. Soulos lorsqu'il a préparé l'offre que M. Soulos a signée relativement à l'immeuble en cause. Il a en outre considéré que ce mandat comportait l'obligation de faire part à M. Soulos de la réponse du vendeur. Le mandat n'avait pas pris fin lorsque le vendeur a présenté sa contre-offre. Le juge du procès a donc conclu que M. Korkontzilas était, pendant toute la période pertinente, le mandataire de M. Soulos.

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.

Le juge du procès a ajouté que les rapports entre le mandant et le mandataire étaient de nature fiduciaire. Il a conclu qu'en qualité de mandataire de M. Soulos, M. Korkontzilas avait un «devoir de loyauté» envers celui-ci. Il a estimé que M. Korkontzilas avait manqué à ce devoir de loyauté en n'informant pas M. Soulos de la contre-offre du vendeur.

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.

8 La Cour d'appel n'a pas remis en question ces conclusions. Les juges majoritaires n'étaient toutefois pas du même avis que le juge du procès quant aux conséquences du manquement par M. Korkontzilas à son devoir de loyauté.

IV

IV

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?

9 Cela nous amène à la principale question en litige dans le présent pourvoi: quelle réparation, s'il en est, le droit offre-t-il à M. Soulos par suite du manquement au devoir de loyauté commis par M. Korkontzilas lorsqu'il a acquis l'immeuble en question au lieu de faire part à son mandant, M. Soulos, du prix que le vendeur accepterait?

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.

10 Au procès, M. Soulos a seulement demandé le transfert de l'immeuble sur paiement de la somme versée par M. Korkontzilas, sous réserve des ajustements nécessaires par suite des changements de valeur intervenus et des pertes subies depuis l'achat de l'immeuble. Il s'est désisté de sa demande de dommages-intérêts au début de la poursuite, ce qui n'est pas étonnant vu que M. Korkontzilas avait acquis l'immeuble pour sa valeur marchande et qu'il avait en fait perdu de l'argent au cours de la période pendant laquelle il en avait été propriétaire. Quoiqu'il en soit, M. Soulos voulait toujours devenir propriétaire de l'immeuble.

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

11 Monsieur Soulos a soutenu que l'immeuble devait lui être remis en vertu de la doctrine de la fiducie par interprétation reconnue en *equity*. Le juge du procès a rejeté cette prétention pour le motif qu'il ne pouvait y avoir fiducie par interprétation que si le défendeur s'était enrichi sans cause par suite de sa conduite fautive. L'impossibilité d'indemniser M. Soulos au moyen de dommages-intérêts n'avait aucune importance: [TRADUCTION] «Il serait anormal de reconnaître l'existence d'une fiducie par interprétation parce que le recours aux dommages-intérêts n'est pas satisfaisant, le demandeur n'ayant subi aucun préjudice» (à la p. 69). De plus, [TRADUCTION] «il semble tout simplement exagéré et inapproprié d'accorder la réparation draconienne que constitue la fiducie par interprétation lorsque le demandeur n'a subi aucun préjudice» (à la p. 69). Le juge du procès a ajouté qu'il

Mr. Soulos had mitigated his loss by buying other properties.

n'y avait pas lieu d'accorder des dommages-intérêts symboliques étant donné qu'il y avait eu renonciation aux dommages-intérêts et que M. Soulos avait atténué sa perte en achetant d'autres immeubles.

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.

Les juges majoritaires de la Cour d'appel étaient d'un avis différent. Le juge Carthy a statué que la décision d'accorder une réparation en *equity* était discrétionnaire et dépendait de l'ensemble des faits invoqués devant le tribunal. Selon lui, le juge du procès avait toutefois exercé son pouvoir discrétionnaire en se fondant sur un principe erroné. Le juge Carthy a affirmé que la valeur morale de la conduite du défendeur pouvait dicter l'intervention du tribunal. Dans la plupart des opérations immobilières, une personne agit gracieusement pour l'acheteur tout en demandant une commission au vendeur. Les obligations fiduciaires de l'agent seraient dénuées de sens si celui-ci pouvait tout simplement acquérir l'immeuble à sa valeur marchande et nier ensuite qu'il est fiduciaire par interprétation parce qu'aucun préjudice n'a été subi. Dans de telles circonstances, les tribunaux d'*equity* [TRADUCTION] «accordent une réparation fondée sur la propriété pour préserver l'intégrité des règles de droit dont ils surveillent l'application» (à la p. 261). Le juge Carthy a admis que le motif pour lequel M. Soulos désirait l'immeuble pouvait sembler [TRADUCTION] «fantaisiste». Il a toutefois conclu que, si on l'examine dans le contexte général des opérations immobilières, le recours à la fiducie par interprétation dans ces circonstances vise un [TRADUCTION] «objectif salutaire». Elle permet au tribunal de veiller à ce que ne se reproduise pas un comportement immoral qui risque d'ébranler la relation de confiance sur laquelle repose la profession. Les juges majoritaires ont donc ordonné le transfert de la propriété de l'immeuble sous réserve des ajustements nécessaires.

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 major-

La divergence entre le juge du procès et les juges majoritaires de la Cour d'appel peut se résumer de la manière suivante. Le juge du procès était d'avis qu'en l'absence d'une perte établie, M. Soulos n'avait aucun droit d'action. Selon lui, il serait «tout simplement exagéré et inapproprié» d'accorder, en l'absence d'une perte, la fiducie par ity 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.

interprétation. Par contre, les juges majoritaires de la Cour d'appel ont adopté une conception plus large du champ d'application de la fiducie par interprétation. Ils ont statué qu'il pouvait y avoir une fiducie par interprétation exigeant la rétrocession du bien en l'absence d'une perte établie afin de sanctionner l'acte répréhensible de l'agent et de préserver le lien de confiance sur lequel repose la profession du courtage immobilier et, par conséquent, «l'intégrité des règles de droit» dont les tribunaux d'*equity* sont chargés de surveiller l'application.

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.

Le pourvoi expose donc deux conceptions différentes du rôle et de la portée de la fiducie par interprétation. Les partisans de la première conception considèrent que la fiducie par interprétation ne peut être accordée que dans le cas d'une perte clairement établie. Selon eux, il ne peut y avoir de fiducie par interprétation que s'il y a «enrichissement» du défendeur et «appauvrissement» correspondant du demandeur. Même s'ils ne nient pas que la fiducie par interprétation peut s'appliquer pour empêcher l'enrichissement sans cause, les partisans de la seconde conception ne la confinent pas dans ce rôle. Selon eux, la fiducie par interprétation peut s'appliquer en l'absence d'une perte établie pour condamner une conduite fautive et préserver l'intégrité du lien de confiance qui est à la base même d'un bon nombre de nos professions et institutions. 14

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.

Je suis d'avis que cette seconde conception plus large de la fiducie par interprétation devrait l'emporter. Elle concorde davantage avec l'évolution de la doctrine de la fiducie par interprétation, la théorie sur laquelle repose la fiducie par interprétation, et les objectifs que cette fiducie vise dans notre système juridique. 15

V

V

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

Les appelants soutiennent que le point de vue adopté par notre Cour relativement à la fiducie par interprétation dans des arrêts tels *Pettkus c. Becker*, [1980] 2 R.C.S. 834, repose exclusivement sur l'enrichissement sans cause. Par conséquent, ils font valoir qu'une fiducie par interprétation ne 16 no deprivation and corresponding enrichment of the defendant.

peut pas être imposée dans les cas où, comme en l'espèce, le demandeur ne peut pas établir un appauvrissement ainsi qu'un enrichissement correspondant du défendeur.

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.

L'évolution des règles de droit relatives à la fiducie par interprétation n'étaye pas un tel point de vue. Elle semble plutôt indiquer que la fiducie par interprétation est une institution ancienne et éclectique imposée par le droit non pas seulement pour remédier à l'enrichissement sans cause, mais aussi pour obliger des personnes se trouvant dans diverses situations à se conformer à des normes élevées en matière de confiance et de probité et les empêcher de conserver des biens qu'en toute «conscience» elles ne devraient pas être autorisées à garder. Cette doctrine avait pour but non seulement d'assurer que justice soit rendue dans l'affaire dont le tribunal était saisi, mais aussi de protéger les liens de confiance ainsi que les institutions qui en dépendent. Il a été possible d'atteindre ces objectifs en considérant que la personne détenait le bien à titre de fiduciaire pour le bénéfice de la personne lésée, même en l'absence d'une fiducie au sens strict créée par la volonté des parties. En Angleterre, la fiducie ainsi créée était appelée fiducie réelle ou «institutionnelle». Aux États-Unis, et récemment au Canada, il est question dans la jurisprudence de la possibilité de demander la fiducie par interprétation à titre de réparation.

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

Même si elle reconnaît des cas précis où s'applique la fiducie par interprétation, la théorie générale du droit anglais ancien n'offre aucun concept limitatif ou unificateur satisfaisant pour la fiducie par interprétation. Comme l'indique D. W. M. Waters dans son ouvrage intitulé *The Constructive Trust* (1964), à la p. 39, la fiducie par interprétation [TRADUCTION] «n'a jamais été autre chose qu'une expression pratique et utile servant à décrire ou à exprimer les obligations des parties». La fiducie par interprétation était utilisée en droit anglais [TRADUCTION] «pour établir un lien entre des situations variées . . . du fait que les obligations imposées par le droit dans de tels cas pouvaient à certains égards être assimilées aux obligaof the Remedial Constructive Trust" (1982-84), 6 *Est. & Tr. Q.* 312, at p. 317, citing Waters, *supra.*

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.

Canadian courts have never abandoned the principles of constructive trust developed in England.

tions qui étaient imposées à un fiduciaire exprès»: J. L. Dewar, «The Development of the Remedial Constructive Trust» (1982-84), 6 *Est. & Tr. Q.* 312, à la p. 317, citant Waters, précité.

19 Parmi les cas où la fiducie par interprétation a été reconnue en Angleterre, notons ceux où la fiducie découlait d'un manquement à une obligation fiduciaire ainsi que ceux où elle était imposée pour éviter que l'absence d'un écrit ne prive une personne de ses droits de propriété, pour empêcher un acheteur ayant une connaissance préalable de retenir frauduleusement des biens en fiducie ou pour assurer l'exécution des fiducies secrètes et des testaments mutuels. Voir Dewar, précité, à la p. 334. Les rapports fiduciaires sous-tendent une bonne partie des règles de droit anglais applicables à la fiducie par interprétation. Comme l'écrit Waters, précité, à la p. 33: [TRADUCTION] «les rapports fiduciaires sont manifestement inhérents à la fiducie par interprétation pour tout ce qui touche ou presque son application». Par ailleurs, ce ne sont pas tous les manquements à des obligations fiduciaires qui donnent naissance à une fiducie par interprétation. Comme le dit L. S. Sealy dans «Fiduciary Relationships», [1962] *Camb. L.J.* 69, à la p. 73:

> [TRADUCTION] Selon nous, le terme «fiduciaire» *ne* définit *pas* une seule catégorie de rapports auxquels s'applique un ensemble de règles et de principes déterminés. Chacun des recours prévus par l'*equity* ne peut être exercé que dans un nombre limité de situations fiduciaires; le simple fait de déclarer que Jean a des rapports fiduciaires avec moi signifie simplement que sa situation est à certains égards assimilable à celle d'un fiduciaire; cela ne permet pas de conclure qu'il est possible d'appliquer un principe ou un recours fiduciaire donné. [En italique dans l'original.]

L'absence de rapports fiduciaires traditionnels n'empêche pas nécessairement non plus de conclure à l'existence d'une fiducie par interprétation; le caractère fautif de la conduite peut suffire pour constituer un manquement à une obligation assimilable à une obligation fiduciaire: voir Dewar, précité, aux pp. 322 et 323.

20 Les tribunaux canadiens n'ont jamais abandonné les principes de la fiducie par interprétation qui ont

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*.

été élaborés en Angleterre. Ils les ont toutefois modifiés. Plus particulièrement, au cours des dernières décennies, les tribunaux canadiens ont utilisé la fiducie par interprétation pour remédier à l'enrichissement sans cause. Il est désormais établi qu'une fiducie par interprétation peut être imposée en l'absence d'un comportement fautif, tel le manquement à une obligation fiduciaire, lorsque trois éléments sont réunis: (1) l'enrichissement du défendeur, (2) l'appauvrissement correspondant du demandeur et (3) l'absence de tout motif juridique à l'enrichissement: *Pettkus c. Becker*, précité.

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.* 155, 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".

L'affirmation par notre Cour, dans des arrêts comme *Pettkus c. Becker*, que la fiducie par interprétation peut être accordée pour prévenir l'enrichissement sans cause, ne devrait pas être interprétée comme ayant fait disparaître du droit canadien la fiducie par interprétation dans les autres cas où l'on reconnaît depuis longtemps la possibilité d'y avoir recours. Les termes utilisés ne permettent pas de faire une telle affirmation. Pour A. J. McClean, «Constructive and Resulting Trusts — Unjust Enrichment in a Common Law Relationship — *Pettkus v. Becker*» (1982), 16 *U.B.C. L. Rev.* 155, le *ratio* de l'arrêt *Pettkus c. Becker* est [TRADUCTION] «un énoncé assez modéré» (à la p. 170). Il ajoute: [TRADUCTION] «Il serait erroné . . . de l'interpréter comme on interpréterait le texte d'une loi et de limiter l'évolution du droit».

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):

D'autres auteurs reconnaissent que l'imposition de la fiducie par interprétation pour remédier à l'enrichissement sans cause n'empêche pas de conclure à l'existence d'une telle fiducie dans d'autres situations. Dans son article intitulé «The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors» (1989), 68 *R. du B. can.* 315, à la p. 318, D. M. Paciocco dit qu' [TRADUCTION] «il faut établir une distinction entre la fiducie par interprétation qui est utilisée pour remédier à l'enrichissement sans cause et les autres types de fiducies par interprétation qui existaient en droit canadien avant 1980». Paciocco affirme que l'enrichissement sans cause n'est pas une condition essentielle à l'existence d'une fiducie par interprétation (à la 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.

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, though 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.

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

[TRADUCTION] . . . dans la catégorie traditionnelle la plus large, soit la fiducie par interprétation, il n'est pas nécessaire qu'il y ait appauvrissement du demandeur. La fiducie par interprétation est imposée pour relever le degré de moralité sur le marché en général, les bénéficiaires de certaines de ces fiducies recevant ce que l'on ne peut décrire que comme un profit fortuit.

Dewar, précité, a un point de vue analogue (à la p. 332): 23

[TRADUCTION] Même s'il est peu probable que les tribunaux canadiens abandonnent les notions et les classifications relatives à la fiducie par interprétation appliquée en Angleterre, nous croyons que l'adoption par la Cour suprême du Canada dans l'arrêt *Pettkus c. Becker* d'une fiducie par interprétation de style américain influencera profondément l'évolution du droit des fiducies canadien.

Dewar, précité, ajoute aux pp. 332 et 333: [TRADUCTION] «En droit anglais et en droit canadien, il n'y a aucune unanimité sur les cas précis dans lesquels s'applique la fiducie par interprétation même s'il est admis qu'il existe certaines catégories générales de situations qui donnent lieu à une telle fiducie». L'une de ces situations est celle où l'on tente de remédier à un comportement frauduleux ou déloyal.

Dans «The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust» (1988), 26 *Alta. L. Rev*. 407, à la p. 414, M. M. Litman considère que l'enrichissement sans cause constitue un outil utile pour rationaliser les catégories traditionnelles de fiducies par interprétation. Il est néanmoins d'avis qu'on commettrait une [TRADUCTION] «erreur importante» en écartant tout simplement les principes traditionnels de la fiducie par interprétation. Il cite diverses décisions canadiennes, postérieures à l'arrêt *Pettkus c. Becker*, précité, qui imposent des fiducies par interprétation pour remédier à l'acquisition irrégulière de biens, même en l'absence d'un enrichissement sans cause et d'un appauvrissement correspondant, et il conclut que la fiducie par interprétation [TRADUCTION] «ne peut pas toujours s'expliquer par le modèle de la fiducie par interprétation fondée sur l'enrichissement sans cause» (p. 416). En résumé, le droit anglais ancien fait encore partie du droit canadien contemporain et oriente son évolution. Comme le dit le juge La Forest (maintenant juge 24 not venture far onto an uncharted sea when they can administer justice from a safe berth".

de notre Cour) dans l'arrêt *White c. Central Trust Co.* (1984), 17 E.T.R. 78 (C.A.N.-B.), à la p. 90, cité par Litman, précité, les tribunaux [TRADUCTION] «ne s'aventureront pas dans des domaines inconnus lorsqu'ils peuvent administrer la justice en s'en tenant à des principes sûrs».

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.

Je conclus que les règles de droit relatives à la fiducie par interprétation dans les provinces de common law du Canada visent les cas où les tribunaux d'*equity* anglais ont traditionnellement conclu à l'existence d'une fiducie par interprétation de même que les cas d'enrichissement sans cause reconnus dans la jurisprudence canadienne récente.

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".

VI

Divers principes ont été proposés pour donner cohésion aux cas où le droit anglais permettait de conclure à l'existence d'une fiducie par interprétation. Dans l'ouvrage intitulé *The Law of Restitution* (3e éd. 1986), à la p. 61, R. Goff et G. Jones sont d'avis que l'enrichissement sans cause est l'un de ces principes. Toutefois, à moins que le terme «enrichissement» ne soit interprété de façon très large de manière à n'être pas limité aux réclamations pécuniaires, il n'explique pas tous les cas où la fiducie par interprétation a été appliquée. Comme le dit McClean, précité, à la p. 168: [TRADUCTION] «aussi satisfaisante que soit [la théorie de l'enrichissement sans cause] pour les autres aspects du droit applicable en matière de restitution, sa portée n'est peut-être pas assez large pour englober tous les types de fiducies par interprétation». McClean aborde ensuite la situation soulevée par le présent pourvoi: [TRADUCTION] «Dans certains cas, lorsqu'une telle fiducie est imposée, il se peut que le fiduciaire n'ait obtenu aucun avantage; ce pourrait être le cas, par exemple, lorsque la personne est déclarée fiduciaire *de son tort*. Le demandeur n'a peut-être pas toujours subi une perte. McClean conclut (aux pp. 168 et 169): [TRADUCTION] «Par conséquent, l'enrichissement sans cause ne peut pas expliquer de façon satisfaisante toutes les catégories de demandes de restitution».

27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at

McClean, comme d'autres, considère que le principe le plus satisfaisant pour fonder la théorie de l'enrichissement sans cause est le concept de la "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.

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).

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.), at p. 301. 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

«conscience» qui est à la [TRADUCTION] «base même de la compétence en *equity*» (à la p. 169):

[TRADUCTION] La «conscience tranquille» ainsi que «la justice naturelle et l'*equity*» étaient deux des critères mentionnés par lord Mansfield dans l'arrêt *Moses c. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.), dans une action en recouvrement des sommes reçues, le prototype des demandes de restitution en common law. Le concept de la «conscience» a des assises solides en *equity* et un certain fondement en common law; il est suffisamment large pour s'appliquer aux fiducies par interprétation lorsque le défendeur n'a obtenu aucun avantage ou lorsque le demandeur n'a pas subi de perte. Par conséquent, on peut dire qu'il s'agit dans le cas du droit de la restitution d'un fondement aussi solide sinon meilleur que l'enrichissement sans cause.

D'autres experts reconnaissent comme McClean que le concept de la conscience peut s'avérer utile pour assurer la cohésion des différentes formes de fiducie par interprétation. Litman, précité, signale la fiducie fondée sur [TRADUCTION] «la justice naturelle et l'*equity*» ou la «conscience» [TRADUCTION] «qui constitue un recours pour les préjudices débordant le cadre de l'enrichissement sans cause», et il ajoute que l'on peut considérer qu'il s'agit du fondement des diverses fiducies institutionnelles ainsi que de la fiducie par interprétation en matière de restitution pour enrichissement sans cause (aux pp. 415 et 416). 28

De nombreux juristes sont d'accord pour considérer la conscience comme le concept unificateur à la base même de la fiducie par interprétation. Selon lord juge Edmund Davies, l'idée d'un «manque de probité» chez la personne à laquelle la fiducie par interprétation est imposée constitue [TRADUCTION] «une pierre de touche utile pour déterminer les circonstances dans lesquelles il y aurait fiducie par interprétation»: *Carl Zeiss Stiftung c. Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276 (C.A.), à la p. 301. Le juge Cardozo a approuvé en termes similaires le thème unificateur de la conscience dans la décision *Beatty c. Guggenheim Exploration Co.*, 122 N.E. 378 (1919), à la p. 380: 29

[TRADUCTION] La fiducie par interprétation est la formule utilisée pour exprimer la conscience de l'*equity*. Lorsque des biens ont été acquis dans des circonstances of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. [Emphasis added.]

telles que le titulaire du titre en common law ne peut pas, en toute conscience, en retenir l'intérêt bénéficiaire, l'*equity* fait de cette personne un fiduciaire. [Je souligne.]

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".

Lord Denning, maître des rôles, a exprimé un point de vue analogue dans une série de décisions où la fiducie par interprétation a été imposée pour remédier à un acte fautif: voir *Neale c. Willis* (1968), 19 P. & C.R. 836; *Binions c. Evans*, [1972] Ch. 359; *Hussey c. Palmer*, [1972] 1 W.L.R. 1286. Dans *Binions*, faisant référence au juge Cardozo, précité, lord Denning a dit que le tribunal imposerait une fiducie par interprétation [TRADUCTION] «pour la simple raison qu'il serait tout à fait injuste que les demandeurs expulsent le défendeur en violation de la clause aux termes de laquelle ils ont occupé les locaux» (p. 368). Dans *Hussey*, il a dit ce qui suit au sujet de la fiducie par interprétation (aux pp. 1289 et 1290): [TRADUCTION] «Quel que soit le terme employé pour la décrire, il s'agit d'une fiducie imposée en vertu du droit lorsque la justice et la conscience l'exigent».

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 Plc*, [1983] 2 Lloyd's Rep. 658.

De nombreux auteurs anglais ont remis en question les déclarations extensives de lord Denning au sujet de la fiducie par interprétation. Néanmoins, il n'est pas seul dans son camp: le juge Bingham a également indiqué dans la décision *Neste Oy c. Lloyd's Bank Plc*, [1983] 2 Lloyd's Rep. 658, que le concept de la conscience était le fondement d'une intervention en *equity*.

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.Z.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:

Dans l'arrêt *Elders Pastoral Ltd. c. Bank of New Zealand*, [1989] 2 N.Z.L.R. 180, la Cour d'appel de la Nouvelle-Zélande semble aussi avoir accepté que la conscience pouvait justifier l'imposition d'une fiducie par interprétation. Le président Cooke, aux pp. 185 et 186, a cité le passage suivant des motifs du juge Bingham dans le jugement *Neste Oy*, précité, à la 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

[TRADUCTION] Compte tenu de la situation [des défendeurs] lorsque le dernier paiement a été reçu, tout administrateur raisonnable et honnête de cette compagnie (ou les administrateurs actuels s'ils l'avaient su) aurait, j'en suis certain, pris des dispositions, sans hésitation ni retard, pour que cette somme soit remboursée aux demandeurs. Il aurait été quasiment déloyal de la part [des défendeurs] de tirer avantage du paiement, et il 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" (1992-95), 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.

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

aurait semblé contraire à toute notion ordinaire d'équité que l'ensemble des créanciers puisse profiter du fait qu'un paiement a été fait à un moment où il n'y avait plus aucune contrepartie. Certes, l'insolvabilité entraîne toujours des pertes et il est impossible d'atteindre la perfection en matière d'équité. La banque et d'autres créanciers ont des réclamations légitimes. Il me semble néanmoins qu'au moment de la réception du paiement, [les défendeurs] ne pouvaient en toute conscience retenir cet argent et que, par conséquent, il faut conclure à l'existence d'une fiducie par interprétation. [Je souligne.]

Le président Cooke a tout simplement conclu (à la p. 186): [TRADUCTION] «Je ne pense pas qu'en toute conscience, les courtiers puissent conserver cet argent.» On a considéré que la décision *Elders* appuyait la thèse voulant que, même en l'absence de rapports fiduciaires ou d'enrichissement sans cause, le comportement contraire à la conscience pouvait entraîner l'imposition d'une fiducie par interprétation à titre de réparation: voir *Mogal Corp. c. 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», (1992-95), 7 *Auck. U. L. Rev.* 147, aux pp. 157 et 158. Même si dans *Re Goldcorp Exchange Ltd. (In Receivership)*, [1994] 2 All E.R. 806, le Comité judiciaire du Conseil privé a rejeté la création d'une fiducie par interprétation pour satisfaire aux exigences de la conscience, il n'en demeure pas moins que la conscience est depuis le début un thème sous-jacent à la fiducie par interprétation.

La conscience concerne non seulement l'équité entre les parties devant le tribunal, mais aussi le souci plus général des tribunaux de maintenir l'intégrité d'institutions tels les rapports fiduciaires que les tribunaux d'*equity* étaient chargés de surveiller. Comme le dit le juge La Forest dans l'arrêt *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, à la p. 453: 33

Le droit des obligations fiduciaires a toujours comporté un élément de dissuasion. On peut déjà le constater dans le passage susmentionné de l'arrêt *Keech*, précité; voir aussi *Canadian Aero*, précité, aux pp. 607 et 610; *Canson*, précité, à la p. 547, le juge McLachlin. Le droit est ainsi en mesure de surveiller une relation que la 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

société considère comme utile, tout en écartant la nécessité d'une réglementation officielle qui risquerait d'en réduire l'utilité sociale.

La fiducie par interprétation imposée pour manquement à une obligation fiduciaire permet non seulement de rendre justice aux parties comme l'exige la conscience, mais aussi d'obliger les fiduciaires et autres personnes occupant des postes de confiance à se conformer aux normes élevées en matière de confiance et de probité nécessaires pour assurer l'efficacité des institutions commerciales et autres institutions sociales.

Il ressort qu'une fiducie par interprétation peut être imposée lorsque la conscience l'exige. L'examen portant sur les exigences de la conscience doit tenir compte des situations où des fiducies par interprétation ont été reconnues dans le passé. Il est guidé aussi par les deux raisons pour lesquelles les fiducies par interprétation ont été traditionnellement imposées: rendre justice aux parties et préserver l'intégrité d'institutions fondées sur des rapports assimilables à ceux qui existent dans le cadre des fiducies. Enfin, l'examen se fait en fonction de l'absence d'indication qu'une fiducie par interprétation aurait un effet inéquitable ou injuste sur le défendeur ou sur des tiers, ce dont l'*equity* a toujours tenu compte. Les réparations reconnues en *equity* sont souples; elles sont accordées en fonction de ce qui est juste compte tenu de toutes les circonstances de l'espèce.

La conscience comme élément unificateur dans les différents cas où il est possible de conclure à une fiducie par interprétation a l'inconvénient d'être très générale. Mais tout concept capable d'englober les diverses circonstances dans lesquelles une fiducie par interprétation peut être imposée doit obligatoirement l'être. Ce sont les circonstances particulières des cas où les juges ont conclu dans le passé à l'existence d'une fiducie par interprétation qui viennent préciser le concept général. Le juge à qui l'on demande d'imposer une fiducie par interprétation tiendra compte non seulement de ce qui pourrait sembler «équitable» dans un sens général, mais aussi des autres cas où les tribunaux ont conclu à l'existence d'une fiducie par interprétation. L'objectif consiste simplement à goal is but a reasoned, incremental development of the law on a case-by-case basis.

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.

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

assurer l'évolution logique et progressive du droit, cas par cas.

On peut considérer que les cas dont le juge doit tenir compte pour déterminer si la conscience exige l'imposition d'une fiducie par interprétation entrent dans deux catégories générales. La première catégorie concerne les biens obtenus par suite de la conduite fautive du défendeur, notamment le manquement à une obligation fiduciaire ou le manquement à un devoir de loyauté. Les fiducies institutionnelles anglaises traditionnelles entrent généralement dans cette catégorie sans toutefois être les seules à en faire partie (du moins au Canada). La seconde catégorie concerne les cas où le défendeur n'a pas obtenu les biens de manière irrégulière, mais où il s'enrichirait sans cause au détriment du demandeur si on lui permettait de les conserver. Les deux catégories ne sont pas mutuellement exclusives. L'acquisition de biens d'une manière irrégulière sera souvent associée à l'enrichissement sans cause, et vice versa. Toutefois, l'un ou l'autre de ces éléments peut suffire à justifier l'imposition d'une fiducie par interprétation. 36

En Angleterre, le droit ne reconnaît pas encore formellement la fiducie par interprétation accordée à titre de réparation dans les cas d'enrichissement sans cause, même si de nombreuses déclarations de lord Denning vont dans ce sens. Toutefois, les tribunaux concluent bel et bien à l'existence de la fiducie par interprétation dans des circonstances analogues à celles dont il est question en l'espèce. L'*equity* reconnaît traditionnellement qu'il est juste d'imposer une fiducie par interprétation pour un simple manquement à un devoir de loyauté. Le droit anglais est résumé par Goff et Jones dans *The Law of Restitution*, précité, à la p. 643: 37

> [TRADUCTION] Il se peut que le fiduciaire abuse de sa position de confiance en utilisant à son profit un contrat, une acquisition de biens ou une autre occasion d'affaires au détriment de son bénéficiaire. S'il le fait, il est réputé détenir en fiducie pour le bénéficiaire les avantages ainsi détournés.

P. Birks est d'accord avec ce principe dans l'ouvrage intitulé *An Introduction to the Law of Restitution* (1985) (à la p. 330 et aux pp. 338 à 343). Il indique que les conflits d'intérêts sont souvent à 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.

l'origine de la fiducie par interprétation accordée en l'absence d'enrichissement sans cause. Birks fait une distinction entre les actes fautifs réprimés en vue de prévenir l'enrichissement et ceux qui sont condamnés afin de faire obstacle à un préjudice (p. 340). Un fiduciaire en conflit d'intérêts représente un risque de préjudice réel ou potentiel, même si son inconduite ne l'enrichit pas toujours. Une fiducie par interprétation peut en conséquence être ordonnée.

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".

Les deux catégories de fiducie par interprétation sont reconnues aux États-Unis; même si l'enrichissement sans cause est parfois invoqué aux États-Unis pour justifier la fiducie par interprétation, en fait, les tribunaux y reconnaissent qu'il est possible d'avoir recours à la fiducie par interprétation pour obtenir la remise du bien acquis par suite d'une conduite fautive en l'absence d'un enrichissement sans cause du défendeur et d'un appauvrissement correspondant du demandeur. Ainsi, les auteurs de *Scott on Trusts* (3e éd. 1967), vol. V, à la p. 3410, affirment que la fiducie par interprétation [TRADUCTION] «peut être invoquée lorsque le bien est obtenu par erreur ou par fraude, ou à la suite d'une autre conduite fautive». Ou comme l'a dit le juge Cardozo, [TRADUCTION] «[u]ne fiducie par interprétation est donc le mécanisme de réparation en vertu duquel l'intérêt personnel s'efface devant la loyauté envers autrui»: *Meinhard c. Salmon*, 164 N.E. 545 (1928), à la p. 548, cité dans *Scott on Trusts*, précité, à la p. 3412. *Scott on Trusts*, précité, indique, à la p. 3418, qu'il y a des cas [TRADUCTION] «où une fiducie par interprétation est imposée au défendeur même si la perte du demandeur est inférieure au gain réalisé par le défendeur ou, en fait, lorsque le demandeur n'a subi aucune perte».

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

Les tribunaux canadiens reconnaissent aussi la possibilité de recourir à la fiducie par interprétation tant dans les cas où des biens sont acquis d'une manière irrégulière que dans les cas d'enrichissement sans cause. Appliquant le droit anglais, ils concluent depuis longtemps à l'existence d'une fiducie par interprétation à la suite d'une acquisition irrégulière de biens, par exemple en raison d'une fraude ou d'un manquement à une obligation 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.

fiduciaire. Plus récemment, les tribunaux canadiens ont reconnu qu'il était possible d'imposer une fiducie par interprétation analogue à celle qui existe aux États-Unis dans les cas d'enrichissement sans cause: *Pettkus c. Becker*, précité. Toutefois, depuis cet arrêt, les tribunaux canadiens ont continué de conclure à l'existence d'une fiducie par interprétation lorsque des biens ont été acquis de manière irrégulière, même en l'absence d'enrichissement sans cause. Bien que de tels cas ne soient pas fréquents car peu de justiciables choisissent d'intenter des poursuites en l'absence d'une perte pécuniaire, ils ne sont pas rares.

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.

Litman, précité, à la p. 416, fait remarquer que [TRADUCTION] «depuis l'arrêt *Pettkus* c. *Becker*, il y a eu de nombreux cas où les tribunaux ont eu recours à la fiducie par interprétation institutionnelle sans qu'il soit question d'enrichissement sans cause». L'imposition d'une fiducie par interprétation dans de tels cas se justifie non pas par l'enrichissement sans cause, mais par le fait que la conduite fautive du défendeur l'oblige à remettre le bien ainsi obtenu au demandeur. 40

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.

Ainsi, dans l'arrêt *Ontario Wheat Producers' Marketing Board c. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (C.A. Ont.), une fiducie par interprétation a été imposée à une banque qui avait reçu de l'argent tout en sachant qu'il n'appartenait pas au déposant mais à un tiers. 41

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

De même, dans l'arrêt *MacMillan Bloedel Ltd. c. Binstead* (1983), 14 E.T.R. 269 (C.S.C.-B.), une fiducie par interprétation a été imposée à des personnes qui avaient participé sciemment à un manquement à une obligation fiduciaire, même si on avait conclu que l'enrichissement sans cause ne justifierait pas l'imposition d'une fiducie parce qu'il était impossible de dire que la compagnie demanderesse avait subi une perte ou un appauvrissement car sa propre politique l'empêchait de toucher les profits. Le juge Dohm (maintenant juge en chef adjoint) a dit que la fiducie par interprétation devait être accordée [TRADUCTION] «non pas en raison de ce qu'exige l'équité entre les parties, mais pour veiller à ce que les fiduciaires demeurent fidèles à la parole donnée et à ce que les per- 42 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. 169-70:

> 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*

sonnes qui les aident à manquer à leurs obligations soient appelées à rendre des comptes» (p. 302).

Je conclus qu'au nom de la conscience, l'application de la fiducie par interprétation est reconnue au Canada tant pour sanctionner des conduites fautives tels la fraude et le manquement à un devoir de loyauté que pour remédier à l'enrichissement sans cause et à un appauvrissement correspondant. Bien qu'elle soit souvent imposée parce qu'il y a à la fois conduite fautive et enrichissement sans cause, la fiducie par interprétation peut aussi être accordée pour l'un ou l'autre motif: lorsqu'il y a conduite fautive mais aucun enrichissement sans cause ni appauvrissement correspondant ou lorsqu'il y a enrichissement sans cause moralement inadmissible, en l'absence de conduite fautive, comme dans l'arrêt *Pettkus c. Becker*, précité. Dans le cadre de ces deux grandes catégories les règles de droit relatives à la fiducie par interprétation pourront évoluer et se préciser au fil des ans et selon les cas qui pourront se présenter.

McClean, précité, a résumé avec habilité le processus évoqué (aux pp. 169 et 170):

> [TRADUCTION] Le droit [en matière de fiducie par interprétation] en est peut-être arrivé à une étape où il est possible de dégager certains principes généraux à partir d'exemples précis et de créer, par analogie et dans le respect de ces principes généraux, de nouveaux chefs de responsabilité. À notre avis, il ne s'agit pas de demander aux tribunaux de se lancer dans une entreprise trop risquée ni même nouvelle, en fait, puisque dans une large mesure, c'est de cette manière que la common law a toujours évolué.

VII

Dans l'arrêt *Pettkus c. Becker*, précité, notre Cour a examiné sous tous leurs angles les conditions préalables à la fiducie par interprétation fondée sur l'enrichissement sans cause. La présente espèce nous oblige à étudier minutieusement les conditions essentielles à l'existence de la fiducie par interprétation fondée sur un comportement fautif. À la lumière des décisions des tribunaux d'*equity* imposant la fiducie par interprétation par suite de comportements fautifs et des critères

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

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.

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

examinés dans un article de Roy Goode intitulé «Property and Unjust Enrichment», publié dans *Essays on the Law of Restitution* (1991), sous la direction d'Andrew Burrows, je conclus que quatre conditions doivent généralement être réunies:

(1) le défendeur doit avoir été assujetti à une obligation en *equity*, c'est-à-dire une obligation du type de celles dont les tribunaux d'*equity* ont assuré le respect, relativement aux actes qui ont conduit à la possession des biens;

(2) il faut démontrer que la possession des biens par le défendeur résulte des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur;

(3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations;

(4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire; par exemple, les intérêts des créanciers intervenants doivent être protégés.

VIII

Appliquant ce critère à l'espèce, je conclus que le manquement par M. Korkontzilas à son devoir de loyauté a suffi pour engager la conscience du tribunal et lui permettre de conclure à l'existence d'une fiducie par interprétation pour les motifs suivants. 46

Premièrement, M. Korkontzilas était assujetti à une obligation en *equity* relativement à l'immeuble en cause. L'omission de faire part à son client de l'information qu'il avait obtenue au nom de ce dernier quant au prix que le vendeur accepterait pour l'immeuble et l'utilisation de cette information pour acheter lui-même l'immeuble constituent un manquement au devoir de loyauté imposé par l'*equity*. Il a permis que ses propres intérêts entrent en conflit avec ceux de son client. Il a acheté l'immeuble de manière irrégulière, après avoir manqué de façon flagrante et inexcusable à son devoir de 47 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 underpin 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

loyauté envers M. Soulos. Voilà le genre de situation où les tribunaux d'*equity*, au Canada et ailleurs, ont traditionnellement conclu à l'existence d'une obligation en *equity* dont la violation peut donner naissance à une fiducie par interprétation, même en l'absence d'enrichissement sans cause.

Deuxièmement, M. Korkontzilas a obtenu la possession de cet immeuble par suite des actes accomplis à titre de mandataire et du manquement à l'obligation que lui imposait l'*equity* envers le demandeur. L'acquisition de l'immeuble était la conséquence directe du manquement à son devoir de loyauté envers son client, M. Soulos.

Troisièmement, même si M. Korkontzilas ne s'est pas enrichi pécuniairement par suite de l'acquisition irrégulière de l'immeuble, il existe de bonnes raisons pour que l'*equity* impose une fiducie par interprétation. Monsieur Soulos soutient qu'une fiducie par interprétation est nécessaire pour remédier à l'appauvrissement qu'il a subi en raison de son désir persistant de devenir propriétaire de l'immeuble en question, bien que pour des raisons non pécuniaires. Selon lui, cette mesure, et rien de moins, permettra de replacer les parties dans la situation où elles se seraient trouvées s'il n'y avait pas eu manquement. À mon avis, cet argument à lui seul suffirait à convaincre un tribunal d'*equity* que la réparation appropriée pour l'acquisition irrégulière de l'immeuble par M. Korkontzilas est une ordonnance portant qu'il doit, à titre de fiduciaire par interprétation, transférer l'immeuble à M. Soulos.

Mais il y a plus. Comme la Cour d'appel, j'estime qu'une fiducie par interprétation est requise dans des cas comme celui-ci pour assurer le respect du devoir de loyauté auquel sont tenus les mandataires et autres personnes occupant des postes de confiance: voir *Hodgkinson c. Simms*, précité, le juge La Forest. Si les agents immobiliers sont autorisés à garder les immeubles qu'ils ont acquis pour eux-mêmes en violation de leur devoir de loyauté envers leurs clients à condition qu'ils paient la valeur marchande de l'immeuble, la confiance sur laquelle repose l'institution qu'est le courtage immobilier sera ébranlée. Le message sera clair: les agents immobiliers peuvent manquer 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.

à leurs obligations envers leurs clients et les tribunaux n'interviendront pas à moins que le client puisse prouver que l'agent immobilier a réalisé un profit. C'est inacceptable. Les tribunaux d'*equity* se sont toujours souciés d'obliger la personne qui agit pour une autre à respecter l'éthique; notre Cour doit aller dans le même sens.

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. Korkontzilas has sustained during the years he has held the property.

J'en viens maintenant à la question de savoir s'il existe en l'espèce des facteurs qui rendraient inéquitable l'imposition d'une fiducie par interprétation. À mon avis, il n'y en a aucun. Nul ne subira un préjudice du fait d'une ordonnance enjoignant à M. Korkontzilas de transférer l'immeuble à M. Soulos. Monsieur Korkontzilas ne sera pas non plus traité inéquitablement. Monsieur Soulos ne demande pas mieux que de faire les ajustements financiers nécessaires, y compris d'indemniser M. Korkontzilas pour la perte qu'il a subie au cours des années pendant lesquelles il a été propriétaire de l'immeuble. 51

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.

Je conclus qu'une fiducie par interprétation doit être imposée. Je suis d'avis de rejeter le pourvoi et de confirmer l'ordonnance de la Cour d'appel portant que les appelants doivent transférer l'immeuble à l'intimé, sous réserve des ajustements appropriés. L'intimé a droit aux dépens dans toutes les cours. 52

The reasons of Sopinka and Iacobucci JJ. were delivered by

Version française des motifs des juges Sopinka et Iacobucci rendus par

SOPINKA J. (dissenting) — 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

LE JUGE SOPINKA (dissident) — J'ai lu les motifs de ma collègue, le juge McLachlin. Bien que j'adhère à sa conclusion selon laquelle le manquement à une obligation fiduciaire a été établi en l'espèce, je ne souscris pas à son analyse concernant la réparation appropriée. À mon avis, elle commet une erreur en confirmant le jugement par lequel les juges majoritaires de la Cour d'appel ont infirmé la décision du juge du procès pour imposer une fiducie par interprétation à l'égard de l'immeuble en question. Ma conclusion se fonde sur deux motifs principaux. Premièrement, la décision d'imposer une fiducie par interprétation relève du pouvoir discrétionnaire du juge et, à ce titre, elle appelle à la retenue. Comme le juge du procès n'a pas commis d'erreur de principe en refusant de 53 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.

rendre une ordonnance en ce sens, les tribunaux d'appel ne devraient pas s'immiscer dans l'exercice de ce pouvoir discrétionnaire. Deuxièmement, même si l'examen en appel était justifié en l'espèce, il ne peut y avoir fiducie par interprétation en l'absence d'enrichissement sans cause. Quoique mon désaccord avec le juge McLachlin porte essentiellement sur ce dernier point, je traiterai tout de même de ces questions successivement, dans le cadre de mon analyse des motifs des juges majoritaires de la juridiction inférieure.

Norme de contrôle et exercice du pouvoir discrétionnaire

Il est bien établi en droit que, règle générale, les tribunaux d'appel ne devraient pas modifier les ordonnances rendues dans le cadre de l'exercice du pouvoir discrétionnaire des juges de première instance. En effet, de telles ordonnances ne peuvent être infirmées en appel que si l'exercice du pouvoir discrétionnaire a été fondé sur un principe erroné: voir *Donkin c. Bugoy*, [1985] 2 R.C.S. 85. Comme l'ont reconnu les juges majoritaires de la Cour d'appel ((1995), 25 O.R. (3d) 257, à la p. 259) la décision d'accorder la fiducie par interprétation est discrétionnaire. Dans l'arrêt *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, la Cour a conclu à la majorité que la décision d'imposer une fiducie par interprétation à la suite d'un manquement à une obligation fiduciaire reposait sur l'examen de l'ensemble des circonstances. Le juge La Forest a dit, à la p. 674:

> En l'espèce, on a démontré qu'il y avait lieu à restitution. La Cour peut accorder une réparation relative à la propriété, c'est-à-dire ordonner à Lac de rendre le bien-fonds Williams, ou accorder une indemnité, c'est-à-dire une somme d'argent. [. . .] [La fiducie par interprétation n'est qu'une] réparation parmi d'autres, et il n'y sera recouru que dans les circonstances appropriées.

Cette conception de la fiducie par interprétation axée sur l'exercice d'un pouvoir discrétionnaire est également conforme avec la manière d'aborder les réparations en *equity* de façon générale: voir *Canson Enterprises Ltd. c. Boughton & Co.*, [1991] 3 R.C.S. 534, à la p. 585.

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.

55 La décision d'imposer une fiducie par interprétation étant discrétionnaire, il faut d'abord établir que le juge de première instance a commis une erreur de principe avant d'annuler sa décision de ne pas accorder une telle réparation. Selon moi, le juge du procès n'a pas commis une telle erreur.

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.

56 Les juges majoritaires de la Cour d'appel ont conclu, semble-t-il, que le juge du procès a commis une erreur en ne prenant pas en compte la nature moralement répréhensible du comportement des appelants. De la même façon, le juge McLachlin, invoquant de simples considérations de «conscience», est d'avis qu'il y avait lieu d'imposer une fiducie par interprétation en l'espèce. Selon moi, le juge du procès a effectivement tenu compte de la valeur morale du comportement des appelants et, par conséquent, un tribunal d'appel ne peut intervenir en se fondant sur ce motif. Le juge du procès a dit ((1991), 4 O.R. (3d) 51, à la p. 69) que même s'il [TRADUCTION] «[n]e fait aucun doute que le maintien de la moralité dans les affaires constitue un aspect de l'ordre public sur lequel un tribunal est fondé à se pencher», la morale ne devrait pas, de façon générale, inciter le tribunal à intervenir, sauf lorsque cela s'avère nécessaire pour faire respecter un droit quelconque en common law. Autrement dit, j'estime que le juge du procès était d'avis que lorsque rien ne justifie que le tribunal accorde une fiducie par interprétation ou une autre réparation, la seule valeur morale de l'acte ne suffira pas à fonder une telle décision. Selon moi, cet énoncé du droit est juste.

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 plain-

57 Selon les juges majoritaires de la Cour d'appel (aux pp. 259 et 260), les principes énoncés par le juge du procès pouvaient s'appliquer lorsque d'autres réparations s'offraient aux parties mais lorsqu'une seule réparation était possible, comme c'est le cas en l'espèce, leur application était contestable. Je ne souscris pas à ce raisonnement. Si la fiducie par interprétation est jugée inappropriée lorsque diverses réparations s'offrent aux parties, je ne vois pas en vertu de quel principe elle serait appropriée lorsqu'il s'agit de la seule réparation possible. Le juge du procès a le pouvoir discrétionnaire d'imposer ou non la fiducie par interprétation et l'exercice de ce pouvoir ne devrait pas dépendre

tiff 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.

du nombre des réparations possibles. En l'espèce, l'intimé a renoncé à réclamer des dommages-intérêts. Même s'il ne pouvait réclamer de dommages-intérêts compensatoires puisqu'il n'a subi aucune perte pécuniaire (j'examinerai cette question plus loin en déterminant si une fiducie par interprétation aurait pu être ordonnée), l'intimé aurait pu réclamer des dommages-intérêts punitifs. Sa décision de ne pas le faire ne devrait pas jouer sur l'exercice du pouvoir discrétionnaire du juge du procès relativement à la fiducie par interprétation.

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 consid-

Le juge du procès a beaucoup insisté sur l'absence de profit en décidant de ne pas accorder la fiducie par interprétation. Pour les motifs que j'exposerai en détail plus loin, j'estime que la décision du juge du procès à cet égard était bien fondée. Par contre, les juges majoritaires de la Cour d'appel et le juge McLachlin considèrent que le juge du procès a commis une erreur en appréciant mal le rôle dissuasif de la fiducie par interprétation dans la présente affaire. À mon avis, la prise en considération du rôle dissuasif de la fiducie par interprétation ne révèle aucune erreur de principe de la part du juge du procès. Il se peut que l'élément de dissuasion, tout comme la valeur morale des actes visés, influent sur l'exercice du pouvoir discrétionnaire de décider de la réparation à accorder en cas de manquement à une obligation fiduciaire (voir, par ex., *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, aux pp. 421 et 453). Toutefois, en l'espèce, le juge du procès n'a pas omis de tenir compte de cet élément en déterminant s'il convenait d'ordonner la fiducie par interprétation. Comme je l'ai déjà mentionné, le juge a affirmé que même si [TRADUCTION] «le maintien de la moralité dans les affaires constitue [. . .] un aspect de l'ordre public sur lequel un tribunal est fondé à se pencher» (à la p. 69), cet objectif, en soi, ne justifie pas l'octroi d'une réparation en l'espèce. À mon avis, cette mention du «maintien de la moralité dans les affaires» montre qu'après avoir tenu compte de l'élément de dissuasion, le juge a néanmoins conclu que celui-ci ne pouvait, en soi, justifier l'octroi d'une réparation en l'espèce. Par conséquent, même s'il était possible de qualifier d'erreur de principe l'omission de tenir compte de l'élément ered an error in principle, the trial judge in the present case did not so err.

de dissuasion, dans la présente affaire, le juge du procès n'a pas commis une telle erreur.

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.

Selon moi, le juge du procès n'a pas commis d'erreur de principe susceptible de justifier l'annulation de son jugement et l'imposition d'une fiducie par interprétation. Même s'il avait commis une erreur de principe, je suis d'avis que, vu les faits de l'espèce, la fiducie par interprétation ne s'offrait pas aux parties. Autrement dit, même s'il n'y a pas lieu de faire preuve de retenue à l'égard de la décision du juge du procès, les juges majoritaires de la Cour d'appel ont commis une erreur en imposant la fiducie par interprétation et le pourvoi devrait être accueilli. Voici les motifs sur lesquels je fonde ma conclusion. 59

Unjust Enrichment and the Availability of a Constructive Trust

Enrichissement sans cause et possibilité de recourir à la fiducie par interprétation

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:

Selon le juge McLachlin, les cas où la fiducie par interprétation peut être accordée entrent dans deux catégories générales: lorsqu'il y a enrichissement sans cause et lorsqu'il y a atteinte à la «conscience». Même s'il peut arriver que, dans un cas particulier, il y ait à la fois enrichissement sans cause et atteinte à la «conscience», le juge McLachlin est d'avis que la présence de l'un ou l'autre élément suffit pour imposer la fiducie par interprétation. Le juge McLachlin conclut qu'en ne tenant pas compte de ce que dicte la «conscience» indépendamment de toute autre considération, le juge du procès a commis une erreur. Avec égards, je ne souscris pas à cette conclusion. Selon moi, il ressort très clairement de la jurisprudence récente de notre Cour qu'une fiducie par interprétation ne peut être imposée que lorsqu'il y a enrichissement sans cause. Par exemple, des extraits de l'arrêt *Lac Minerals*, précité, exposent les circonstances dans lesquelles il conviendrait d'imposer une fiducie par interprétation. À mon avis, il ressort clairement de cet arrêt que l'imposition d'une fiducie par interprétation ne peut être accordée à titre de réparation que lorsqu'il y a enrichissement sans cause. Le juge La Forest a dit, aux pp. 673 et 674: 60

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*

Cette Cour a été appelée récemment à examiner, dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltd.*, [1989] 1 R.C.S. 426, les circonstances motivant

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 Cana-

l'imposition d'une fiducie par interprétation. Le Juge en chef y a analysé l'évolution de la fiducie par interprétation au cours d'une période de 200 ans, depuis son emploi initial dans le cadre des rapports fiduciaires jusqu'à l'arrêt *Pettkus c. Becker*, [[1980] 2 R.C.S. 834], dans lequel la Cour a donné à la fiducie par interprétation son emploi contemporain de réparation en matière d'enrichissement sans cause. Le Juge en chef a souligné que l'arrêt *Pettkus c. Becker*, précité, établissait un processus en deux temps. En premier lieu, la Cour détermine si l'enrichissement sans cause est établi et ensuite elle se demande si, dans les circonstances, la fiducie par interprétation est la réparation appropriée à l'égard de cet enrichissement. Dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltd.*, on a refusé d'appliquer la fiducie par interprétation, non pas parce qu'elle ne s'offrait pas aux parties (bien qu'à mon avis elle aurait pu ne pas être appropriée), mais plutôt parce que l'enrichissement sans cause n'ayant pas été établi, la question de la réparation ne se posait pas.

En l'espèce, on a démontré qu'il y avait lieu à restitution. La Cour peut accorder une réparation relative à la propriété, c'est-à-dire ordonner à Lac de rendre le bien-fonds Williams, ou accorder une indemnité, c'est-à-dire une somme d'argent. Même si, comme le Juge en chef le faisait observer à la p. 847 de l'arrêt *Pettkus c. Becker*, «Le principe de l'enrichissement sans cause est au coeur de la fiducie par interprétation», l'inverse n'est pas vrai. La fiducie par interprétation n'est pas au coeur du droit de la restitution. [Je souligne.]

Il a ajouté, à la p. 678:

Une grande partie de la difficulté disparaît si l'on reconnaît que, dans ce contexte, la question de la réparation appropriée se pose seulement une fois que l'on a démontré qu'il y avait lieu à restitution. La fiducie par interprétation confère un droit de propriété, mais ce droit ne peut exister que si un droit à une réparation a déjà été établi. [Je souligne.]

Dans *Brissette, Succession c. Westbury Life Insurance Co.*, [1992] 3 R.C.S. 87, les juges majoritaires ont cité et approuvé certains des passages de l'arrêt *Lac* et ils ont conclu, à la p. 96, que «[l]'enrichissement sans cause est une condition fondamentale du recours à la fiducie par interprétation».

Se référant uniquement à l'arrêt *Pettkus*, précité, le juge McLachlin dit, au par. 21, que cet arrêt et d'autres décisions, ne devraient pas être interprétés dian law the constructive trust in circumstances where there has not been unjust enrichment. With respect, I do not see how statements such as "[t]he 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.

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

comme faisant disparaître du droit canadien la fiducie par interprétation en cas d'absence d'enrichissement sans cause. Avec égards, je ne vois pas comment des déclarations telles «[l]'enrichissement sans cause est une condition fondamentale du recours à la fiducie par interprétation» pourraient ne pas faire disparaître du droit canadien le recours à la fiducie par interprétation en l'absence d'enrichissement. Il a été maintes fois répété que l'enrichissement sans cause constituait une condition préalable au recours à la fiducie par interprétation. Par conséquent, l'imposition d'une telle fiducie en l'absence d'enrichissement sans cause, irait manifestement à l'encontre d'un principe juridique établi.

Même en faisant abstraction de la jurisprudence, j'estime que l'impossibilité d'imposer une fiducie par interprétation en l'absence d'un enrichissement sans cause est compatible avec le rôle réparateur de cette fiducie. L'intimé a soutenu que si aucune réparation ne s'offrait à lui en l'espèce, il en résulterait une situation inacceptable, car il jouirait d'un droit tout en étant privé d'un recours pour le faire respecter. Je ne suis pas d'accord. De toute évidence, le bénéficiaire a le droit d'exiger du fiduciaire qu'il remplisse son obligation et, s'il subit un préjudice, il a droit à une réparation. À mon avis, cela est conforme aux autres principes de droit privé en matière de réparation. La violation d'une obligation, dans d'autres contextes juridiques, donne lieu à une réparation uniquement en cas de perte. Ainsi, il se peut que j'aie l'obligation, envers mon voisin, de déneiger mon allée, et il se peut que j'aie manqué à cette obligation. Cependant, si cette violation ne fait subir aucune perte à mon voisin, il n'y a pas de délit civil et aucune réparation ne s'offre à lui. De la même façon, il se peut que j'aie l'obligation contractuelle de fournir des marchandises à une certaine date, à un prix déterminé. Si, après que j'ai manqué à mon obligation, mon cocontractant parvient à se procurer les mêmes marchandises au prix, à la date et au lieu prévus au contrat, il ne subira aucun préjudice et aucune réparation ne s'offrira à lui. Le principe selon lequel il n'existe aucune réparation en cas de violation d'une obligation d'un fiduciaire si celui-ci ne s'enrichit pas du fait de cette violation, est 63 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

parfaitement compatible avec les règles que je viens de mentionner.

Les principes en matière de réparation étayent donc, de façon générale, la règle interdisant l'imposition d'une fiducie par interprétation en l'absence d'enrichissement sans cause. À mon avis, l'analyse des principes régissant la fiducie par interprétation, exposés dans l'arrêt *Lac Minerals*, appuie également cette règle. Dans cet arrêt, le juge La Forest a dit que, même en cas d'enrichissement sans cause, la fiducie par interprétation constituait une réparation extraordinaire, la solution normalement retenue étant les dommages-intérêts. Il a affirmé, à la p. 678:

> Dans la grande majorité des cas, la fiducie par interprétation ne sera pas la réparation appropriée. Ainsi, dans l'arrêt *Hunter Engineering Co. c. Syncrude Canada Ltd.*, précité, si l'on avait établi qu'il y avait lieu à restitution, il n'y aurait eu aucune raison d'imposer une fiducie par interprétation puisqu'il aurait pu être satisfait aux prétentions du demandeur par une simple indemnité; il n'y a lieu de conférer une fiducie par interprétation qu'en présence d'un motif pour accorder au demandeur les droits supplémentaires découlant de la reconnaissance d'un droit de propriété. [Je souligne.]

Le juge La Forest conclut donc que le bénéficiaire lésé ne peut généralement obtenir que des dommages-intérêts, et non le bien lui-même. C'est dire qu'en général, le bénéficiaire n'a pas droit au bien en question mais plutôt à la valeur des gains tirés de son acquisition. Il s'ensuit que si aucun gain n'a été réalisé, c'est-à-dire s'il n'y a eu aucun enrichissement sans cause, le bénéficiaire n'a pas le droit d'obtenir réparation. Par conséquent, en l'absence d'enrichissement sans cause, il n'existe aucun droit à une fiducie par interprétation ni à aucune autre réparation.

Bien que, selon moi, les arrêts récents de notre Cour et les principes qui les sous-tendent règlent la question, le juge McLachlin, citant d'autres arrêts canadiens, conclut que la fiducie par interprétation peut s'appliquer même en l'absence d'enrichissement sans cause. Elle fait référence à trois décisions de juridictions inférieures qui, selon elle, ont imposé une fiducie par interprétation en l'absence d'un enrichissement sans cause. Avec égards, 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, and *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.

j'estime qu'aucune de ces décisions n'étaye son point de vue. L'enrichissement sans cause se déduit de la présence de trois éléments, soit un enrichissement du défendeur, un appauvrissement correspondant du demandeur, et l'absence de tout motif juridique à l'enrichissement: *Pettkus c. Becker*, [1980] 2 R.C.S. 834, et *Hunter Engineering Co. c. Syncrude Canada Ltd.*, [1989] 1 R.C.S. 426. Or, le juge McLachlin n'a cité aucune décision dans laquelle une fiducie par interprétation a été accordée à titre de réparation en l'absence d'un tel enrichissement.

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.

Dans *Ontario Wheat Producers' Marketing Board c. Royal Bank of Canada* (1984), 9 D.L.R. (4th) 729 (C.A. Ont.), une fiducie par interprétation a été imposée à une banque qui a reçu, en toute connaissance de cause, des sommes d'argent qui appartenaient à une personne autre que le déposant. Dans cette affaire, la banque était créancière garantie du déposant qui éprouvait des difficultés financières au moment des dépôts. De toute évidence, il s'agissait d'un cas d'enrichissement sans cause: la banque tirait profit de la situation en obtenant des droits sur les sommes déposées tout en augmentant ses chances d'être remboursée du crédit fait au déposant; la demanderesse (une société dont le mandataire, le déposant, avait manqué à ses obligations fiduciaires) était privée du droit de recouvrer son argent; et il n'y avait aucun motif juridique justifiant l'enrichissement. L'imposition d'une fiducie par interprétation répondait donc à un enrichissement sans cause, que la cour ait fait allusion ou non à une telle doctrine. 67

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,

MacMillan Bloedel Ltd. c. Binstead (1983), 14 E.T.R. 269 (C.S.C.-B.) présente, selon moi, un autre cas d'enrichissement sans cause. Dans cette affaire, le fiduciaire d'une société a manqué à son obligation en effectuant une opération intéressée, sans révéler son conflit d'intérêts. Une fiducie par interprétation a été imposée relativement aux profits secrets réalisés, même si la société demanderesse n'aurait pas pu, à cause de sa politique interne, réaliser elle-même les profits. Bien que le fiduciaire se soit manifestement enrichi, le juge du procès et le juge McLachlin ont conclu à l'absence d'un «appauvrissement correspondant» et donc 68 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.

d'un enrichissement sans cause, étant donné que la demanderesse n'aurait pas pu réaliser elle-même les profits.

Je n'adhère pas au point de vue du juge McLachlin selon lequel il n'y avait pas d'enrichissement sans cause dans l'arrêt *Binstead*. Tout d'abord, les tribunaux ont, de façon constante, explicitement qualifié d'enrichissement sans cause les profits réalisés par le fiduciaire, peu importe que le bénéficiaire ait pu ou non les réaliser lui-même. Par exemple, dans *Reading c. The King*, [1948] 2 All E.R. 27 (K.B.D.), conf. par [1949] 2 All E.R. 68 (C.A.), conf. par [1951] 1 All E.R. 617 (H.L.), le juge Denning a dit (à la p. 28):

> [TRADUCTION] Le fait que l'employeur n'a perdu aucun profit ni subi aucun préjudice est sans importance. Et le fait que l'employeur n'aurait pu accomplir l'acte lui-même n'a pas d'importance non plus. Si l'employé s'est enrichi de façon injuste du fait de l'exercice de ses fonctions et sans la permission de son employeur, la loi interdit qu'il soit autorisé à conserver l'argent . . . [Je souligne.]

Dans l'arrêt *Canadian Aero Service Ltd. c. O'Malley*, [1974] R.C.S. 592, aux pp. 621 et 622, le juge Laskin, plus tard Juge en chef, a dit:

> Pour établir la responsabilité d'O'Malley et de Zarzycki pour violation d'obligation de fiduciaire, il n'est pas nécessaire que Canaero démontre qu'elle aurait obtenu le contrat de la Guyane, si ce n'avait été de l'intervention de ces derniers; ce n'est pas non plus une condition du recouvrement de dommages-intérêts que Canaero établisse ce qu'auraient été ses profits éventuels ou ce qu'elle a perdu en ne réalisant pas l'occasion d'affaires en question. Elle a le droit d'obliger les fiduciaires déloyaux à rendre compte de leur manquement suivant le gain qu'ils ont réalisé. Que les dommages-intérêts adjugés en l'espèce soient considérés comme compte de profits ou, ce qui équivaut à la même chose, comme basés sur un enrichissement injuste, je suis d'avis de ne pas en modifier le montant. [Je souligne.]

Il ressort clairement des arrêts *Reading* et *O'Malley* que les profits réalisés par le fiduciaire à la suite d'un manquement à ses obligations sont rattachés à l'enrichissement sans cause, que la société ait été ou non en mesure de réaliser elle-même les profits. Par conséquent, il y a bien eu

Thus, *Binstead* involved unjust enrichment, contrary to McLachlin J.'s assertion.

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.]

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.

enrichissement sans cause dans l'arrêt *Binstead*, contrairement à ce qu'affirme le juge McLachlin.

J'aimerais ajouter que le fait que les profits aient 70
été considérés comme un «enrichissement injuste» dans les arrêts *Reading*, *O'Malley*, et *Binstead* n'est pas incompatible avec les règles générales régissant l'enrichissement sans cause. Dans chaque cas, la partie demanderesse avait le droit d'obtenir le respect par le fiduciaire de son obligation. Les profits réalisés par la partie défenderesse par suite du manquement à son obligation sont considérés en *equity* comme appartenant à la société, que cette dernière ait été ou non en mesure de réaliser ces profits en l'absence du manquement visé. Pour illustrer l'analogie établie avec le droit de propriété, le maître des rôles Denning a dit, dans *Phipps c. Boardman*, [1965] 1 All E.R. 849 (C.A.), à la p. 856, conf. par [1966] 3 All E.R. 721 (H.L), que:

> [TRADUCTION] [S]'il réalise un profit personnel à l'aide des *renseignements ou connaissances* qu'il devait recueillir ou découvrir pour le compte de son mandataire *ou qu'il a par ailleurs acquis* pour ce dernier, il peut être tenu responsable [. . .], car de tels renseignements ou connaissances appartiennent à son mandataire, au même titre qu'une invention . . . [En italique dans l'original; je souligne.]

Par conséquent, dans l'arrêt *Binstead*, la conser- 71
vation des profits par le fiduciaire aurait privé la société de son droit à ceux-ci. Les sommes que le fiduciaire a obtenues en portant atteinte aux droits de la partie demanderesse représentent l'appauvrissement. Pour qu'il n'y ait ni appauvrissement ni enrichissement sans cause dans des circonstances par ailleurs analogues à celles de l'affaire *Binstead*, il faudrait que l'opération intéressée n'engendre aucun profit secret. Si une réparation était accordée en l'absence de profit, et donc en l'absence d'enrichissement et d'appauvrissement, le juge McLachlin serait fondée à invoquer ce cas à l'appui de sa conclusion. Cependant, étant donné qu'un profit a bel et bien été réalisé dans *Binstead*, il y a eu enrichissement sans cause justifiant l'imposition d'une fiducie par interprétation, que la cour se soit fondée expressément ou non sur la doctrine de l'enrichissement sans cause.

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.

En résumé, le juge McLachlin n'a cité aucune décision canadienne dans laquelle une fiducie par interprétation a été imposée malgré l'absence d'enrichissement sans cause. À la lumière de cette conclusion et d'arrêts récents de notre Cour qui interdisent, de manière non équivoque, l'imposition d'une fiducie par interprétation en l'absence d'un enrichissement sans cause, j'estime que le juge McLachlin se trompe en concluant qu'une telle fiducie peut être imposée en l'absence d'enrichissement sans cause.

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 in so far 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.

Outre la jurisprudence canadienne, le juge McLachlin s'efforce d'étayer sa conclusion en citant divers auteurs et décisions étrangères. À cause des règles de droit claires récemment formulées par notre Cour, j'estime que la doctrine et la jurisprudence étrangère ne sont utiles que dans la mesure où il ressort des principes énoncés que le droit canadien devrait être modifié. J'analyserai donc seulement les principes sur lesquels se fonde le juge McLachlin, au lieu d'examiner chaque décision et article qu'elle cite.

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

En un mot, le juge McLachlin conclut, à l'instar des juges majoritaires de la Cour d'appel, que le refus d'accorder la fiducie par interprétation à la suite d'un manquement à une obligation fiduciaire mais en l'absence d'un enrichissement sans cause, protégerait inadéquatement l'intégrité des rapports fiduciaires. À propos de l'imposition d'une fiducie par interprétation sur le simple fondement du concept de la «conscience», elle dit, au par. 33:

> La conscience concerne non seulement l'équité entre les parties devant le tribunal, mais aussi le souci plus général des tribunaux de maintenir l'intégrité d'institutions tels les rapports fiduciaires que les tribunaux d'*equity* étaient chargés de surveiller [. . .] La fiducie par interprétation imposée pour manquement à une obligation fiduciaire permet non seulement de rendre justice aux parties comme l'exige la conscience, mais aussi d'obliger les fiduciaires et autres personnes occupant des postes de confiance à se conformer aux normes élevées en matière de confiance et de probité nécessaires pour assurer l'efficacité des institutions commerciales et autres institutions sociales.

Le juge McLachlin considère donc que l'élément de dissuasion ne jouera sur les fiduciaires déloyaux constructive trust as a remedy even where there has been no unjust enrichment.

que s'il est possible de recourir à la fiducie par interprétation, même en l'absence d'enrichissement sans cause.

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.

À mon avis, la dissuasion n'est pas un facteur 75
qui appelle la modification du droit canadien et l'imposition de la fiducie par interprétation en l'absence d'un enrichissement sans cause. Comme je l'ai déjà souligné, malgré des considérations de dissuasion, il est vrai que le droit privé ne prévoit habituellement pas de recours en cas d'absence de perte. Les tribunaux n'ont pas jugé qu'il était nécessaire d'accorder, même en l'absence de perte, une réparation à la suite d'un manquement à une obligation en matière délictuelle ou contractuelle par souci de protection de l'intégrité de ces obligations. Je ne vois pas ce qui distingue le rôle des obligations fiduciaires du rôle social très important que jouent d'autres obligations juridiques, et qui justifierait qu'elles reçoivent un traitement particulier en matière de réparation.

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 <u>were</u> gains in value, and therefore unjust enrichment, he or she <u>would</u> be compelled to pay damages or possibly give up the property. Thus, if the fiduciary were motivated to

De toute façon, l'impossibilité d'invoquer la 76
fiducie par interprétation en l'absence d'enrichissement sans cause n'a, selon moi, aucune incidence importante sur la dissuasion des fiduciaires déloyaux ni grande influence sur la protection de l'intégrité des rapports fiduciaires. Premièrement, si dans un cas donné, l'élément de dissuasion était jugé particulièrement important, le demandeur pourrait obtenir du juge du procès des dommages-intérêts punitifs. L'imposition d'une fiducie par interprétation n'est pas nécessaire au maintien de l'intégrité du rapport, même si cette dernière constituait un aspect important d'une affaire. Le fait que des dommages-intérêts punitifs n'ont pas été revendiqués en l'espèce ne devrait pas obliger notre Cour à imposer une fiducie par interprétation à la place. Deuxièmement, même si aucune réparation ne pouvait être demandée en l'absence d'enrichissement sans cause (ce qui est faux, vu la possibilité de réclamer des dommages-intérêts punitifs), l'élément de dissuasion n'est pas exclu pour autant. Supposons une affaire semblable au présent pourvoi. Même si le fiduciaire sans scrupules sait bien qu'il ne sera pas tenu de rendre le bien qu'il a malhonnêtement acquis si celui-ci n'a pas pris de valeur, il devra tout de même avoir à l'esprit la

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.

possibilité que, si le bien prenait de la valeur, c'est-à-dire s'il s'enrichissait sans cause, il devrait alors payer des dommages-intérêts ou peut-être même céder le bien. Par conséquent, si ce fiduciaire décidait de manquer à son obligation dans l'espoir de réaliser un profit, ce qui, j'imagine, constitue le motif habituel, voire l'unique motif d'un tel comportement, le fait de ne pas imposer une fiducie par interprétation en l'absence de profit n'aurait aucune incidence sur l'élément de dissuasion. Je suis donc en désaccord avec le juge McLachlin, qui estime que la dissuasion exige que l'on puisse recourir à la fiducie par interprétation, même en l'absence d'un enrichissement sans cause.

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.

À l'évidence, je ne peux souscrire à l'opinion du juge McLachlin selon laquelle une fiducie par interprétation pouvait et, en fait, devait être ordonnée dans la présente affaire, même s'il n'y a eu aucun enrichissement sans cause. Pour déterminer si une telle réparation pouvait être accordée en l'espèce, à mon avis, il faut d'abord déterminer s'il y a eu enrichissement sans cause.

Was There Unjust Enrichment?

Y a-t-il eu enrichissement sans cause?

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.

À mon avis, il n'y a eu aucun enrichissement, et par conséquent, aucun enrichissement sans cause en l'espèce. Tout d'abord, les appelants n'ont manifestement pas réalisé de profits en achetant l'immeuble. En effet, le juge du procès à dit (à la p. 68):

> [TRADUCTION] Je traiterai maintenant des faits de l'espèce. La nature de l'obligation et du manquement a déjà été examinée. À l'étape interlocutoire, le demandeur a renoncé à réclamer des dommages-intérêts. Une telle décision n'entraînait aucun sacrifice puisqu'il aurait été impossible pour le demandeur d'établir l'existence d'un préjudice. [Je souligne.]

L'enrichissement provenant de l'achat de l'immeuble n'était pas de nature pécuniaire, ce qui donne à penser qu'il n'y a eu aucun enrichissement et, par conséquent, aucun enrichissement sans cause.

79 It could, perhaps, be argued that if the property were unique or otherwise difficult to value, the

On pourrait peut-être avancer, si l'immeuble était exceptionnel ou s'il était par ailleurs difficile 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.

à évaluer, que les profits réalisés par le défendeur ne représentent ni son enrichissement ni l'appauvrissement du demandeur. Par analogie avec une ordonnance portant exécution en nature d'un contrat, lorsque la propriété qui en fait l'objet est exceptionnelle ou par ailleurs difficile à évaluer, on peut conclure que des dommages-intérêts ne sont pas satisfaisants et que l'exécution en nature du contrat doit être ordonnée pour indemniser adéquatement le demandeur. Il se peut que, dans un tel cas, des dommages-intérêts ne puissent représenter la perte subie par le demandeur ni le gain réalisé par le défendeur du fait de la violation du contrat. On pourrait donc conclure qu'il y a eu enrichissement, même en l'absence d'une fluctuation de la valeur marchande d'une propriété, si celle-ci est exceptionnelle ou, si par ailleurs, elle est difficile à évaluer.

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.

Indépendamment de l'utilité de telles considérations pour déterminer s'il y a eu un enrichissement, l'immeuble en question n'a pas été jugé exceptionnel ou par ailleurs difficile à évaluer au point d'influer sur le choix de la réparation appropriée. Le juge du procès a souligné que l'intimé a soutenu que l'immeuble avait une valeur particulière pour lui parce que le locataire était une banque et que le fait d'être le bailleur d'une banque était une source de prestige dans la communauté grecque. Selon le juge du procès (à la p. 69), il ne fallait pas tenir compte d'un tel facteur, pas plus qu'il ne faut tenir compte de l'attachement d'une personne pour sa propriété dans une cause d'expropriation. Autrement dit, bien que des considérations personnelles aient pu conduire à l'achat de l'immeuble, elles n'entrent pas en ligne de compte lorsqu'il s'agit de déterminer la valeur de celui-ci. Cela montre, à mon avis, que le juge du procès n'a pas considéré que l'immeuble était exceptionnel au point d'influer sur son analyse de la réparation appropriée. Cette conclusion ressort clairement de l'analyse que le juge du procès fait de *Lee c. Chow* (1990), 12 R.P.R. (2d) 217 (C.S. Ont.). Dans cette affaire, une fiducie par interprétation a été ordonnée à l'égard d'un immeuble qu'un mandataire avait malhonnêtement acheté dans des circonstances semblables à celles qui nous occupent. En l'es-

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

pèce, le juge du procès a établi la distinction suivante avec la décision *Lee* (à la p. 70):

> [TRADUCTION] Parmi ces circonstances [celles de l'affaire *Lee*], mentionnons les suivantes: une certaine dépendance du demandeur qui, selon moi, n'existe pas en l'espèce; le fait qu'il s'agissait d'un immeuble résidentiel répondant aux exigences particulières du demandeur, et non d'un immeuble commercial n'ayant de valeur qu'à titre d'investissement; et le fait qu'il paraissait probable que le prix d'achat en faisait une aubaine, ce qui n'est pas le cas en l'espèce. [Je souligne.]

Dans l'affaire *Lee*, des profits avaient été réalisés — d'où enrichissement — et l'immeuble avait des qualités exceptionnelles qui contribuaient à justifier l'imposition d'une fiducie par interprétation. En l'espèce, aucun profit n'a été réalisé, et le juge du procès n'a constaté aucun avantage non pécuniaire important lié à l'immeuble: celui-ci n'avait de valeur «qu'à titre d'investissement». À mon avis, comme l'immeuble ne conférait ni avantage pécuniaire ni avantage non pécuniaire, il n'y a eu aucun enrichissement, et par conséquent, aucun enrichissement sans cause.

Vu l'absence d'enrichissement sans cause, j'estime que le juge du procès a eu raison de ne pas accorder la réparation demandée, soit la fiducie par interprétation. Le juge du procès a dit (à la p. 69):

> [TRADUCTION] Dans l'arrêt *LAC Minerals*, précité, il a été jugé opportun d'imposer une fiducie par interprétation parce que les dommages-intérêts ne donnaient pas satisfaction. Il serait anormal de reconnaître l'existence d'une fiducie par interprétation parce que le recours aux dommages-intérêts n'est pas satisfaisant, le demandeur n'ayant subi aucun préjudice.

Le juge du procès, vu l'absence d'un préjudice pécuniaire dont on aurait pu déduire l'existence d'un enrichissement sans cause, a refusé d'imposer une fiducie par interprétation. Or, ni les juges majoritaires de la Cour d'appel ni le juge McLachlin n'invoquent une erreur de principe dans les motifs du juge du procès; en fait, je suis d'avis qu'ils se trompent en concluant que la fiducie par interprétation peut s'appliquer dans la présente affaire. Même si le juge du procès avait omis de tenir compte de facteurs tels la valeur morale du comportement des défendeurs et l'élément de dissuasion, ce qui n'est pas le cas, et même si une 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.

telle omission pouvait être assimilée à une erreur de principe, les facteurs à considérer pour décider s'il y a lieu d'imposer une fiducie par interprétation ne jouent qu'à la deuxième étape de l'enquête, lorsqu'il s'agit de déterminer la réparation appropriée. À moins que l'enrichissement sans cause ne soit établi à la première étape de l'examen, il n'est pas nécessaire de tenir compte de ces facteurs. Les juges majoritaires de la Cour d'appel ont commis une erreur en s'immisçant dans l'exercice du pouvoir discrétionnaire du juge du procès et en concluant qu'une fiducie par interprétation pouvait être imposée en l'absence d'enrichissement sans cause.

Conclusion

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.

Conclusion

Étant donné que le juge du procès ne s'est pas trompé en n'imposant pas une fiducie par interprétation et que ce sont plutôt les juges majoritaires de la Cour d'appel qui ont commis une erreur en accordant cette réparation, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et de rétablir le jugement du juge du procès. Vu les circonstances, je n'adjugerais de dépens aux appelants ni dans le présent pourvoi, ni en Cour d'appel. 82

Appeal dismissed with costs, SOPINKA *and* IACOBUCCI JJ. *dissenting.*

Solicitors for the appellants: McCarthy Tétrault, Toronto.

Solicitors for the respondent: Stockwood, Spies & Campbell, Toronto.

Pourvoi rejeté avec dépens, les juges SOPINKA *et* IACOBUCCI *sont dissidents.*

Procureurs des appelants: McCarthy Tétrault, Toronto.

Procureurs de l'intimé: Stockwood, Spies & Campbell, Toronto.

In the Court of Appeal of Alberta

Citation: Scott & Associates Engineering Ltd v Finavera Renewables Inc, 2015 ABCA 51

Date: 20150209
Docket: 1301-0333-AC
Registry: Calgary

Between:

Scott & Associates Engineering Ltd.

Appellant
(Plaintiff)

- and -

Finavera Renewables Inc.

Respondent
(Defendant)

- and -

Scott & Associates Engineering Ltd. and Bryan G. Scott

Not Parties to the Appeal
(Defendants by Counterclaim)

- and -

Finavera Renewables Inc.

Not a Party to the Appeal
(Plaintiff by Counterclaim)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice S.L. Martin
Dated the 14th day of May, 2013
Filed on the 13th day of November, 2013
(2013 ABQB 273, Docket: 0701 08472)

Memorandum of Judgment

The Court:

[1] Scott & Associates Engineering Ltd. appeals a trial judge's conclusion that damages and not the proprietary remedy of a constructive trust were the appropriate remedy for Finavera Renewables Inc.'s unjust enrichment: *Scott & Associates Engineering Ltd v Finavera Renewables Inc*, 2013 ABQB 273, 10 WWR 551.

[2] The appeal is dismissed.

Background

[3] Near the end of the bid process, Scott was the sole bidder on two Penn West Petroleum Ltd. wind power generating assets. However, Scott needed capital to complete the purchase. It attempted to raise the necessary capital without success until it was introduced to Finavera. Scott then introduced Finavera to the prospect of purchasing these assets, including sharing with Finavera, on a confidential basis, the due diligence it conducted on the developability and potential profitability of the assets.

[4] Scott and Finavera agreed that they would act in good faith in attempting to form a mutually agreeable partnership to develop the assets once acquired by Finavera. That partnership was never formed.

[5] But as part of the negotiations Finavera did offer to pay Scott $600,000 for introducing it to the project. Scott accepted that offer.

[6] Finavera also offered to retain Scott to be its project engineer, but that never happened.

[7] Finavera purchased the wind power assets from Penn West; but unhappy differences arose between Scott and Finavera. As a consequence, Finavera refused to pay Scott for having introduced it to the project and hired a different engineer to develop the project. And no partnership, joint venture or joint ownership agreement was ever entered into.

[8] Scott sued Finavera claiming breach of confidence, misappropriated business opportunity and unjust enrichment, and claimed the remedy of constructive trust or, in the alternative, damages.

[9] About a year later, Finavera sold some of the assets it acquired to a third party for a profit. Scott seeks a 10% ownership interest in the net profits generated by the assets, including those assets now in the hands of the third party.

Trial Decision

[10] The trial judge held that Finavera had been enriched by Scott's efforts. To quote from the trial judge's reasons:

> [155] I find that Finavera was enriched by many of Scott's actions. Finavera benefited from Scott's position as preferred purchase; Scott's bid price; Scott's gathering; forwarding, and preliminary analysis of relevant information, including asking Golder to make certain site inspections and to come forward with a proposal to finish same on the preliminary reports, and Scott's negotiation of certain terms of the acquisition of the project. Simply put, Finavera could not have acquired this project when it did without Scott and Scott's efforts.

[11] The trial judge also found that Scott suffered a corresponding deprivation:

> [163] Scott has suffered a deprivation to the extent that it allowed Finavera to step into its status in the bid process and it expended time and labour performing services to the benefit of Finavera. As a result it could not work for others and did not receive any form of compensation from Finavera. Indeed, Mr. Bak [the President of Finavera] acknowledged that it ended up with Penn West assets and Scott ended up with a law suit.

[12] The trial judge went on to find that there was no juristic reason which would justify Finavera's enrichment or Scott's deprivation.

[13] So, Finavera was found to have been unjustly enriched by the efforts of Scott.

[14] The trial judge then considered Scott's claim to the equitable remedy of a constructive trust in the form of a 10% ownership interest in the net profits from the project. She rejected that claim but did find that Scott was entitled to a judgment for the $600,000 Finavera agreed to pay Scott for introducing it to the project. A judgment for that amount was of little use to Scott because it is alleged that Finavera is on the brink of insolvency or that enforcing a judgment against it would push it into insolvency. Scott sought a proprietary remedy instead.

[15] The trial judge found that she had the discretion to grant a proprietary remedy consisting of the imposition of a constructive trust, but opted for the monetary remedy instead on the basis that Scott's role in the acquisition of the wind power project was that of a finder or a broker. That is, the trial judge declined to impose a constructive trust because she was of the view that Scott had not contributed to the value of the properties in respect of which the trust was sought to be imposed.

[16] Scott had also argued that a monetary remedy (damages) was not an appropriate remedy due to difficulties in enforcing a monetary judgment. The trial judge rejected the argument that such difficulties or even a potential insolvency is sufficient cause for granting the extraordinary

proprietary remedy of constructive trust. She said counsel had not provided any authority in support of that proposition.

[17] The trial judge dismissed Scott's breach of confidence claims: paras 94-134. She also dismissed Scott's claim that Finavera had misappropriated Scott's business opportunity (paras 135-44) because she found that Scott lacked the financial resources (and financial backers) to avail itself of the opportunity. She also rejected the claim that a fiduciary relationship existed: para 182. She also found that "Scott allowed Finavera to bid and proceed in its name alone with [Scott's] full knowledge and consent": para 141. Finally, the trial judge declined to award any damages in respect of Finavera's decision to hire a project engineer other than Scott.

Grounds of Appeal

[18] Scott argues the trial judge erred by not awarding it a constructive trust. More specifically, it submits the trial judge erred in law by failing to consider the sufficiency and enforceability of a monetary judgment and the moral quality of Finavera's conduct. Scott also argues that the trial judge erred in holding that a right to property is a prerequisite to a declaration of a constructive trust. That is, Scott argues that the trial judge failed to recognize that the declaration of a constructive trust can create a right to property when no such right previously existed.

[19] In oral submissions we were advised that Scott has a pending action against the third party who purchased the wind farm asset from Finavera and that that action is awaiting the outcome of this appeal.

Standard of Review

[20] "[T]he decision to order a constructive trust is a matter of discretion" and, because "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.": *Soulos v Korkontzilas*, [1997] 2 SCR 217, 146 DLR (4th) 214 at paras 54-55, in dissent but not on this point.

Analysis

[21] The trial judge found that the parties' understanding immediately preceding Finavera's acquisition of the assets was that Scott would be paid $600,000 in exchange for the services it rendered in introducing the purchase opportunity to Finavera. It was also anticipated that Scott would be hired by Finavera as the project's engineer. The $600,000 agreement was reduced to writing: see reasons at paras 32 and 33. However, the parties never did come to terms on the project engineering retainer. It is also important to note that the parties agreed that for the purposes of trial no contract existed. Scott advised the court that it was not pursuing a contract action against Finavera: reasons at paras 59-64.

[22] The trial judge accepted that Scott's due diligence was decisive to Finavera's decision to purchase the assets; but that fact, though necessary, did not entitle Finavera to the proprietary remedy it sought.

i. Proprietary Interest Lacking

[23] A constructive trust is only available to remedy an unjust enrichment when there is a "direct link between the contribution and the property" and a "monetary award is insufficient": *Peter v Beblow*, [1993] 1 SCR 980 at 982, 101 DLR (4th) 621. Put another way, when monetary damages are inadequate and when there is a direct link between the contribution which founds the action and the property in which the constructive trust is claimed, a constructive trust may be an appropriate remedy. Here, a monetary judgment may have been a problematic remedy, but the contribution which founded the action (i.e., the "finding" of the business opportunity) is not linked to the property in the sense that that finding and investigating the properties and the opportunities they presented did not improve or add value to them. The first branch of the test has not been met.

[24] Although at one time it was contemplated by the parties that Scott would have a proprietary interest in the asset, no agreement was reached on this. Scott's remuneration for its efforts to secure the property was agreed to be monetary and in the form of a commission, a $600,000 cash payment and ongoing income from its project engineering services.

[25] In effect, the trial judge found that ultimately Scott was a broker and was entitled to a commission for those services. Scott was found to have made no contribution to the value of the assets acquired and therefore lacked the basis for a constructive trust. Given the discretionary nature of the remedy, no error warranting our intervention has been established.

[26] The uncontested evidence is that, after much heated discussion and a so-called "cooling off period", Scott agreed that Finavera would "buy us out" for "10% … of the $6M (reference to seed capital)", that is, $600,000. To suggest now that it is entitled to a 10% interest in the "net carried interest" of the asset sold to a third party because Finavera's financial circumstances are such that a monetary award of damages might be unenforceable is not appropriate. Scott agreed to be paid in money and it is surprising that he now seeks to be compensated in another form of compensation.

ii. Moral Quality of Conduct Assessed by Parties' Expectations

[27] The second focus in oral submissions was on the "moral quality" of Finavera's conduct. That is, Scott asserts that moral culpability is a factor in determining whether a constructive trust is available.

[28] However, for the reasons which follow, we are of the view that in the absence of a fiduciary relationship or a relationship giving rise to confidence or a contractual relationship, it is doubtful that moral culpability – if indeed it arises on these facts – becomes a factor.

[29] As noted above, the trial judge expressly found no fiduciary duty to engage the duty of loyalty. This eliminates *Soulos* and the cases awarding constructive trusts for a breach of a fiduciary duty.

[30] The trial judge also expressly found no breach of confidence, which eliminates the *Lac Minerals* (*Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14) breach of confidence line of cases that considered moral quality, and on which the appellant relies.

[31] And, because the parties expressly agreed not to proceed on the basis of contract, even the principles recently enunciated by the Supreme Court in *Bhasin v Hrynew*, 2014 SCC 71 (available on CanLII) do not apply. In *Bhasin*, the Supreme Court held that while a contracting party should have appropriate regard to the legitimate interests of the other contracting party, "appropriate regard" does not require the party to serve those legitimate interests in all cases. It merely requires that a party not seek to undermine those legitimate interests of the other party. In this case, the trial judge found that Finavera did not seek to undermine Scott's legitimate interests.

iii. Effect on Third Parties or Creditors

[32] The fourth step of the *Soulos* test is whether or not the rights of creditors and other third parties' interests might be impacted by the court's decision to impose a constructive trust. This is an important consideration. A constructive trust, that is, a trust imposed by operation of law (i.e., not pursuant to the actions of a settlor) immediately gives the party in whose favor the trust is granted an enforceable right in the trust property. Professor Waters writes that it imposes upon the legal title holder of the property "an obligation to hold specific property for another": Donavan WM Waters, Q.C., *Waters Law of Trusts in Canada*, 3d ed (Toronto, ON: Thomson Carswell, 2005) at 454.

[33] Professor Waters also states (citations omitted) at 479:

> A great deal has been written about constructive trusts in insolvency situations. ... If [the constructive trust] arises only when judgment is given, it is clear that the judge created it. The creation of such a trust, promoting the plaintiff from unsecured creditor to trust beneficiary, would seem clearly inconsistent with the *Bankruptcy and Insolvency Act*.

Whether it is inconsistent or not, we save for another day. The point is that constructive trusts cannot be declared without careful regard for their effect on the interests of third parties.

[34] Counsel for Finavera argued that a declaration of a constructive trust giving Scott an interest in Finavera's property might prejudice Finavera's creditors. Scott's counsel argued that Finavera's creditors would, in fact, be better off than if Scott attempted to enforce its damages judgment. However, that is only because the assets are now in the hands of new owners (against whom a suit is pending). The thrust of Scott's argument was that the reason a constructive trust

ought to be declared was to give Scott the priority accorded to the holder of a property right in a bankruptcy. For the reasons set out above, we agree with the trial judge that no property right was created and therefore there was no need to accord Scott the priority he sought.

[35] The constructive trust sought by Scott cannot be said to have arisen when the bargain was made. Had it, there might have been a different outcome. Scott was content to receive money from Finavera for his efforts. It is only now, when seeking judgment, that Scott is concerned that a constructive trust might be the only remedial response that would ensure a judgment is enforceable. Without overstating the point, if a constructive trust can be justified in commercial circumstances such as these, when the enforceability of a judgment for damages is alleged by the claimant to be an issue and the claimant initially agreed to receive a monetary payment, this could impact well-established solvency schemes.

[36] The trial judge not only exercised her discretion reasonably, she did so correctly.

iv. Cases Relied Upon by the Appellant

[37] With respect to the appellant's argument that this approach was endorsed by this Court in *Walter Stewart Realty Ltd v Traber* (1995), 174 AR 45, 31 Alta LR (3d) 162 (CA), that case is distinguishable on the facts (The parties there agreed that a percentage of the profits from the real estate development was to be the basis of the "finder's" compensation). In the *Traber* case, the realtor became aware that certain land inside the City of Lethbridge, which even the City considered undevelopable, was in fact developable. The land was owned by Marathon Realty. The realtor then approached Traber as a potential financier, extracting a promise from Traber not to disclose the information he had about the potential developability of the lands. The trial judge found that it was agreed that the realtor would receive 30% of all the profits from developing the lands. Traber purchased the land from Marathon and then conveyed it to a family holding company instead of to a company in which the realtor had an interest. The realtor received nothing for his efforts. The Court awarded the realtor 30% of all the profits from the development and permitted the filing of a *lis pendens* against the property.

[38] The distinguishing feature of the *Traber* case is that the parties were found to have agreed to a 30% share of the project. There was no agreement in this case for the appellant to receive a net 10% interest in the wind power project. The only agreement was to pay the appellant $600,000 for having introduced the project to the respondent. Also, the *Traber* case is distinguishable in that in *Traber* it was found as a fact that the realtor's investigation of the property in question did add to its value. The realtor discovered that the land which even the municipality considered was undevelopable was developable. The results of the realtor's investigation enhanced the value of the land. Scott's investigations simply demonstrated that there was merit in acquiring the assets. He didn't enhance their value.

[39] In *Visagie v TVX Gold Inc.* (2000), 49 OR (3d) 198, 132 OAC 231, the circumstances were also distinguishable. The causes of action pleaded by claimants in *TVX Gold* were breach of a joint venture agreement, breach of confidence and breach of fiduciary duty. The respondent approached

the appellant TVX proposing that TVX become the respondent's joint venture partner for the purpose of privately acquiring certain mines in Greece. TVX and the respondents entered into a joint venture funding agreement which provided that the respondent was to receive a 12 per cent carried interest. TVX then discovered that the Greek government was not prepared to allow the mines to be sold except through a public tendering process. TVX terminated its obligations under the joint venture funding agreement, as it was entitled to do under its terms, and then bid for the mines on its own in the tender process and was successful.

[40] The respondents claimed the 12 per cent carried interest. The trial judge awarded that remedy and the Court of Appeal upheld the remedy on the basis that there had been a breach of confidence (as in *Lac Minerals*).

[41] There are critical differences between *TVX Gold* and this case which make the *TVX Gold* case entirely inapplicable. The remedy upheld by the Court of Appeal of Ontario was based on the successful claim of breach of confidence. As noted above, the trial judge expressly found that there was no breach of confidence. Accordingly, *TVX Gold* is distinguishable for that reason. And, as in *Traber*, there was, at one point, an enforceable agreement providing for a carried interest in the venture.

Conclusion

[42] The trial judge's reasons do not disclose an error of principle. Given the discretionary nature of the remedy our intervention is not warranted.

[43] The appeal is dismissed.

Appeal heard on September 10, 2014

Memorandum filed at Calgary, Alberta
this 9th day of February, 2015

Authorized to sign for: Rowbotham J.A.

O'Ferrall J.A.

Authorized to sign for: Veldhuis J.A.

Appearances:

J.E. Fletcher
for the Appellant

P.D. Edwards
for the Respondent

Court of Queen's Bench of Alberta

Citation: Hoard (Re), 2014 ABQB 426

Date: 20140715
Docket: B101 653252
Registry: Calgary

In the Matter of the Bankruptcy

of

Graham Charles Hoard

Reasons for Decision
of
J.L. Mason , Registrar in Bankruptcy

Introduction

[1] Elizabeth Toerper and Graham Hoard contractually share commissions flowing from insurance and investment contracts held in Mr. Hoard's name alone. Mr. Hoard did not pay Ms. Toerper her full share and in 2011, Ms. Toerper obtained a judgement for damages for breach of contract against Mr. Hoard. After the judgment, Ms. Toerper learned Mr. Hoard had transferred a significant portion of the contracts to another licensed insurance agent, Shawna Brackley, for apparently no consideration. Ms. Toerper commenced an action against Ms. Brackley for her share of the commissions from the transferred contracts. In August of 2012, Mr. Hoard made an assignment in bankruptcy. Hardie & Kelly Inc. is the trustee of his estate.

[2] Ms. Toerper is now seeking redress for the transfer to Ms. Brackley in the bankruptcy. She submits that due to Mr. Hoard's wrongful transfer of a portion of the contracts, she should get his share of commissions paid on the remaining contracts to Mr. Hoard's trustee in bankruptcy, in addition to her own share. The trustee rejected Ms. Toerper's proprietary claim to Mr. Hoard's share of the commission payments. Ms. Toerper appeals the trustee's decision. She relies on her affidavit sworn April 28, 2014 in support of the application.

[3] For the reasons that follow, the appeal is dismissed.

History of Ms. Toerper's claim

[4] Ms. Toerper commenced action 0801 05424 against Mr. Hoard, his numbered company and Ms. Brackley. The following review of the litigation is largely drawn from the reasons of Justice Strekhaf dated February 15, 2011.

[5] The action arose out of agreements entered into by the parties in 2006 relating to the acquisition of insurance and investment "books of business", consisting of an entitlement to future remuneration in the form of trailer fees and various commissions. The parties did not divide the underlying insurance and investment contracts, but rather agreed to share the whole of the cash flow arising under those contracts, held exclusively in Mr. Hoard's name.

[6] On March 15th, 2006, Ms. Toerper and Mr. Hoard together paid $125,000 to acquire in equal shares a "book of business" from a Gary Phillips.

[7] On December, 29, 2006, Ms. Toerper purchased a 50% interest in Mr. Hoard's "book of business".

[8] Ms.Toerper paid $50,000 to acquire this interest.

[9] Her interest was subject to fees payable to Mr. Hoard's numbered company that would administer the payments. Mr. Hoard or his numbered company were to receive the payments, deduct the administrative fees and pay Ms. Toerper her share.

[10] Ms. Toerper became concerned that Mr. Hoard and his numbered company were breaching their contractual obligations under the agreements in numerous ways, including by not providing her the required monthly statements or the revenue to which she was entitled, and by transferring accounts to other parties without her consent.

[11] The action was commenced September 8, 2008. Mr. Hoard and his numbered company defended the action but the defence was eventually struck by order of Justice Stevens on June 11, 2010.

[12] In late January, 2011, Justice Strekhaf presided over a two- day *vive voce* damages assessment hearing pursuant to Rule 3.37. Both Ms. Toerper and Mr. Hoard presented witnesses.

[13] Justice Strekhaf issued reasons on February 15, 2011. She held that Mr. Hoard and his numbered company breached their obligations to Ms. Toerper under the agreements. She was not

satisfied that Ms. Toerper had alleged a sufficient factual basis in her amended statement of claim to establish claims for breach of trust or breach of fiduciary duty that went beyond the claims for breach of contract and accordingly, granted no relief on those bases.

[14] She quantified the damages for breach of contract at approximately $260,000, to and including December 9, 2009. She accepted Ms. Toerper's interpretation of the agreements that she was entitled to a 50% interest in all commissions, except first year commissions from new clients who were not clients of Mr. Hoard at the time of contracting.

[15] Also included in these damages was approximately $8000.00, representing Ms. Toerper's share of commissions from clients given to Ms. Brackley without Ms. Toerper's consent, contrary to section 9.2 of the December 29, 2006 agreement. Ms. Brackley had initially been named as a defendant in the action but Ms. Toerper subsequently discontinued the action against her prior to the assessment hearing.

[16] Justice Strekhaf also declared that Ms. Toerper was entitled to damages after December 31, 2009, to be calculated in accordance with the agreements. She declined to award general damages for estimated future loss of business.

[17] Following the damages assessment and in the course of enforcing the judgment, Ms. Toerper learned that Mr. Hoard had in fact transferred further contracts to Ms. Brackley for apparently no consideration, in January of 2010.

[18] In a document entitled "Assignment of Responsibility – Name Change Agreement", Mr. Hoard assigned his right to represent clients holding life insurance and investment contracts he had placed with Industrial Alliance Insurance and Financial Services Inc. and/or Industrial-Alliance Pacific Life Insurance Company. Over 100 are listed in an attachment to this document. It provides that the assignment covers all commissions, bonuses or other compensation payable by the two companies relative to the client contracts placed by Mr. Hoard with them.

[19] There are further such Assignments to Ms. Brackley that are not in evidence, but which the trustee concedes took place.

[20] The trustee accepts that Ms. Toerper is entitled to 50% of the net commissions it has received and will receive from the various insurance companies who continue to pay commissions to Mr. Hoard The balance of the commissions form part of Mr. Hoard's estate.

[21] Ms. Toerper wants to go beyond her 50% share and dip into Mr. Hoard's 50% share collected by the trustee to the exclusion of the other unsecured creditors, on the basis that Mr. Hoard wrongly transferred away some of the contracts to Ms. Brackley prior to bankruptcy

without her consent.

[22] She presented this argument to Registrar Prowse, who directed Ms. Toerper to come back with authority supporting her position. Her counsel briefed the issue and submits that Mr. Hoard's share of the commissions are subject to a constructive trust in favour of Ms. Toerper. The trustee asserts that the circumstances do not support the imposition of a constructive trust.

Imposition of constructive trust

[23] The onus of proving a constructive trust falls upon the claimant and, in a bankruptcy setting, is not lightly undertaken. The evidence must be clear and the standard of proof is high. Given that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 provides a code by which legislators have balanced the interests of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust: ***Re McKinnon***, 2006 NBQB 108.

[24] The remedy is discretionary and the authorities have expressed reservations as to the availability of a constructive trust where creditors and third party interests are affected: see for example, ***Re McKinnon; Melchior v. Cable Estate***, 2007 BCSC 136.

[25] Ms. Toerper submits that pursuant to the Supreme Court of Canada decision in ***Soulos v. Korkontzilas*** (1997), 46 C.B.R. (3d) 1 (S.C.C.), there are two possible bases upon which to impose a constructive trust in this case: unjust enrichment and wrongful conduct.

Unjust enrichment

[26] A constructive trust can be utilized to remedy unjust enrichment, which is established where: there is an enrichment; a corresponding deprivation; and an absence of juristic reason for the enrichment. It is a discretionary remedy that will not be imposed without taking into account the interests of others who may be affected by granting the remedy.

[27] In the particular circumstances here, Mr. Hoard has not been enriched. He has transferred away a portion of the contracts upon which commissions are based to Ms. Brackley. There is no evidence that Mr. Hoard derived any benefit or "kickbacks" from this transaction. It is Ms. Brackley who has benefitted from the transaction, assuming that the contracts continued to generate commissions and did not terminate or mature. As noted, Ms. Toerper has commenced a fresh action against Ms. Brackley for the return of her share of the commissions from the transferred contracts.

[28] Even assuming there has been some gain to Mr. Hoard, the Court of Appeal of Alberta

held that where a party to a contract gains by a breach of that contract, that party is not truly enriched, as the breaching party takes that gain subject to its liability for breach of contract: ***Luscar Ltd. v. Pembina Resources Limited***, 1994 ABCA 356 at paragraph 117. Here, as recognized by Justice Strekhaf in her reasons assessing Ms. Toerper's breach of contract damages, Mr. Hoard was in breach of the agreements by transferring contracts to Ms. Brackley without Ms. Toerper's consent.

[29] Ms. Toerper asserts that Mr. Hoard is being enriched by retaining his share of commissions. Medhurst J. addressed a similar argument in ***Bassano Growers Ltd. v. Price Waterhouse Ltd***. (1997), 214 A.R. 380 (Q.B.), aff'd 216 A.R. 328 (C.A.). He held that this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the *Bankruptcy and Insolvency Act*. In bankruptcy situations, the creditors who benefit from the failure of a trust claim are not "enriched", but merely recover what they are owed according to the pro-rata distribution requirements set out in the *Bankruptcy and Insolvency Act*. The Court in ***Re McKinnon*** also makes this point.

[30] Even if it could be argued that Mr. Hoard's unsecured creditors have been enriched by the ongoing receipt of commissions, there is no corresponding deprivation vis-à-vis Ms. Toerper regarding those commissions. Her deprivation is in regard to the subject of the transfer to Ms. Brackley. ***New Skeena Forest Products Inc. v. Kitwanga Lumber Co***., 2007 BCSC 808 underlines the need for the correspondence between the two. Quite simply, Ms. Toerper is seeking to dip into other funds in Mr. Hoard's estate to compensate for her possible loss in regard to the contracts transferred away. I say "possible" because there is no evidence before the court that Ms. Brackley has received commissions in regard to these transferred contracts. To the extent that Mr. Hoard's estate continues to receive certain commissions from transferred contracts, Ms. Toerper remains entitled to half of those net amounts and has not been deprived of these, albeit given the intervention of the bankruptcy, the payments are not as prompt as she would like.

[31] Further, there is a juristic reason for any enrichment. Mr. Hoard and Ms. Toerper agreed that each of them is entitled to 50% of the net commissions. The operation of the *Bankruptcy and Insolvency Act* and its system of pro-rata distribution constitutes another juristic reason which precludes the imposition of a constructive trust: ***Bassano Growers Ltd. v. Price Waterhouse Ltd***. (Q.B.) at paragraph 19.

[32] In addition, as noted in ***Barnabe v. Touhey*** (1995), 37 C.B.R. (3d) 73 (Ont. C.A.), while a constructive trust, if appropriately established, could have the **effect** of the beneficiary receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that **purpose**. Here, the imposition of a constructive trust might be a fair result as between the

Mr. Hoard and Ms. Toerper, but it would be unfairly detrimental to Mr. Hoard's other unsecured creditors.

[33] In summary, the requirements of imposing a constructive trust on the basis of unjust enrichment are not made out in this case.

Wrongful conduct

[34] The Supreme Court held in ***Soulos v. Korkontzilas*** that a constructive trust can also be used to right wrongful conduct, if the following conditions are met: the bankrupt must have been under an equitable obligation in relation to the activities giving rise to the assets in his hands; the property in the hands of the bankrupt must be shown to have resulted from deemed or actual agency activities of the bankrupt in breach of his equitable obligation to the claimant; the claimant must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the bankrupt remain faithful to their duties; and there must be no factors that would render the imposition of a constructive trust unjust in all the circumstances.

[35] Decisions subsequent to ***Soulos v. Korkontzilas*** emphasize that the property sought to be impressed with the trust must be the property obtained through the wrongful act: see for example, ***Ontario v. NRS Mississauga Inc.*** (2003), 40 C.B.R. (4th) 127 (Ont. C.A.); ***Credifinance Securities Limited v DSLC Capital Corp***., 2011 ONCA 160.

[36] As recognized by Justice Strekhaf in her 2011 reasons in regard to a similar transfer by Mr. Hoard to Ms. Brackley without Ms. Toerper's consent, these further transfers to Ms. Brackley are plainly a breach of the parties' contract.

[37] The trustee takes no issue with treating this as a breach of an equitable obligation.

[38] However, the property that Ms. Toerper is seeking to assert a proprietary interest over has not been generated by this breach. The wrongful conduct is not in regard to property in Mr. Hoard's hands – it has gone to Ms. Brackley. Mr. Hoard's share of the ongoing commissions derived from non-transferred contracts are payable to his trustee post- bankruptcy, and divisible between Mr. Hoard and Ms. Toerper pursuant to their agreements. There is some evidence that indicates that Mr. Hoard also continues to receive certain commissions from transferred contracts. Those commissions cannot be said to result from the wrongful transfer, but rather, they continue to be received in spite of the wrongful transfer. Ms. Toerper remains entitled to her share of those commissions pursuant to her agreements with Mr. Hoard.

[39] Ms. Toerper's proprietary remedy lies with Ms. Brackley and cannot be realized by

accessing Mr. Hoard's share of the ongoing commissions. Ms. Toerper has commenced an action against Ms. Brackley in this regard and is not left without a remedy. She would prefer that she not have to proceed in this fashion, which will take some time and money, but would rather have access to Mr. Hoard's portion of ongoing commissions to the exclusion of the other unsecured creditors.

[40] To manufacture a proprietary interest in favour of Ms. Toerper in Mr. Hoard's share of post-transfer commissions in these circumstances would not be fair and just vis-à-vis the other unsecured creditors.

[41] The trustee reviewed the transfers to Ms. Brackley and concluded that there were not sufficient resources in the estate to properly prosecute the action. Given the additional benefit to Ms. Toerper of an action against Ms. Brackley, the trustee asked Ms. Toerper to consider contributing to the costs of recovery, consistent with its responsibility to all unsecured creditors. She has not been willing to do so.

[42] The trustee has thus reasonably concluded that there are insufficient resources and potential return to the estate for the benefit of all creditors to pursue the action. He has offered it up to creditors pursuant to section 38, at their own cost and for their own benefit. Ms. Toerper is free to make an application in this regard.

[43] In summary, Mr. Hoard's transfer of a portion of the contracts to Ms. Brackley does not give rise to a constructive trust in Mr. Hoard's share of commissions post-transfer.

Conclusion

[44] Ms. Toerper's appeal from the trustee's rejection of her proprietary claim is dismissed. Costs may be spoken to if necessary.

Heard on the 10th day of July, 2014.
Dated at Calgary, Alberta this 15th day of July, 2014.

J.L. Mason
Registrar in Bankruptcy

Appearances:

Craig McMahon
Field LLP
For Hardie & Kelly, trustee for the estate of Graham Hoard

Elizabeth Toerper
On her own behalf

Court of Queen's Bench of Alberta

Citation: Wurth v 1135096 Alberta Ltd., 2014 ABQB 520

Date: 20140822
Docket: BK01 094159
Registry: Calgary

Between:

Larry Wurth

Applicant

- and -

MNP Ltd., Trustee of the Estate of 1135096 Alberta Ltd.

Respondent

Reasons for Judgment
of the
Honourable Madam Justice J. Strekaf

Introduction

[1] Larry Wurth is appealing the decision of the MNP Ltd. ("MNP"), in its capacity as Trustee in Bankruptcy of 1135096 Alberta Ltd ("113"), pursuant to section 81(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B – 3, as amended ("*BIA*") to disallow the Proof of Claim he had filed in relation to a property interest in $154,404 of the funds in the approximate amount of $344,000 remaining in the bankrupt's estate. He claims that monies were paid to 113 by a related company in breach of trust, that 113 acquired the monies with knowledge of the breach of trust, and that as a result he is entitled to a constructive trust with respect to those funds. The Trustee opposes the appeal.

Relevant Facts

[2] The evidence on this appeal consists of two affidavits of Mr. Wurth, upon which he was not cross-examined, as well as the Trustee's Report and Supplemental Report, from which evidence I make the following factual findings.

[3] In May 2008 Mr. Wurth was approached by Brian Ostrander to invest in a hotel project in Fort Saskatchewan, Alberta to be undertaken through 1264271 Alberta Ltd ("126"), a company of which Mr. Ostrander was the sole director that was wholly owned by a company of which he was also the sole director. Mr. Ostrander is also one of the directors and a 30% shareholder in 113.

[4] Mr. Wurth provided a deposit of $480,823.43 to 126 on June 10, 2008, which he deposes was to be held in trust pending his review of documentation ("Wurth Funds"). This characterization is consistent with how Mr. Wurth described the payment in subsequent correspondence with Mr. Ostrander and there is no evidence contradicting same. I accept that the money was provided pursuant to an oral agreement that it would be held in trust.

[5] Contrary to the oral arrangement, the Wurth Funds were not held in trust but were wholly expended by 126 by July 31, 2008. Between June 30, 2008 and July 31, 2008, $111,000 was paid to 113, whose business involved the construction and operation of a hotel in Strathmore, Alberta. 113 used all of the funds it received from 126 during this period by July 31, 2008 for such things as their overdraft (approx. $28,000), bank loan payments (approx. $35,000), property tax (approx. $20,000), employee expenses (approx. $16,000), franchise fees, visa expenses, waste disposal services and bank fees. In addition, 126 paid $50,000 directly to one of 113's third party subcontractors with respect to work performed on the construction of the Strathmore hotel, of which $43,404 came from the Wurth Funds. The remainder of the Wurth Funds were paid by 126 to other parties.

[6] Mr. Wurth began demanding the return of his deposit from Mr. Ostrander and 126 in February 2009, and commenced an action against Mr. Ostrander, 126 and others on April 30, 2010 to recover same.

[7] 113 was adjudged bankrupt and MNP was appointed Trustee by an Order of this Court on May 12, 2011. The only asset at the date of bankruptcy was cash in the amount of approximately $1.5 million representing the proceeds remaining from the sale of the hotel.

[8] 126 filed a proof of claim in the 113 bankruptcy, which was allowed by the Trustee as an unsecured claim to the extent of $552,539. This claim included both the $111,000 advanced to 113 by 126, and the payment of $43,404 to the third party subcontractor, both of which involved monies that had originated from Mr. Wurth.

[9] The Trustee declared an interim distribution of approx. $1.2 million that was distributed to proven creditors on June 15, 2012. 126 received a dividend of 25.82% of $38,094 (excluding levy).

[10] Mr. Wurth became aware that monies were paid by 126 to 113 through the course of the litigation which he had commenced against 126. His counsel first advised MNP that Mr. Wurth was making a claim for $264,000 under s. 67(1)(a) of the *BIA* on December 14, 2012, on the basis that it reflected trust funds held for his benefit that did not form part of the bankrupt's estate. He is now seeking to recover the amount of $154,404 which the Trustee acknowledges was paid by 126 to 113 from funds that originated from Mr. Wurth.

[11] On June 4, 2013, the Trustee issued a Notice by Trustee Requiring Filing of a Proof of Claim on Property to Mr. Wurth.

[12] On June 14, 2013, Mr. Wurth filed a Reclamation of Property Claim asserting that he provided funds to 126 in trust and that he had reason to believe that $264,000 of those funds were paid to 113 in breach of trust between June and September 2008.

[13] On June 28, 2013 the Trustee issued a Notice of Dispute rejecting Mr. Wurth's claim.

[14] On July 12, 2013 Mr. Wurth filed this application appealing the Trustee's decision.

[15] The Trustee currently holds approximately $344,000 in its trust account of which $144,000 relates to the remaining proceeds from the sale of the Strathmore hotel and $200,000 to a recovery from the Canada Revenue Agency.

Applicable Law

[16] Section 81 of the *BIA* states in part:

> 81. (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.
>
> (2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee' decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.
>
> (3) The onus of establishing a claim to or in property under this section is on the claimant.

[17] Section 67(1)(a) of the *BIA* states:

> 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;

[18] In some circumstances liability can be imposed on a stranger to a trust by way of a constructive trust on the basis of "knowing receipt" of trust property, as was outlined by the Supreme Court of Canada in ***Citadel General Assurance Co v Lloyds Bank Canada***, [1997] 3 SCR 805. The Court distinguished between tracing orders at common law and restitutionary remedies based upon the principles of unjust enrichment imposed in equity in "knowing receipt cases" at paras 58 – 59:

> In my view, a distinction should be made between the imposition of liability in "knowing receipt" cases and the availability of tracing orders at common law and

> in equity. Liability at common law is strict, flowing from the fact of receipt. Liability in "knowing receipt" cases is not strict; it depends not only on the fact of enrichment (i.e. receipt of trust property) but also on the unjust nature of that enrichment (i.e. the stranger's knowledge of the breach of trust). A tracing order at common law, unlike a restitutionary remedy, is only available in respect of funds which have not lost their identity by becoming part of a mixed fund. Further, the imposition of liability as a constructive trustee is wider than a tracing order in equity. The former is not limited to the defence of purchaser without notice and "does not depend upon the recipient still having the property or its traceable proceeds"; see In re Montagu's Settlement Trusts, supra, at p. 276.
>
> Despite these distinctions, there appears to be a common thread running through both "knowing receipt" and tracing cases. That is, constructive knowledge will suffice as the basis for imposing liability on the recipient of misdirected trust funds. Notwithstanding this, it is neither necessary nor desirable to confuse the traditional rules of tracing with the restitutionary principles now applicable to "knowing receipt" cases. This does not mean, however, that a restitutionary remedy and a tracing order are mutually exclusive. Where more than one remedy is available on the facts, the plaintiff should be able to choose the one that is most advantageous. In the present case, the plaintiff did not seek a tracing order. It is therefore unnecessary for me to decide whether such a remedy would have been available on the facts of the present appeal, and I have not explored the issue.

[19] In the bankruptcy context, there are additional considerations that may be relevant when dealing with equitable remedies, as was noted in Houlden, GB Morawetz and J Sarra, *Bankruptcy and Insolvency Law of Canada* (4th Ed (loose-leaf)), Vol 2, at 3-41:

> In proving the existence of a constructive trust in a bankruptcy setting, the standard of proof is high; and given that the BIA provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust…

[20] In ***Barnabe v Touhey*** (1995), 26 OR(3d)477, the Ontario Court of Appeal set aside a declaration that property of a bankrupt was held on a constructive trust where that had the effect of granting to the claimant a floating charge over all of the assets of the bankrupt in priority to the bankrupt's other creditors. The Court found that the unjust enrichment, upon which the constructive trust remedy is based, did not exist in that case. The Court stated, at paras 2 – 6, that:

> We are of the opinion that the remedy of constructive trust is not appropriate in the circumstances. To dispose of this appeal, it is not necessary to refer to all of the arguments dealt with by counsel, since we are of the view that the unjust enrichment on which the constructive trust remedy is based does not exist in this case. To establish the unjust enrichment, there must be some specific property which is the subject of the enrichment, that property must have been retained by the person holding it in deprivation of the party claiming the trust, and there must be no juristic reason for the retention.

As to the first requirement, in this case there is no specific property which is the subject of the trust. The property ordered held comprises all of the property of the bankrupts. This alone would probably be sufficient to decide the appeal. However, we will comment on the other requirements to establish an unjust enrichment.

As to the second requirement -- that the property must be held in deprivation of the party claiming the unjust enrichment -- it is clear that the parties which are said to hold the trust property -- the Canadian Imperial Bank of Commerce (the "Bank") or Messrs. Touhey and Sigouin -- do not hold it in deprivation of the respondents. The property said to be the subject of the trust is money which, by the order of Farley J., dated May 17, 1990, should have been paid back to the accountant administering the assets of the original "1986" partnership. The motions judge found that these moneys, which were not paid back as they should have been, were deposited in the Bank and used to support the operations of the new "1990" partnership. There is no evidence which clearly establishes that this money was ever paid into the account of the new partnership at the Bank. However, even if it was, there is no evidence that indicates that the funds remain in the hands of the Bank. Indeed, the account involved has generally been in negative balance, and, since it was an operating account of the new partnership, funds were paid in and out of the account over a period in excess of four years before the motions judge made the order imposing a constructive trust. Under those circumstances it is almost impossible to show any true connection between funds which may have been deposited in the "1990" partnership account and the assets of that partnership or of the bankrupts. To overcome this problem the motions judge imposed a constructive trust over all of the assets of the bankrupts. This is contrary to clear law which requires that a constructive trust be imposed over specific property in which the person claiming the trust has a reasonable expectation of obtaining a property interest. While the respondents may not have succeeded in having funds returned to the accountant by Touhey and Sigouin, as required by the order of Farley J., they were not deprived of any of the assets which were made the subject of the constructive trust. They were merely unsecured creditors of Touhey and Sigouin.

As to the third requirement -- that there be no juristic reason for the retention of the property -- there are at least two juristic reasons why the Bank should retain the funds involved (if they were in fact deposited in the "1990" partnership account). First, the Bank, through the account of the "1990" partnership, financed at least some of the operations of that partnership. In order to do so, it obtained security over the receivables and other assets of the partnership, which are subject to the order of Bell J. It was in reliance on that security that the Bank financed the operations of the "1990" partnership. It was entitled to retain any funds which may have been paid into the account to reimburse it for payments out of the account, and it was entitled to its security for the purpose of securing payment. The second juristic reason for retention of the funds is that the order of Farley J., by its terms, anticipated that the funds paid over by the accountant administering

> the assets of the "1986" partnership would be returned only if needed and demanded. Funds were also paid over to the other partners in the "1986" partnership, and none were required by the order to hold any funds in trust; indeed, any such order would have rendered the original payment over of no practical benefit to any of the partners.
>
> While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that purpose. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

[21] In ***Bassano Growers Ltd v Diamond S Produce Ltd. (Trustee of)***, (1997), 214 AR 380, aff'd 1998 ABCA 198, 216 AR 328, Medhurst J found no constructive trust existed for the purposes of section 67(1)(a) of the *BIA* as there was no unjust enrichment established. Of note, he stated at paras 19 - 20:

> Before a constructive trust can be imposed, unjust enrichment must be established, see ***Pettkus v. Becker***, [1980] 2 S.C.R. 834. An unjust enrichment occurs where there has been an enrichment, a corresponding deprivation, and no juristic reason to allow the enrichment and deprivation. The Applicants argue that Diamond S was unjustly enriched by virtue of the fact that the funds were retained by it upon bankruptcy. But this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the *BIA*. The British Columbia Court of Appeal was asked to find a constructive trust in National Bank, supra where taxes collected under a deemed trust had not been segregated from the tax collector's own funds. The Court found at 238-40 that there could be no unjust enrichment in such cases. In bankruptcy situations, the creditors who benefit from the failure of a s. 67(1)(a) trust claim are not "enriched," but merely recover what they are owed, and any deprivation experienced by the unsuccessful trust claimants results from the bankruptcy. In other words, the operation of the *BIA* is a juristic reason which precludes the possibility of awarding a constructive trust remedy, ***National Bank***, supra at 238.
>
> Secondly, even constructive trusts require some certainty of subject matter upon which the trust can be impressed. In ***Barnabe v. Touhey*** (1995), 37 C.B.R. (3d) 73 at 74 (Ont. C.A.) the court considered the constructive trust remedy in the bankruptcy context. The Court held that to establish unjust enrichment "there must be some specific property which is the subject of the enrichment, that property must have been retained by the person holding it in deprivation of the party claiming the trust, and there must be no juristic reason for the retention." The Court rejected the claimant's argument because there was no specific identifiable property which was the subject of the trust. Similarly, in the case at bar there is an uncertainty of subject matter which arose upon the commingling and conversion of the deemed trust moneys by Diamond S. No constructive trust arises on the facts before the Court.

[22] In affirming this decision on appeal, the Court of Appeal relied on ***Barnabe***, in reiterating that "(a) constructive trust cannot arise unless there is identifiable property to which it can attach…": para 13.

Analysis

[23] Mr. Wurth seeks an order directing the Trustee to allow his claim to a property interest in $154,404 of the remaining funds held by the Trustee in the bankrupt's Estate. I accept that $154,404 was received by the bankrupt ($111,000 directly and $43,404 indirectly) from trust monies deposited by Mr. Wurth with 126, and that 113 had actual knowledge that such funds were impressed with a trust and were transferred in breach of trust as 113 and 126 were related entities and as Mr. Ostrander was the principal of both entities. Mr. Wurth has established on a balance of probabilities that 126 was in "knowing receipt" of $154,404 transferred in breach of trust. However, the issue which remains to be determined on this application is what remedy is appropriate, having regard to all the circumstances, including how the funds were used by 126 and the stage of 113's bankruptcy.

[24] Mr. Wurth is asserting that he is entitled to a form of tracing remedy or constructive trust that would give him a proprietary interest over $154,404 of any remaining funds in the bankrupt's estate. In my view, that remedy is not available to him for several reasons.

[25] As the Court recognized in ***Citadel***, a plaintiff may have the option to pursue either a restitutionary remedy of a constructive trust or a tracing remedy at common law, where both are available on the facts. In this case, no common law tracing remedy is available as the monies paid by 126 to 113 in breach of trust cannot be traced to any specific assets acquired by 113 as the full $111,000 was expended on various expenses related to the ongoing operations of the hotel, other than $951 used to purchase furniture that would likely have been sold as part of the sale of the hotel, and the $43,404 paid to the subcontractor. While the monies in the Trustee's possession reflect the remaining proceeds from the sale of the hotel, those funds cannot be traced directly to any specific assets acquired with the funds from 126.

[26] Mr. Wurth's claim to a constructive trust based on "knowing receipt" and unjust enrichment must also fail due to the fact that he cannot identify specific property which is the subject of the enrichment and is essentially seeking the equivalent of a floating charge over all the assets of 126. This is not available for the reasons outlined in ***Barnabe*** and ***Bassano***.

[27] There is no unjust enrichment in the circumstances where there is a juristic reason for the deprivation due to the operation of the *BIA* as was outlined in ***Barnabe*** and ***Bassano***.

[28] Mr. Wurth's claim has been brought too late. No notice was given to the Trustee until December 2012. This was over four years after the money was paid by 126 to 113, 34 months after Mr. Wurth began demanding its return in February 2009, and six months after the Trustee had accepted the claim advanced by 126, which included the funds advanced by Mr. Wurth, and made a distribution accordingly in June 2012. If Mr. Wurth is now given a constructive trust over $154,404 of 113's remaining assets, then 113's other creditors will be detrimentally affected as there will be a double counting and double compensation for that portion of the 126 claim. To the extent that credit has already been given through the bankruptcy proceeding for the full amount of Mr. Wurth's claim as part of the claim of 126, there is no longer any remaining benefit retained by 113 that could support a claim for unjust enrichment.

Conclusion

[29] Mr. Wurth's appeal is dismissed.

Heard on the 23rd day of July, 2014.
Dated at Calgary, Alberta this 20th day of August, 2014.

J. Strekaf
J.C.Q.B.A.

Appearances:

Peter R.S. Leveque
for the Applicant

Peter Jull, Q.C.
for the Trustee

Court of Queen's Bench of Alberta

Citation: Transtrue Vehicle Safety Inc v Werenka, 2015 ABQB 197

Date: 20150324
Docket: 1103 15902, B103 869312
Registry: Edmonton

Between:

Docket: 1103 15902

Transtrue Vehicle Safety Inc

Plaintiff

\- and -

Yvette H. Werenka, 1351454 Alberta Ltd and CY Assets Inc

Defendants

Yvette H. Werenka, 1351454 Alberta Ltd and CY Assets Inc

Plaintiffs by Counterclaim

\- and -

Transtrue Vehicle Safety Inc, Lola Ventures Inc and Terrence R. Booth

Defendants by Counterclaim

And Between

Docket: B103 869312

In The Matter of The *Bankruptcy And Insolvency Act*, RSC 1985, c B-3

And In The Matter of Yvette Helena Marie Werenka

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

Introduction

[1] On the brink of a 10-day trial, Yvette Werenka (Werenka) settled a lawsuit brought against her by Transtrue Vehicle Safety Inc (Transtrue). Twelve days later, she made an assignment into bankruptcy.

[2] Werenka's trustee in bankruptcy, Exelby & Partners (Trustee), seeks a declaration that the settlement of the lawsuit (Settlement) is a preference prohibited by s 95 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (*BIA*). In turn, Transtrue claims that the money Werenka intended to fund the Settlement is impressed with a trust in its favour, and seeks declaratory relief to that effect.

[3] Transtrue concedes that if it does not succeed in establishing a trust, the evidence supports the Settlement being declared a prohibited preference.

What Happened

[4] Werenka and Terry Booth (Booth) were the indirect shareholders of Transtrue. Werenka was also a director, officer and key employee.

[5] Werenka and Booth's relationship soured. Their attempts at exit strategies failed, and they ended up seeking the Court's help. The result was a Court Ordered sealed bid tender to buy each other's shares. The Order also contemplated this eventuality if they could not agree on closing adjustments:

> 14. … If the parties cannot agree on the appropriate adjustments the parties' shall be at liberty to apply for further directions or order of this Court and the selling party's solicitor shall hold the disputed amounts in trust until further order of the Court.

[6] Werenka, Booth submitted bids. Booth's bid prevailed. Werenka and Booth could not agree on the closing adjustments. Booth claimed that they were $652,807.12 in his favour, $180,000.00 of which he claimed Werenka had misappropriated. They dealt with their stalemate by another Court attendance that resulted in an Order for Booth to pay 25% of the purchase price ($162,571.70) into trust "pending resolution of the matter between the parties or further Order of this Court" (Adjustment Fund).

[7] Later, Booth claimed to unearth more financial irregularities and Transtrue commenced the lawsuit seeking damages for alleged misappropriation ($565,476.00), additional accounting fees ($25,000.00), other accounting costs ($7,980.00), punitive damages ($500,000.00) and solicitor-client costs (Action). Transtrue also registered a certificate of *lis pendens* against the title to Werenka's house (CLP). Werenka defended and counterclaimed adding Booth as a

defendant by counterclaim and alleging malicious prosecution. The parties subsequently amended their pleadings, but the thrust of their allegations, the remedies they sought, and their respective denials of wrongdoing remained the same.

[8] Next, Werenka wanted to sell her house. Transtrue agreed to discharge the CLP on condition that she would pay the net sale proceeds into Court. A Court Order issued which provided for the Clerk of the Court to hold those proceeds "pending further Order of this Court or agreement of the parties". Werenka deposited $91,084.82 with the Clerk (CLP Fund).

[9] Five days before the trial of the Action, Werenka offered to settle by having Transtrue take the Adjustment and CLP Funds ($253,656.52), a mutual release (with no admission of fraud by her), and discontinuances of claims. That same day, Transtrue accepted and received the Adjustment Fund ($162,571.70).

[10] The next day, Transtrue's counsel sent a form of Settlement Agreement, discontinuances, and a draft Consent Order to pay out the CLP Fund. Werenka's counsel returned all but the Settlement Agreement, explaining that Werenka was reviewing it and that no changes were expected. Transtrue's lawyers immediately obtained the Consent Order and deposited the $91,084.82 into its trust account. (I digress to note that the Trustee concedes that want of an executed settlement agreement does not affect Transtrue's position).

Standing

[11] Transtrue filed separate, mirrored motions styled in the Action and in Werenka's bankruptcy concerning each of the CLP and Adjustment Funds. Booth is not a party to the motions.

[12] Transtrue did not file a proof of claim in the bankruptcy (as required by *BIA* s 81(1)) or move to lift the stay of proceedings (as required by *BIA* s 69). Consequently, it does not have standing to bring its motions. That said the issue is merely technical since the question of whether Transtrue has a valid trust claim over the Funds can be resolved on the Trustee's motions.

The Issues

[13] The result of this case hinges on the answers to these questions:

1. Should the Court infer that Werenka has admitted the validity of the equitable trust claims pled in the Action?
2. Who has an interest in the CLP Fund?
3. Who has an interest in the Adjustment Fund?

The Short Answer

[14] Evidentiary concerns preclude inferring that Werenka's entering into the Settlement is an admission of the validity of Transtrue's alleged trust claims.

[15] As the CLP did not give Transtrue an interest in Werenka's home, it can have no interest in the CLP Fund that stands in its stead. The $91,084.82 from the CLP Fund together with any interest accrued thereon is property of the bankrupt payable to the Trustee.

[16] The Adjustment Fund is not the subject of an express trust under s 67 of the *BIA*, because Transtrue did not intend to create a trust when Booth paid the money to Werenka's lawyer. As such, one of the required certainties is not satisfied. Booth and Werenka are contingent claimants to the Adjustment Fund. The contingency must be resolved to ascertain the extent of their interest(s) in the Adjustment Fund since the Trustee can be in no better position than Werenka would have been but for the bankruptcy.

Analysis

The Basics

[17] A brief discussion of certain fundamental principles provides the backdrop for the assessment of the issues.

i. The *BIA* and Trustees

[18] The *BIA* is a complete code. Its collective action regime is designed to avoid the "free-for-all that would otherwise prevail" if creditors were allowed to exercise their remedies through normal civil processes: R J Wood, *Bankruptcy and Insolvency Law* (2009) at pp 2-3 cited with approval in ***Ted Leroy Trucking [Century Services] Ltd***, ***Re***, 2010 SCC 60, at para 22 (***Century Services***).

[19] The *BIA* defines a creditor as a person having a "claim provable". In turn, a "claim provable" includes any claim or liability provable by a creditor: *BIA* s 2.

[20] The *BIA* broadly defines property to include any property whether vested, contingent, or incident to property: *BIA* s 2. This includes money held by the bankrupt's solicitor in a trust account at the date of the bankruptcy: ***Smith, Re*** (1975), 20 CBR (NS) 205, [1976] 1 SCR 341 (SCC).

[21] A trustee in bankruptcy is in no higher position than the bankrupt is at the date of bankruptcy and accordingly, the property that vests in the trustee comes "warts and all": ***Saulnier v Royal Bank of Canada***, 2008 SCC 58 at para 50.

[22] Trustees in bankruptcy's watchwords are fairness and neutrality. While a primary function is to maximize proper recovery for the estate, trustees must maintain a dispassionate approach that is ever mindful of the interests of all stakeholders. As officers of the court, trustees must act in an equitable manner and obey the rules of natural justice. In this regard, they cannot allow a windfall to the general body of creditors by depriving others of their interest in property: ***Credifinance Securities Ltd*** at para 38; ***Re Greenstreet Management Inc*** (2007), 38 CBR (5th) 307 at para 18 and (2008) 41 CBR (5th) 86 (Ont SCJ) (***Greenstreet***).

ii. Trusts and the *BIA*

[23] Section 67(1)(a) of the *BIA* provides:

> The property of a bankrupt divisible among his creditors shall not comprise

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

[24] On bankruptcy all of the property, including property held in trust for another, passes to the trustee, who is obliged to hold and administer the subject matter of the trust for the benefit of the beneficiaries: *BIA* s 67(1)(a); ***Ramgotra (Trustee of) v North American Life Assurance Co***, [1996] 1 SCR 325; ***Gough v Gough*** (1996), 41 CBR (3d) 94 (Ont CA).

[25] A person claiming that a bankrupt holds trust property for their benefit must prove a valid trust at the date of bankruptcy: ***Kenny, Re*** (1997) 149 DLR (4th) 508 (ON Ct GD), at para 32. This requires establishing the three certainties of a trust: certainty of intention to create the trust, certainty of the property that is the subject matter of the trust, and certainty of the object for which the trust is created: ***Century Services***.

[26] Unlike an express trust, a constructive trust is not the result of any party's intention. Rather, it is a tool of the Court of equity to remedy a legal wrong: ***Soulos v Korkontzilas***, [1997] 2 SCR 217, 146 DLR (4th) 214; Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters Law of Trusts in Canada*, 3d ed (Toronto, Thomson Carswell, 2005) at 454 (*Waters*).

[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)

[29] Similarly, in ***Credifinance Securities Ltd***, the Court noted that there are other interests to consider besides those of the "defrauder and the defraudee", and that the exercise of remedial

discretion must be informed by additional considerations beyond those in a civil fraud trial (at para 44).

The Issues

Issue 1: Should the Court infer that Werenka admitted the validity of the equitable trust claims pled in the Action?

[30] Again, ***Grant*** is instructive. There, the *BIA* stay was lifted for a trial about who had the right to certain money the plaintiff gave to a serial fraudster that ended up with the fraudster's trustee in bankruptcy. In finding an express trust on the facts, the Court said in *obiter dicta* that a constructive trust would likely result in any event because the evidence showed the exact timing of payments made to the bankrupt by the plaintiff and its routing thereafter. Applying the concepts of "following" and "tracing", the Court found that the money could be "followed" from the plaintiff to the bankrupt to his criminal defence lawyer. The funds could then be "traced" into the lawyer's trust account and then to the Clerk of the Court, who received the funds from the lawyer as partial restitution (for victims of previous frauds) and finally to the trustee in bankruptcy.

[31] The evidence in the present case is very different. There are unanswered questions about whether Werenka agreed, or indeed *could* agree, that the allegedly misappropriated funds can be 'followed' or 'traced' to the Funds.

[32] Tracing is a means of identifying a substitute for the original thing claimed. One therefore questions how Werenka could admit tracing when the monies deposited to the Adjustment Fund came from Booth.

[33] Concerning the CLP Fund, there is evidence that Werenka deposited her pay for four years (which Transtrue alleges she improperly inflated) and from the same account paid $83,388.79 on her mortgage. Alone, this does not satisfy the threshold for proving a constructive trust in this case. Something more is required to defeat the general body of creditor' legal rights and upset the scheme of the *BIA*.

Issue 2: Who has an interest in the CLP Fund?

[34] Transtrue's description of the CLP Fund as a "lien" mischaracterizes its nature. The CLP did not create an interest in property. It was simply notice of a pending lawsuit. Veit J's overview of the history of the certificate of *lis pendens* in ***TRG Developments Corp v Kee Installations Ltd*** 2014 ABQB 482 at para 23 explains why:

> The purpose of a certificate of *lis pendens* was set out in Brock over one hundred years ago and has not changed; if the articulation of the purpose has not improved over time, it at least has not lost any of its merit:
>
> > The certificate must be distinguished from the *lis pendens* itself. The phrase "*lis pendens*" means precisely what its component words indicate, "law suit pending" and what is sometimes called the doctrine of *lis pendens* was well known and recognized in England many years before the organization of our Court of Chancery. For example, in 1746 Lord Chancellor Hardwicke in ***Worsley v. Earl of Scarborough,*** 3 Atk. 392, says: There is no ...

> doctrine in this Court that a decree ... shall be an implied notice to a purchaser ... but it is the pendency of the suit that creates the notice; for, as it is a transaction in a sovereign Court of justice, it is supposed that all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation." The theory, object, and extent of the doctrine are here set out with great clearness: the effect being that purchasers for valuable consideration without actual notice were sometimes defrauded of their purchase by the operation of this rule of implied notice by *lis pendens*. Parliament interfered in 1839, and by the Act 2 & 3 Vict. (Imp.) ch. 11, sec. 9, provided that no *lis pendens* should bind a purchaser or mortgagee without express notice, unless a memorandum, much the same as our certificate, were left with the senior Master of the Court of Common Pleas.

When our Court of Chancery was constituted by 7 Wm. IV. ch. 2, the doctrine was in full force -- and upon the reorganization in 1849 by 12 Vict. ch. 64, the English legislation as to *lis pendens* was not introduced. In 1855, however by 18 Vict. ch. 127, an *Act to amend the Registry Laws of Upper Canada*, it was by sec. 3 provided in practically the same language as O.J.A., sec. 97. See also 20 Vict. ch. 56, sec. 9.

The whole effect of registering a certificate of *lis pendens* is to place the whole world in the same position as though the legislation had not been passed.

Upon the application to vacate and discharge a certificate of *lis pendens* the plaintiff must say: "I have an action in which some title or interest in certain land is called in question. I desire that the whole world shall know of that, so that any person dealing with this land must take subject to my rights as ultimately declared: the law holds that the registration of a certificate of *lis pendens* will operate as notice to the whole world, and I insist on such notice being given." That is all -- no rights are given by the certificate – the whole effect is that notice is given that rights are being claimed. And a plaintiff, after such registration, is in precisely the same position as he would have been if the legislation of 1849 had not been passed. Of course, any one desiring to deal with the land, and seeing the certificate registered, may examine the records of the Court and satisfy himself as to the validity or otherwise of the claim set up. If he thinks it baseless, he may disregard the warning: but be need not fear the document itself as conferring any rights upon any one.

To a certain extent, however, the registration acts as a cloud upon the title; and, in actual practice, purchasers or mortgagees are deterred from dealing with such land.

[35] The CLP gave Transtrue a means of providing notice to the world of the Action. It did not give Transtrue an interest in the land, a right to file a writ, or a right to execute on a judgment. The CLP Fund, which replaced the CLP, is merely a pool of potential recourse money available to Transtrue, if and when it ever proved its case.

[36] The CLP is property of the bankrupt that the Trustee is entitled to receive.

Issue 3: Who has an interest in the Adjustment Fund?

[37] Over time, a rather jumbled body of law has developed concerning contests between trustees in bankruptcy and a litigation claimant to money held in a lawyer's trust account or posted in court pending resolution of a dispute. There are three lines of authority with varying results, sometimes involving factually-like cases.

The First Line of Authority

[38] The earliest line of authority considers s 70 (and its predecessor, s 50 of *the Bankruptcy Act*, RSC 1970, c B-3), which gives precedence to a receiving order or assignment in bankruptcy over all but completed execution processes and secured creditors. The result is that the fund (Posted Money) remains the payor's property until it is paid out under a lawful order.

[39] A review of *BIA* s 70 and its predecessor, s 50 sets the framework for the reasoning of the first line of authority:

> 70(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishment, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.
>
> 50(1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or otter attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

[40] In ***Tradmor Investments Ltd v Valdi Foods*** (1987), 33 CBR (3d) 244 (Ont GD); upheld on appeal 43 CBR (3d) 135 (Ont CA) (***Tradmor****)*, the plaintiff argued that the payment of money into court by a defendant prior to bankruptcy as a condition of proceeding with litigation elevated its status to that of secured creditor. The Court concluded that payment did not bring the plaintiff within the definition of a secured creditor. Accordingly, the money remained the bankrupt's property that vested in the trustee on assignment. The Court specifically noted (at para 19):

> In circumstances such as the present it would be an anomaly if the Plaintiff, prior to judgment, was given a greater right to the money in court than it would have following judgment.

[41] In ***Meridian Construction Inc, Re***, 2006 NSSC 17 the defendant/bankrupt was ordered by an arbitrator to pay money into his trust account as security for costs. The Court noted that in seeking to have the fund paid out to the other party in the arbitration, the potential creditor was seeking priority for its costs over the claims of both secured and other unsecured creditors. The Court cited ***Tradmor*** and then relied on ***Canadian Freight Assembly Ltd v Garden Grove Distribution*** (1998) Ltd, 2005 MBQB 246 (QL) at paras 22-23 to explain the discrepancy between ***Tradmor*** and ***Acepharm Inc (Re)*** (a case detailed below):

> An order for security for costs is intended to act as security against the legal costs associated with future legal proceedings in the event that the party ordered to pay costs loses and remains the property of the payor.
>
> That is different from where money is paid into court as security for an order to seize property from another, there is case law that holds that the security in intended to protect the interest that the party against whom the order is granted may have in the property. In the event that the property is eventually determined to have been improperly ordered seized from a party, his interest in the property is replaced by the money paid into court.

Thus, money paid into court as security for costs is different from money paid to provide security for the value of goods taken and that therefore replaces the creditor's interest in the particular goods.

[42] ***Re McDermott***, 54 CBR (NS) 37 concerned money paid into court pending appeal. Under the Ontario Rules of procedure, execution of the judgment was stayed pending appeal. When the creditor learned that the debtor was attempting to sell some property, she sought an order lifting the stay. The Court continued the stay and ordered the defendant to pay the sale proceeds into court "until the disposition of the defendant's appeal subject to any other order that may be made in the meantime by reason of unforeseen circumstances." The defendant was unsuccessful on appeal and made an assignment in bankruptcy before the creditor applied to have the money paid out of court.

[43] Rejecting agency and trust notions, Catzman J, (as he then was) ruled that money paid into court remained property of the bankrupt because s 50(1) created a clear statutory preference over any judgment creditor in favour of the trustee in bankruptcy.

[44] Similarly, in ***Laker (Trustee of) v Colby***, 66 CBR (NS) 71 (Que SC), the Court rejected trust and agency arguments. There, money paid into court as a condition of an appeal that was not paid out to the successful party before the payor became bankrupt was held to be property of the bankrupt. The Court noted that the general principle that an assignment in bankruptcy takes precedence over all judgment and executions unless the execution procedure is completed before the assignment. In the result, the deposit continued to belong to the payor debtor.

[45] In ***MJ Roofing & Supply Ltd v Guay***, 40 CBR (NS) 88 (Man QB), the defendant to a debt action paid money to the plaintiff's solicitors to buy a term deposit in both parties' names rather than paying money into court to the credit of the action. Hewak J (as he then was) explained (at para 22):

> While it may be open to interpretation that the monies were advanced by the bank to the bankrupts on certain conditions which may amount to a trust, i.e., the purchase of a term deposit, that condition was met. One must now go on to consider the purpose of purchasing that security as well as the use to which it is intended to be put, in interpreting the application of s. 50(1) of the Act. Obviously the purpose of the advance of funds was to create a ready fund which could be used to satisfy a judgment should the plaintiff succeed in its law suit, or to be returned to the defendants should they be successful in their defence. That being the case, it is still the property of the bankrupts as contemplated under s. 50(1)

and thus payable to the trustee to be distributed in accordance with the provisions of the Act.

[46] Justice Hewak found that there was no difference between the Posted Money and the garnishment fund at issue in the seminal decision, ***Can Credit Men's Trust v Beaver Trucking Ltd*** (1959), 38 CBR 1. Although the payor bankrupt's interest in the fund was contingent on his success in the litigation, the money nevertheless remained his property because of the operation of s 50 (now s 70).

[47] In ***Bank of Montreal v Faclaris***, 48 OR (2d) 348 (Ont HCJ), a trustee in bankruptcy claimed entitlement to money held by Order "to the credit of the action" where the creditor had obtained default judgment in one of two actions against the bankrupt. The funds were held in trust by the lawyers representing one of the plaintiffs. The Court found a difference between funds held in court and funds held in trust by a lawyer, ruling that in either case, they were not the absolute property of the plaintiff. The Court found that the creditor was not a secured creditor, the money paid into court was not the creditor's money, and the creditor's interest at the date of bankruptcy was contingent on the results of the litigation. The trustee prevailed despite the bankrupt having only a contingent right to the money (at para 14).

[48] In ***Re Charisma Fashions Ltd*** (1971), 15 CBR (NS) 207, money was paid into court with an admission that it was owing to the plaintiff. Logically, given the admission of liability, the trustee lost out to the plaintiff.

The Second Line of Authority

[49] This line of authority applies trust principles. The logic is that Posted Money is impressed with a trust in the non-bankrupt litigant's favour as the parties intended it to be held for the benefit of the successful litigant.

[50] ***Ferguson Gifford v British Columbia (Director of Employment Standards)*** (1997), 47 CBR (3d) 226 (BCSC) (***Ferguson Gifford***) involved a contest between an employer's lawyer, claiming a solicitor's lien, and the Director of Employment Standards who was successful in obtaining an award against the lawyer's client. The client posted the full amount of the award into the lawyer's trust account pending appeal, but the client's bankruptcy intervened before the appeal concluded. The Court found the money was impressed with a trust arising on the agreement of counsel. Noting that although certainty of object generally requires an identifiable person as beneficiary, Boyle J ruled (at para 12): "...it would be too narrow a conclusion to decide that, when created, it was uncertain pending the appeal, which of two persons would benefit. Its purpose was clear".

[51] Justice Boyle rejected the contention of a failed trust (arising from a moot appeal) attributable to the bankruptcy, finding instead that if the appeal was abandoned or unsuccessful, the monies would go to the Director. Under s 15 of British Columbia's *Employment Standards Act*, the certificate granted in the hearing gave the Director a "lien, charge and secured debt". Boyle J held that "The trust fund, although held pending appeal, unless and until the Court rules otherwise is money collected and held in trust for the Director" (at para 15) and "In simplest terms, it's his money. There is no "operational conflict" with the Bankruptcy Act" (at para 18).

[52] ***Re Anderson (Bankrupt),*** 1999 ABQB 398 (Registrar) applied ***Ferguson Gifford***. To open up a default judgment, the defendant debtor paid the net sale proceeds from the sale of a house into a lawyer's trust account "pending resolution of the subject legal proceedings". Some

nineteen months later the plaintiff obtained judgment. Between the judgment and month that passed when another creditor filed a petition for the debtor's bankruptcy, the creditor had twice asked for the money. In his very brief analysis, the Registrar determined that the parties understood the sale proceeds were to be held for the benefit of the creditor if it won its lawsuit, and "once successful" the bankrupt and agent lawyer held the money in trust for the creditor.

The Third Line of Authority

[53] The third line of authority is a hybrid form of reasoning that combines the notion of trust law with contingent interests in property on other grounds. This reasoning requires that the trustee is successful in the litigation before it has a right to the money. Section 70 does not factor in the reasoning.

[54] ***Re Acepharm***, [1999] OJ No 2353 (CA) concerned a contest between the trustee and a litigant to disputed rents held under an agreement permitting the defendant occupier of premises to retain occupation until trial. The plaintiff claimed that the defendant was a tenant while the defendant claimed ownership of the premises. The Ontario Court of Appeal found the chambers judge erred in relying on ***Tradmor*** to find that the fund should be handed to the trustee rather than the appellant/plaintiff.

[55] Noting that money paid into court (as in ***Tradmor***) and money in a law firm's trust account (as in ***Re Acepharm***) have the same practical consequence, Carthy JA commented that but for s 67 it would be logically tempting to assume that the legal consequences of bankruptcy would be the same (at para 7). Justice Carthy went on to observe that an Accountant of the Ontario Superior Court [equivalent to the Alberta Clerk of the Court] is simply "...a repository that responds not to terms of a trust but to the rules of court and court orders" (at para 9).

[56] Ultimately, the Court determined (at para 12):

> The funds were, in every sense, trust funds in the hands of the law firm. *To the extent that they might be considered as held in trust by the bankrupt, the appellant was a contingent beneficiary of that trust. If the funds are not "held by the bankrupt in trust for any other person" then the only property the Trustee can reach is the bankrupt's contingent interest.* That can be realized by continuing the litigation to a conclusion: see s. 67(1) (d) of the Act [which gives the trustee power to deal with the bankrupt's property as might have been exercised by the bankrupt for his own benefit].
>
> (Emphasis Added)

[57] In his concluding words, Carthy JA said that he would set aside the lower court's order "and in its place declare that the funds in question are not property of the bankrupt divisible amongst its creditors *at this time*" (Emphasis added). What happened subsequent to the decision is unknown.

[58] ***Re Acepharm*** was considered in ***Re Greenstreet***. While the facts are distinguishable as there was an unequivocal contractual trust in play, the discussion of contingent interests warrants mention.

[59] The facts are straightforward. Greenstreet Management Inc entered into an agreement for the purchase and sale of a property pursuant to which it paid two deposits to the vendor's solicitor. The agreement for purchase and sale provided that the deposits would be held in trust

pending closing or termination, and credited to the purchase price on completion. The deal did not close. Greenstreet sued the vendor for misrepresentation and refused to close the sale. The vendor counterclaimed for breach of contract. Later, the deposits were ordered to be paid into court "pending further order of the court of the final adjudication of the herein action". Bankruptcy intervened before the litigation was adjudicated.

[60] Morowetz J found that the deposits were trust funds when they were initially paid to the vendor's lawyer to which the bankrupt had only a contingent interest. Mindful of the observation in ***Re Acepharm*** that the Accountant of the Ontario Superior Court Justice is merely a "repository" which responds to the rules of court and court orders, not trusts (at para 9), Morowetz J found that the payment into court merely substituted the Court's Accountant for the lawyers' trust account. The characterization of the deposits as trust money and the parties' contingent interests in it was therefore unaffected. In the result, the trustee could only get at the money by winning the lawsuit (at para 29).

Resolving the Conflicting Logic

[61] Resolving the conflicting logic applied in the authorities requires consideration of the principles underlying the *BIA* and the principles of statutory interpretation.

[62] It is trite that in interpreting legislation, the Court must give effect to the purpose and overall intention of the legislation, in keeping with the definitive formulation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.": ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21. This means that provisions must be read to work harmoniously together and that no provision "trumps" another, unless expressly stated with language like "subject to". Context is important and there is a presumption of "harmony, coherence, and consistency": ***Bell ExpressVu Limited Partnership v Rex***, [2002] 2 SCR 559 at para 27.

[63] Principles of statutory interpretation also provide that the legislature does not intend to produce absurd consequences and that an absurd interpretation includes interpretations that are "incompatible with other provisions or with the object of the legislative enactment" or "which defeat the purpose of a statute or render some aspect of it pointless or futile": ***Rizzo Shoes*** at para 27.

[64] Section 70 provides that an unsecured judgment creditor is only entitled to the judgment amount if the judgment has been fully executed by the time of the bankruptcy. An assignment into bankruptcy takes precedence over any unexecuted judgment or order.

[65] Section 67 provides that the Bankrupt's estate does not include any property the bankrupt holds in trust for another. The intent of this provision is relatively apparent when the bankrupt is a traditional trustee holding, for example a real estate vendor holding a deposit from a purchaser or a broker holding stocks for her client. It becomes less clear when the property is paid into court or a lawyer's trust fund pending the resolution of a dispute or litigation.

[66] Read contextually and harmoniously, s 67 and s 70 must be interpreted to work together rationally to achieve these legislative objectives:

1. to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors;
2. to ensure that the only property that is distributed is the bankrupt's;

3. to maximize to the extent that is fair and equitable the value of the estate for distribution; and
4. to provide for the financial rehabilitation of insolvent persons.

[67] When Posted Money is held by a lawyer, it is clearly a trust fund in the lawyer's hands: ***Re Acepharm*** at para 12. The question is: Does the simple fact of deposit with a lawyer automatically mean that there is a "trust" for the purposes of s 67 of the *BIA*?

[68] According to ***Re Acepharm*** and ***Re Greenstreet***, Posted Money deposited with the Clerk of the Court is treated differently, depending on its initial characterization. If it was simply deposited with the Clerk of the Court pursuant to a Court Order, the Clerk is a "mere repository", not a trustee. However, if it was initially deposited with a lawyer as true trust money, that characteristic continues if it is later transferred to the Clerk of the Court.

[69] The authorities ruling that ownership of Posted Money must be determined by resolution of the litigation on the basis of it being s 67(a) "trust" for whoever the ultimate victor might be run afoul of s 70.

[70] If the litigation is pursued to judgment and the Posted Money paid without fully executing on the judgment, that creditor is bootstrapped to a better position than a pre-bankruptcy judgment creditor holding an unexecuted judgment. The effect operates to the detriment of the other creditors and violates the *BIA*'s foundational principles of creditor equality and rateable distribution of a bankrupt's property. I therefore conclude that if bankruptcy intervenes before the matter is adjudicated and the judgement is executed, s 70 applies and the trustee in bankruptcy should prevail. Perhaps facially harsh to the solvent litigant, the result is consistent with the principles of statutory interpretation and the context of ss 67 and 70.

[71] In this scenario, the answer is not dependent upon where the Posted Money is held. As noted in ***Re Acepharm***, if held by a lawyer, such funds are, in every sense, trust funds in her hands. However, this does not equate to the funds automatically qualifying as "trust" property for the purpose of s 67(a). The lawyer is a repository like the Clerk of the Court. The difference is that unlike the Clerk of the Court, the lawyer has professional and fiduciary obligations to her client. Accordingly, it makes no difference whether the fund is on deposit with a lawyer or the Clerk of the Court.

[72] Respectfully, the reasoning in ***Re Anderson*** and ***Ferguson Gifford*** is wanting given the reliance on trust principles without considering s 70 or the germane decisions in ***Re McDermott*** and ***Re Laker***.

[73] While one might try to rationalize the trust logic in ***Ferguson Gifford*** as being consistent with the underlying principles of ss 67 and 70 by arguing that the Director was successful and the award was effectively "executed" by payment into trust, the Director could not access it until the appeal was resolved in its favour or was abandoned.

The Result

[74] As interesting as dissection of the three lines of authority is (or is not, depending on one's perspective), the question of how Posted Money is to be treated is mainly a red herring in this case.

[75] The Adjustment Fund was a hold back of 25% of Booth's payment to Werenka to buy her shares of Transtrue. The purchase value of those shares is contingent on the resolution of the

value of the closing adjustments. Transtrue did not intend that Werenka would hold the Adjustment Fund for its benefit. Rather, Booth's intention was that the hold back would not be released to Werenka until the closing adjustments were resolved.

[76] Simply put, the Adjustment Fund is not the subject of an express trust under s 67 of the *BIA*, because Transtrue did not intend to create a trust when the money was paid to Werenka's lawyer. As such, one of the required certainties for a valid trust is unsatisfied. However, the Trustee can be in no better position than Werenka would have been, but for the bankruptcy.

[77] Werenka had a contingent claim upon the Adjustment Fund at the date of her bankruptcy. She could only claim ownership if she was successful in resolving the closing adjustments in her favour or with Booth's agreement. It is this contingent interest that vested in the Trustee, and consequently the value of the closing adjustments must be resolved.

Is the Settlement a preference under s 95(1)(a) of the *BIA*?

[78] Transtrue concedes that absent a trust in its favour, the evidence establishes that the Settlement constitutes a preference. I agree with its conclusion.

[79] Having found that there is no trust affecting the CLP Fund and that the interest(s) to the Adjustment Fund are contingent on resolution of the closing adjustments for the purchase of Werenka's shares, the Settlement is void as against the Trustee.

Conclusion

[80] Evidentiary concerns preclude the Court from inferring that the Settlement constitutes an admission by Werenka of the validity of Transtrue's constructive trust claim.

[81] The CLP did not give Transtrue an interest in Werenka's home. Accordingly, it does not give Transtrue an interest in the CLP Fund, which stands in its stead. The CLP Fund was and remains Werenka's property, and hence the Trustee's.

[82] The Adjustment Fund is not the subject of an express trust under s 67 of the *BIA*, but the Trustee can be in no better position than Werenka would have been but for the bankruptcy. The interest(s) in the Adjustment Fund must be determined by resolving the closing adjustments on the share sale.

[83] The Settlement is a preference under s 95(1) (a) of the *BIA*.

Dated at the City of Edmonton, Alberta this 24th day of March, 2015.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

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Sheila English
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Most Negative Treatment: Distinguished

Most Recent Distinguished: Pearce v. Edwards | 2010 ONSC 6641, 2010 CarswellOnt 10154, 196 A.C.W.S. (3d) 944 | (Ont. S.C.J., Nov 8, 2010)

2008 CarswellOnt 3183
Ontario Superior Court of Justice (Divisional Court)

Beidas v. Pichler

2008 CarswellOnt 3183, [2008] O.J. No. 2135, 166 A.C.W.S. (3d) 752, 238 O.A.C. 103, 294 D.L.R. (4th) 310

JENNIFER BEIDAS, HEATHER CLAIRE DAVIES, JENNIFER CLAIRE PALLISTER, MYSTI RAE MEADOWS and DAWNA TRACEY ARMSTRONG (Plaintiffs / Respondents) and GREGORY PICHLER a.k.a. JOELLE LEGASSÉ, LUCY PYBKA-BECKER a.k.a. KRISTA PAPARAZZI, OPEN SYSTEMS GROUP LIMITED and TRANSGRESSION.COM (Defendants / Appellants)

Molloy J., Murray J., and Pitt J.

Heard: February 13, 2008
Judgment: May 29, 2008
Docket: Toronto 584/06

Proceedings: reversing *Beidas v. Pichler* (2006), 2006 CarswellOnt 7989 (Ont. S.C.J.)

Counsel: Jennifer Beidas for herself
Heather Claire for herself
Gregory M. Sidlofsky for Defendants / Appellants, Gregory Pichler, Open Systems Group Limited

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Remedies
II Injunctions
II.2 Availability of injunctions
II.2.f Injunctions in specific contexts
II.2.f.iv Defamation

Remedies
II Injunctions
II.4 Form and operation of order
II.4.h Continuance of interim or interlocutory injunctions
II.4.h.iii Balance of convenience
II.4.h.iii.A Irreparable injury

Torts
V Defamation
V.2 Publication
V.2.b Publication in mass media
V.2.b.iii Internet or electronic mail

Headnote

Remedies --- Injunctions — Availability of injunctions — Injunctions in specific contexts — Defamation

Plaintiffs were transsexuals who had undergone gender reassignment surgery — Defendant P owned website catering to transsexuals — Plaintiffs alleged that P and defendant R wrote, and P published and disseminated, defamatory materials about plaintiffs — Plaintiffs brought defamation action against defendants — Plaintiffs obtained temporary injunction prohibiting defendants from publishing materials — Defendants brought motion to set aside or vary interim injunction order, and plaintiffs brought motion for broadening of injunctive relief — Order was replaced with interim order prohibiting defendants from publishing materials possibly identifying plaintiffs — Defendants appealed — Appeal allowed — Injunction on variation was set aside, and replaced with original injunction — There was no evidence of irreparable harm — No undertaking as to damages was given by plaintiffs — Plaintiffs refused to be examined prior to return of motion — Scope of injunctive relief granted on variation was too broad.

Remedies **---** Injunctions — Form and operation of order — Continuance of interim or interlocutory injunctions — Balance of convenience — Irreparable injury

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Torts **---** Defamation — Publication — Publication in mass media — Internet or electronic mail

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The plaintiffs were transsexuals who had undergone gender reassignment surgery. The defendant P owned a website catering to transsexuals. The plaintiffs alleged that P and the defendant R wrote, and P published and disseminated, defamatory materials about the plaintiffs.

The plaintiffs commenced a defamation action against the defendants. The plaintiffs obtained a temporary injunction prohibiting the defendants from publishing materials. The defendants brought a motion to set aside or vary the interim injunction order, and the plaintiffs brought a motion for a broadening of injunctive relief. The order was replaced with an interim order prohibiting the defendants from publishing materials possibly identifying the plaintiffs. The defendants appealed.

Held: The appeal was allowed.

Per Murray J.: The injunction on variation was set aside, and replaced with the terms of the original injunction. There was no evidence of irreparable harm. No undertaking as to damages was given by the plaintiffs. The plaintiffs refused to be examined prior to return of the motion. The scope of injunctive relief granted on variation was too broad.

Per Molloy J. (concurring in the result): The scope of the injunction granted on variation was overly broad. The injunction should be amended to restrict the scope of the injunction.

Per Pitt J. (dissenting): The appeal ought to be dismissed. There was no basis on which to interfere with the order. The motion judge committed no error of law or findings of fact. The motion judge did not err in finding that this was a clear case to grant interim interlocutory relief. The scope of the injunction was not overly broad.

Table of Authorities

Cases considered by *Murray J.*:

Barrick Gold Corp. v. Lopehandia (2004), 23 C.C.L.T. (3d) 273, 2004 CarswellOnt 2258, 187 O.A.C. 238, 49 C.P.C. (5th) 1, 71 O.R. (3d) 416, 239 D.L.R. (4th) 577, 31 C.P.R. (4th) 401 (Ont. C.A.) — considered

Beidas v. Pichler (2006), 2006 CarswellOnt 7989 (Ont. S.C.J.) — referred to

Beidas v. Pichler (2006), 2006 CarswellOnt 8010 (Ont. Div. Ct.) — referred to

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario*) 71 O.R. (3d) 291 (Ont. C.A.) — considered

Canada (Human Rights Commission) v. Canadian Liberty Net (1998), 157 D.L.R. (4th) 385, 1998 CarswellNat 388, 224 N.R. 241, 31 C.H.R.R. D/433, 22 C.P.C. (4th) 1, 50 C.R.R. (2d) 189, [1998] 1 S.C.R. 626, 147 F.T.R. 305 (note), 1998 CarswellNat 387, 6 Admin. L.R. (3d) 1 (S.C.C.) — considered

Canada Metal Co. v. Canadian Broadcasting Corp. (1975), 7 O.R. (2d) 261, 55 D.L.R. (3d) 42, 1975 CarswellOnt 903 (Ont. Div. Ct.) — considered

Centre Ice Ltd. v. National Hockey League (1994), 53 C.P.R. (3d) 34, 166 N.R. 44, 1994 CarswellNat 1332, 75 F.T.R. 240 (note) (Fed. C.A.) — referred to

F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade & Industry (1974), [1974] 2 All E.R. 1128, [1975] A.C. 295 (U.K. H.L.) — considered

R. v. Consolidated Fastfrate Transport Inc. (1995), 99 C.C.C. (3d) 143, 125 D.L.R. (4th) 1, 61 C.P.R. (3d) 339, 24 O.R. (3d) 564, 40 C.P.C. (3d) 160, 83 O.A.C. 1, 1995 CarswellOnt 993 (Ont. C.A.) — considered

Rapp v. McClelland & Stewart Ltd. (1981), 19 C.C.L.T. 68, 128 D.L.R. (3d) 650, 1981 CarswellOnt 588, 34 O.R. (2d) 452 (Ont. H.C.) — followed

Risi Stone Ltd. v. Omni Stone Corp. (1989), 24 C.P.R. (3d) 559, 1989 CarswellOnt 1441 (Ont. H.C.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — considered

Rosemond Estates Inc. v. Levy (2003), 2003 CarswellOnt 1610, 65 O.R. (3d) 79 (Ont. S.C.J.) — considered

Saan Stores Ltd. v. Effigi Inc. (2006), 2006 CarswellOnt 7423 (Ont. S.C.J.) — referred to

Sherwood Dash Inc. v. Woodview Products Inc. (2005), 2005 CarswellOnt 7191 (Ont. S.C.J.) — considered

Syntex Inc. v. Apotex Inc. (1991), 39 C.P.R. (3d) v (note), 137 N.R. 391 (note), 1991 CarswellNat 1545 (S.C.C.) — referred to

Syntex Inc. v. Novopharm Ltd. (1991), 126 N.R. 114, (sub nom. *Syntex Inc. v. Novopharm Ltd. (No. 2)*) 51 F.T.R. 299 (note), 36 C.P.R. (3d) 129, 1991 CarswellNat 1113 (Fed. C.A.) — referred to

Willow Corp. v. McDonald's Restaurants of Canada Ltd. (1994), 1994 CarswellOnt 2635 (Ont. Gen. Div.) — referred to

Cases considered by *Pitt J.*:

Aetna Financial Services Ltd. v. Feigelman (1985), 1985 CarswellMan 19, 1985 CarswellMan 379, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145 (S.C.C.) — referred to

American Cyanamid Co. v. Ethicon Ltd. (1975), [1975] 2 W.L.R. 316, 119 Sol. Jo. 136, [1975] 1 All E.R. 504, [1975] F.S.R. 101, [1975] R.P.C. 531, [1975] A.C. 396 (U.K. H.L.) — considered

Beidas v. Pichler (2006), 2006 CarswellOnt 7989 (Ont. S.C.J.) — referred to

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

L. (M.S.) v. G. (H.R.) (2005), [2005] 9 W.W.R. 97, 42 B.C.L.R. (4th) 136, 2005 BCSC 488, 2005 CarswellBC 848 (B.C. S.C.) — referred to

Law Society of Upper Canada v. MacNaughton (1942), [1942] O.W.N. 551, 1942 CarswellOnt 332 (Ont. C.A.) — considered

Newman v. Halstead (2006), 2006 BCSC 65, 2006 CarswellBC 52 (B.C. S.C.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — considered

Statutes considered:

Canadian Human Rights Act, R.S.C. 1985, c. H-6

s. 13(1) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 31.04(1) — referred to

R. 34.15(1) — referred to

R. 40.03 — referred to

R. 57 — referred to

R. 57.01 — considered

APPEAL by defendants from judgment reported at *Beidas v. Pichler* (2006), 2006 CarswellOnt 7989 (Ont. S.C.J.), broadening scope of interlocutory injunction granted to plaintiffs in demation action.

***Murray J.*:**

1 Initially there were five plaintiffs in this action initiated against Gregory Pichler, Open Systems Group Limited, Lucy Rybka-Becker and www.Transgression.com. The five plaintiffs were: Jennifer Beidas, Heather Claire Davies, Jennifer Claire Pallister, Mysti Rae Meadows and Dawna Tracey Armstrong.

2 The action was commenced on September 13, 2005 and — in the main — is an action seeking damages for defamation against the defendants. The plaintiffs brought a motion on short notice for injunctive relief concerning the publication and dissemination of certain articles on the Internet.

3 No plaintiff, other than Heather Claire Davies, filed an affidavit in support of the initial motion for injunctive relief.

4 On September 15, 2005, Justice Somers granted an interim injunction prohibiting the defendants from publishing a list of articles and audio files.

5 The order of Justice Somers provided that the defendants could serve responding materials and then move to set aside or otherwise amend the injunctive relief granted by Justice Somers.

6 In August of 2006, the defendants moved before Justice Himel to set aside the order of Justice Somers dated September 15, 2005 and, at the same time, the plaintiffs sought to broaden the order granted by Justice Somers to prohibit the defendants from publishing any materials which name the plaintiffs. In the proceedings before Justice Himel, the plaintiffs Beidas, Davies and Pallister were represented by counsel, Mr. Howard Crosner. The plaintiff Armstrong consented to an order dismissing her action against the defendants. The plaintiff Mysti Rae Meadows did not file any material and did not appear before Justice Himel.

7 By order dated October 3, 2007, Justice Swinton ruled that Mysti Rae Meadows had no standing to be heard on this appeal.

8 The plaintiff Jennifer Pallister died in August 2007. This appeal was adjourned on October 3, 2007 to permit adequate notice to the executor of her estate, if there was one. At the outset of this appeal on February 13, 2008, the plaintiffs Davies and Pallister sought an adjournment in order to arrange for the appointment of an executor, which request was refused. Accordingly, the plaintiffs, for purposes of this appeal, are Jennifer Beidas and Heather Davies.

9 As is clear from paragraph 7 of Justice Himel's endorsement dated August 22, 2006 [2006 CarswellOnt 7989 (Ont. S.C.J.)], the plaintiffs Beidas, Davies and Pallister did not oppose setting aside the order of Justice Somers provided that the defendants "are restrained pending trial from publishing any material which may identify these plaintiffs and that all references to these plaintiffs be deleted (from the Internet)."

10 As is noted in paragraph 5 of Madam Justice Himel's decision, the plaintiffs Pallister and Beidas did not file any affidavit material in support of the injunction either before Justice Somers or before Himel J. and, before the return of the defendants' motion before Himel J., both Pallister and Beidas refused to attend to be examined as witnesses although they were personally served with notices of appointment by the defendant's counsel, Mr. Gregory M. Sidlofsky.

11 Madam Justice Himel made, *inter alia*, the following orders:

> 1. The order of Somers J. dated September 15, 2005 will be replaced by an order until trial of this action prohibiting the defendants from publishing any materials which may tend to identify the plaintiffs Beidas, Davies and Pallister.
>
> 2. The defendants shall delete all references to Beidas, Davies or Pallister from any publications to which the defendants have, or can obtain access.

12 In a separate endorsement dated October 11, 2006 Justice Himel awarded costs to the plaintiffs in the amount of $35,000 for fees excluding GST and disbursements of $2277.65.

13 These orders, including the cost order, are the subject of this appeal for which leave to appeal was granted on the 18th of December 2006 by Justice Matlow [2006 CarswellOnt 8010 (Ont. Div. Ct.)].

Analysis

Interlocutory Injunctive Relief

14 First, it is appropriate to consider the general principles applicable in a case such as the one before this Court. In *Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2d) 452 (Ont. H.C.), Griffiths J. described generally the requirements for an injunction in a case of defamation at p. 455.:

> In this jurisdiction, unless both parties are prepared to waive the requirement, a libel action must be tried by a jury and while the presiding trial judge has the duty to determine whether in law the words complained of are capable of being defamatory of the plaintiff it is the exclusive function of the jury to determine whether they are, under all the circumstances, in fact defamatory. The words to be defamatory must be false and the jury must be satisfied that the words in their natural or innuendo meaning tend to lower the plaintiff in the estimate of right-thinking members of society generally or cause her to be shunned or avoided or exposed to hatred, contempt or ridicule.
>
> As the learned author Gatley on Libel and Slander, 7th ed. (1974), observes at pp. 23-24:
>
> > It will be seen that it is not possible to say that any particular imputation is defamatory, regardless of the circumstances of its publication. Whether or not it is so will vary with time, place and the state of public opinion.

> In any case, whether or not any imputation is defamatory is not a matter of law, but a matter of fact for the jury, and no other jury will be bound to reach the same decision. It is similarly a matter of fact whether any words convey the defamatory imputation alleged, and this may depend to a great extent on the circumstances and context of a particular publication.

In the light of this sovereign jurisdiction of the jury to determine the issue of defamation a fairly stringent rule was developed early in the history of the law concerning the granting of interim injunctions restraining the publication of alleged defamatory material until the trial of the action. In the decision of *CanadaMetal Co. Ltd., v. Canadian Broadcasting Corp.* (1975), 7 O.R. (2d) 261, 55 D.L.R. (3d) 42, Stark J., delivering the reasons of the Divisional Court said at pp. 261-62:

> The granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest of cases. That reluctance to restrict in advance publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion. The exceptions to this rule are extremely rare.
>
> For at least one hundred years and certainly since the leading cases of *William Coulson & Sons v. James Coulson & Co.* (1887), 3 T.L.R. 846, and *Collard v. Marshall*, [1892] 1 Ch. 571, andperhaps above all, in the leading case of *Bonnard v. Perryman*, [1891] 2 Ch. 269, it has been universally and consistently held by British and Canadian Courts that such an interim injunction will never be granted where the defendant expresses his intention to justify unless the words in question are so clearly defamatory and so obviously impossible to justify that the verdict of a jury accepting a plea of justification as a defence would of necessity have to be set aside as a perverse finding on appeal.

The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.

In this case, I am not prepared to predict at this stage that a jury will, inevitably, find the words here complained of defamatory of the plaintiff. The English Court of Appeal has recently held in *Herbage v. TimesNewspapers*, May 1981 (not yet reported) that the decision of the House ofLords in *American Cyanamid Co. v. Ethicon Ltd*., [1975] A.C. 396, hasnot affected the well established principle in cases of libel that an interiminjunction should not be granted unless the jury would inevitably come tothe conclusion that the words were defamatory.

In my view as well the principle should be preserved in libel cases thatexcept in a case of manifest libel the interim injunction should not issuewhere the wrong suffered by the plaintiff may be adequately compensatedfor in damages. There is early authority for this in the decision of *Monsonv. Tussauds Ltd*., [1894] 1 Q.B. 671.

15 In *Rosemond Estates Inc. v. Levy*, 65 O.R. (3d) 79, [2003] O.J. No. 1748 (Ont. S.C.J.), Spence J. stated: that the court should be particularly cautious about granting an injunction where the issue concerns defamation is clear from the decision in *Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2d) 452, 128 D.L.R. (3d) 650 (Ont. H.C.) per Griffiths J. at p. 455 O.R..

16 In his treatise *Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf)), Robert Sharpe says the following, at paras. 5.40-5.70 (pp. 5.2-5.4):

There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded.

. . . . .

> The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.
>
> ...it seems clear that the rule is unaffected by the *American Cyanamid* case and that the balance of convenience is not a factor.

"Clean Hands"

17 In *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 (Ont. S.C.J.), P.M. Perell J. quoted the often-cited maxim that one who seeks equity must have clean hands. He said as follows in paragraphs 51-53:

> An injunction is an equitable remedy and it is subject to the principles that govern the grant of equitable decrees and orders. One of those principles is the maxim that "one who comes to equity with clean hands."
>
> As commentators and judges have noted, the metaphor that a claimant for equitable relief must have clean hands must be put into context. Judges of the courts of equity do not deny relief because the claimant is a villain or wrongdoer; rather, the judges deny relief when the claimant's wrongdoing taints the appropriateness of the remedy being sought from the court. In *Argyll v. Argyll* [1967] Ch. 302, Ungoed-Thomas, J. described the principle nicely at pp. 331-2, when he said: "A person coming to Equity for relief... must come with clean hands; but the cleanliness required is to be judged in relation to the relief sought."
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> In *City of Toronto v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.), in describing the clean hands principle Schroeder, J.A. stated at pp. 699-70:
>
>> The misconduct charged against the plaintiff as ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief; or as is indicated by the reporter's note in the old case of *Jones v. Lenthal* (1669), 1 Chan. Cas. 154, 22 E.R. 739: "... that the iniquity must be done to the defendant himself."

18 In *R. v. Consolidated Fastfrate Transport Inc.*, [1995] O.J. No. 1855, 24 O.R. (3d) 564 (Ont. C.A.), the Court of Appeal stated as follows at paragraph 133:

> A Mareva injunction is a discretionary equitable remedy. It will only be granted to a person "who has clean hands". It is on this basis that the requirement for full and frank disclosure rests. See *Chitel v. Rothbart*, supra, where the application was refused because the plaintiff failed to make the necessary full and frank disclosure. The granting of an injunction also involves weighing the balance of convenience to the parties: *Aetna Financial Services Ltd. v. Feigelman*, supra, at p. 176. It will be issued in circumstances where the plaintiff demonstrates that he will suffer irreparable harm if the injunction is not issued. Fairness to both sides is a consideration. By contrast, an execution can be issued as of right once a judgment has been obtained against the defendant. If the plaintiff has a valid judgment, considerations such as fairness and the "clean hands" of the plaintiff are irrelevant.

This Appeal

19 This appeal is granted for the reasons that follow.

20 First, there was no affidavit evidence before Justice Himel from either Beidas or Pallister and therefore no evidence of irreparable harm from these two plaintiffs. No injunctive relief should have been granted to Beidas or Pallister for this reason.

21 Secondly, no undertaking as to damages was given by the plaintiffs and no order of the court exempted them from this requirement. See Rule 40.03.

22 Thirdly, both Beidas and Pallister refused to be examined prior to the return of the motion for interlocutory relief. In the face of such refusal, no injunctive relief should have been granted to the plaintiffs Beidas or Pallister.

23 Fourthly, the scope of the injunctive relief granted by Justice Himel was too broad.

24 Finally, Himel J. made errors in principle with respect to her award of costs.

The Failure of the Plaintiffs Beidas and Pallister to File Affidavit Material in Support of Their Application for Interlocutory Injunctive Relief.

25 Himel J. made no mention of the defendants' stated intention to plead justification. As Robert Sharpe says in the passage from *Injunctions and Specific Performance* quoted above: "The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify." Justice Sharpe clearly sets out that the onus is on the plaintiff at the interlocutory stage to satisfy the court that the words are both clearly defamatory and impossible to justify. In my view this underscores what is obvious from the Rules, that interlocutory injunctive relief must be based on evidence sufficient to meet the applicable threshold.

26 It is unclear whether Himel J. applied the correct "stringent rule" as set out in the decision of *Canada Metal Co. v. Canadian Broadcasting Corp.* (1975), 7 O.R. (2d) 261, 55 D.L.R. (3d) 42 (Ont. Div. Ct.). Justice Himel appears instead to have applied the three-part test for interlocutory injunctive relief established by *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). Whether Himel J. applied the correct test for injunctive relief in a defamation case is perhaps not of great significance in this appeal. Under either *Canada Metal Co.* or *RJR-MacDonald Inc.*, where a plaintiff seeks injunctive relief, it is incumbent on the plaintiff to prove irreparable harm. The plaintiff's obligation is to convince the court that irreparable harm will be suffered and such proof is a condition precedent for obtaining relief.

27 Evidence of irreparable harm must be clear and not speculative: see *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 (Fed. C.A.) at p. 135, leave to appeal to S.C.C. refused (1991), 39 C.P.R. (3d) v (note), 137 N.R. 391 (note) (S.C.C.); see also *Centre Ice Ltd. v. National Hockey League*, [1994] F.C.J. No. 68, 53 C.P.R. (3d) 34 (Fed. C.A.) at p. 54; *Willow Corp. v. McDonald's Restaurants of Canada Ltd.*, [1994] O.J. No. 1169 (Ont. Gen. Div.) at para. 7; *Risi Stone Ltd. v. Omni Stone Corp.*, [1989] O.J. No. 103 (Ont. H.C.).

28 Neither Beidas nor Pallister provided any evidence of irreparable harm. Indeed, as is clear from the endorsement of Justice Himel, the plaintiffs Pallister and Beidas (who were represented by counsel at the time) "did not file affidavits and did not attend to be examined as witnesses on this motion, although they were personally served with notices of appointment."

29 The appeal succeeds for this reason.

The Plaintiffs Failed to Comply with Rule 40.03

30 The failure to provide a viable undertaking as to damages is sufficient reason alone to deny the request for an interlocutory injunction. See J.M. Wilson J. at para. 103 in *Saan Stores Ltd. v. Effigi Inc.*, [2006] O.J. No. 4685 (Ont. S.C.J.). See also *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade & Industry* (1974), [1975] A.C. 295 (U.K. H.L.), at 361, where Lord Diplock said:

> The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit.

31 The plaintiffs failed to provide an undertaking as to damages and there was no order of the Court exempting them from this requirement.

32 The appeal also succeeds for this reason.

The Failure of the Plaintiffs Beidas and Pallister to submit to examination before their Application for Interlocutory Injunctive Relief.

33 If a plaintiff seeking an interlocutory injunction fails to file affidavit material and refuses to be examined, not only is there a failure to prove irreparable harm but also that person does not have "clean hands" and is for that reason too not entitled to relief.

34 Interlocutory injunctions are most commonly decided on the basis of affidavits and the transcripts of cross-examinations of the deponents. Although a motions judge may hear *viva voce* evidence and cross-examination, this will not be the usual case. Affidavit evidence and the transcripts of cross-examination on those affidavits are usually what is before the judge and what informs the judge's decision on whether an injunction should issue.

35 In my view, even if Beidas and Pallister had filed affidavit material, a refusal to subject themselves to cross-examination would have been fatal to their claim for interlocutory injunctive relief. A defendant is entitled to cross-examine a party seeking equitable relief.

36 It may be proper for a court to issue an interim injunction to protect a plaintiff pending the return of the motion for interlocutory injunctive relief to allow further affidavit material to be filed and cross-examinations to take place. However, the defendants have the right to examine any party seeking injunctive relief and have the right to rely on the transcript of such examination in order to argue that the interim injunction should be terminated or modified on an interlocutory basis. The plaintiffs' refusal to be examined not only deprives the court of a more complete record on which to ascertain the facts but also results in a denial of procedural fairness and natural justice to the defendants. Refusing to submit to examination is no less a denial of natural justice than it would be if a motions judge hearing viva voce evidence denied the defendant the right to cross-examine the plaintiff seeking injunctive relief.

37 Even though the plaintiffs Beidas or Pallister did not file affidavits in support of their motions for injunctive relief, they were fully protected by the interim injunction granted by Somers J. when they refused to be examined. The law should not reward plaintiffs who will not subject themselves or their version of the facts to examination. They do not come to Court with "clean hands".

38 No interlocutory injunctive relief should have been granted by Himel J. on behalf of these two plaintiffs because they refused to be examined by the defendants' counsel.

39 The defendants' appeal also succeeds for this reason.

The Scope of the Injunction Order of Justice Himel

40 Justice Himel made the following orders:

> 1. The order of Somers J. dated September 15, 2005 will be replaced by an order until trial of this action prohibiting the defendants from publishing any materials which may tend to identify the plaintiffs Beidas, Davies and Pallister.
>
> 2. The defendants shall delete all references to Beidas, Davies or Pallister from any publications to which the defendants have, or can obtain access.

41 In my respectful opinion, these orders are too broad and unnecessarily impair the freedom of speech and expression of the defendants.

42 In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] S.C.J. No. 31, [1998] 1 S.C.R. 626 (S.C.C.) the S.C.C. found it "helpful to look at the approach to injunctions in cases of defamatory speech" to determine how "urgency" should be defined in the context of s. 13(1) of the *Human Rights Act*. The Supreme Court (at para 49) cited with approval the following excerpt from *Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf)), Robert Sharpe at paras. 5.40-5.70 (pp. 5.2-5.4):

> There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded....
>
> The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.
>
> ... it seems clear that the rule is unaffected by the American Cyanamid case and that the balance of convenience is not a factor.

For this case, the importance of the above quotation is the reference to the "significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded."

43 In Canada *Canada (Human Rights Commission) v. Canadian Liberty Net*, the Court expressed its concerns about limitations on speech if injunctive relief is too easily obtained. At para 49, the Court continued:

> One of the leading English authorities has a close affinity to the Human Rights Act in that it was a statutory prohibition on certain expression. *Herbage v. Pressdram Ltd.*, [1984] 1 W.L.R. 1160, involved the application of the *Rehabilitation of Offenders Act 1974*, which had been enacted by Parliament to prevent indefinite reference to an individual's criminal history, after the individual had served his or her sentence. Based on that specific legislative intention, contended the applicant, an injunction should be issued. Griffiths L.J. (on behalf of himself and Kerr L.J. on a two-judge panel) rejected that approach (at p. 1163):
>
>> If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the American Cyanamid principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.
>
> In *Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2d) 452, Griffiths J. attempted to define the precise threshold for the granting of an injunction in the following terms (at pp. 455-56):
>
>> The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.
>>
>> ...American Cyanamid... has not affected the well established principle in cases of libel that an interim injunction should not be granted unless the jury would inevitably come to the conclusion that the words were defamatory.
>
> This passage has recently been cited with approval in the Quebec Court of Appeal in *Champagne v. Collège d'enseignement général et professionnel(CEGEP) de Jonquière*, [1997] R.J.Q. 2395. Rothman J.A., on this point

speaking on behalf of Delisle and Robert JJ.A., went on to comment on the constitutional dimension of these common law approaches to the use of the injunctive power (at pp. 2402-3):

> With the coming into force of the Canadian Charter and the Quebec Charter, these safeguards protecting freedom of expression and freedom of the press have become even more compelling.
>
> The common law authorities in Canada and the United Kingdom have suggested the guiding principle that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases — where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. Given the value we place on freedom of expression, particularly in matters of public interest, that guiding principle has much to recommend it.
>
> [Emphasis added.]

These cases indicate quite clearly that the Cyanamid test is not applicable in cases of pure speech and, therefore, the appellants are misguided in presuming that this test does apply. As Griffiths L.J. points out in *Herbagev. Pressdram*, supra, such a test would seldom, if ever, protect controversial speech.

44 Stark J. in *Canada Metal Co. v. Canadian Broadcasting Corp.* (1975), 7 O.R. (2d) 261 (Ont. Div. Ct.) commented on the importance of free expression of opinion in our democratic society when he said (at pp. 261-62) that the reluctance of the courts to restrict in advance publication of words spoken or written is founded "on the necessity under our democratic system to protect free speech and unimpeded expression of opinion." He further noted that "the exceptions to this rule are extremely rare."

45 The order of Himel J. dated prohibited the defendants "from publishing any materials which may tend to identify the plaintiffs Beidas, Davies and Pallister" and ordered the defendants to "delete all references to Beidas, Davies or Pallister from any publications to which the defendants have, or can obtain access."

46 By enjoining the defendants from mentioning the plaintiff Davies or any of the plaintiffs, Justice Himel went further than was necessary to protect the plaintiffs from publication and/or dissemination of defamatory words. The order made was too broad and represents an unwarranted restraint on the defendants' freedom of expression.

47 Neither does the fact that the alleged defamatory expression took place on the Internet justify an order in the form decided by Himel J. Certainly defamation on the Internet has presented non-traditional problems. As Blair J.A. said in *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329, 71 O.R. (3d) 416 (Ont. C.A.):

> The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation.

48 Blair J.A. did find that there is something about defamation on the Internet — "cyber libel" — that distinguishes it, for purposes of damages, from defamation in another medium. He outlined the standard factors to consider in determining damages. Those factors may include "the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances." According to Justice Blair (at paras 31-32):

> Thus, of the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, inter-active,

blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed: see *Vaquero Energy Ltd. v. Weir*, [2004] A.J. No. 84 (Alta. Q.B.) at para. 17.

These characteristics create challenges in the libel context. Traditional approaches attuned to "the real world" may not respond adequately to the realities of the Internet world. How does the law protect reputation without unduly overriding such free wheeling public discourse? Lyrissa Barnett Lidsky discusses this conundrum in her article, "Silencing John Doe: Defamation and Discourse in Cyberspace", (2000) 49 Duke L.J. 855 at pp. 862-865:

> Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and "venting" is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that "anything goes," and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. While this view is undoubtedly overstated, certainly the immediacy and informality of Internet communications may be central to its widespread appeal.

Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. *The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie"*. The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse [emphasis added].

These characteristics differentiate the publication of defamatory material on the Internet from publication in the more traditional forms of media, in my opinion.

49 While the Court of Appeal held that the Internet may have an impact on damages in a defamation case, there is no suggestion in *Barrick* that, in cases involving the Internet, courts should be less vigilant in protecting free speech and expression. Quite the contrary, Blair J.A. asked the question: "How does the law protect reputation without unduly overriding such free wheeling public discourse?" Clearly, protection of freedom of discourse on the Internet is of fundamental importance to the Court of Appeal.

50 I conclude therefore that the fact that the alleged defamation took place on the Internet is not a justification for the breadth of the orders made by Himel J.

51 One of the problems raised by the plaintiff Davies in the case at bar related to the potential of other Internet servers distributing the alleged defamatory material. The Court of Appeal in *Barrick* found that an injunction would operate to prevent third party service providers from further dissemination of defamatory material. This issue is what Blair J. A. was adverting to in the *Barrick Gold* case when he said at para 76:

> Here, at least one of the bulletin boards utilized by Mr. Lopehandia for the dissemination of his campaign against Barrick is operated by Yahoo Canada Inc. in Toronto. The posting of messages on that board constitutes at least an act done by the defendant that affects Barrick's reputation, goodwill, and personal property in Ontario, and arguably constitutes an act done by him in Ontario. The courts in Ontario must have jurisdiction to restrain such conduct. Even if an injunction may only be enforced in this province against Mr. Lopehandia if he enters the province personally, there are two reasons why the injunction may nonetheless be effective. The first is that it will operate

to prevent Yahoo! from continuing to post the defamatory messages: *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, [1996] S.C.J. No. 83; *Attorney-General v. Times NewspapersLtd.*, [1991] 1 A.C. 191 (H.L.). Secondly, it may be enforceable in British Columbia, where Mr. Lopehandia resides: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135; J.-G. Castel and Janet Walker, *Canadian Conflict of Laws*, 5th ed. (looseleaf) (Toronto: Butterworths, 2004), at p. 14-31. [page446]

52 In *Barrick* a permanent injunction was granted by the Court of Appeal "restraining the defendants from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees."

53 There is nothing in *Barrick* or in any other case that this Court has been made aware of to support the granting of an injunction which restricts non-defamatory speech on the Internet.

54 The Internet should not be less free for expression than other media. The Internet may present unique problems and unique challenges but its use does not and should not invite unwarranted restriction of freedom of expression.

The Consent Injunction Relating to Heather Claire Davies

55 Heather Claire Davies is the only plaintiff who filed any affidavit material in support of her application for interlocutory relief and she was cross-examined by counsel for the defendants.

56 Before the Divisional Court, the defendants consented to the continuation of an injunction in favour of the plaintiff Heather Claire Davies. In short, they agreed to an order restraining the defendants from publishing, continuing to publish or otherwise disseminating on the Internet an article or statement called "A Silhouette of Doom" in which Ms. Davies is mentioned. This is the only article or audio file published by the defendants which mentions Heather Claire Davies. The defendants argue that this language is sufficient to protect the interests of the plaintiffs.

57 Given the Court of Appeal decision in *Barrick*, had Justice Himel wanted to make a more general order protecting the plaintiff against potential continued Internet defamation, with a proper evidentiary foundation, it would have been open to her to grant interlocutory injunctive relief restraining the defendants from disseminating, posting on the Internet or publishing defamatory statements concerning Heather Claire Davies.

58 The order made by Himel J. was too broad and is an unwarranted restraint on the defendants' freedom of expression.

59 The appeal succeeds for this reason as well.

The Costs Order

60 Justice Himel received written submissions with respect to costs. The plaintiffs sought costs of approximately $50,000 on a substantial indemnity basis.

61 The defendants took the position that the cost claimed were excessive, contained time and expenses that were not recoverable on the motion, that the motion was not complex or novel and the argument took approximately half day and, most importantly, that there were no supporting dockets from the law firm which acted for the plaintiffs. The defendants further submitted that the claim for costs included claims on behalf of former solicitors which resulted in duplication of time and effort. Finally, the defendants objected to costs on a substantial indemnity scale.

62 Justice Himel fixed costs on a partial indemnity basis in the amount of $35,000 for fees excluding GST and disbursements including GST of $2277.65.

63 The Bill of Costs submitted by plaintiffs' counsel was not particular enough. The Bill of Costs does not provide a reasonable description of services rendered with charges related thereto. It contained virtually no detail indicating the nature of the services provided, the name of the lawyer providing such services and the time spent. In such circumstances,

neither the Court nor the respondent is in any position to assess the reasonableness or unreasonableness of her cost submissions.

64 The purpose of a Bill of Costs is to clearly itemize the elements of the total bill so as to give the payor an opportunity to exercise his/her judgment as to whether the bill is reasonable or not. In my respectful opinion, for the court to proceed in the absence of sufficient detail from the party claiming costs about the nature of services performed is to deprive both the court and the unsuccessful litigant of the information necessary to make informed submissions on the question of costs. It amounts to making a finding of fact without any evidence in support. It is an error.

65 In this case there were numerous lawyers involved from other law firms. The matter was not complex and the amount of time spent is unreasonably high. It is reasonable in these circumstances for the unsuccessful litigant to want a detailed breakdown of time spent, the nature of services provided and the name of the lawyer providing such services.

66 A brief review of some of the discrepancies in the material demonstrates some of the problems facing the defendants in this case. The following are examples:

- The costs claim of the plaintiffs should relate to services performed for the motion before Himel J. heard on August 22, 2006. Himel J. makes no reference to the costs incurred in respect of the motion before Somers J. on September 15, 2005. The limited supporting documents produced (notably the dockets of Ms Rubin) date back to July 2005. Services rendered before September 15, 2005 could not relate to the motion before Himel J.

- The bill of costs claims a total of $7950.00 for work done by Kenneth Smookler. Mr. Smookler was never solicitor of record and never appeared in court.

- Mr. Crosner argued the motion before Justice Himel. He produced no dockets whatsoever and no itemized breakdown of his time. However, 25 hours of his time is claimed at the total amount of $10,000.00 for reviewing the defendants' motion material. An amount is also claimed for Ms Rubin for reviewing the defendants' motion material. Further, the bill of costs claims another 8 hours for Mr. Smookler to review the same material, for an additional $1600.00. The total amount claimed in the bill of costs for reviewing the defendants' motion material is $17,950.00, reflecting a total of 76 hours from five different people.

- Mr. Crosner claimed a full day counsel fee on the motion in the amount of $3500.00 (although we were advised the argument was only half a day) and the bill of costs also claims a counsel fee for Mr. Smookler in the amount of $450.00, although he did not appear on the motion.

- Included is a claim for $4000 to prepare the submissions on costs.

67 Unsuccessful litigants must, as a matter of fairness, have the right to be provided with the detail of the case on costs which they have to meet. Unilaterally determined cost figures which by their nature do not permit detailed scrutiny by the court or by the unsuccessful party will lead to excessive cost awards, unfairness to the paying party, and lack of accountability in the legal profession and will create further barriers adversely impacting access to justice.

68 To award costs in the sum awarded and in the absence of a detailed breakdown by the party claiming costs in this case is an error.

69 The Court of Appeal, in *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634, 71 O.R. (3d) 291 (Ont. C.A.) at para. 26:

> The fixing of costs does not begin or end with the calculation of hours times rates. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by the actual costs incurred by the successful litigant.

And further, the Court of Appeal in *Boucher* stated at paras. 36-37 as follows:

> The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.
>
> In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in *Stellarbridge* at para. 96. [page302]

The amount awarded by Himel J. is excessive and well beyond the reasonable expectations of the unsuccessful party and is in error for this reason as well.

Conclusion

70 The appeal by the defendants is allowed. The injunction of Justice Himel is vacated.

71 An order for a continuing interlocutory injunction in favour of the plaintiff Davies shall go in terms consented to by the defendants as follows:

> THIS COURT ORDERS that the defendants shall cease and desist and are otherwise enjoined from in any way publishing, continuing to publish or otherwise disseminating the article or statement known as "A Silhouette of Doom".

Costs

72 The defendants have two weeks from the date of this judgment to make brief written cost submissions (together with supporting material) as to whether they should be awarded costs and, if so, on what scale and in what quantum. The plaintiffs shall have two weeks from receipt of the defendants' cost submissions to respond.

***Molloy J.*:**

Concurrence in Result

73 I have had the benefit of reading the reasons for decision of my colleagues Pitt J. and Murray J. and I agree with much of what is said by both of them. However, I cannot agree with Pitt J.'s opinion that the scope of the injunction granted by Himel J. is not overly broad. I agree with Murray J. on this point. I would have amended the injunction to restrict the scope of the injunction. My colleague Murray J. cannot support granting an injunction that is narrower in scope because of other issues which in his opinion mean that the injunction cannot stand at all (except with respect to the narrow injunction in favour of Heather Claire Davies to which the defendants have consented). My colleague Pitt J. does not agree that there should be any interference with the order granted by Justice Himel. Since there is no consensus on the panel to support a modification of the injunction, and since I cannot support continuing the injunction in its current form, I must agree with Murray J. in the result, and the injunctions, other than the consent order with respect to Heather Davies, must fall.

Scope of the Injunction Order of Justice Himel

74 I agree with paragraphs 40 to 54 of the Reasons of Murray J. dealing with the scope of the injunction order granted by Justice Himel. There can be no justification for restraining speech that is not defamatory, particularly at an

interlocutory stage of the proceedings. In my opinion, the cases cited by Pitt J. at paragraph 113 of his Reasons do not support granting an injunction in such broad terms in the circumstances of this case.

75 I recognize the difficulty for enforcement presented by the narrow wording of the initial injunction granted in this case. Even after the order of Somers J. prohibiting the publication of specified articles about the plaintiffs, the offending material continued to appear on the Internet on sites other than the one to which it was first posted by the defendants, although not under the titles specifically enjoined. The first paragraph of Himel J.'s Order restraining the publication of anything identifying the plaintiffs sought to remedy that difficulty. Himel J. also sought to require the defendants to undo the harm that had been done by directing, in the second paragraph of her Order, that they delete all references to the plaintiffs from any publications to which they have, or can obtain, access. I have no difficulty with these being appropriate objectives. However, the Orders simply go further than is necessary to accomplish those objectives. I would have modified the injunction to restrain publication of the material in the specified articles, any other material derived from those articles, any information pertaining to the health status or medical history of the plaintiffs and any other information defamatory of the plaintiffs. A similar modification would have been appropriate with respect to the requirement that the defendants delete any references to the plaintiffs.

Failure of Beidas and Pallister to File Affidavit Material

76 I agree with Murray J. that proof of irreparable harm is a requirement for obtaining injunctive relief. However, I do not agree that on the particular facts of this case the failure of each plaintiff to file a separate affidavit attesting to irreparable harm was fatal to her entitlement to injunctive relief.

77 Himel J. was well aware of the failure of these two plaintiffs to file separate material. She nevertheless was satisfied that the material she did have before her satisfied all aspects of the test for an injunction. All three plaintiffs were represented by the same counsel. A substantial affidavit was filed by plaintiffs' counsel, sworn by Heather Davies, dealing with all of the offensive material, not just that which referred to her. There was also substantial material filed by the defendant Pichler. Both Dr. Davies and Mr. Pichler were cross-examined. The nature of the statements made by Mr. Pichler is vile, clearly defamatory and, in my view, impossible to justify. He admitted deliberately making the statements for the purpose of ruining the plaintiffs. In these circumstances, it would not have been unreasonable to infer irreparable harm would be suffered by the plaintiffs, indeed by anyone against whom these kinds of statements were made. Accordingly, I would not have found this to be an error warranting setting aside the injunctive relief in favour of Beidas and Pallister.

Failure to Comply with Rule 40.3

78 This argument was not raised on the appeal before us. It would appear that the plaintiffs did not file an undertaking as to damages and there is no reference in the Order of Himel J. to such an undertaking. A refusal by a party to provide the usual undertaking as to damages can be grounds, in and of itself, to deny equitable injunctive relief. However, that does not mean that an injunction can never be granted in the absence of an undertaking; nor does it mean that there must be a specific exemption in the injunction order with respect to the undertaking. In the absence of any request by the defendants for an undertaking as to damages or any argument by them that Himel J. erred in granting an injunction without an undertaking, I do not consider this to be grounds for setting aside the Order.

Failure of the Plaintiffs Beidas and Pallister to Attend for Examination

79 The failure of the Plaintiffs Beidas and Pallister to submit to examination under oath prior to the argument of the motion before Himel J. is more problematic. The plaintiffs were seeking extraordinary relief from the court in the form of an injunction. It is normally incumbent upon the plaintiffs to place before the court an evidentiary record to support that claim for relief. As I have already stated above, I would be prepared to uphold the granting of injunctive relief in this case even in the absence of an affidavit from the plaintiff Beidas. However, having failed to file an affidavit, at the very least, she was required to attend for examination in compliance with a validly served notice. I agree with Murray

J. that in these circumstances to grant an injunction in the face of an outright refusal by the plaintiff to be examined under oath would be unfair to the defendants and constitute a denial of natural justice. However, I do not agree that the conduct of these two plaintiffs is such that the "clean hands" doctrine is invoked.

80 All three plaintiffs who obtained injunctive relief were at the time represented by the same counsel. They were apparently under the misapprehension that the Notice of Examination served by the defence for the examination under oath of the plaintiffs Beidas and Pallister was not legally valid because the defendant had not delivered an affidavit of documents. They were wrong in that regard; this was not a notice of examination for discovery, but a notice for examination of a witness on a pending motion. Both plaintiffs appearing before us, no longer represented by counsel, argued that the notices were invalid. They are wrong and ignorance of the law is no excuse for failing to abide by the Rules. However, this is not the kind of "wrongdoing" that is contemplated by the "clean hands" doctrine and, in my view, is not an automatic disentitlement to equitable relief.

81 That said, it would not be fair to the defendant to continue an injunction in favour of Beidas until trial in the face of her refusal to be examined, and I agree with Murray J. that it was a fundamental error for Himel J. to have done so. However, I would have extended one further indulgence to the plaintiff Beidas by upholding the injunctive relief subject to the requirement that she make herself available for examination, with a right to the defendant to move to strike the relief if she failed to attend or to stroke or vary the relief based on any new information obtained from the examination.

The Costs Order

82 On the issue of the cost award made by Himel J., I agree with the reasons of Justice Murray. In any event, given the success of the appeal, the costs award would fall.

Final Order on This Appeal

83 In the result, an Order shall issue as follows:

(a) The Order of Somers J. dated September 15, 2005 is set aside.

(b) The Orders of Himel J. August 22, 2006 (granting injunctive relief) and the Order of Himel J. dated October 11, 2006 (awarding costs) are set aside.

(c) An order shall issue stating,

> THIS COURT ORDERS that the defendants shall cease and desist and are otherwise enjoined from in any way publishing, continuing to publish or otherwise disseminating the article or statement known as "A Silhouette of Doom".

(d) The defendants have two weeks from the date of this judgment to make brief written cost submissions (together with supporting material) as to whether they should be awarded costs and, if so, on what scale and in what quantum. The plaintiffs shall have two weeks from receipt of the defendants cost submissions to respond.

***Pitt J.*:**

84 This is an appeal of the order of Madam Justice Himel dated August 22, 2006, granting an interlocutory injunction. The appellants are the defendants in an action commenced by the plaintiffs alleging defamation and other claims.

85 The plaintiffs (respondents in appeal*)* sought and obtained an order from Mr. Justice Somers dated September 15, 2005 which prohibited the publication of a list of articles and audio files produced by the defendants (appellants) that the plaintiffs alleged were defamatory. The defendants sought to set aside the order of Somers J., or in the alternative to narrow the scope of the order.

86 Himel J. set aside the order of Somers J., and replaced it with an altered injunction, prohibiting the appellants from publishing any material which might tend to identify the respondents, and ordering the appellants to delete any references to the respondents in publications to which the appellants "have, or can obtain access". Himel J. stated that this was a more "streamlined" order, but the appellants view it as an expansion of Somers J.'s order as it extends beyond allegedly defamatory materials.

87 Leave to appeal the order of Himel J. dated August 22, 2006 [2006 CarswellOnt 7989 (Ont. S.C.J.)] was granted by Matlow J. on December 18, 2006 [2006 CarswellOnt 8010 (Ont. Div. Ct.)]. Matlow J. also granted leave to appeal costs.

88 The appellants now ask:

(a) that the order of Somers J. enjoining the publication of five articles created by the appellants be lifted;

(b) that unspecified relief pertaining to the plaintiffs Dawn Tracey Armstrong ("Armstrong") and Mysti Rae Meadows ("Meadows") be lifted; and

(c) that the expanded restrictions in the order of Himel J. be set aside.

89 The Appellants also appeal the award of costs by Himel J.

Background

90 The plaintiffs commenced an action against the defendants on September 13, 2005, seeking damages for defamation, as well as for "invasion of privacy, breach of confidence, injurious falsehood and intentional infliction of nervous shock" for a series of articles, audio clips, and web postings on a website operated by the respondent Gregory Pichler ("Pichler").

91 Pichler is the owner and directing mind of the defendant Open Systems Group Limited ("OSG"), which in turn owns the website *www.transgression.com* ("the Website"), which is an online publication dealing with news and information targeted at the transsexual community. The plaintiffs also named Lucy Rybka-Becker ("Becker"), alleging that articles written by that defendant were defamatory.

92 The plaintiffs, according to the affidavit of the plaintiff Heather Claire Davies ("Davies"), have all been diagnosed with Gender Identity Disorder ("GID"), and all except Mysti Rae Meadows ("Meadows") have undergone reassignment surgery. The plaintiffs allege that the defendants oppose gender reassignment surgery and are working to prevent government funding for the procedure. The plaintiffs further allege that the defendants published material on the Website which contains many defamatory statements and innuendo. Among other things, the plaintiffs argue that the material suggests that the plaintiffs suffer from psychiatric disorders, obtained their surgeries through unethical behaviour, and are unfit for employment.

93 The plaintiffs also allege that the defendants published confidential medical and other personal information in an attempt to damage the reputations of the plaintiffs, and that the defendants caused irreparable harm to the plaintiffs' reputations, their ability to find and maintain employment, and their emotional and mental well-being.

94 The plaintiffs also sought an interim injunction, at the time they commenced the action, prohibiting the defendants from publishing any of the alleged defamatory statements. Somers J. heard the matter on short notice, and the defendants, who were self-represented at that time, did not have an opportunity to file responding materials. On the basis of affidavit evidence from the plaintiff Davies, Somers J. issued an interim injunction prohibiting the defendants from publishing a list of articles and statements relating to the plaintiffs.

95 The defendants filed responding materials and moved for the order to be set aside. The plaintiff Davies filed responding affidavit evidence and was cross-examined by defendants' counsel. The plaintiffs Jennifer Claire Pallister

("Pallister") and Jennifer Beidas ("Beidas") did not file affidavits and did not attend to be examined as witnesses on this motion, although they were personally served with notices of appointment.

Somers J.'s Order of September 15, 2005

96 Somers J. ordered that the "defendants shall cease and desist and are otherwise enjoined from in any way publishing, continuing to publish or otherwise disseminating any one or all of the following articles and statements" set out in an attached schedule to the order.

Himel J.'s Order of August 22, 2006

97 The defendants sought to set aside the order of Somers J., and the plaintiffs moved to expand the scope of the order. The defendants argued on that motion, and in this appeal, that there is a defence of truth to the allegations of defamation, and that the plaintiffs failed to show irreparable harm. The plaintiffs argued that the defendants had been in continuous breach of the order of Somers J. by having the materials subject to the injunction still available on the internet.

98 Himel J. considered the three part test for granting injunctive relief and found that the test was met. First, the plaintiffs had a serious issue to be tried. The fact that two of the plaintiffs did not give evidence might be relevant at a later stage, but not for an interlocutory injunction. The test of whether there is a serious issue to be tried is a low one. Himel J. held that "the defendants' words may be actionable." Second, *t*he plaintiffs might suffer irreparable harm to their reputations if the relief was not granted. Finally, noting the concerns about the defendants' livelihood, Himel J. nonetheless found that the balance of convenience favoured the plaintiffs.

99 Himel J. considered the requirement that injunctive relief for defamation will only be granted in the "rarest and clearest of cases", but noted that defamation on the internet has been recognized as having the potential for far reaching and damaging consequences. Himel J. stated that her order reflected a more focused application of the injunction ordered by Somers J. She also noted that, while not being bound by it, the order was in keeping with an order made by a justice as a term of the recognizance of bail for a criminal charge against Pichler.

100 Himel J. replaced the order of Somers J. with an order the defendants were prohibited, until trial of the action, from "publishing any materials, which may tend to identify the plaintiffs". The court also ordered the defendants to "delete all references to the plaintiffs from any publications to which the defendants have, or can obtain access."

101 The court also ordered costs of the motion to be fixed at $35,000 plus GST of $2277.65 payable by the defendants.

Key Issues

102 The key issues in this appeal are as follows:

(a) Was the interlocutory order appropriate?

(b) Did Himel J. err in making no adverse findings for the failure of Pallister and Beidas to attend examinations?

(c) Was the costs order appropriate?

Analysis

103 The standard of review on a pure question of law is correctness. Factual findings cannot be reversed in the absence of a "palpable and overriding error." An error of mixed fact and law is subject to a more stringent standard of review than an error of fact: *Housen v. Nikolaisen*, [2002] S.C.J. No. 31 (S.C.C.).

104 I can find no error of law in Himel J.'s careful reasoning. I can find no error whatever in the limited fact-finding process in which Himel J. was required to engage, and certainly no palpable or overriding error.

105 The learned motion Judge correctly located the burden for the relief sought on the party seeking the relief.

Defamation Injunction

106 The appellants (defendants) submit that they made clear their intent to justify the alleged defamatory statements, and that the statements at issue are not so obviously defamatory and so impossible to justify that a finding of justification would be set aside as perverse on appeal. The appellants have filed evidence supporting the truth of the published materials, and note that the respondents have failed to file evidence that the contents at issue are false.

107 The appellants submit that the motion Judge's finding that the words themselves "may be actionable" is not a sufficient basis to grant an injunction, and note that Himel J. did not state what evidence had been relied upon in determining that there was a serious issue to be tried.

108 The respondents (plaintiffs) argue that the fact that the defamatory material was made available on the internet is enough to meet the test for injunctive relief. They submit that statements published by the appellants were obviously defamatory and impossible to justify; that Pichler has frequently stated that his statements are false, or that he does not know the truth; and that Pichler declared that his intention in publishing was to "destroy" the respondents. They also claim that the appellants frequently published the material prohibited by Somers J. under other titles. They submit that the affidavit of Davies was firsthand knowledge and therefore sufficient to grant the injunction.

109 The respondents further argue that injunctions are a frequent remedy for breach of confidence, and that prior restraint orders have been ordered in cases involving the internet and breach of confidence. They also submit that the appellants had no authorization to publish personal information about the respondents.

110 The learned motion Judge carefully analyzed each of the three steps required by *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) for granting interim interlocutory relief, giving special treatment to the unique problem raised by injunctive relief in defamatory cases. She clearly recognized the need for finding that the case was of the rarest and clearest variety, citing both the treatise, The Honourable Mr. Justice Sharpe, *Injunctions and Specific Performances* 2nd ed. (Toronto: Canada Law Book, 1992) at 5.40, and *Canada Metal Co. v. Canadian Broadcasting Corp.* (1975), 55 D.L.R. (3d) 42 (Ont. Div. Ct.).

111 In my view, the motion Judge did not err in finding that this is a clear case to grant interim interlocutory relief. While the learned motion Judge only specifically referred to the far-reaching scope of the internet in the paragraph in which she dealt with the rarity and clarity of the case, there is no basis for an inference that she was not sensitive to the reasonable allegation of the respondents that among other things, the appellants were exposing the respondents, an obviously vulnerable group, to public scandal and contempt. It would be fair also to recognize that the appellants, on the record, had no professional medical qualifications, and that on their face the alleged defamatory statements seemed grotesquely gratuitous, touching as they did on the respondents' personal health. The evidence suggests that this is not a case in which the freedom of expression of the appellants should trump the privacy rights of the respondents.

112 The appellants relied in their defence on the truth of the defamatory statements. The learned motion Judge observed that the "burden of proving the truth of the statements will rest upon the defendants at trial". Whether or not she did, it would have been appropriate for the motions Judge to take cognizance of the unlikelihood of the appellants being able to meet his onus on the issue of truth, since the very meaning of truth in the context would probably not be susceptible of precise definition. This is particularly relevant in light of the appellants' lack of medical expertise. Emanating from a lay person, the allegedly defamatory words were almost bizarre.

Breadth of Order

113 The appellants argue that Himel J. did not limit the order to materials or references that were alleged to be defamatory, and did not limit the appellants' obligation to delete references created or maintained by the appellants. They

submit that the order as crafted would include a prohibition on information that was both true and not confidential, and that it was beyond the jurisdiction of the judge to enjoin the publication of any content other than that which was potentially tortious or wrongful.

114 There is authority for the first and second paragraphs of Himel J.'s order, namely:

> 1. **THIS COURT ORDERS THAT** the Order of Somers J. dated September 15, 2005 will be replaced by an order until trial of this action prohibiting the defendants from publishing any materials, which may tend to identify the plaintiffs.
>
> 2. **THIS COURT ORDERS THAT** the defendants shall delete all references to the plaintiffs from any publications to which the defendants have, or can obtain access.

115 There is authority supporting the availability of such terms in an order of this nature. In *Newman v. Halstead*, [2006] B.C.J. No. 59 (B.C. S.C.), the Court upheld such an order on the basis that there was a serious possibility that the defendant would continue to publish defamatory statements. See also *Campbell v. Cartmell*, [1999] O.J. No. 3553 (Ont. S.C.J.); and *L. (M.S.) v. G. (H.R.)*, [2005] W.D.F.L. 2507 (B.C. S.C.) [2005 CarswellBC 848 (B.C. S.C.)]. Admittedly, it would be necessary to infer the existence of some control by the defendants over the publication referred to in paragraph 2.

Failure to Attend Examinations

116 The appellants argue that the failure of Pallister and Beidas to attend examinations permits the court to dismiss their action pursuant to r. 34.15 (1) of the *Rules of Civil Procedure*, and that the motion Judge erred by failing to make any adverse findings with respect to their failure to attend. The appellants submit that the onus is on the respondents to strike out the notices of examination if they were improper.

117 The respondents argue that the notices of examination constituted improper discovery and were prohibited under Rule 31.04 (1) of the *Rules of Civil Procedure*, as the appellants had not served an affidavit of documents nor did the respondents consent, and therefore there was no need to strike out the notices. Further, they argue that even if the notices were proper, the appellants failed to act with diligence in pursuing a remedy at the time of the non-appearances.

118 The motion Judge was obviously aware of the refusal of Beidas to be examined for discovery, or as a witness, and the impact of her refusal on her claim. The motion Judge specifically noted that the lack of discovery evidence for the plaintiff may be relevant at trial but not in the interlocutory application. That was not, in my view, either an error in law or otherwise. The appellant produced no authority for the proposition that a failure to comply (assuming the failure was unjustified, which the respondent did not acknowledge) with even an important interlocutory step necessarily in all circumstances without more, deprives the party in breach of the step of all its rights to relief in the litigation. There are other sanctions for such breach of the *Rules*. I am not persuaded that Beidas' failure to be examined was fatal to the plaintiffs' interlocutory claim for relief. The motions Judge had the defamatory material before her very eyes, and the plaintiff did not deny having published the material.

Since much has been said about the impact of the failure to attend for examinations on the issue of irreparable harm, it is useful to remember that:

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty [as to the result on the merits of the underlying action] were resolved in his favour at the trial.
>
> *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.), at 406.

> I have always understood the rule to be that the question is not whether the injunction will harm the defendant, but whether it is probable that unless the defendant is restrained, wrongful acts will be done which will do the plaintiff irreparable injury.
>
> Rose C.J.H.C. in *Law Society of Upper Canada v. MacNaughton*, [1942] O.W.N. 551 (Ont. C.A.), at 551, cited with approval in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.), at 10.It is useful to note the comment of Sharpe J. as he then was, in his work on Injunctions and Specific Performance, second edition Canada law book at 2.600, that terms like "irreparable harm"... do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case.

119 The appeal ought to be dismissed.

Other Matters

120 J.C. Pallister's claim in defamation ended with her death. Meadows and Armstrong did not participate in the motion, and are therefore not entitled to injunctive relief or costs.

The Cost Appeal

121 I am also of the view that the cost appeal should be dismissed.

122 The appellants argue that there was insufficient evidence filed by the respondents to support the costs award. They note that the respondents did not submit any evidence or dockets concerning $39,000 of the more than $49,000 claim in costs, and that the respondents claimed costs related to the motion before Somers J. in their costs submissions. They also note that the respondent's bill of costs states that a former solicitors' time is included at partial indemnity rates, when it is in fact included at substantial indemnity rates.

123 It is clear that the motion Judge exercised her discretion judicially with due regard to the provisions of Rule 57, which she included in her Reasons, and to the case law.

124 In the first place, I do not agree that the award was inordinately high, when one takes into consideration the factors set out in Rule 57.01, in particular the complexity of the proceedings, the importance of the issues for the plaintiffs, indeed the curious nature of the issues, and the time involved. Notably, cross-examinations on affidavits continued for more than two days and the hearing was at least half a day. The plaintiffs fought vigorously for their most valuable asset, their self-respect.

125 The main complaint of the appellant was the lack of evidence in support of the quantum. I agree that the bill of costs was not a model of clarity, and indeed contained some questionable calculations. However, nowhere in the motion Judge's reasons did she indicate that she relied on the defendants calculations in fixing costs. The learned motion Judge reduced the bill submitted by the plaintiff by almost 25% and refused to grant costs on a substantial indemnity scale.

126 It is clear that the motion Judge exercised her discretion in accordance with high and consistent authority.

127 The authority provided by the plaintiff which best addresses this issue is *Chittenden Trust Co. v. Weston*, [1993] O.J. No. 7 (Ont. Gen. Div.), where at para. 6, Blair J. (as he then was*)* said:

> A judge, in *fixing* costs is not *assessing* costs in the way in which a Master or Assessment Officer does when costs are referred to be assessed, but instead is making a "determination of what the services devoted to the motion or other proceeding are worth according to the submissions of counsel, his own experience and (in party and party situations) with some regard to what could be taxed on the party and party scale": see *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.*, (1991) 4 O.R.3(d) 321, at p. 326, per Henry J.

128 Incidentally, the reasonable expectations of the parties may perhaps be gleaned from the draft bill of costs submitted by the appellant in this appeal in which he claimed approximately $75,000.00.

Appeal allowed.

Court of Queen's Bench of Alberta

Citation: KGH v. SLV, 2013 ABQB 326

Date: 20130605
Docket: FL01 04625
Registry: Calgary

Between:

KGH

Plaintiff

- and -

SLV

Defendant

Editorial Notice: On behalf of the Government of Alberta **identifying information** has been removed from this unofficial electronic version of the judgment.

Reasons for Judgment
of the
Honourable Mr. Justice P. R. Jeffrey

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[1] KGH claims that SLV was unjustly enriched as a result of their cohabiting, combining finances and sharing expenses for over 10 years. He says that at the end of their relationship everything was in her name and he came away with virtually nothing, despite having contributed far more than she to their pool of common assets. He brings this action for compensation.

[2] For the following reasons I grant the claim but set some conditions upon KGH's ability to access the award.

Facts

[3] KGH and SLV's relationship began in the spring of 1997. At that time KGH was 51 and living with his wife and their two children in Calgary, Alberta. He worked for Siemens Canada Ltd. and was responsible for its accounts across southern Alberta. SLV was 44, divorced from her second husband and raising an adopted daughter. She worked for a small insurance agency in Coaldale, Alberta.

[4] The parties met in an internet chat room. They decided to meet in person in Lethbridge, Alberta. KGH's wife found out. KGH left his wife ("**EH**") on May 16, 1997. He said of that marriage that it was "loveless and over".

[5] SLV accepted an offer of new employment in Calgary and rented accommodation there on July 14, 1997. KGH joined her. In late 1998 they moved together to another rental property. In 1999 a house was purchased, registered in SLV's name alone, and on November 21, 1999, they both moved in. They separated early December 2007. SLV has now married a third time.

[6] KGH and SLV pooled their funds into a single joint bank account from almost the beginning of their co-habitation. KGH said he learned from a co-worker that if his money was in an account with someone else it could not be as easily frozen or accessed by EH or by Maintenance Enforcement, if at all. SLV supported this objective and approach. KGH and SLV conspired in this scheme to avoid or at least impede EH pursuing her matrimonial claims against him.

[7] KGH had all his pay deposited directly into that joint account. That deposited pay was net of child and spousal support amounts, because Maintenance Enforcement started to garnishee his income at source.

[8] KGH remained intentionally ignorant of all the banking and financial details. KGH entrusted all of those details to SLV, who looked after everything. KGH didn't want to know anything about it so that in his matrimonial litigation he would have nothing to reveal to his ex-wife's lawyer. KGH remained wilfully blind of what SLV was doing with what he now says by this lawsuit was really their joint funds.

[9] KGH operated no other bank accounts. SLV had other accounts, including a joint account with her mother while she was still alive. However, absent KGH's pay going to the joint account, SLV would not have been able to accumulate the assets that she did.

[10] KGH said SLV was "fascinating". He said that he had erectile dysfunction, but that SLV accepted it and that their "sex was top-notch". He said that outside the bedroom, however, the two faced challenges. His extended family did not accept SLV. SLV's daughter suffered from

fetal alcohol syndrome and his ex-wife "just would not go away". By that I took him to mean that she was not as interested as he in settling up on his terms.

[11] SLV, however, said the relationship between the two was ever only as friends. SLV said she just looked after the banking to help him out. They shared the costs of a single household rather than each paying for their own. She said she was his landlord.

[12] SLV said that they started sleeping in the same bed only because they each got tired of taking turns sleeping on the couch. She said they were not doing anything so she "thought it was okay". He had told her, she said, that he was impotent and gay and that's why she thought it was safe to even share the space. She said her daughter did have issues, including panic disorder, fetal alcohol syndrome and ADHD.

[13] In his Statement of Claim KGH alleged that they "cohabited in a common law relationship as adult interdependent partners from July 1997" until their separation December 3, 2007. SLV in her Statement of Defence (filed by her earlier lawyer, not her trial lawyer) expressly admitted that allegation. She therefore admitted, pursuant to section 1(1)(f) of the *Adult Interdependent Relationships Act*, that the two of them:

a. shared each other's lives,

b. were emotionally committed to one another, and

c. functioned as an economic and domestic unit.

[14] Notwithstanding that admission, I am satisfied that the relationship between them was not, as SLV intimated, merely a platonic landlord tenant relationship, overlaid by some cost sharing while they each struggled to get re-established. Their interest in each other waned as time wore on, but they remained together out of a mutual sense that it was better than available alternatives. SLV sought to end the relationship earlier than KGH. But in the result, the relationship overall was characterized by a significant degree of commitment to and reliance upon each other emotionally in priority to anyone else, as well as by functioning in common economically.

[15] I reach this conclusion because, among other reasons, they pooled all KGH's finances with most of SLV's finances, they paid all household expenses from out of those pooled resources, they paid all KGH's personal expenses and most (sometimes all) SLV's personal expenses from out of those pooled resources, they paid most of SLV's daughter's expenses from out of those pooled resources (the child support that SLV received for the daughter from her second husband was relatively nominal, did not appear to be intermingled with the pooled resources, and at times was used by SLV for other things and therefore more of the daughter's expenses were borne by KGH and SLV's pooled resources), they shared the same residence, the same bedroom and the same bed, they went on vacations together, they went house hunting

together, they applied for credit jointly, they collaborated on future renovations to the house they shared, KGH took SLV to gatherings of his extended family early on in their relationship (his extended family did not welcome her; she ceased accompanying him thereafter), KGH tried to thaw their chilled reception of SLV by enlisting the assistance of his "Aunt Frances" – as an emissary to the rest of KGH's family to get them to see her more positively, they both testified that they worked together as a team, in effect by helping each other in different ways at different times (for example, under cross-examination SLV admitted "well sure we worked as a team"), SLV did not connect with KGH's work colleagues or his friends either but despite that he continued his relationship with her, and during the relationship SLV expressed to KGH how much she had been able to set aside and save from out of their pooled resources (in reference to at one point in their relationship saying to KGH that she had accumulated $75,000, she testified that it was not in a joint account because KGH was hiding the money from EH – admitting in effect that it was both of their money not just SLV's). All of these factors were inconsistent with, or at least would be very, very unusual to occur within, a merely platonic or superficially symbiotic landlord tenant relationship.

[16] I was unable to rely upon any of the evidence of KGH that was not confirmed by evidence from another source because he admitted that he:

a. masqueraded from EH what his true assets were;

b. kept his name off of the title to SLV's new home to evade the claims of EH;

c. used a joint bank account with SLV because, he said, "I didn't want to show I had any money" (in his litigation with EH);

d. entered into a sham lease, in order to be able to claim that he was paying $1,375.00 per month as a tenant when actually he was not;

e. lied to his aunt when he said in a letter that SLV bailed him out of his then indebtedness when, *he now says*, in fact he was not in debt then and SLV did not bail him out; and

f. swore a Statutory Declaration May 1, 1999 in the litigation with EH, as to his then assets and liabilities, knowing its contents were false.

[17] In his April 19, 1999 letter to his aunt, KGH wrote:

> Speaking of money I am returning your cheque with thanks, but I cannot accept it. There have been too many innuendos about the lady that I am residing with [SLV], and so to keep peace of mind in the family I will not accept any money from family members ever again, no matter what amount for whatever reason (even inheritance).

> ...
>
> Of all that has happened in the past 2 years, I think the most disheartening thing is that my own family has vilified the one person who is helping this family, by helping and giving support to me. My family thinks of her as “manipulating” and “after all my (our) money”. This is the same person who moved up to Calgary to be with me, gave up her house, a good job (yes, she does work for a living), 15 year old friendships, relatives (her mother, daughter and grand kids). She has even paid off some of my bills and now she has debts that she didn’t have when she came here.

[18] KGH was asked under oath if that letter was true. He responded:

> I don’t believe so. ... Depends on how you read it, and it depends on how you take it.

[19] At trial KGH said that actually he had no indebtedness in April 1999 and that he had no debts with SLV. He did have debts with others (for example his parents and for his RSP).

[20] With respect to the Statutory Declaration, he testified that it was developed by cribbing off EH’s statement of assets and liabilities and that he did not read it before signing it. He further admitted under oath that it was not the first time that he did not pay attention to the content of what he was swearing under oath to be true.

[21] As part of the pre-trial process KGH swore under oath that he did not invest in the house. At trial before me he testified that he did not tell the truth that day. He said he was trying to protect his interest in the house from EH.

[22] Under oath KGH admitted to intentionally withholding from EH support payments for two years. His salary was being garnisheed but he withheld the bonus monies explaining:

> ... we were reluctant to give it to her because it was dragging on and if we could prove she could live off her monthly alimony we were thinking this would be a case of we could get it reduced. And Ms. SLV is totally aware of that and she took the money and put it into her own savings account. I have since cleared that off, OK. And there are no arrears as of when I left.

[23] KGH has demonstrated to me that under oath he is prepared to say whatever he thinks serves his economic interests at the time, regardless of its truth. I have no confidence that anything KGH tells me is true, absent any confirmatory evidence, for example from a separate credible source. Given the context of these deceptions (within ongoing litigation) many were deceptions of the Court, abuses of the process and subversions of the interests of justice, as well as potentially defrauding EH.

[24] Amazingly, as KGH testified to this conduct he neither displayed nor communicated one scintilla of remorse, regret, embarrassment or apology for such egregious behaviour. It appeared that to him these means were all everyday practice and justified by the end purpose: of keeping every penny from his ex-wife. Yet he now seeks justice for himself as between he and SLV, via the same system of justice that he earlier thwarted, undermined and abused.

[25] Normally this would simplify the judicial task – the claims of such a person would be eschewed and the evidence of the party opposite would in large part dictate the result. However I also find that I am unable to rely upon any of SLV's evidence either, that is not separately confirmed by other independent evidence, because:

a. She knowingly assisted KGH in many of his deceptions of EH. For example, (i) she entered into the lease, knowing that it was meant to deceive, (ii) she signed that lease using her maiden name, "Suzan Blake", as the "landlord" knowing it would help avoid detection by EH that it was KGH's adult independent partner purporting to be landlord, (iii) she cooperated in the use of a joint bank account to thwart Maintenance Enforcement, receiving control over all KGH's income for doing so, (iv) she conspired with KGH to conceal from EH his true assets, and (v) she prepared and signed cheques to pay KGH's expenses arising from his marriage, to knowingly further the falsehood that KGH had no funds of his own by it appearing that a third party was helping KGH out by paying these amounts for him;

b. Frequently during her testimony SLV would blurt out a defiant and emphatic answer, in reactionary mode, obviously without thinking of the accuracy or truth of her answer. Then her subsequent testimony would contradict her earlier 'blurted-out' answer. It appeared she was determined not to provide any answer adverse to her interests regardless of the truth content of the statement;

c. Her explanations of the 'non-KGH' sources of her funds were not substantiated in the banking or other records she or KGH produced and, in some cases, were contradicted by financial records. An example of that was her explanation of the source of some funds not being KGH but being her income tax refund, when the funds allegedly so sourced were used in January, prior to receipt of the refund late March that year. Her subsequent attempted explanation that it may have been the previous year's income tax refund used in January was not possible given the cash flows over that prior year; and

d. On being confronted with some of the inconsistencies in her evidence she stated that she was on a lot of medication so did not remember a lot.

[26] SLV looked after all of the financial matters in the parties' relationship. She conveniently and emphatically recalled specifics and details of such matters that would advance her interests in

this litigation, but ignorance as to any other details. When pressed on the inconsistencies between the bank records and the details she initially recalled with confidence, she reverted to not remembering.

[27] In short, I found neither witness credible.

[28] Fortunately there were a few more reliable pieces of confirmatory evidence; these formed the basis of the facts that I have found, along with threads of the more plausible among the incredible, the half-lie and the exaggerated. I have accepted the bank records as reliable, though incomplete, as well as some of the other handwritten records. I found some points in common between the recollections of the two parties and was more prepared to accept those. I accepted for the most part the evidence of their real estate agent, Mr. Gilbeault, specifically when he recalled having met with both parties on at least one of the house hunting outings, that their mortgage pre-approval was in both their names, and that they wanted a house with an assumable mortgage. He said that he *assumed* the parties were not brother and sister or landlord and tenant but were a couple, so could not inform the Court on that point.

[29] KGH said that they went through the house purchasing process together; that they were buying the house together but that they did it all in SLV's name alone in order to keep it beyond the reach of EH within their matrimonial litigation. He said they would only consider purchasing houses with assumable mortgages, believing this would enable them to stay beyond the reach of EH by limiting the attachable flows of capital. He said the entire deposit originated with him though it was drawn from either the joint account or one or some of SLV's accounts. Funds had accumulated there mostly by virtue of his contributions. Those contributions, he said, were significantly greater than SLV's.

[30] SLV said that the purchase was entirely her undertaking alone, that any involvement by KGH in the house hunting was minimal and was for his input as a tenant. However she also said that she did not want KGH relocating with her at all. She said the entire down payment (and subsequent mortgage payments) came from her cashing in GICs from her matrimonial property settlement with her second husband. She acknowledged that she was only looking at houses with assumable mortgages. She said that she ultimately did let KGH relocate with her, just as a tenant, out a sense of obligation for a friend and only because he promised he would remain there no more than one year.

[31] I find that SLV drove the home purchase process, not KGH. I find that they both knew she was using funds they both contributed to for the down payment and that he was, again, lying when he said under oath that the down payment was not his. I find that they contributed equally to the down payment. KGH's portion was all from funds he relinquished any claim to or interest in, but he thought he and SLV would be together for the long term and over that time he would benefit economically, if not realize directly in a share of its net value after everything was over with EH. He made out as if he was fine with SLV getting it all, so long as EH got none.

[32] After the purchase, KGH and SLV signed a one year lease with KGH as tenant and SLV as landlord. SLV signed it using her birth name "Blake", not a subsequent married name. SLV said that the amount of rent stated in that lease to be paid by KGH to her, $1375.00 monthly, was never paid. She said that KGH told her to take that amount each month out of the money that went directly into their joint account from his employer, but she said that there was never enough left in their joint account after all their other expenses were covered. These included all his ongoing support and litigation costs.

[33] KGH said the lease was a sham, contrived to leave the impression KGH's expenses were much higher than they actually were, in order to deceive EH. He said SLV was a knowing party to this and that they understood between themselves that no rent was ever to be paid.

[34] I find that the lease was a fabrication designed by them both to mislead, if not defraud, EH. If it was genuine, SLV would not have knowingly concealed her identity by signing as Suzan "Blake". The lease was not renewed at the end of its year, even though KGH continued to reside in the property. This is consistent more with it being generated as a ruse than as genuine. Also, they were more than landlord and tenant in that property because they had been more than that previously, as revealed by KGH's letter to his aunt long before they moved in to the house, replete though it was with lies. The point is that he would not have gone to the trouble of crafting the letter, complete with its lies, if the parties were truly just landlord and tenant and friends.

[35] KGH vacated the house after SLV applied for and was issued a Restraining Order against him. She says it was a last resort for her because it was her house and she had tried to get him to leave, because he was not dealing with her daughter appropriately (in accordance with her special needs), and because he was accessing porn sites and exposing her daughter to them. KGH disputes all this, says he never received her earlier written eviction notice, that the watching of porn sites was something they did together repeatedly, as well as role playing and cross dressing and, he said, in any event "she liked watching men".

[36] The amount of KGH's inheritance received during the relationship was approximately $26,500. He covered the cost of the new flooring for the house near the end of their cohabitation, which cost approximately $16,000. At the end of the relationship SLV had approximately $36,500 in savings and KGH had approximately $3,500. At the end of the relationship the house was worth, I find, approximately $340,000 and was subject to a mortgage with an outstanding balance on it of approximately $130,000. It was appraised at $365,000 around that time and only $342,000 at the time of trial. I fixed the value as I did after reviewing and considering the context of each appraisal and the content of the more recent appraisal entered into evidence.

Applicable Law

[37] A claim for unjust enrichment is established once three elements are proven (*Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 30, [2004] 1 S.C.R. 629, *Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269, at para 31):

a. an enrichment;

b. a corresponding deprivation; and

c. the absence of a juristic reason for the enrichment.

Positions of the Parties

[38] KGH claims SLV was enriched by now having everything the two owned (except about $3,500), despite:

a. her coming into the relationship in debt:

b. his contributing almost $200,000 more than SLV into their common resources over their 10 years together (*after* deduction for all his spousal and child support payments), by virtue of his earning so much more than her in each of those 10 years;

c. his being the source of most if not all of the $10,000 down payment for the house registered solely in SLV's name, plus paying approximately $16,000 for new flooring in it near the end of their relationship. He recognizes that SLV has made the last 5 or so years of mortgage payments on the house after he departed, which would need to be reflected in determining the equitable outcome;

d. her retaining all of an inheritance left to him;

e. owing him another $13,000 or $14,000, related to Maintenance Enforcement transactions; and

f. his tax refund(s) that went into her sole control.

He says there is no juristic reason for this and that it is inequitable. He asks for "a fair settlement".

[39] SLV acknowledged that she had been enriched and KGH deprived commensurately, but disagreed as to the amount of that enrichment claimed by KGH and, in any event of that, maintained that there were juristic reasons for it, including the "cloak of secrecy" she accorded him in his matrimonial litigation with EH and, as a policy reason why he should be denied recovery, his discreditable conduct.

[40] In the alternative, SLV suggested the appropriate amount of any award would be only the $16,000 in respect of the flooring and, on a *quantum meruit* basis only, an amount in respect of part of the down payment on the house of, say, between $5,000 and $10,000 plus interest since.

Analysis

[41] In *Rubin v Gendemann*, 2011 ABQB 71, (upheld on appeal) Justice Moen summarized the three elements a claimant must prove to succeed in a claim of unjust enrichment, set out in *Garland* and *Kerr*. Regarding the third step, the absence of juristic reason for the enrichment, she stated:

> b. Absence of juristic reason
>
> [66] It is at this stage of the analysis that the court must consider whether the enrichment, if there is one, is unjust. Here the court does not evaluate the enrichment but determines if the defendant should keep that enrichment: *Kerr*, at para 114.
>
> [67] The Plaintiff ... must show no reason in law or justice for [the Defendant] to retain any benefit conferred by [the Plaintiff], if there is one, thereby making the retention of the benefit unjust in the circumstances of this case: *Kerr*, at para 40.
>
> [68] There are established categories of juristic reason available to deny recovery of a benefit bestowed which include contracts, valid common law, equitable or statutory obligations or an intention to make a gift. If there is no established category the court may consider other juristic reasons to deny recovery for any benefit bestowed such as the reasonable expectations of the parties and other public policy considerations. For example, in a domestic partnership, one of the partners may have provided domestic services for the other. As is explained in *Kerr*, at para 42, Canadian courts have for some time recognized this constitutes value to the family because the other partner benefits from such services. Therefore, there is no juristic reason to deny recovery for domestic services. Further such services obviously provide the concomitant deprivation to the spouse that provides them.
>
> [69] Cromwell J., in *Kerr* at para 43, explains the process to determine if there is an absence of a juristic reason. The court must undertake a two step analysis:
>
> 1. Determine if one of the established categories applies; then
>
> 2. if it does not, consider the legitimate expectations of the parties and whether there is any other moral or public policy reason to deny recovery.

> [70] It is the plaintiff in the first step of the analysis that has the burden of showing that there is no juristic reason falling under the established categories to deny recovery of the benefit given to the defendant. Once the plaintiff has shown a benefit has been conferred on the defendant, that there has been a concomitant deprivation on the part of the plaintiff and that there exists no juristic reason under the established categories, then the plaintiff has made out a prima facie case for unjust enrichment: *Kerr* at para. 43.
>
> [71] At the second step of the juristic reason analysis, the defendant may rebut the prima facie case by establishing that there is a juristic reason for him/her to retain the benefit that does not fall within the existing categories. This analysis may take into account whether the parties legitimate expectations and other moral and policy-based arguments to show that the retention by the defendant of the benefits is just: *Kerr* at para. 44.
>
> [72] In this step of the unjust enrichment analysis, [*sic*] that the court may consider conferral of mutual benefits. This is a consideration of the extent to which the defendant has provided reciprocal benefits to the plaintiff. Justice Cromwell explains that reciprocal benefits would usually be considered at the defence and remedy stages of the analysis. Consideration of mutual benefit conferral has a limited role to play in the juristic reason analysis, but is not excluded. It should "only be considered to the extent that it provides relevant evidence of a juristic reason for the enrichment": *Kerr* at para.104 and 109.

[42] As between KGH and SLV, SLV has been unjustly enriched. The question for this court is therefore whether SLV should be permitted to keep the enrichment and if there is a juristic reason for her to do so?

[43] SLV's counsel said one of the juristic reasons for SLV being able to retain the enrichment, whatever amount it might be, was the "cloak of secrecy" she accorded KGH. SLV suggested that she was not a party to the deceptions of EH, saying "he was trying to keep it away from his ex, I wasn't".

[44] On the contrary, I find that SLV was a willing, active and uncoerced party to these deceptions. To describe SLV's participation as providing "a cloak of secrecy" flatters the nature of her involvement. She did much more than merely learn of KGH's masquerading, deceptions and lies and just keep it to herself. She was an active participant. Without her active participation in the joint account, in executing the sham lease, in attending to all of the bill payments and expenses enabling KGH to remain willfully blind, KGH could not have perpetrated all his deceptions upon EH. This was far more than mere secrecy on her part. She actively, knowingly and intentionally participated in out-right deception. She signed numerous documents and cheques in furtherance of the deceptions knowing their erroneous content and knowing that their

purposes were to deceive EH and subvert the interests of justice. She directly benefited from all of KGH's funds that were not diverted to EH.

[45] She should *not* be allowed to retain the benefit of her dishonest purpose.

[46] She also argues that KGH should not receive any of her enrichment because of his "discreditable conduct". She says that as a matter of public policy therefore, pursuant to the second part of the juristic reason analysis, his claim should be denied.

[47] On this point I agree with SLV. It would be similarly unjust for this court to allow KGH to achieve his dishonest purpose, particularly by means of the very legal system he deceived, undermined and abused.

[48] Although KGH has asked the Court to grant him an equitable remedy, he has not come with clean hands. The equitable maxim of equity not being available to those coming to court without clean hands was summarized as follows in Spry's *The Principles of Equitable Remedies*, 6th ed. (Toronto: Carswell, 2001) at pp. 245-246, cited with approval in *Saskatchewan Wheat Pool v Feduk*, 2003 SKCA 46, at para 50, and in *1297835 Alberta Ltd. v Xtreme Coil Drilling Corp*, 2010 ABQB 539, at para 25 (emphasis added):

> Clean Hands
>
> The maxims that a plaintiff in equity must approach the court with clean hands and that he who seeks equity must do equity are often used in a purely rhetorical manner in cases where the refusal of relief may better be justified on more precise grounds. So many cases where the absence of clean hands is referred to may be explained by the presence of fraud, or misrepresentation, or illegality, or a breach of contract leading to a lack of readiness or willingness on the part of the plaintiff to perform his obligations. These matters have already received consideration ...
>
> Nonetheless there are cases that are not readily explicable on any of the more limited grounds that have already been considered here, where nonetheless the plaintiff is denied specific performance according to the settled practice of the courts of equity. It may be said of these cases that they fall into two main categories. In the first category, the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so.
>
> <u>In the second category of cases are cases where the grant of relief that the plaintiff seeks would enable him to achieve a dishonest purpose and where in all the circumstances it appears to the court to be inequitable to grant the particular relief in question</u>. These case may indeed be said to depend ultimately on a general principle that is directed against unconscionable conduct or the absence of clean hands. But whilst this general principle is

> susceptible of fresh applications in appropriate circumstances, care should be taken not to extend it to cases where, by implication, it has already been held not to apply.
>
> In the first category, specific performance may be refused if the plaintiff is shown to have materially misled the court or to have abused its process or to have attempted to do so ...
>
> In the second category of cases the court is being asked to assist unconscionable conduct on the part of the plaintiff, either by enforcing a right already improperly obtained or by otherwise furthering unconscionable purposes. So it has been said, "No court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim." But nonetheless the undesirable behaviour in question must involve more than merely a "general depravity"; it must have "an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense." An "immediate and necessary relation", that is, the fact that the plaintiff seeks to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief, has thus been insisted on in many situations.

[49] Here it is the second category that is engaged. Granting the relief KGH requests "would enable him to achieve a dishonest purpose", to the extent that any of the enrichment in SLV's hands that KGH might now receive actually should be EH's. In all the circumstances it would be grievously inequitable to grant the claim without EH first having opportunity to claim against those monies. They may have come into SLV's hands only because of KGH's and SLV's deceit. Equity is always discretionary. I am not prepared to exercise that discretion in a way that may permit KGH to derive any advantage from his wrongs against EH and against the very system of justice he asks now come to his aid.

[50] It could be said that KGH also fits within the first category of cases referred to by Spry, having abused the court's process, but that category relates more to cases where the abuse is in the context of matters directly against the party opposite. Here his unclean hands were in the context of matters with EH, not SLV.

[51] Therefore, the process I have decided to follow in effecting a just and equitable outcome in these unique circumstances has been to, first, find the equitable solution between KGH and SLV as if none of the enrichment over which they fight might have resulted from their dishonesty. Then, second, require that to be paid into Court to accord EH opportunity to access it. Third, dictate some terms by which EH can become aware of the deceptions and, if she wishes, assert any claim to the enrichment she may wish (for example asserting any claim to priority to the sources of funds awarded below) and/or reassert a past claim against KGH (for example in the event she thinks she may have under-recovered as a possible consequence of the deceptions of KGH and/or SLV) and/or assert a new claim for loss occasioned by the deceits (for example for recovery of legal fees expended as a consequence of KGH's contrived grounds to resist her claims). Fourth, after a reasonable time for EH to claim against the funds placed in Court, any funds remaining will be paid out to KGH upon his further application.

[52] The possibility of this type of approach was broached with counsel in final argument. KGH's counsel supported it, exuding confidence that his client's conduct, though regrettable, did not actually result in any loss to EH. He thought she had no lawful entitlement to the funds KGH was hiding from her.

[53] Regarding the amount of the enrichment, to determine an award that would do equity as between KGH and SLV, Moen, J. said this in her summary in *Rubin*, at para 64:

> Only once those three things have been established must the court determine the remedy. *Kerr*, at para 7, makes it clear that the old dichotomy of quantum meruit or constructive trust no longer exists where common-law spouses collaborate:
>
> [W]here 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. <u>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.</u> [Emphasis added.]

[54] Cromwell, J in *Kerr* also laid out the considerations for determining whether a joint family venture existed. KGH has proven that one did. They pooled their resources, took a team approach to most of the issues they each faced, were economically integrated , held themselves out publicly to be in a relationship of exclusivity and mutuality, and to a degree they placed each other in priority to their extended family. They each conferred benefits on the other. They covered some or all of each others' periodic indebtednesses, such as for legal fees and a line of credit for a car purchase. See also paragraphs [13] to [15] above.

[55] This suggests a monetary remedy rather than proprietary to suffice. Additionally, KGH has not requested a proprietary remedy nor suggested that a monetary award would place him at risk of not recovering the enrichment.

[56] I find SLV's enrichment to be the sum of: (i) all of the inheritance ($26,500), (ii) none of the flooring cost (because that investment will be reflected in the fair market value of the house, a portion of which value I include in the quantification of the enrichment), (iii) half of the cash amount she saved in excess of the amount he walked away with [($36,500 - $3,500)/2 = $16,500], and a portion of the equity in the house ($64,000). I do not use half of the roughly $210,000 equity in the house but rather a third of the realizable equity I find to be $192,000. To realize his share of the house equity the house would have to have been sold, incurring about $18,000 in real estate sales commissions, legal costs and other transaction fees. I have reduced the $210,000 by this amount. I then grant him one third of that rather than a greater portion, such as a half, because SLV took all the risk on the property over the period of their cohabitation and because SLV was solely behind the decision to buy the house in the first place – prudently

making the investment at a time when KGH was turtling from the world and was happy to relinquish all he had (just so long as not another nickel made its way to EH). Therefore the total award to KGH would have been, but for his unclean hands, $107,000.

[57] That $107,000 is to be paid into Court by SLV, to the credit of this action, by July 31, 2013. Interest is to be paid by SLV thereafter on any portion not paid into Court by that date at the interest rate of 12% per annum, compounded annually. Any costs incurred by any party enforcing this obligation of SLV to pay this sum into Court shall be recoverable on a solicitor and own client basis from SLV.

[58] Within 48 hours of the entry of the Judgment Roll in this action, KGH must provide to each of EH and her counsel, at his expense and not from out of the funds paid into Court, a copy of this decision, all resulting orders and/or judgment rolls, and the full trial transcripts of the evidentiary portion of this trial. On demand thereafter, also at his expense, KGH must without delay provide to EH or her counsel a copy of any trial exhibits they request.

[59] EH shall have six months from the date of her receipt of this judgment and the trial transcripts, which she receives last, to commence any claim or claims on the funds held in Court, as a consequence of or affected by KGH's deceit, including but not limited to additional legal fees incurred, reduced spousal and/or child support received, delayed receipt of child support, delayed receipt of arrears of support, added expenses by not getting access to interim costs, a diminished proportion of matrimonial property upon distribution, and the opportunity cost of lost time pursuing Mr. KGH. To be clear, EH's entitlement or not to the funds is not a function of whether she had or has any entitlement to the inheritance dollars, the cash saved or the home equity. Those are the bases of quantifying SLV's enrichment at KGH's expense, not limits upon what EH might claim against KGH upon revelation of his deceits.

[60] The funds are not available to KGH to access until all claims brought by EH against the funds are determined with finality, provided that each such claim is commenced within the aforementioned 6 month time frame or such extended period as this Court may allow upon application.

[61] EH shall be entitled to recover from out of the funds paid into Court, or if they are exhausted from KGH directly, her legal costs on a solicitor and own client basis for all such costs incurred in seeking advice on whether or not she might have any entitlement to those funds, for any and all steps taken to demonstrate an entitlement to any of the funds, for ensuring payment into Court of those funds, and for any other consequence of or enforcement of any of the terms of this judgment.

[62] Finally, EH's recovery from KGH and/or SLV as a consequence of this judgment is not limited by the amount paid into Court.

Costs

[63] The parties are required to return before me for an order as to costs; counsel shall make the necessary arrangements to speak to that matter.

Heard on February 4th through 8th, 2013.

Dated at the City of Calgary, Alberta this 4th day of June, 2013.

P. R. Jeffrey
J.C.Q.B.A.

Appearances:

Dale Ellert
for the Plaintiff

Nigel Montoute
for the Defendant

COURT FILE NO.: 33-159292
DATE: 2005/07/27

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: In the Matter of the Proposal of Atsana Semiconductor Corp.

BEFORE: C. Aitken J.

COUNSEL: Michael S. Hebert for the Creditor, 1019883 Ontario Inc.

Leigh Ann Kirby for Atsana Semiconductor Corp.

E N D O R S E M E N T

Nature of Proceeding

[1] On July 20, 2005, Atsana Semiconductor Corp. ("Atsana") filed a Notice of Intention to Make a Proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.-3, as amended ("the BIA"). The Applicant, 1019883 Ontario Inc. is a creditor of Atsana. The Applicant brings a motion under s. 47.1 of the BIA for an order:

1. abridging the time for service of the motion;
2. appointing KPMG Inc. as interim receiver of all of Atsana's property with power to review all contracts, correspondence, memoranda, agreements or any other documentation under the terms of which any of the intellectual property of Atsana is being sold or is contemplated to be sold;
3. requiring the receiver to disclose to the creditors all details of negotiations, marketing, and sale attempts of the said intellectual property including any appraisals or opinions as to the value thereof, as well as any documentation in Atsana's possession with respect to evaluations or appraisals of the said intellectual property;
4. restraining the interim receiver from entering any agreement in respect of the intellectual property of Atsana until full disclosure to the creditor of the information set out in subparagraph 3 above;
5. granting costs on a substantial indemnity basis.

[2] There is no dispute that Atsana is in the process of trying to sell its assets and is actively engaged in serious negotiations with a prospective purchaser. The name of the purchaser, the terms of the proposed agreement of purchase and sale, and the concrete steps that Atsana has taken to market its assets and to ensure that the transaction being contemplated is as favourable to Atsana's creditors as can reasonably be expected, considering market conditions, have not been disclosed to the Applicant with any degree of specificity.

[3] Atsana opposes the Applicant's motion on the grounds that (1) the appointment of an interim receiver would be redundant in that KMPG has already been identified as the proposal trustee in Atsana's Notice of Intention; (2) there are existing safeguards under the BIA following the filing of a Notice of Intention to Make a Proposal to adequately protect the Applicant and other creditors; (3) the disclosure of more specific information about the potential sale transaction to the Applicant or other creditors at this time could irreparably hurt the integrity of the sale negotiations to the detriment of Atsana and its creditors; and (4) the Applicant is not coming to court with clean hands and should therefore not be granted equitable relief.

Facts

[4] Atsana is insolvent. It is attempting to sell its assets, the main one being its intellectual property. A letter of offer has been negotiated by Atsana and a potential purchaser. The terms of the proposed deal are comprehensive. The purchaser is a *bona fide*, arm's length, third party. The purchase would be of Atsana's assets and undertaking as a going concern. It is anticipated that if the sale proceeds as proposed, there might be continued employment of up to 25 employees and the sale proceeds would be used to replace the assets for the sole purpose of funding the proposal to Atsana's creditors. Prior to the letter of offer being negotiated, Atsana, with the assistance of its corporate lawyer, had been exploring various commercial options including mergers, dispositions of various assets and business undertakings as well as additional debt financings and equity investments from both existing and fresh investors.

[5] The Applicant is Atsana's landlord, and the creditor with the largest potential claim. As of the date of filing of the materials relating to this motion, all on-going payments under Atsana's lease had been paid. Nevertheless, the filing of the Notice of Intention may be considered a default under the lease, and if that were the case, and the payments under the lease were accelerated, the amount owing to the Applicant could be in the range of $3.5 million. The total outstanding debts of Atsana estimated in its Statement of Affairs under the BIA is $5.6 million.

[6] In its motion materials, the Applicant's expressed concern is that, if there is no receiver or trustee appointed to take possession of Atsana's property, Atsana may dispose of or attempt to dispose of its only asset, being its intellectual property, on terms or at a price that would not be the most advantageous for all of the creditors. As well, it is uncontroverted that the Applicant expressed to Atsana its interest in making its own offer to purchase the assets of Atsana, though no such offer has been submitted at this point. I consider this fact important in regard to the potential motivation of the Applicant in bringing this motion.

[7] The sale of Atsana's assets to the proposed purchaser will require the support of the proposal trustee and the approval of the court under the BIA. Any assets to be transferred as a result of the proposed transaction would be conveyed by a vesting order of the court. When that approval is sought, creditors will have the opportunity of challenging whether the proposed sale is commercially reasonable.

[8] Prior to any litigation commencing, and prior to Atsana filing its Notice of Intention, representatives of the Applicant met with representatives of Atsana, including its corporate lawyer, to discuss Atsana's financial circumstances. The communications that took place at that meeting were intended to be on a without prejudice basis, and therefore privileged. During the course of this meeting, certain information was provided to the Applicant by Atsana concerning the proposed sale in question. The Applicant sought more information from Atsana concerning the proposed sale; Atsana's representatives refused to provide further details, one reason being that the letter of offer imposed a confidentiality obligation on Atsana. Some of the information provided by Atsana to the Applicant at the time of that meeting found its way into the Applicant's motion materials.

[9] Following this meeting, representatives of the Applicant went to Atsana's offices and spoke to various employees in the absence of the Atsana officer who had been in attendance at the meeting. The Applicant's representatives lead the Atsana employees to understand that Atsana had offered to sell its assets to the Applicant's principal. The Applicant's representatives then made inquiries to obtain further details regarding the proposed sale of Atsana's assets. The Applicant's representatives did not advise the Atsana employees that they had already been denied access to this information by Atsana's principals. More will be said of this later.

[10] On July 19, 2005, the Applicant commenced an action under the *Bulk Sales Act*, R.S. O. 1990, c. B. 14 and under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 setting aside any bulk sale of Atsana's assets and seeking the appointment of a receiver. Within that action, the Applicant scheduled a motion for today's date, seeking virtually the same relief as is being sought today under the BIA. In the affidavit filed in support of the motion are statements attributed to an unnamed "representative of Atsana" in regard to the amount of Atsana's outstanding debts, the nature of Atsana's assets and the amount of money to be received by Atsana were a sale of its assets to occur to the proposed purchaser.

[11] In response to this action on behalf of the Applicant, and in consultation with the prospective purchaser, Atsana filed the Notice of Intention to Make a Proposal. Upon this filing, the Applicant's earlier action and motion under the *Bulk Sales Act* were stayed. The Applicant then brought this motion under s. 47.1 of the BIA.

[12] Counsel for Atsana has spoken to other stakeholders in this insolvency situation, namely secured creditors, including the Royal Bank of Canada, employees and selected trade creditors and investors. No other creditor has expressed a concern to Atsana about the proposed sale of its assets. No other creditor has joined in the Applicant's motion to seek the appointment of an interim receiver. Those other stakeholders canvassed have agreed with Atsana that the vesting order procedure provides sufficient protection of their respective interests and the appointment of an interim receiver is an unnecessary and costly exercise.

Analysis

Abridged Time for Service

[13] No adequate reason was provided as to why the Notice of Motion herein was served only on Monday of this week for a Wednesday hearing. Nor was any adequate reason provided as to why Atsana's lawyers, Fraser Milner Casgrain LLP, were never provided with a copy of the Notice of Motion and were only provided with a copy of the Factum and Book of Authorities on Tuesday afternoon. Atsana's lawyers had previously contacted the Applicant's lawyers to ask when they could expect to receive service of the Applicant's materials. I do not accept the argument of the Applicant's lawyer that, because Atsana's lawyer did not specifically state in the e-mail that Fraser Milner Casgrain had authority to accept service on behalf of Atsana, there was no reason for the Applicant's lawyer to send a copy of the Applicant's materials to that firm. I consider the lack of reasonable response to the e-mail from Fraser Milner Casgrain to be discourteous and unprofessional.

[14] That being said, Atsana's lawyers did receive a copy of the motion materials from their own client and a copy of the Factum from the Applicant's lawyers. Atsana's lawyers were able to prepare responding materials overnight and provide a copy to the Applicant's lawyers and to the Court this morning. Atsana's counsel was prepared to argue the motion, and therefore an order is made abridging the time for service of the motion materials by the Applicant, subject to my comments below on costs.

Merits of Motion

[15] Section 47.1(1) of the BIA states:

> 47.1(1) **Appointment of interim receiver –** Where a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time thereafter, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property, for such term as the court may determine,
> (a) the trustee under the notice of intention or proposal;
> (b) another trustee; or
> (c) the trustee under the notice of intention or proposal and another trustee jointly.
>
> …
>
> **(3) When appointment may be made –** An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
> (a) the debtor's estate; or
> (b) the interests of one or more creditors, or of the creditors generally.

[16] In *Royal Bank of Canada v. Zutphen Brothers Constructions Ltd.* (1993), 17 C.B.R. (3d) 314 (N.S.S.C. – In Bankruptcy), Registrar Smith stated in regard to an application under s. 47.1 of the BIA, as it then was:

> [Section 47(3)(b) – now s. 47.1(3)(b)] is extremely important and places the onus on the applicant to establish, by a preponderance of evidence, that the appointment of an interim receiver is necessary for the protection of "the interests of the creditor who sent the notice under subsection 244(1)".
>
> It is well established law, that in order to support an application for the appointment of an interim receiver, the danger of dissipation of assets must be actual and immediate and not one based on suspicion and speculation.

[17] The Applicant's lawyer argues that the mere fact of the proposed sale of Atsana's assets to a potential purchaser, the details of which proposed transaction have not been shared with the Applicant, creates the danger of an actual and immediate dissipation of assets. I do not agree.

[18] The word "dissipate" implies something more than a sale. In regard to money or property, "dissipate" means to squander, fritter away or waste.[1] It implies that after the dissipating event, there will be less available than there was before; in other words, there will not be a transfer of one form of value for another of equal worth – there will be a reduction in value at the end of the day. There is no evidence before me that the proposed sale will involve a dissipation of Atsana's assets.

[19] The evidence in the affidavits of Douglas Quinn, to the extent that it speaks to the money that Atsana will receive in the proposed asset sale, is not evidence of dissipation. First, the evidence came from an unidentified third party and it was not stated to be on information and belief. Secondly, the evidence regarding the money to be received was not related to any evidence regarding the value of the assets in question or to any evidence regarding other consideration Atsana may receive in return for the value of the assets. Standing alone, the evidence as to the money Atsana may receive pursuant to the sale of its assets, and its potential liabilities in a bankruptcy, is inadequate evidence to support a finding of an actual and immediate danger of dissipation of assets. At the most what is referred to in the affidavit evidence of Mr. Quinn is his suspicion regarding what may be happening and his speculation as to why the directors of Atsana may want to pursue the transaction in question. As has been noted above, suspicion and speculation are inadequate reasons to justify the granting of an extraordinary remedy such as the appointment of an interim receiver.

[20] There are other reasons why the appointment of an interim receiver must fail. First, such an appointment, in the present circumstances, would be largely redundant and therefore would entail an unnecessary expense. There is already a proposal trustee who will be maintaining a close eye on the management of Atsana's assets and on any proposed sale of those assets.

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[1] See Barber, Katherine ed. *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998); *Words and Phrases* Vol 3 (Toronto: Carwsell, 1993) p. 3-450.

[21] No sale shall occur without the support of the proposal trustee and the approval of the court. Creditors will have the opportunity to challenge any proposed sale that would be prejudicial to their interests.

[22] It would not be beneficial to Atsana's creditors if money were diverted to fund the appointment of an interim receiver, when one is not necessary to protect the creditors' valid interests.

[23] Finally, the appointment of an interim receiver is a form of equitable relief. The Applicant should come to court with clean hands when seeking this relief. The late service of the motion materials, the lack of cooperation to provide a copy of those materials to Atsana's counsel, and most importantly the sneaky efforts of the Applicants' principals to obtain information about the proposed sale from Atsana's employees, when its principals and the corporate lawyer had already refused to provide that information, means that I cannot conclude that the Applicant is coming to court with clean hands. What also concerns me is the undenied fact that the Applicant has indicated to Atsana that it might be interested in making its own offer to purchase Atsana's assets or undertaking. Consequently, the Applicant might be a competitor to the purchaser in the proposed transaction. This naturally brings into question whether there was more than one motive at play when the Applicant brought its motion seeking to get more information as to the nature of the proposed sale transaction. I must keep in mind that the goal of the court should be to fairly protect the rights of all creditors, and not to do anything that places the interests of one creditor ahead of those of the others.

[24] For these reasons, the Applicant's motion is denied.

Costs

[25] I see no reason why costs should not follow the event, especially in circumstances where there was short service and discourteous conduct by one counsel to another.

[26] Atsana shall have its costs on the motion fixed in the amount of $3,500 and payable forthwith.

Non-publication Order

[27] In an affidavit of Douglas Quinn filed on this motion, and in submissions made in court, reference was made to a dollar amount that might be payable to Atsana under the proposed sale that was the subject of this motion. At this time Atsana and the prospective purchaser are still in negotiations to conclude an agreement of purchase and sale. Those negotiations are intended to be confidential. It is important that information that was intended to be kept confidential between the parties negotiating a potential agreement not be publicized because that could lead to the breakdown of negotiations and the withdrawal of any prospective offer. As well, the publication of such confidential information could give other potential purchasers an upper hand in entering negotiations with Atsana or in making their own offers. That would not be in the best interests of the creditors as a whole, nor would it be in the best interest of the other stakeholders.

[28] This is an especially important point in the circumstances of this case where the evidence regarding the dollar amount possibly payable to Atsana was offered in a vacuum, without accompanying evidence regarding other relevant facts that would have placed the evidence of a dollar mount in some meaningful context. As well, it was hearsay evidence, without Mr. Quinn identifying the source of the information or his belief that it was accurate.

[29] No one, including the media, shall publicize the dollar amount allegedly to be paid to Atsana under the proposed sale, as set out in Mr. Quinn's affidavit filed in these proceedings.

C. Aitken J.

DATE: July 27, 2005

COURT FILE NO.: 33-159292
DATE: 2005/07/27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE PROPOSAL OF ATSANA SEMICONDUCTOR CORP.

BEFORE: Madam Justice C. D. Aitken

COUNSEL: Michael S. Hebert, for the Creditor, 1019883

Leigh Ann Kirby, for Atsana Semiconductor Corp.

ENDORSEMENT

C. Aitken J.

DATE: July 27, 2005

Ontario
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

In the Matter of the Proposal of Randolph Bruce Hood aka Randy Hood, in the Town of Milton, in the Province of Ontario

Estate No.: 32-1040910

-and-

In the Matter of the Proposal of Ana Isabel Hood, in the Town of Milton, in the Province of Ontario

Estate No.: 32-1040909

December 12, 2008

Appearances:	Ethan M. Rogers	-for the Moving Party
	Robert J. van Kessel	-for the Proponents

Heard: December 8, 2008

Reasons

[1] Genrep Ltd./Ltee ("Genrep") moves, in both Estates, for an Order pursuant to s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), lifting the stays of proceedings therein to enable it to proceed with its claims set out in Action No. CV-08-0886-00, commenced at Brampton, (the "Action"). It seeks this relief *nunc pro tunc*, having commenced the Action in the face of the stay provided for in s. 69(1) BIA. That stay was continued under s. 69.1 BIA after filing of the Proposal herein.

[2] The Proponents, Randolph Bruce Hood and Ana Isabel Hood[1] ("Randolph" or "Ana", singularly or the "Proponents" collectively), opposed the motions. The two motions were argued on essentially the same materials, and at the same time. These Reasons are issued for both Estates.

[3] The Proponents filed Notices of Intention to Make a Proposal ("NOI") February 18, 2008. This resulted in a s. 69(1) BIA stay. Their Proposals were filed March 18, 2008. This resulted in a further stay under s. 69.1 BIA. Genrep was on the Statement of Affairs for each Proponent, and received the NOIs. Despite this, it commenced the Action March 17, 2008. That was a clear breach of the stay, for which no excuse has been offered by it. The Trustee sent Genrep formal notice of the stay March 31, 2008. In the face of that, Genrep brought a motion in the Action for a Certificate of Pending Litigation. That motion was dismissed by Mr. Justice Gordon, at Brampton, on the basis that the Action was stayed, and no Order had been obtained from this Court lifting the stay.

[4] Counsel for Genrep indicated at the hearing of these motions that it was his misreading of the BIA and the cases that led him to believe that he could bring the Certificate of Pending Litigation motion in the face of the stay, as the Action seeks, in essence, a declaration of breach of the statutory trust in the *Construction Lien Act*, R.S.O. 1990, c. C-30, and a declaration that Genrep is owed personally by the Proponents, as officers and/or directors of Industrial Light & Electric Inc., ("ILE"), for breach of trust, and, further, a declaration that that breach constitutes a s. 178 BIA debt. Counsel, in effect, asks that I not attach any opprobrium to Genrep for

[1] At the outset of the hearing, I disclosed to both counsel that Randolph Bruce Hood is a distant relation of mine, although I have never personally met the gentleman. Both counsel indicated that they were content to proceed with the motion in front of me.

the second breach of the stay. Even if I accept this, it does not address the issuance of the Statement of Claim in the Action in the face of the stay.

[5] The breaches by Genrep of the stays in these matters are important, as the test under s. 69.4 BIA for lifting the stay is either that the Court finds material prejudice to the moving party, or that it is equitable on other grounds to lift the stay. Clearly, the conduct of a party which seeks the exercise of an equitable discretion by the Court on its behalf is relevant, and I find that Genrep does not come to this Court with clean hands. Even if I did not so find, for the reasons below, I would not find other equitable grounds upon which to exercise my discretion.

[6] Turning to the other test, that of material prejudice, I am also not persuaded to exercise my discretion in favour of Genrep.

[7] Firstly, Genrep has not pleaded any material prejudice in its materials. In well made arguments by Mr. Rogers, Genrep's position is that the conduct of the Proponents, of which there is some evidence, in breaching a statutory trust is so reprehensible, to use the language of some of the cases cited, and so clear, as to constitute material prejudice if I do not permit the Action to proceed. It has been said, and I generally agree, that where the claims are clearly of the type that will survive the insolvency event, that may be viewed as a proxy for material prejudice to a creditor. This includes most, if not all, of the types of claims enumerated in *Re Advocate Mines Ltd.* (1984), 52 C.B.R. (N.S.) 277 (S.C.O.).

[8] However, the problem is not with these propositions as statements of law, it is with their application to a proposal and not to a bankruptcy. The vast majority of requests to lift the BIA stay are within the context of a bankruptcy, not a proposal.

[9] In the matters at bar, I have the evidence of the Proponents that to lift the stays would "damage [the Proponents'] ability to perform the proposal[s]". There are some 23 creditors or accounts listed for Randolph, totaling approximately $500,000.00; and some 14 creditors or accounts, totaling approximately $340,000.00 listed for Ana. Genrep is but one of these, whose debt, if proven against the Proponents[2], is only approximately 20% of the total in Randolph's Estate, and 25% of the total in Ana's Estate. The concern is that, even if there is objective material prejudice to Genrep in not lifting the stay, what about the prejudice to the other 75% - 80% of the creditors? As Mr. Justice Pitt found, in *Toronto-Dominion Bank v. Ty (Canada) Inc.*, 2003 CarswellOnt 1371, at paragraph 22: "The stay should not be lifted where the only effect in the refusal to lift the stay is to delay the moving party. The court should also take into account the effect of the lifting of the stay on the administration of the estate and the prejudice to other stakeholders."

[10] In considering this, I am mindful that the Trustee has not objected to the relief sought. From this I conclude that the administration of the Estates will not be hampered by the continuation of the Action. However, when I consider the impact on the other stakeholders, and, specifically, the creditors, I am given pause.

[11] I am prepared to infer from the affidavits of the Proponents, as to the impact on their Proposals of lifting the stays, that there is a real possibility of the Proposals going into default or not being completed if I grant the motions. This would very possibly result in bankruptcies for both Proponents, and reduced yields to the

[2] I note that there is no allegation of personal liability to Genrep for the unpaid balance due from ILE for its generator. The only liability for the Proponents is if a Court finds that they have breached the trust provisions of the *Construction Lien Act*, and owe damages for that.

creditors. But not to all creditors, as Genrep would still maintain that it has a s. 178 BIA claim which would survive discharge from bankruptcy equally as it would survive a Certificate of Full Performance of the Proposals. Thus, the failure of the Proposals[3] would quite possibly harm all creditors other than Genrep, while the refusal to lift the stays will result only in a delay to Genrep as to when it may prosecute its claims for damages for breach of trust and for s. 178 BIA declarations, which, if successful, it will enforce post proposal.

[12] I do not find that it would be appropriate to risk recovery by the other creditors, who are many more in number and dollar value than Genrep, of the amounts bargained for by them when accepting these proposals, only to avoid delaying the right of Genrep to pursue its claims herein.

[13] There is one consideration which I wish to note, however. That is the fact that the Proponents' home, in which they claim there to be no equity, is the subject of interest by Genrep in the pursuit of its claims for tracing of any trust funds. While it is correct that Genrep has only raised certain suspicions in its material in this regard, it is equally true that it would not be fair to require it to detail with precision that which the Proponents did or did not do with their funds, or those of ILE over which there may have been a trust imposed. On the evidence before me, the Proponents have taken out $200,000.00 in equity from their home very shortly before their insolvencies, in the form of an alleged advance from a family member in that amount, and against which they granted mortgage security over their home.

[3] It should be noted that the proposals call for payments between the Proponents of $200,000.00, being approximately 20% - 25% of each of their liabilities, with, I am advised, a high degree of commonality of creditors between the two Estates. The Proposals were funded primarily by third parties, with not insignificant payments by each of the Proponents, in addition to the third party funding, over 60 months for the balances.

An outright refusal to lift the stays would result in a delay of at least another 4 ½ years for Genrep, during which time the Proponents would remain in control of their property, and during which time, said property, and the ability to meaningfully attack the mortgage to Owen Mellon[4], might well disappear to Genrep. Section 69.4 BIA permits the lifting of the stay, subject to any qualifications that the Court finds proper. I find that the concern about dealing with the home is dealt with by lifting the stays in respect of the Action, solely for the purpose of moving therein for a Certificate of Pending Litigation against the Proponents' home, and for no other purpose. If successful, the Certificate may be registered against title, and no further steps shall be taken in the Action until the Proposal Trustee is discharged, or on further Order of this Court.

[14] If there is any issue as to costs, I may be spoken to.

Scott W. Nettie
Registrar in Bankruptcy

[4] By this I observe that it will be small comfort to a creditor such as Genrep if, after the lifting of the stay following the discharge of the Trustee, Genrep were to discover that the property had been disposed of, the second mortgage paid in full, and the second mortgagee nowhere to be found. Compare this to the situation now, whereby if the mortgage transaction were to be successfully attacked, and I advance no opinion as to the likelihood or not of this, the equity remains in the hands of the Proponents, and is available for realization.

Engels v. Richard Killen & Associates Ltd. et al.
[Indexed as: Engels v. Richard Killen & Associates Ltd.]

60 O.R. (3d) 572
[2002] O.J. No. 2877
Court File No. 31-328425

Ontario Superior Court of Justice
In Bankruptcy
J. Wilson J.
July 23, 2002

Bankruptcy and insolvency -- Property of bankrupt -- Client list -- Non-solicitation -- Trustee in bankruptcy selling insurance brokerage business of bankrupt -- Purchaser seeking that court impose term that bankrupt not solicit his former customers -- Common law obligation on vendor of business not to solicit former clients not applying when sale of business by trustee in bankruptcy.

In October 1994, Klaas Engels ("Engels"), an insurance broker, entered into an exclusive brokerage agreement with Merit Insurance Brokers Inc. ("Merit"). Under the agreement, Engels' "book of business", the client list from his own brokerage business, was to be owned by Merit for seven years and then to revest in Engels. Around the time of signing the agreement with Merit, Engels was in divorce proceedings and, as a result of his wife's seizure of moneys for his support obligations, his brokerage corporation was in debt to insurers for between $50,000 and $60,000. Merit agreed to loan money to Engels to repay his brokerage's debt to the insurers. In 1995, Engels borrowed an additional $28,500. Neither debt was a secured loan. In March 1997, Engels petitioned himself into bankruptcy. In his statement of affairs, he stated that he had no assets. In January 1998, Engels was discharged from bankruptcy. At that time, he refused to sign a promissory note for his indebtedness to Merit, although he verbally acknowledged that he would repay the debt. Nevertheless, the relationship between them deteriorated.

In July 2000, without notice to Engels, Merit applied to the Registrar in Bankruptcy for a reopening of the bankruptcy and for the appointment of a new trustee. Merit claimed that Engels had failed to disclose his book of business before his discharge, which allegation Engels denied because the book of business was owned by Merit under the brokerage agreement.

Merit purchased the book of business from the new trustee in bankruptcy. Subsequently, Engels, who was now a broker for another brokerage firm, solicited some of his former clients. Merit applied for the imposition of a non-solicitation term. Engels sought a declaration that he was entitled to compete with Merit. In the alternative, Engels argued that Merit's conduct disentitled it to the equitable remedy of a non- solicitation term and, in the further alternative, Engels argued that any reasonable period of non-solicitation had expired. [page573]

Held, there should be judgment for Engels.

The rule in Labouchere v. Dawson that when an owner of a business sells the business, the law will imply a promise that the owner will not solicit former clients or customers, does not apply when the sale of the business is by the owner's trustee in bankruptcy. In circumstances of bankruptcy, a non- solicitation term would be inconsistent with the rehabilitation policy of bankruptcy law, where the bankrupt is given a chance to start again after his or her discharge. Thus, a bankrupt may establish a competing business and solicit trade from former customers. Therefore, Engels was entitled to a declaration that he could solicit his former clients. In the alternative, a non-solicitation term should not be imposed. Bankruptcy is a court-supervised process. The trustee and its counsel are officers of the court who must act with professional neutrality in the interests of the creditors and the bankrupt. In the immediate case, however, the trustee became an active participant on behalf of Merit with the goal of ousting Engels from Merit rather than having the goal of repayment of the creditors. Merit was precluded from seeking equitable relief because of its conduct, which was inequitable. It had fiduciary obligations to Engels due to the unusual terms of the brokerage agreement, and the parties were obliged to act in good faith. Merit breached its duties to Engels, and it failed to consider his legitimate interests. Its conduct was high-handed and, at times, coercive. Merit's request for an equitable remedy should be denied because a party who seeks equity must do equity. Finally, if a non-solicitation clause should have arisen in this case, a two-year term would have been appropriate.

TRIAL in an action for a declaration.

Cases referred to Allen v. Furness, [1892] 20 O.A.R. 34 (C.A.); Ashmore v. Corporation of Lloyd's (No. 2), [1992] 2 All E.R. 486, 2 Lloyd's Rep. 620 (H.L.); Axelrod (Re) (1994), 20 O.R. (3d) 133, 119 D.L.R. (4th) 37, 17 B.L.R. (2d) 161, 29 C.B.R. (3d) 74 (C.A.), affg (1994), 16 O.R. (3d) 649, 111 D.L.R. (4th) 540, 24 C.B.R. (3d) 149 (Gen. Div.); Beauchamp v. United States, 76 F.2d 663 (Ct. App. 9th Cir. 1935); Bird v. Philpott, [1900] 1 Ch. 822, 69 L.J. Ch. 487, 82 L.T. 110, 16 T.L.R. 173, 44 Sol. Jo. 246, 7 Mans. 251; Buffalo Oyster Co. Inc. v. Nenno, 132 Misc. 213, 229 N.Y.S. 210 (Sup. Ct. N.Y. 1928); Commonwealth Investors Syndicate Ltd. (Re) (1986), 69 B.C.L.R. 346, 61 C.B.R. (N.S.) 147 (S.C.); Engels v. Merit Insurance Brokers Inc. (2000), 17 C.B.R. (4th) 209 (Ont. S.C.J.); Fogazzi (Re) (1990), 77 C.B.R. (N.S.) 240 (Ont. S.C. Bkcy.); Frame v. Smith, [1987] 2 S.C.R. 99, 23 O.A.C. 84, 42 D.L.R. (4th) 81, 78 N.R. 40, 42 C.C.L.T. 1, 9 R.F.L. (3d) 225; Graham Mining Ltd. (Re) (2002), 34 C.B.R. (4th) 37 (Ont. C.A.), affg (2001), 26 C.B.R. (4th) 28, 9 C.L.R. (3d) 149 (Ont. S.C.J.); Green & Sons (Northampton) Ltd. v. Morris, [1914] 1 Ch. D. 562, 83 L.J. Ch. 559, 110 L.T. 508, 30 T.L.R. 301, 58 Sol. Jo. 398; Grobstein v. Kouri, [1936] S.C.R. 264; Hong Kong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167, 6 Alta. L.R. (3d) 337, 100 D.L.R. (4th) 40, 148 N.R. 1, 29 R.P.R. (2d) 1 (sub nom. Canada Mortgage & Housing Corp. v. Hong Kong Bank of Canada); Husky Oil Operations Ltd. v. M.N.R., [1995] 3 S.C.R. 453, 26 O.R. (3d) 81, 137 Sask. R. 81, 128 D.L.R. (4th) 1, 188 N.R. 1, 107 W.A.C. 81, [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1; In Re Brown, 242 N.Y. 1, 150 N.E. 581 (1926); International Corona Resources Ltd. v. Lac Minerals Ltd., [1989] 2 S.C.R. 574, 69 O.R. (2d) 287n, 36 O.A.C. 57, 61 D.L.R. (4th) 14, 101 N.R. 239, 44 B.L.R. 1, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 6 R.P.R. (2d) 1; Katz (Re) (1991), 6 C.B.R. (3d) 211 (Ont. Gen. Div.); Keddy Motor Inns Ltd. (Re) (1999), 181 N.S.R. (2d) 120, 15 C.B.R. (4th) 48 (S.C.); Labouchere v. Dawson (1872), L.R. 13 Eq. 322, 41 L.J. Ch. 427, 25 L.T. 894, 36 J.P. 404, 20 W.R. 309; Lumley v. Broadway Coffee Co., [1935] O.R. 278, 2 D.L.R. 417 (C.A.), affg [1935]

O.R. 104, [1935] 1 D.L.R. 813 (H.C.); McLeod v. Ryan-McLeod Inc., 206 So.2d 16 (Dist. Ct. App. F.L. 1968); Mercure v. A. Marquette & Fils Inc., [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, 10 N.R. 239; [page574] Metal Fabricating & Construction Ltd. (Trustee of) v. Husky Oil Operations Ltd. (1997), 158 Sask. R. 302, 153 D.L.R. (4th) 432, 153 W.A.C. 302, [1998] 5 W.W.R. 335, 97 D.T.C. 5538, 37 C.L.R. (2d) 159, 1 C.B.R. (4th) 1 (C.A.) [Leave to appeal to S.C.C. refused (1998), 227 N.R. 292n, 168 Sask. R. 319n, 173 W.A.C. 319n], affg (1995), 135 Sask. R. 200, [1995] 9 W.W.R. 469, 35 C.B.R. (3d) 162, 95 D.T.C. 5599 (Q.B.) (sub nom. Bank of Montreal v. Deloitte & Touche Inc.); Mickelson v. Kill- Em-Quick Co. Ltd., [1919] 46 D.L.R. 622, [1919] 2 W.W.R. 210 (Man. C.A.), affg, [1918] 1 W.W.R. 781 (Man. K.B.); Perkins v. Becker's Conservatories Inc., 61 N.E.2d 833 (Sup. Ct. Mass. 1945); R. Payer & Cie (Re), [1979] C.A. 486, 31 C.B.R. (N.S.) 62 (Que. C.A.), affg (1978), 28 C.B.R. (N.S.) 277 (Que. S.C.); Rassell (Re) (1999), 71 Alta. L.R. (3d) 85, 177 D.L.R. (4th) 396, 12 C.B.R. (4th) 316 (C.A.); Trego v. Hunt, [1985-9] All E.R. Rep. 804, [1896] A.C. 7, 65 L.J. Ch. 1, 73 L.T. 514, 44 W.R. 226, 12 T.L.R. 80 (H.L.); Von Bremen v. MacMonnies, 200 N.Y. 41, 93 N.E. 186 (Ct. App. N.Y. 1910); Walker v. Mottram (1881), 19 Ch. D. 355, 51 L.J. Ch. 108, 45 L.T. 659, 30 W.R. 165 (C.A.) Statutes referred to Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 144 Insolvent Act, 1875, 38 Vict., c. 16 Rules and regulations referred to Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368 Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.07, 51, 51.04 Authorities referred to Finn, P.D, "The Fiduciary Principle" in T.G. Youdan, ed., Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989) Halsbury's Laws of England, 4th ed., Vol. 3(2) (London: Butterworths, 2002 (reissue)) Houlden, L.W. and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, 3rd ed., looseleaf (Scarborough, Ont.: Carswell, 1992-) Lando, A., "Sale of Assets by a Trustee: The Fundamental Pragmatics" (1991), 3 C.B.R. (3d) 179 The Digest, Vol. 4(1) (London: Butterworth & Co., 1991 (2nd reissue)) Williston, S., Treatise on the Law of Contracts, 4th ed., Vol. 6 (Rochester, N.Y.: Lawyers Cooperative, 1995)

James C. Morton, for applicant.
John Bruggeman and Robert N. Kostyniuk, for defendant Merit
Insurance Brokers Inc.
Miles O'Reilly and Carene I.C. Smith, for the trustee in
bankruptcy.

[1] J. WILSON J.: -- When the trustee in bankruptcy sells a book of business to a third party, does that sale include an implied common law restriction upon the bankrupt not to solicit his or her former clients?

[2] What are the obligations of a Trustee in Bankruptcy and his or her counsel to the bankrupt if the estate is reopened after discharge?

[3] What impact does the conduct by the third party purchaser have upon its right to claim equitable relief? [page575]

Relief Sought and Overview

[4] Klaas Engels (Engels), after a 28-year career as an insurance broker, entered into an exclusive brokerage agreement dated October 31, 1994 (the "Brokerage Agreement") with Merit

Insurance Brokers Inc. ("Merit"). Engels petitioned himself into bankruptcy in March 1997. He was discharged from bankruptcy in late January 1998. Merit had loaned money to Engels. Merit was a disgruntled creditor. In July 2000, without notice to the bankrupt, Merit reopened the bankruptcy before the Superintendent in Bankruptcy, appointed a new trustee, and claimed that Engels had failed to disclose the asset of his book of business prior to his discharge. A book of business is a client list that is developed from insurance policies previously written by a broker, anticipating future renewals. Merit purchased the book of business from the trustee in bankruptcy. Engels is now a broker with another brokerage firm. Engels has solicited some of his former clients. He wishes to solicit others.

[5] Merit asserts that it should be entitled to the protection of an indefinite non-solicitation order, to protect the book of business that it purchased from the trustee in bankruptcy. It claims that its conduct was fair throughout. Further, Merit states that the price paid for the book of business was reasonable, and reflective of fair market value.

[6] Engels seeks a declaration that he is free to compete directly with Merit, including soliciting of former clients in his pre-bankruptcy book of business. It has been Engels' assertion throughout that he did not misrepresent the state of his assets at the time of his bankruptcy, given the governing terms of the Brokerage Agreement. Merit has unfairly taken advantage of its position and breached all duties owed to Engels, and should not be protected from solicitation by Engels. Engels asserts in the alternative that, if Merit is entitled to a reasonable period of non-solicitation, that period has expired.

[7] The parties have had a fractious history. There have been some 30 odd motions brought before different judges between January 1998 to date. Engels has attempted, unsuccessfully, to salvage any future equitable interest in the book of business, and his ability to earn income.

The Need to Specify the Factual and Documentary Chronology

[8] Before beginning, I raise a preliminary matter.

[9] When the trial began, counsel had not defined the contested factual issues. Attention was addressed to the factual issues after the trial began. I did not have any pleadings, or affidavits defining the factual and legal issues in dispute. The required agreed [page576] statement of facts ordered by Justice Spence had not been agreed to and, hence, had not been filed. During the trial, counsel were able to come to some agreement with respect to a succinct agreed statement of facts. However, it is far from complete and not particularly helpful. I did not have the court file, as it had been sent to storage in error. Counsel at my request provided a copy of the contents of the court file and other requested documents prior to argument.

[10] It is incumbent upon counsel in all cases with a lengthy history and many documents to provide a comprehensive chronology of the undisputed facts and to define the contested factual and legal issues for determination. It is not reasonable to expect a trial judge to ferret out a chronology to put all pieces of the puzzle together.

[11] If the parties are unable to agree on a chronology, as so often happens, then counsel ought to prepare and serve a neutrally worded comprehensive Request to Admit pursuant to Rule 51 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, dealing with all factual issues and documents. It is prudent to begin with what appears to be undisputed, moving to the disputed areas. The opposing party should then respond neutrally with particularity, fully outlining its position. A blanket denial of all facts and documents is unhelpful to a trial judge and undermines the purpose of the rule. Cost consequences for a blanket refusal may well follow (see rule 51.04).

[12] In the context of motions, issues are clearly defined in the mandatory facta. Similar discipline should apply in the context of a trial based largely on documents. It is not a free for all. Although this matter proceeded during the trial relatively quickly, the state of organization of the file left much to be desired.

[13] Lord Templeman in Ashmore v. Corporation of Lloyd's (No. 2), [1992] 2 All E.R. 486, 2 Lloyd's Rep. 620 (H.L.) makes the following apt comment at p. 493 All E.R.:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration . . .

Outline of Judgment

[14] There is a line of cases in Canada, England and the United States that are determinative of the non-solicitation issue. The issue has not been considered in Ontario. I conclude that this line of cases applies in Ontario. As this line of cases is not dependent upon the facts or any equities, I will begin by outlining this legal analysis.

[15] Engels claims in the alternative that, if there may be an implied common law obligation not to solicit, Merit by its conduct [page577] is precluded from claiming this equitable relief. Analysis of this issue is very factually dependent. I will consider the following in the analysis of this argument:

-- The role and obligations of the Trustee in Bankruptcy and his or her counsel to the bankrupt;

-- The relevant facts, including my conclusions with respect to credibility;

-- A discussion of the nature of the relationship between Merit and Engels, and the obligations flowing from that relationship;

-- Whether Merit by its conduct is precluded from claiming equitable relief;

-- If there is to be a non-solicitation period, what period is reasonable in the circumstances.

The Law on Non-Solicitation in Bankruptcy

[16] The defendant acknowledges that there are no contractual provisions mandating non-solicitation. The Bill of Sale dated July 24, 2000 between Merit and the Trustee provides:

> . . . all of the aforesaid assets are on an "as is where is" basis and the Bargainor makes no representation whatever as to quality or quantity.

(Emphasis added)

[17] The issue of whether the sale of a business by a trustee includes an implicit common law non-solicitation provision by the bankrupt has not been specifically considered in Ontario. The question has, however, been considered by the Quebec and Manitoba Courts of Appeal in Re R. Payer & Cie (1979), 31 C.B.R. (N.S.) 62 (Que. C.A.) and Mickelson v. Kill-Em-Quick Co. Ltd., [1919] 46 D.L.R. 622, [1919] 2 W.W.R. 210 (Man. C.A.). The Manitoba Court of Appeal expressly approves an earlier line of English cases. As well, American cases have considered the issue.

[18] The defendants seek to rely upon the principles enunciated by the Master of the Rolls in Labouchere v. Dawson (1872), 41 L.J. Ch. 427, L.R. 13 Eq. 322 and Trego v. Hunt, [1896] A.C. 7, [1895-9] All E.R. Rep. 804 at pp. 813-14 (H.L.). Lord Macnaghten at pp. 24 to 25 A.C. in Trego v. Hunt, confirms that in the context of a sale of a business, there is a common law obligation not to solicit former clients:

> But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus [page578] interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage-ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion.

(Emphasis added)

[19] The line of English cases dealing with solicitation in the context of bankruptcy begins with the root case Walker v. Mottram (1881), 19 Ch. D. 355, 51 L.J. Ch. 108 (C.A.). The court distinguishes between a voluntary, arm's-length sale involving goodwill, as in Labouchere, where a common law obligation not to compete will be imposed, as opposed to the compulsory alienation of the bankrupt's business by the trustee in bankruptcy, where no such obligation flows.

[20] This distinction is the common thread in the existing English and American caselaw. Walker at p. 364 Ch. D. provides:

> But in our opinion, the right of a purchaser of the goodwill of a business from the trustee in bankruptcy does not extend to restrain the bankrupt (even if he joins in the conveyance) from bona fide commencing a fresh business, and from seeking assistance in it from his old friends and customers. It would, in our opinion, be contrary to the policy of the Bankruptcy Laws to extend Labouchere v. Dawson to such a case. It is not necessary to overrule that decision; we leave it where it is, that is to say, it will still be applicable to voluntary sales. But we do not think it ought to be extended to alienations which are compulsory. When a man sells his own business and goodwill for his own benefit it is thought unfair on his part to avail himself of his personal acquaintance with his old customers and to induce them to withdraw their support from the business he has sold, and this element of personal unfairness may be sufficient to justify the decision in Labouchere v. Dawson. . . . The obligation enforced in Labouchere v. Dawson is, however, a purely personal obligation, and not a mere incident to the transfer of property.

(Emphasis added)

[21] Similarly, Green & Sons (Northampton), Ltd. v. Morris, [1914] 1 Ch. D. 562 at pp. 566-67, 83 L.J. Ch. 559 confirms the distinction that exists in bankruptcy where the principles enunciated in Trego v. Hunt do not apply:

> There is no question as to the general principle that if a man sells the goodwill of his business to a purchaser and receives the purchase-money he cannot afterwards destroy that which he has sold by soliciting his old customers. But that principle has never been extended to any case except that of a sale or of some contract equivalent to a sale; and in particular in the case of Walker v. Mottram it was decided that the rule to which I have referred and which was there referred to as the rule in Labouchere v. Dawson, did not apply to the case of a sale not by the man who was carrying on the business, but by his trustee in bankruptcy. It was further held in that case that it made no difference in principle whether the bankruptcy was brought about by the bankrupt filing his own petition or by the hostility of his creditors . . . it is impossible to find any rational distinction between the case of a man who becomes a bankrupt on his [page579] own petition and has lost his property which has become vested in his trustee in bankruptcy and that of a man who brings about the same result by executing a deed of assignment of his property for the benefit of creditors. . . . I can see no rational distinction between Walker v. Mottram and the present case. In one sense what the debtor does is voluntary, in another sense it is not voluntary at all, as he may have taken the steps he did take in order to avoid other proceedings being taken by the creditors. A man by divesting himself of his property under such circumstances as those in this case does not thereby constitute the relation of vendor and purchaser between himself and the ultimate purchaser of the property.

(Emphasis added)

[22] In England, Walker continues to be the governing law. See The Digest (London: Butterworth & Co., 1991 (2nd reissue)) in Vol. 4(1) at para. 3010, and Halsbury's Laws of England, 4th ed. (London: Butterworths, 2002 (reissue)) in Vol. 3(2) at para. 424.

[23] Although the provisions of the governing bankruptcy legislation have changed since 1881, providing broader powers to the trustee in bankruptcy, these changes do not appear to derogate or change the principles enunciated in Walker. Looking at the Insolvent Act, 1875, 38 Vict., c. 16, the underlying principles concerning the definition of "property" for the purposes of insolvency legislation have changed little. Now, like then, property encompasses all assets of any kind or description whatsoever which a bankrupt may be possessed of or entitled to up to the time of discharge.

[24] In Mickelson v. Kill-Em-Quick, supra, at p. 631 D.L.R., the Manitoba Court of Appeal adopted the Walker line of cases:

> It was argued that as this was a sale by a receiver and not by a vendor, the purchaser acquired, so far as the signature was concerned, really no rights whatsoever, and Lord Macnaghten in Trego v. Hunt, supra, was quoted. There he says at p. 23 ([1896] A.C.):
>
> > There is all the difference in the world between the case of a man who sells what belongs to himself, and receives the consideration, and a man whose property is sold without the consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee.

[25] The Quebec Court of Appeal decision in Re R. Payer & Cie, supra, does not refer to the Walker line of cases. However, Mayrand J.A. reached the conclusion that a bankrupt is entitled to solicit former clients after the sale of the business by the trustee in bankruptcy. The headnote provides:

> The bankrupt company was a family company run by one man and, in the absence of a non-competition clause, he was at liberty to create a new company. Likewise, he had the right to invite his former clients and agents to do business with the new company. In any case, if there was a claim it should have been against that individual personally. In addition, the clientele of a family enterprise of modest scope was loyal to the person or persons directing the enterprise rather than the corporate entity. [page580]

[26] In addition to the English and Canadian caselaw, a line of American cases has also concluded that non-solicitation of former clients is not an implicit term within the context of a sale of a business by a trustee in bankruptcy. There do not appear to be cases to the contrary. See: Von Bremen v. MacMonnies, 200 N.Y. 41, 93 N.E. 186 (Ct. App. N.Y. 1910); In Re Brown, 242 N.Y. 1, 150 N.E. 581 (1926); Buffalo Oyster Co. Inc. v. Nenno, 132 Misc. 213, 229 N.Y.S. 210 (Sup. Ct. N.Y. 1928); Beauchamp v. United States, 76 F.2d 663 (Ct. App. 9th Cir. 1935); Perkins v. Becker's Conservatories Inc., 61 N.E.2d 833 (Sup. Ct. Mass. 1945); McLeod v. Ryan-McLeod Inc., 206 So.2d 16 (Dist. Ct. App. F.L. 1968).

[27] Williston's Treatise on the Law of Contracts, 4th ed., Vol. 6 (Rochester N.Y.: Lawyers Cooperative, 1995) at p. 457 succinctly confirms the general rule distinguishing bankruptcy from a voluntary sale:

> Furthermore there is no implied restrictive promise in an involuntary sale by a receiver or trustee in bankruptcy. A discharged bankrupt may therefore compete with the purchaser from his trustee by soliciting his former customers.

[28] In Beauchamp v. United States, supra, Garrecht J. noted at p. 667:

> The right of the purchaser of the goodwill of the business from the trustee in bankruptcy does not extend to restraining the bankrupt from again engaging in the same class of business or from seeking assistance in it from his former customers.
>
> Justice Cardozo . . . distinguishes between voluntary and involuntary sales of goodwill. "After a voluntary sale, the seller, though he may compete, may not drum up or circularize the customers of the business. After a sale in invitum, he is not subject to a disability, so heavy."

[29] A similar conclusion was reached by Wilkins J. of the Supreme Court of Massachusetts in Perkins v. Becker's Conservatories Inc., supra, at p. 837:

> It is settled in the Commonwealth that after a voluntary transfer of good will the grantor cannot derogate from his grant by engaging in a competing business of the same kind, selling the some goods, and endeavouring to deal with the same customers . . . Where, however, the transfer is involuntary, an individual former owner may establish another business of the same kind and solicit trade from the old customers.

[30] Finally, in McLeod v. Ryan-McLeod Inc., supra, at p. 17, the court confirms "On a judicial sale no restriction as to solicitation of former customers or clients exists nor should restrictions be implied."

[31] The defendants rely upon the Ontario Court of Appeal in Re Axelrod (1994), 20 O.R. (3d) 133, 119 D.L.R. (4th) 37 (C.A.). I conclude that this case deals with quite a different issue. [page581]

[32] The court in Axelrod confirms that a voluntary contractual grant pledging patient lists and records by a dentist prior to his bankruptcy in a general security agreement is enforceable post-bankruptcy, if the trustee in bankruptcy sells the client list. By such a voluntary pre-bankruptcy act, the dentist contractually parts with his interest in the patient list for valuable consideration, subject to respecting the patients' rights of confidentiality. He is not entitled to compete for his former patients, after the trustee in bankruptcy sells the patient list to another dentist. Arbour J.A., as she then was, at p. 139 O.R., p. 44 D.L.R., emphasizes the proximity of the facts to a voluntary sale: "I see no difference between a dentist's entitlement to sell his or her practice, and a dentist's entitlement to pledge records." Axelrod does not deal with whether the common law should imply a non-solicitation clause in the case of a sale of an asset as a consequence of bankruptcy.

[33] Houlden and Morawetz in Bankruptcy and Insolvency Law of Canada, 3rd ed., looseleaf (Scarborough, Ont.: Carswell, 1992-) confirm the purposes of the bankruptcy regime in general,

and of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended ("BIA"), in particular. In Volume One of the text, at 1-4/5, a number of purposes of the Act are set out:

> (1) The Act is designed to permit the rehabilitation of the bankrupt unfettered by his debts;
>
> (2) The Act permits an honest debtor, who has been unfortunate in business, to secure a discharge so that he can make a fresh start and resume his place in the business community;
>
> (3) The Act provides a means whereby people who are in financial difficulties may resolve those difficulties, while providing an orderly method of distributing whatever assets remain available for the creditors; and
>
> (4) The Act permits a debtor who is overcome by the burden of his debts to be able to support his family and to perform his ordinary duties as a citizen.

[34] The case law beginning with Walker is clear. There is a distinction between the rights and obligations of a bankrupt and those that flow from a voluntary sale or pledge of assets for one's benefit. The analysis of the imposition of an implied obligation not to solicit is grounded on equitable principles of fairness between arm's-length buyers and sellers. In bankruptcy, the context is quite different. From the perspective of the bankrupt, all has been lost. The state provides an orderly regime to allow creditors to recover from the debtor's estate. The bankrupt is given a chance to start again after his or her discharge. Mr. Justice Gonthier confirms in Husky Oil Operations Ltd. v. M.N.R., [1995] 3 S.C.R. 453 at pp. 470-71, 128 D.L.R. (4th) 1, that the bankruptcy regime serves [page582] two distinct goals. The first is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors. The second goal is the financial rehabilitation of insolvent individuals.

[35] In assessing what is equitable, as well as commercially reasonable, the price paid in the context of bankruptcy is a relevant factor. Prices paid by a purchaser in the context of bankruptcy are routinely less than the price obtained in an orderly, voluntary fair market value sale of a business. Certainly, as I will outline later in these reasons, Merit did not pay anything close to fair market value for the book of business as a going concern.

[36] In a voluntary sale of a book of business, it is standard that a non-solicitation clause is a standard negotiated contractual term. In this case, the trustee sold the book of business on an "as is where is basis". Engels was unaware of the sale, and there was certainly no contractual term agreed to by Engels not to solicit.

[37] Having considered the caselaw, I confirm the principles enunciated in Walker and the American line of cases. In an involuntary alienation of assets in bankruptcy, there is no common law implied obligation on the part of the bankrupt not to compete and to solicit former clients. The reasoning makes sense in the commercial and practical context of bankruptcy. If, however, the bankrupt has obliged himself contractually not to compete, or has pledged or sold an asset for valuable consideration prior to bankruptcy, then the principles of Axelrod apply.

[38] I conclude, therefore, that the plaintiff is entitled to a declaration that he can solicit his former clients.

[39] Engels' alternative claim is that if the Walker line of cases does not apply in Ontario, then Merit is precluded from obtaining equitable relief due to its conduct. Although I have concluded that the Walker line of cases does apply in Ontario, as the issue has not specifically been considered before, I will consider the alternative argument raised by the applicant in some detail.

The Obligations of the Trustee and Its Counsel to the Bankrupt

[40] In light of comments made by counsel for the trustee during argument, and to provide context for the facts in this case, it would be appropriate to confirm some basic principles with respect to obligations by the trustee in bankruptcy and his or her counsel to a bankrupt.

[41] Counsel for the trustee suggested during his submissions that the trustee in bankruptcy owes no duty to the bankrupt, but only to the creditors. In his words, with respect to the bankrupt, there are "no rules" and no duties between the trustee in bankruptcy and the bankrupt. This, he says, is "the adversary system". Respectfully, I disagree. [page583]

[42] It is a fundamental principle of bankruptcy law that the trustee in bankruptcy is the legal representative of the bankrupt: Grobstein v. Kouri, [1936] S.C.R. 264. As the legal representative of the bankrupt, the trustee takes the property of the debtor subject to all the rights and equity to which it was subject while it was held by the bankrupt. When a trustee is appointed, it becomes the debtor's representative, and the debtor's successor: Mercure v. A. Marquette & Fils Inc., [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, as quoted in Metal Fabricating & Construction Ltd. (Trustee of) v. Husky Oil Operations Ltd. (1997), 153 D.L.R. (4th) 432, 37 C.L.R. (2d) 159 (Sask. C.A.).

[43] Pursuant to s. 144 of the BIA, a debtor is entitled to any surplus remaining after payment in full of his creditors. The trustee is accountable to the bankrupt as a cestui que trust, and the fiduciar[y] duties that a trustee owes to the creditors extend to the bankrupt. The jurisprudence can be traced back to Bird v. Philpott, [1900] 1 Ch. 822 at p. 829, 69 L.J. Ch. 487, where Farwell J., sitting in the Chancery Division, noted:

> . . . the property remaining undistributed, being no longer required for any function of that court, falls under the general rule of law, which raises, on the part of the legal owner of property no longer required for the purposes of the conveyance to him, a trust and obligation to restore that which is not wanted to the original owner, from whom it was taken for a limited purpose . . .

(Emphasis added)

[44] These comments were adopted by Gibbs J. in Re Commonwealth Investors Syndicate Ltd. (1986), 61 C.B.R. (N.S.) 147, 69 B.C.L.R. 346 (S.C.).

[45] Counsel in essence suggested that in the real world of bankruptcy deals are routinely made, implying lofty principles do not apply. He attempted to argue that a decision of Lissaman J. in an earlier proceeding in this matter, is wrong. Again, respectfully, I disagree.

[46] A trustee in bankruptcy and its counsel are officers of the court. They are cloaked with broad powers, and significant responsibilities. In exercising those powers, justice must be done. It also must be seen to be done.

[47] The power to liquidate the assets of the bankrupt's estate is one of the broadest and most significant powers a trustee has. The trustee in bankruptcy has a duty to maximize the yield from all the assets available to the trustee for the benefit of all creditors, subject to practicalities and honesty: Re Rassell (1999), 177 D.L.R. (4th) 396, 71 Alta. L.R. (3d) 85 (C.A.). A trustee in bankruptcy has two competing obligations. As Hood J. in Re Keddy Motor Inns Ltd. (1999), 15 C.B.R. (4th) 48, 181 N.S.R. (2d) 120 (S.C.) noted, a trustee must uphold the integrity of the bankruptcy process, and sell the estate assets for the best price in the circumstances. [page584]

[48] In his article "Sale of Assets by a Trustee: The Fundamental Pragmatics" (1991), 3 C.B.R. (3d) 179, A. Lando identifies the dual obligations of a trustee to enhance the bottom line along with the imposition of a standard of conduct. At p. 181 C.B.R., Lando notes:

> The trustee in bankruptcy, however, is governed by standards that go beyond those which determine the business behaviour of the entrepreneur. As an officer of the court, the trustee must always be concerned about the integrity of the insolvency process. There are times when 'reasonable' business principles are not easy to reconcile with the determinants for standards of behaviour that govern an officer of the court. The businessman is playing in his own game, and must do what is fair and reasonable, no less, but not necessarily more. The stakes are greater for the trustee; his actions are measured against a higher test, a test of not only being right and fair but that of appearing to be right and fair. The dilemma arises when doing what is right, when conducting an administration from the 'highest moral ground', does not necessarily produce the best commercial result.

(Emphasis added)

[49] The trustee and his or her counsel must be neutral and evenhanded with all classes of creditors, and with the bankrupt.

[50] In his conclusion at p. 195 C.B.R., Lando confirms that there are certain assets that are difficult to deal with but that the trustee should be governed by the same fundamental principles that underlie the sale of all assets:

> What are these principles? Among those described or alluded to are: fairness, equity, good faith, order, . . . honesty, integrity, due care and sound commercial practice. Of equal importance, the trustee's actions must be perceived to be governed by these standards. That the process functions effectively, is a manifestation of the symbiosis between the practices and procedures as they are articulated in the Act, superintendent directives, and the case law, on the one hand, and their practical application in the business world, on the other hand.

(Emphasis added)

[51] Courts accord trustees in bankruptcy a great deal of deference when realizing an estate's assets. A review of the case law reveals that courts are reluctant to interfere with reasonable business decisions by trustees in bankruptcy: Re Rassell, supra, at p. 402 and Re Katz (1991), 6 C.B.R. (3d) 211 (Ont. Gen. Div.) at p. 215.

[52] A trustee's exercise of discretion should not be interfered with if it acted in good faith and the decision is not unreasonable in the circumstances and is for the benefit of the estate: Re Graham Mining Ltd. (2001), 26 C.B.R. (4th) 28, 9 C.L.R. (3d) 149 (Ont. S.C.J.) citing with approval Re Fogazzi (1990), 77 C.B.R. (N.S.) 240 (Ont. S.C. Bkcy.).

[53] Concurrent with this deference, is the need to ensure that the trustee has been transparent and even-handed in meeting its obligations to all concerned. [page585]

[54] The duties and obligations of trustees in bankruptcy apply equally to their counsel. Counsel, too, are officers of the court. They are not ordinary counsel representing one litigant entitled to wage war with the bankrupt, or to prefer one creditor over another utilizing all of the artillery of the adversary system. They are obliged to act neutrally and fairly throughout, to all creditors and to the bankrupt.

[55] Unfortunately, in this case, it appears that counsel for the trustee stepped into the fray, by protecting Merit's interests as purchaser of the book of business in priority to any equitable obligation he owes to the bankrupt. I make this comment reluctantly. Counsel for the trustee was contacted for advice by Merit's counsel in February 2000. The objective of that contact is bluntly reflected in a docket entry that states "re using bankruptcy to oust Engels". This objective appears to have governed conduct throughout.

[56] Counsel for the trustee has not assumed the role of neutral watchdog and officer of the court, balancing the interests of all concerned, including the bankrupt. After Merit purported to purchase Engels' future contingent rights in the book of business, Engels was prepared to repay all creditors in full from future commissions earned. The struggle in this proceeding has not been to repay creditors, but to allow Merit to retain the book of business.

[57] The trustee in bankruptcy testified in this matter. He appeared to be a man of integrity. He followed the advice of counsel with respect to aspects of his tasks, including the issue of service of the proceeding to reopen the bankruptcy, and legal interpretation of the documents in question. I strongly disagree, however, with his position that Engels was not required to be served with notice of the reopening of the bankruptcy or with the second meeting of creditors. Apart from notice issues, the trustee has been the passive recipient of funds and has relied upon his counsel's advice. Meanwhile, this battle has raged between Merit and Engels.

The Facts

[58] Engels is a Dutch-born 56-year-old independent insurance broker who has been in the insurance business in Canada since 1968.

[59] Engels petitioned himself into bankruptcy in March 1997. Engels listed Revenue Canada, Merit and the Bank of Nova Scotia as his principal unsecured creditors. His debts totalled approximately $211,000.

[60] In Engels' Statement of Affairs in the bankruptcy, he stated that he had no assets. Engels was discharged without conditions in January 1998. Engels disclosed his earnings in the bankruptcy file. In spite of a high level of earnings, no terms [page586] were imposed for partial payment of creditors from his future commission income earned pending discharge.

[61] In 1994, Engels was an insurance broker with his own brokerage firm, J.M. Dixon Insurance Brokers Inc. (Dixon). He had developed a significant "book of business". Engels had purchased the book of business of two smaller brokerage firms along the way to augment his existing client base.

[62] Merit's combined book of business in 1994, prior to Engels' arrival and the Dixon book of business, was $5 million. The Dixon book of business was between $2.9 million, and $3.5 million.

[63] I accept Engels' evidence that the usual fair market value of a book of business in the case of an arm's-length sale is between 1 1/2 and 2 times the annual commissions, dependent upon the quality of the book and claims history. The two times ratio was confirmed by Engels in a previous transaction with one Brennen. Dixon's annual commissions prior to merging with Merit were $300,000.

[64] I conclude, therefore, that the estimated fair market value in an arm's-length sale of the Dixon book of business owned by Engels prior to the transaction with Merit in 1994 was between $450,000 and $600,000.

[65] It goes without saying that to own the book of business that Engels brought to Merit would be a significant benefit to the Merit shareholders. As well, as 52.3 per cent of all commissions earned are paid to Merit, the impact from an income point [of] view of the addition of Dixon's book of business to Merit was very significant.

[66] In 1994, Engels was in divorce proceedings. He was in arrears of support obligations. For a period (June to September 1994) Engels' wife was by court order in control of Dixon to enable her to enforce the outstanding support arrears. She did not remit payments received from Dixon clients to the insurers. When Engels regained control of Dixon there were arrears owing to insurers in an amount between $50,000 [and] $60,000. Engels was unable to borrow funds to pay the arrears. He had to either sell his book of business, or a portion thereof, or make arrangements with another insurance broker to pay off the pressing debt. A business acquaintance suggested he contact Merit as a potential solution to his problems. He sought out an arrangement with Merit. Engels and the principals of Merit did not know each other prior to 1994, although they had heard of each other.

[67] Merit agreed to loan funds to Engels to repay the Dixon debts with the insurers, in the context of Engels joining Merit and merging the Dixon book of business with Merit's.

Coincidental with the execution of the Brokerage Agreement, Merit loaned funds to Engels and Dixon to enable Engels to repay the insurers. In the loan document, Engels agreed to pay 9 per cent interest, and [page587] acknowledged personal responsibility to repay the Dixon debt from future commission income (the "Guaranteed Corporate Debt").

[68] In light of his pressing financial problems, Engels did not look elsewhere. Time was of the essence.

The Governing Terms of the Brokerage Agreement

[69] Merit has an arrangement with all incoming producer brokers concerning their own book of business. A standard contract in accordance with the terms of the Brokerage Agreement is signed. Ronald Berry ("Berry") gave evidence on behalf of Merit. He is president, member of the board and shareholder in Merit.

[70] The effect of the Brokerage Agreement merges the legal and equitable title of the incoming broker's book of business with Merit's for seven years following the execution of the Brokerage Agreement:

> 15. For a period of seven years (eight four months) [sic] after the signing of this Agreement, Merit shall own absolutely and exclusively all business written or otherwise aquired [sic] by the broker, specifically including all business assigned to the broker by Merit, all new customers acquired by the broker or Merit, all customers or business jointly acquired by the broker, or any other agent or broker, Merit, or any other person or company, with such absolute ownership of Merit subject only to the express exceptions stated in this Agreement.

(Emphasis added)

[71] It was Engels' evidence and understanding that the legal and equitable interest in the book of business revested in him after seven years at Merit. The seven-year period is subject to certain exceptions when revesting will occur earlier, including disability and death, or termination of the Brokerage Agreement by Merit. Engels' understanding is borne out by the contractual terms of the Brokerage Agreement. This interpretation of the Brokerage Agreement was not disputed by Merit's counsel.

[72] Equitable rights would revest in Engels seven years after the execution of the Agreement -- in this case on October 31, 2001 -- so long as he continued as a broker with Merit. Engels was discharged from bankruptcy in January 1998 -- some 31/2 years before the expiry of the seven-year period.

[73] The Brokerage Agreement does not specifically contemplate terms of what transpires in case of bankruptcy of either Engels or Merit. I note that Merit now has an amended brokerage agreement that does specify terms in case of bankruptcy.

The Chronology

[74] After joining Merit in 1994, Engels' financial difficulties persisted. It appears in the context of his matrimonial situation, that Engels paid obligations to his former wife at the expense of Revenue Canada. [page588]

[75] Therefore, on February 5, 1995, Engels borrowed a further sum of $28,500 from Merit, with an interest rate of 9 per cent per annum (the "Personal Debt"). It is this debt that was the subject matter of the dispute between Engels and Merit culminating in the judgment of Lissaman J. dated June 2000 (see Engels v. Merit Insurance Brokers Inc. (2000), 17 C.B.R. (4th) 209 (Ont. S.C.J.)). Disputes about the Personal Debt precipitated this unfortunate proceeding.

[76] At the time Engels declared bankruptcy there were two loans outstanding with Merit. The balance of the Guaranteed Corporate Loan was outstanding, and the entire amount of the principal of the Personal Loan remained outstanding (some interest payments only had been paid). I agree with the findings of Lissaman J. that the Personal Debt was not a secured loan. Parallel provisions apply to the Guaranteed Corporate Loan. I conclude that neither debt was a secured loan.

[77] In January 1998, Berry, on behalf of Merit, required Engels to sign a promissory note with respect to these debts, in exchange for not disputing Engels' discharge in bankruptcy. A dispute arose between Engels and Merit. The document presented to Engels, which he refused to sign, provided:

> It is understood and agreed that KLAAS ENGELS owes MERIT INSURANCE BROKERS, INC. the sum of $57,835.[unreadable] . . . This amount is to be repaid as a deduction of 6 [per cent] of all monies due Klaas Engels, including Commissions and Bonuses. The amount of $57,835.[unreadable] will bear interest of 2 [per cent] above the prime rate at the Hong Kong Bank of Canada January 1st of every year. The interest will be charged every November, if the Coffee Time Account [unreadable]. If not, it will be deducted the following year in equal installments.
>
> KLAAS ENGELS waives all protection provided from his Bankruptcy Discharge as of December 30, 1997 in exchange for the following conditions:
>
> 1) Merit Insurance Brokers will not challenge the Bankruptcy Discharge.
>
> 2) Klaas Engels will owe the renewal value of his accounts when the account is fully paid, as determined by Merit Insurance Brokers Inc.'s systems and previous arrangements with other retired brokers, at this point in time being Tom Kipping and Bruce Powell.

[78] Notwithstanding his refusal to sign the note, Engels acknowledged verbally to Merit that he would repay the Personal Loan as a "debt to honour".

[79] After Engels refused to sign the draft promissory note in January 1998, relations between Merit and Engels deteriorated.

[80] In January 1998, Engels' office key at Merit was taken away from him.

The Proceedings Before Lissaman J.

[81] Merit, for a short period, withheld all commissions payable to Engels. Engels commenced proceedings requiring Merit to pay [page589] to him commission income, and Merit counter-claimed, claiming that the Personal Loan was a secured debt.

[82] Post-discharge, Merit began to deduct blended payments of interest and principal on both loans against commissions earned by Engels. A total of $30,551.81 was deducted by Merit from commissions earned by Engels between 1998 and March 2000. Engels repaid the entire Guaranteed Corporate Debt from commission income earned, as well as some interest on the Personal Loan. It does not appear disputed that these payments were made in preference to other unsecured creditors.

[83] The matter proceeded to trial in February 2000 before Lissaman J. to determine whether the Personal Loan was a secured loan.

[84] Prior to the commencement of the trial the claim was dismissed, as all outstanding commission income previously withheld had been paid by Merit. The trial proceeded on the counterclaim in February 2000. Merit was unsuccessful. Lissaman J. concluded that the Personal Debt was not a secured loan, and dismissed Merit's action in June 2000. Lissaman J. ordered costs payable by Engels on the claim on a party and party basis until the trial, but ordered solicitor client costs payable by Merit to Engels throughout due to its conduct.

[85] His comments at p. 213 C.B.R. were blunt with respect to Merit's coercive attempts to enforce payment of its debt:

> It is also my view that the concept of "creditors and debtors" making side deals to avoid the Bankruptcy Act is somewhat unsavory and should not be judicially encouraged. The defendant relies on Tildesley v. Weaver [now cited as
> (1998), 7 C.B.R. (4th) 313 (B.C.S.C.)] to support his position. It is also my opinion that the onus of proving consideration is clearly on the defendant which onus has not been discharged. Mr. Kostyniuk also relies on the decision of Mr. Justice Pitt in Queenview Holdings Inc. v. Pelz [now cited as (1995), 31 C.B.R. (3d) 191 (Ont. Gen. Div.)]. This is a case on its own facts that does not help me.

> Judges are entitled to draw inferences. In the case at bar, I am of the opinion that Merit at all material times used its position to coerce the plaintiff in paying a discharged debt. Such conduct should not be in any way condoned by a Court.

(Emphasis added)

[86] I agree with Lissaman J.'s findings and conclusions.

[87] By February 2000, Merit's objective with respect to Engels was clear. When Mr. Kostyniuk consulted with Mr. Miles O'Reilly on February 26, 2000, the objective was "using bankruptcy to oust Engels". It is clear as the chronology continues that Merit succeeded.

[88] Merit appealed Lissaman J.'s decision. The appeal was subsequently abandoned or dismissed for delay. [page590]

The Ex Parte Reopening of the Bankruptcy

[89] Immediately following the release of the reasons by Lissaman J. dismissing Merit's earlier action, Merit formally retained Mr. Miles O'Reilly for advice.

[90] Following that advice, Merit moved ex parte before the Registrar in Bankruptcy on July 6, 2000 seeking to appoint a new trustee in bankruptcy, and asserting that Engels had failed to disclose in the bankruptcy his interest in a valuable book of business.

[91] The reopening of bankruptcy after discharge is an unusual occurrence. In my view, given the fractious history, and the proceedings before Lissaman J., the reopening of the bankruptcy should have been brought before a judge of the Commercial Court, rather than the registrar. The motion should have been on notice to Engels, for reasons that I will outline later in this judgment.

[92] The second meeting of creditors was called by the new trustee and occurred on July 24, 2000. No notice of either the outstanding order of the Superintendent of Bankruptcy, or the meeting of creditors was provided to Engels. Engels at the time continued to work as an exclusive broker for Merit.

[93] At the second meeting of creditors the following occurred:

-- Mr. Miles O'Reilly was appointed as counsel for the trustee in bankruptcy.

-- Merit presented an Offer to Purchase Klaas Engels' book of business (the Book of Business Offer).

-- The representative of Revenue Canada was appointed as the sole inspector.

-- In a meeting between the trustee and the inspector, the Book of Business Offer was accepted by the trustee.

-- A Bill of Sale dated July 24, 2000 was executed between the trustee and Berry on behalf of Merit.

[94] Merit's offer for the book of business included a payment of $25,000, plus 50 per cent of the commission income earned over a period of 36 months, or until the creditors were paid their debts in full. Merit was able also to pay their legal fees from the 50 per cent of commissions earned to defend their purchase of the book of business. In accordance with the usual formula, 50 per cent of the commission earned goes to the broker (in this case Engels), and 50 per cent to the brokerage company for overhead expenses.

[95] In essence, Merit purchased the book of business for $25,000 plus Engels' 50 per cent share of the commission income to be earned for a 36-month period. [page591]

[96] Merit also proposed to continue the existing financial arrangement with Engels' primary assistant, with such payments to be made from the 50 per cent of commissions. This would presumably ensure her continued loyalty and presence at Merit.

[97] Beginning in July 2000, Merit withheld all commission income from pre-bankruptcy clients. Merit began screening incoming telephone calls to divert clients from Engels. Unless clients specifically insisted on speaking to Engels, he had difficulty communicating with his former clients.

[98] On July 26, 2000, after Engels received notice of the order of the superintendent, and the Bill of Sale, he brought an ex parte application to set aside the appointment of the new trustee, and sought a declaration that the book of business was not property at the date of bankruptcy, or after-acquired property at the date of discharge.

[99] Nordheimer J. rightly declined to hear the motion without notice to Merit.

[100] On July 27, 2000, Nordheimer J. made the following endorsement:

> I am not satisfied that notice should not have been given to Mr. Engel[s] of the application to re-open the Estate since it seems to me that he was a person who would well be affected by the Order sought. However, be that as it may, it is clear that there is a serious issue as to whether the 'book of business' which the Trustee has purported to sell to Merit Insurance Brokers Inc. is an asset of the Estate and, in order to have that issue properly determined, the appointment of a Trustee of the Estate would appear to have been necessary in any event. I do not, therefore, intend to interfere with that appointment.
>
> Having said that, until the issue as to whether the book of business is or is not an asset of the Estate is determined, the purported role of that asset pursuant to the Bill of Sale dated July 24, 2000, shall be stayed and no action shall be taken by the Trustee or by Merit in furtherance of that purported sale.

[101] Skirmishes and legal issues arose as to whether Merit was in breach of the Order of Justice Nordheimer.

[102] The battle between Engels and Merit became increasingly bitter, but by the terms of the Brokerage Agreement, from a financial point of view, the disgruntled parties had little alternative [but] to co-exist.

[103] Until the Book of Business Agreement was approved by the court, had Merit terminated the Brokerage Agreement it would have been required by its terms to pay to the trustee the full fair market value of the book of business as determined by an independent arbitrator. I have previously concluded that this amount would be between $450,000 and $600,000 (see para. 65

for details). Had this occurred, the trustee could have paid off the $211,000 owing to creditors, and the balance would have been paid to Engels.

[104] Obviously the terms of the Book of Business Agreement with its $25,000 down payment and payment of the broker's 50 per [page592] cent of future commissions earned over three years were far more favourable to Merit than a sale at fair market value.

[105] Had Engels terminated the Brokerage Agreement prior to October 2001, by its terms, he would have forfeited all future rights to the book of business.

[106] After July 2000, until the date of termination in June 2001, I find that Engels continued to work full-time on his pre-bankruptcy book of business, as well as upon any new clients that he was able to attract after July 2000.

[107] As a result of the order of Justice Nordheimer, all commissions earned by Engels after July 2000 until June 2001 for work performed on his pre-bankruptcy clients were withheld by Merit. An amount between $115,000 [and] $120,000 was withheld by Merit and eventually paid to the Trustee. These funds earned by Engels have been used by the Trustee to reduce Merit's obligation to the Trustee with respect to the Book of Business Agreement. Between July 2000 and June 2001, Merit only paid Engels the commission on post-bankruptcy new clients totalling some $18,000.

[108] On September 14, 2000, Madam Justice Swinton, as requested by Merit yet consented to by Engels, did not deal with the application on its merits, but ordered the trial of an issue as to whether the book of business was property within the meaning of the BIA.

[109] Although interpreting the terms of the Brokerage Agreement was a purely legal issue, the parties raised numerous disputed factual matters about the value of the book of business, its contents, and issues with respect to the conduct of the parties.

[110] The trial of the issue, as defined by Swinton J., was scheduled for January 2001. Attempts were made to settle matters between Merit and Engels. The parties exchanged offers to settle.

[111] Engels did not have the means to pursue matters in another trial. He could not fuel the costs of litigation.

[112] On January 6, 2001, Engels accepted Merit's offer. Its terms include repayment of all creditors in full from future commissions. It also includes onerous requirements with respect to payment of all costs incurred by Merit from the trial before Lissaman J.

[113] It is clear from the correspondence that Engels understood that he would have access to pay the capital amounts contemplated in the settlement from the $120,000 withheld by Merit from his portion of the commissions earned from pre- bankruptcy clients.

[114] Anticipating completion of the settlement, on February 6, 2001, Justice Farley made a consent order with respect to the book of business. No material was filed before Justice Farley.

The issue of whether the book of business was future contingent [page593] property of the bankrupt in light of the terms of the Brokerage Agreement and the BIA has not been determined on its merits.

[115] The consent order of Justice Farley dated February 5, 2001 states:

> 1) This court declares that the interest of Klaas Engels in a "Book of Business" owned by Merit Insurance Brokers Inc. is vested in the Trustee of Estate of Klaas Engels, a Bankrupt as of December 20, 1997.
>
> 2) This court declares that the transfer of the Bankrupt's interest in the "Book of Business" to Merit Insurance Brokers Inc. is valid and enforceable according to the terms of the Bill of Sale dated July 24, 2000.

[116] After the consent order of Farley J., the trustee refused to release these funds to pay the required capital obligations of the settlement. Merit insisted upon immediate payment in full in the amount of $60,000 for legal fees with respect to the trial before Lissaman J. The trustee insisted on the $25,000 capital payment.

[117] At this point, Engels' earnings had been decimated. He was earning approximately $18,000 annually. Engels had no ability to borrow funds. He was unable to fulfill the onerous capital terms of the settlement.

[118] The settlement fell apart. Engels subsequently tried in various court proceedings to set aside the consent order of Farley J. He was unsuccessful.

[119] Engels continued to work as an exclusive broker with Merit until matters deteriorated. Merit terminated the Brokerage Agreement in June 2001. Merit continued to withhold all commissions earned on Engels' pre-bankruptcy clients.

[120] By the terms of the Book of Business Offer, Merit is entitled to deduct all of its future legal fees for defending the book of business from its obligations to creditors. To date, Merit has paid Mr. Kostyniuk, counsel for Merit, $82,444.74 for defending Engel's efforts to regain control of the book of business or to be able to solicit former clients. I note that according to counsel for the trustee, these accounts have not been reviewed, assessed or approved by the trustee.

[121] In addition, $19,750 has been paid to Engels' former assistant from the commission income generated. Merit has also paid to the trustee in bankruptcy the sum of $165,237.84, which is being held in trust for creditors.

[122] As of September 2001, Engels is now associated with another insurance brokerage firm. He is soliciting some of his former clients. He seeks a declaration that he is entitled to do so.

[123] I accept Engels' evidence that he did not take any computer records with respect to his client base. Notwithstanding the 60-day notice period for termination in the Brokerage Agreement, [page594] on the date of termination, "a large male gave the [termination] letter to

me, told me to get my gear, and escorted me out". I accept Engels' evidence that any client contacts were from memory.

[124] The former clients may be broken into two groups. The first is a group that Engels actively solicited. The second is a group of former clients that sought out Engels. I note that Merit is not seeking an accounting with respect to commissions earned from either group of clients. It is perhaps not surprising, as the commissions earned to date from either group of clients are not significant.

[125] Counsel for Merit acknowledges that former clients may contact Engels if they wish. They object to Engels initiating the contact.

[126] The gross commissions earned from both categories of solicited clients from September 2001 to April 2002 are $33,759. I accept Engels' evidence that 50 per cent of the commissions were earned as a result of unsolicited calls from former clients, and the remaining 50 per cent of commissions were earned as a result of solicitation. Engels retains 47.5 per cent of the gross commission, and the balance is paid to the brokerage firm as contribution to overhead and expenses. Engels has therefore been paid a total of $16,035. One-half of this amount are solicited commissions.

Findings of Credibility

[127] Engels presents as a proud, stubborn man. These characteristics have resulted in financial disaster for him. He gave his evidence in a straightforward manner in spite of an aggressive and highly suggestive cross-examination.

[128] I accept his evidence. I conclude that at the time of declaring personal bankruptcy, he followed the professional advice of his accountant and he did not include the pre-Merit book of business as an asset, due to the terms of the governing Brokerage Agreement. At the time he understood that both legal and equitable title of the book of business had vested absolutely with Merit until October 2001.

[129] I conclude that there was no deliberate attempt to hide an asset from creditors. Engels made disclosure of his earnings, and it was clear in the bankruptcy file that he was working as an insurance broker. I echo the comments of Nordheimer J. that there was a serious issue whether the book of business was property of the bankrupt, given the terms of the Brokerage Agreement. Merit was a creditor and was vigorously represented by counsel throughout. Revenue Canada, a sophisticated creditor, was the major creditor. There were no material facts withheld prior to discharge.

[130] Berry presents as an opportunist, who has taken advantage of Engels' bankruptcy for his own, and for Merit's, advantage. [page595] On the stand Berry appeared red-faced and flustered. He was clearly incensed that Engels could avoid paying a personal loan owed to Merit by declaring personal bankruptcy. He had no understanding or respect for the judgment of Lissaman J. which dismissed Merit's claim. I agree with the conclusion of Lissaman J. that coercion was a tactic inappropriately used by Merit.

[131] It appears clear that Merit began the deliberate course of conduct to take advantage of Engels' bankruptcy for its own gain.

[132] It also appears that Berry and Merit have little respect for the principles of bankruptcy. After Engels was discharged, Merit began deducting from commission income earned by Engels payments with respect to the Guaranteed Corporate Loan, and the Personal Loan. Neither loan was secured. There was no attempt to share these payments with other creditors. Merit enforced payment of debts extinguished by bankruptcy, creating a situation of preference with respect to other creditors.

[133] Berry and Merit were relentless. Berry lacked perspective and judgment. Merit spent $60,000 in legal fees in the trial before Lissaman J. in order to protect a $28,500 debt.

[134] It appears clear that Berry and Merit saw a significant business opportunity for Merit, and pursued it vigorously at Engels' expense.

[135] Where there is a conflict between the evidence of Engels and Berry, I accept the evidence of Engels.

Nature of the Relationship Between Merit and Engels

[136] The relationship between Engels and Merit is governed by at least principles of good faith, as is confirmed in the Principles of Intent signed by the parties on October 18, 1994. As a broker, Engels carried on business independently, not as an employee. As the trustee in bankruptcy stated, Merit was "the guardian of the book of business". By the peculiar terms of the Brokerage Agreement, Engels' life work in his previous brokerage business vested absolutely in Merit for a period of seven years. This term was probably included to ensure that an incoming broker would be committed to a serious long-term relationship. In my view, this component of the relationship raises the duties owed by Merit to Engels from those of good faith to those of a fiduciary.

[137] According to La Forest J. in International Corona Resources Ltd. v. Lac Minerals Ltd., [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, adopting Wilson J.'s proposition in Frame v. Smith, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, the following features provide a guide as to whether or not a fiduciary obligation should be imposed: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that [page596] power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. This test has been adopted as the governing test as to whether or not a fiduciary obligation should be imposed on a relationship.

[138] Merit had scope for the exercise of discretion and power. Clearly, Merit was in a position to deal with the book of business absolutely for seven years. Merit had the potential to prejudicially affect Engels' professional life through an improper exercise of that power. As well, Engels was completely dependent on any commissions earned for his livelihood. Engels was clearly vulnerable.

[139] Whether the obligations between Merit and Engels are grounded merely on good faith principles or those of a fiduciary nature, I conclude that Merit breached its duties to Engels. Good faith, while permitting a party to act in self- interest, nonetheless qualifies this by requiring that party, in decision and action, to have regard to the legitimate interests of the other: see P.D. Finn's analysis in T.G. Youdan, ed., Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989) at p. 4.

[140] I conclude that Merit committed many breaches to either the strict obligations of a fiduciary, or to the less stringent obligations of good faith. These include:

-- Using coercive means to enforce payment of personal debts owed by Engels;

-- When a dispute arose, withholding all commissions owing, requiring Engels to initiate the proceedings;

-- Engels was working as an exclusive broker for Merit, yet Merit moved without notice to reopen the bankruptcy;

-- The affidavit material filed on behalf of Merit to reopen the bankruptcy was far from complete and, hence, misleading. There is no mention in the affidavit of the unsuccessful proceedings before Lissaman J. nor are the reasons attached to the affidavit. The Brokerage Agreement is not attached to the affidavit material. By the terms of the Brokerage Agreement there is a serious issue as to whether or not there was non-disclosure of property;

-- Merit reopened the bankruptcy while pursuing an appeal from Justice Lissaman's decision. The re-opening was based on Merit being an unsecured, unpaid creditor. On appeal, Merit was arguing that it was a secured creditor while, in reopening the bankruptcy, it pursued remedies as an unsecured creditor; [page597]

-- Merit did not provide notice to Engels of the second meeting of creditors, or of its intention to purchase the book of business;

-- Merit did not pay fair market value for the book of business. The book of business was worth between $450,000 and $600,000 in the open market. Merit paid only $25,000, plus the broker's 50 per cent of commission[s] for a three- year period. As well, by the unfair terms of the Brokerage Agreement, Merit was entitled to deduct its legal fees, and fees paid to Engels' assistant from the commissions earned;

-- I note as part of the failed settlement, Engels was prepared to repay all creditors in full from future commissions. As he did not receive notice of the proposed sale, he was unable to propose this, or any other solution to creditors; and,

-- Merit has been slow to account for the moneys received. The trustee has not approved payment of the fees paid to counsel for Merit in the amount of $82,444.74.

[141] Whether the obligations of Merit are founded upon fiduciary principles or those of good faith, Merit is obliged to recognize Engels' legitimate interests. Merit's conduct throughout the proceeding against Engels has been high-handed and at times coercive. In its quest to "oust" Engels and to acquire his book of business, Merit's conduct falls below that of a party who owes good faith or fiduciary obligations to another.

[142] Merit requests an equitable remedy. He who seeks equity must do equity: Allen v. Furness, [1892] 20 O.A.R. 34 (C.A.) and Lumley v. Broadway Coffee Co. Ltd., [1935] O.R. 278, 2 D.L.R. 417 (C.A.). Merit must come to court with "clean hands": Hong Kong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167, 100 D.L.R. (4th) 40. Merit's conduct in its pursuit of Engels' book of business was inequitable. I conclude, therefore, that Merit's conduct precludes pursuit of equitable relief.

[143] If I am wrong in the conclusion reached, I must consider what period of non-solicitation is reasonable, and from what date. In my view, a two-year non-solicitation period is reasonable, balancing the rehabilitative objectives of bankruptcy law previously outlined, with fairness to prospective purchasers acquiring a business from a trustee in bankruptcy. When would the period of non-solicitation have begun? Beginning in July 2000, Merit began withholding commission income earned from his pre-bankruptcy clients. In my view, if there was to be a non-solicitation provision, it should have begun on that date. Any non-solicitation period would have ended, therefore, on July 6, 2002, two years after the bankruptcy was reopened. [page598]

Summary of Conclusions

1. Requirement of notice in bankruptcy proceedings

[144] To ensure transparency for the trustee, and the appearance of fairness, the trustee must provide interested parties with notice of steps taken in a bankruptcy matter.

[145] In civil cases in general, and in bankruptcy in particular, ex parte procedures are strongly discouraged. It should be limited to situations of genuine emergency, or where documents or assets may disappear if notice is given. The fiasco in this case could have been avoided if counsel for Merit had provided notice of the reopening of the bankruptcy to Engels.

[146] The Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368 do not deal with a discharged bankrupt. By Rule 3 of the General Rules, where a situation is not provided for in the General Rules, the ordinary Rules of Civil Procedure apply. Rule 37.07 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, therefore, applies. Clearly, Engels ought to have been given notice as an affected party. As well, I note that para. 26 of the Commercial List Practice Direction, which applies to bankruptcy matters, strongly discourages ex parte hearings: (2002), 57 O.R. (3d) 97.

[147] In my view, given the litigious nature of the relationship, the motion to reopen the bankruptcy and to appoint a new trustee should have been brought by Merit before a judge of the Commercial Court on notice to Engels, not ex parte before the Superintendent's office. This involves an important substantive matter.

2. The distinction between a voluntary sale and alienation by the trustee in bankruptcy

[148] I adopt the line of English cases beginning with Walker that distinguishes between the equitable principles that apply in the case of non-solicitation in a voluntary sale for fair market value, and the sale by a trustee in bankruptcy. The American caselaw is consistent with the English cases, and is persuasive. These lines of cases recognize the intended principle of bankruptcy of rehabilitation, and the notion of a fresh start. Therefore in the context of bankruptcy, it is not appropriate to impose upon the bankrupt a common law term of non-solicitation with respect to former clients. For the Canadian and English cases see: Re R. Payer & Cie (1979), 31 C.B.R. (N.S.) 62 (Que. C.A.) and Mickelson v. Kill-Em-Quick Co. Ltd., [1919] 46 D.L.R. 622, [1919] 2 W.W.R. 210 (Man. C.A.); Walker v. Mottram (1881), 19 Ch. D. 355, 51 L.J. Ch. 108 (C.A.); [page599] Green & Sons (Northampton), Ltd. v. Morris, [1914] 1 Ch. D. 562, 83 L.J. Ch. 559. For the American cases see: Von Bremen v. MacMonnies, 200 N.Y. 41, 93 N.E. 186 (Ct. App. NY 1910); In Re Brown, 242 N.Y. 1, 150 N.E. 581 1926; Buffalo Oyster Co. Inc. v. Nenno, 132 Misc. 213, 229 N.Y.S. 210 (Sup. Ct. N.Y. 1928); Beauchamp v. United States, 76 F.2d 663 (Ct. App. 9th Cir. 1935); Perkins v. Becker's Conservatories Inc., 61 N.E.2d 833 (Sup. Ct. Mass. 1945); McLeod v. Ryan-McLeod Inc., 206 So.2d 16 (Dist. Ct. App. F.L. 1968), and Williston's Treatise on the Law of Contracts, 4th ed., Vol. 6 (Rochester, N.Y.: Lawyers Cooperative, 1995) at p. 457.

[149] I conclude that the decision of the Ontario Court of Appeal in Axelrod confirms that if a bankrupt, prior to bankruptcy, pledges or sells an asset, the principles of Labouchere and Trego v. Hunt do apply. A non-solicitation term may be imposed by common law if equitable under the circumstances. As the pledge of the client list occurred prior to bankruptcy in the facts of Axelrod, the English and American cases on point were not considered by Ground J. or the Ontario Court of Appeal.

3. Obligations of the trustee in bankruptcy and its counsel

[150] Bankruptcy is a court-supervised process governed by principles of fairness. The trustee in bankruptcy and its counsel are officers of the court. They must act with professional neutrality in the interests of the creditors and the bankrupt. The actions of trustees are accorded great deference by the court. Coincidental with that deference is the responsibility of trustees and their counsel to be even-handed and dispassionate with all parties affected. Unfortunately, in this case it appears that counsel for the trustee entered the fray, and seemingly became an active litigant on behalf of Merit, rather than a neutral officer of the court. The focus in this aggressively fought battle has been upon Merit retaining the book of business in question, and ousting Engels from Merit, not upon repayment of the creditors.

4. Alternatively, Merit is precluded from seeking equitable relief due to its conduct

[151] In my view, the obligations between Merit and Engels are fiduciary ones. This is due to the unusual terms of the governing Brokerage Agreement, which vests absolutely equitable and legal

rights in the book of business that Engels brought to Merit in 1994 for a period of seven years. As the trustee observed, Merit is the "guardian of the book of business".

[152] By the terms of the Principles of Intent, the parties acknowledge that they are at least bound by the duty of good faith. [page600]

[153] Whether the nature of the obligation between the parties is founded upon a fiduciary relationship, or one of good faith, I conclude that Merit has breached duties owed to Engels. Merit has failed to consider Engels' legitimate interests.

[154] Those who seek equity must do equity. Further, they must come to court with clean hands. In the circumstances and unique facts of this case, if the Walker line of cases does not apply in Ontario, I would have concluded that Merit, by its conduct, is precluded from seeking equitable relief.

5. Duration and commencement date of non-solicitation term

[155] Had I concluded that a non-solicitation term should have arisen in this case, I would have chosen a two-year term. The term would have begun on July 6, 2000, when Merit moved ex parte to reopen the bankruptcy, and at which point Merit began withholding Engels' commissions for work he performed on any pre-bankruptcy clients.

6. Late submissions made

[156] In his written submissions, counsel for Engels requested that the book of business be returned to Engels. In light of the consent order of Justice Farley, and various unsuccessful attempts made to set aside that order, I do not have jurisdiction to make the order requested. In any event, such a fundamental request should have been raised in the pleadings and during the trial. It is inappropriate to add the request as an add-on in written submissions after the conclusion of the trial.

[157] It would, however, be appropriate for me to hear submissions with respect to the appropriateness of paying out fees in the amount of $82,444.74 to counsel for Merit from the commissions collected on behalf of creditors. The trustee has not seen or approved these accounts. He expressed concern with respect to quantum, and the fact that they had been paid without his approval. I have difficulty in characterizing these payments as reasonable and in the interests of the creditors other than Merit.

[158] I request receipt of submissions concerning the costs of this proceeding. I request short written submissions, to be provided within 30 days of the release of these reasons. It may be necessary to schedule a date to fix costs. I thank counsel for their submissions.

Order accordingly.