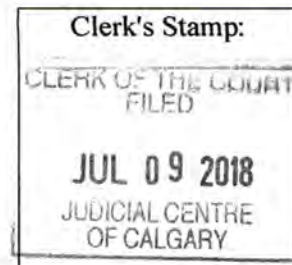


COURT FILE NUMBER 1801-09188
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF THIRD EYE CAPITAL CORPORATION
DEFENDANTS OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163
ALBERTA INC., 1859821 ALBERTA INC., AIR DELLAIRE LTD.,
OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC.,
OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
DOCUMENT **BRIEF OF AIRBORNE ENERGY SOLUTIONS INC.**
VOLUME 1 OF 2



ADDRESS FOR SERVICE AND
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**Application before the Honourable Madam Justice Romaine,
on the Commercial List, in Chambers, on
Tuesday, July 10, 2018, commencing at 10:00 a.m.**

I. INTRODUCTION

1. This is the Brief of Airborne Energy Solutions Inc. ("AES") filed in limited opposition to the receivership application of Third Eye Capital Corporation ("TEC") in these proceedings. AES objects to the appointment of a receiver over the Business (defined below) which AES purchased from OpsMobil Group Inc., OpsMobil Inc. and OpsMobil Energy Services Inc. (collectively, "OpsMobil") effective November 1, 2017.

2. AES has been in possession of and operating the Business since November 1, 2017. OpsMobil has invested significant capital in the Business and has improved it. AES is ready, willing and able to close the acquisition of the Business, and has been for many months. The closing has not occurred due to defaults and other obstructionist behaviour by OpsMobil at the direction of TEC, and by TEC. AES has commenced an action in the Court of Queen's Bench of Alberta against OpsMobil and TEC seeking, *inter alia*, specific performance of the closing of the transaction, and a constructive trust over the Business.

3. For these reasons it is neither just nor convenient to appoint a receiver over the Business and this Honourable Court should not do so. AES respectfully submits that the Court ought to exclude the Business from any receivership order granted in these proceedings.

4. In the alternative, AES submits that an adjournment of the application for the appointment of a receiver over the Business is appropriate to allow for:

- (a) Questioning on the Affidavit of TEC, but only in the event TEC submits any evidence which challenges the evidence of AES, which TEC has not done as of the time of filing this Brief; and
- (b) AES to make a cross application in these proceedings for an order (i) directing specific performance of the obligations of OpsMobil and TEC under the Purchase and Sale Agreement (defined below), (ii) vesting the Business in AES free and clear of claims against OpsMobil and the encumbrances of TEC, and (iii) that OpsMobil holds the Business as constructive trustee for AES.

5. AES will conduct any such Questioning and make its application diligently, and in accordance with any time frames directed by this Honourable Court. AES respectfully submits it would be an error to appoint a receiver over the Business without the Court first hearing the application of AES and determining whether AES is entitled to this relief given that if any of this relief is granted the Business will not form part of the OpsMobil estate.

6. For clarity, AES takes no position with respect to the appointment of a receiver over the property of the defendants other than the Business, and AES takes no position with respect to the competing CCAA application of the defendants.

II. FACTS

Background and Acquisition of the Business

7. The Mizera Affidavit (defined below) was filed and served on TEC on June 29, 2018. TEC has had ample opportunity to challenge the evidence contained in the Mizera Affidavit, but has chosen not to do so. Indeed, since June 29 TEC has filed two additional affidavits in these proceedings. However neither of these address the issue of the purchase of the Business, or otherwise challenge or contradict the

Mizera Affidavit in any way. As a result, the following evidence of AES is unchallenged, and this Honourable Court must accept it.

8. AES is a private Alberta corporation with 41 employees. AES is a wholly owned subsidiary of Rilpa Enterprises Ltd. which owns and operates an aviation business which supplies parts and components, and leases helicopters, to industry in Alberta. Ripla has been in operation for 45 years.

- Affidavit of Kenneth I. Mizera filed June 29, 2018 (the "**Mizera Affidavit**"), Exhibit "C" at Paragraph 2.

9. On November 21, 2017, AES and OpsMobil entered into a term sheet concerning the sale of a certain business and assets from OpsMobil to AES. This confidential term sheet was consented to and acknowledged by TEC.

- Mizera Affidavit, Exhibit "C" at Exhibit "C".

10. On December 14, 2017, AES and OpsMobil entered into a purchase and sale agreement (the "**Purchase and Sale Agreement**") whereby AES agreed to purchase from OpsMobil the "Assets" defined therein. The Purchase and Sale Agreement contains the following definitions:

"**Assets**" means all assets of any nature and kind, real property and personal property, which the Vendor has an interest in related, directly or indirectly to the Business, including, without limitation, the Aircraft, Helicopter, Lands, Leases, Improvements, Equipment, Vehicles, Contracts, Licenses, Intellectual Property, Software, Books and Records, Goodwill and Miscellaneous Interests, excepting the Excluded Assets, free and clear of all Encumbrances.

"**Business**" means the ongoing business, assets and undertakings of the Vendor, as a whole, as conducted as of the Effective Date, related to its aerial surveillance and scanning, chemical spraying and local charter businesses operated by the Vendor and/or its Affiliates in the Province of Alberta and elsewhere in Canada, excluding any such operations in the United States of America.

- Mizera Affidavit, Exhibit "C" at Exhibit "C".

11. In this Brief, the assets and business acquired by AES pursuant to the Purchase and Sale Agreement are collectively referred to as the "**Business**".

12. AES and OpsMobil also entered into a Transition Services Agreement dated December 14, 2017, also effective November 1, 2017 (the "**Transition Services Agreement**").

- Mizera Affidavit, Exhibit "C" at Exhibit "B".

13. During the time that AES and OpsMobil were negotiating the aforementioned term sheet, Purchase and Sale Agreement and Transition Services Agreement and thereafter, TEC acted as "lender in possession" of OpsMobil. Specifically, TEC asserted that the Business was controlled by TEC, asserted the value of the Business, renegotiated a higher price for the Business than initially negotiated between AES and OpsMobil, reviewed and revised the Purchase and Sale Agreement, reviewed and revised the trust letter governing closing of the transaction, and renegotiated the terms and mechanism of closing the transaction. During this time Mark Horrox, on behalf of TEC, continuously assured AES and OpsMobil that:

- (a) TEC was committed to the purchase and sale;
- (b) TEC approved and consented to the purchase and sale;
- (c) title to the Business would be transferred free and clear of any encumbrances of TEC;
- (d) AES would be entitled to operate and be in possession of the Business as of the effective date of November 1, 2017; and
- (e) The accounts receivable generated by the Business on and after November 1, 2017 would be the property of AES free and clear of the encumbrances of TEC.

- Mizera Affidavit, Exhibit "C" at Paragraphs 6-8.

14. AES relied on the aforementioned commitments and representations of TEC. Furthermore, TEC confirmed these assurances, commitments and representations, and TEC reviewed, revised, approved and consented to the Purchase and Sale Agreement prior to OpsMobil executing it.

- Mizera Affidavit, Exhibit "C" at Paragraphs 9 and 11.

15. TEC has, at all material times, acted as a lender in possession of the Business and, as such, TEC controlled and directed, and was the "mind" of all major financial decisions of OpsMobil, including OpsMobil's dealings with AES. TEC directly negotiated with AES concerning the acquisition of the Business. TEC is bound and obligated by the actions, commitments and contracts of OpsMobil which OpsMobil has made with AES on its own behalf and at the direction of TEC.

- Mizera Affidavit, Exhibit "C" at Paragraphs 16-18.

16. In accordance with the Purchase and Sale Agreement and the Transition Services Agreement, AES, with the approval and direction of OpsMobil and TEC, has been in possession of the Business since the effective date of November 1, 2017. Between November 1, 2017 and June 13, 2018, AES has incurred substantial unrecovered costs and expenses related to the Business in excess of \$1,689,556.00. In addition, AES has entered into other substantial financial commitments including leasing of certain airport facilities and hiring of employees in connection with the Business.

- Mizera Affidavit, Exhibit "C" at Paragraphs 21-22.

17. The Business employs 41 people who are reliant upon such work to support their families. AES has grown and developed the Business and its goodwill. AES supplies services to a number of companies (approximately 46) which in turn supply essential services to the public. These companies are reliant upon AES for their own compliance and safety issues, performance and related contracts such as pipeline safety reports and forest fires. AES has entered into a number of long term commitments, without any ability of cancellation, to supply such essential services to these counterparties. AES intends to honour these commitments.

18. As at June 29, 2018 AES has invested, and continues to invest, substantial capital in excess of \$2,200,000 in the operation of the Business without yet receiving any proper return. In addition, AES has entered into a number of long term financial commitments for the Business including, without limitation, entering into new leases of former OpsMobil facilities at Villeneuve Airport and Rocky Mountain House Airport, and aircraft leases. AES has also negotiated and committed to sign new 15 year leases on the

Whitecourt facility upon OpsMobil providing acceptable environmental reports to the landlord, Woodlands County.

19. Without this Business being separated and excluded from the other business of OpsMobil in any receivership, there is a substantial risk that AES will lose its investment, efforts and the value which it has added to the Business. Such event would also detrimentally effect many others including employees, vendors, landlords and governmental agencies. As well, OpsMobil and TEC would be unjustly enriched in a receivership by virtue of the investments in the Business of AES over the last 8 months.

- Mizera Affidavit, at Paragraphs 20-24.

20. AES has not yet received its expected financial return on its investment in the Business.

- Mizera Affidavit, Exhibit "C" at Paragraph 23.

The Revenues of the Business and the Preservation Order

21. Pursuant to the Transition Services Agreement, the accounts receivable generated by the Business after November 1, 2017 were to be paid to OpsMobil, but kept in a segregated trust account.

- Mizera Affidavit, Exhibit "C" at Paragraph 16.

22. In violation of the Transition Services Agreement, OpsMobil and TEC entered into an arrangement whereby all funds deposited into OpsMobil's bank accounts were forwarded to TEC, including the accounts receivable generated by the Business which were required to be segregated and be held in a trust account.

- Mizera Affidavit, Exhibit "C" at Paragraph 18-23.

23. TEC was aware at all material times that the accounts receivable generated by the Business were to be held in the trust account.

- Mizera Affidavit, Exhibit "C" at Paragraph 33 and Exhibit "K".

24. AES was provided with access to review the ATB trust account information on May 30, 2018. Upon gaining such access AES became aware of a number of improper withdrawals from this trust account by OpsMobil and TEC.

- Mizera Affidavit, Exhibit "C" at Paragraphs 35-43, Exhibit "M" and Exhibit "N".

25. As a result of all of the foregoing, AES commenced Court of Queen's Bench Action No. 1801-08383 on June 13, 2018 (the "**AES Action**") against OpsMobil and TEC. The Statement of Claim in this action seeks, *inter alia*, the following relief:

- (a) A judgement and direction for specific performance of the Purchase and Sale Agreement ordering the transfer of the assets and the Business to AES free and clear of the encumbrances of TEC;
- (b) A declaration that the funds in the ATB trust account and the accounts receivable of the Business after November 1, 2017 are trust funds and belong beneficially to AES; and

- (c) A declaration that OpsMobil holds the Business and related assets as constructive trustee for AES; and
- (d) Punitive damages and full indemnity costs.

- Mizera Affidavit, at Paragraph 3 and Exhibit "A".

26. On June 14, 2018, upon Application by AES in the AES Action, the Court of Queen's Bench of Alberta granted a Preservation Order in respect of the accounts receivable of the Business.

- Mizera Affidavit, at Paragraph 4 and Exhibit "B".

Failure to Close the Purchase and Sale Agreement

27. OpsMobil and AES mutually agreed on several occasions to extend the closing of the Purchase and Sale Agreement in order to allow OpsMobil to deal with certain issues regarding its deliverables on closing. The principal issue which prevented OpsMobil from closing was that it could not transfer the leases related to the Whitecourt facility until the landlord of that facility was provided with acceptable environmental reports. Winter weather conditions delayed this environmental report from being obtained. In mid-April, 2018, it became apparent that there was no progress being made on obtaining the environmental reports as OpsMobil was not paying the company it commissioned to complete these reports. It is Mr. Mizera's belief that TEC was not releasing sufficient funds for OpsMobil to pay company.

- Mizera Affidavit, Exhibit "C" at Paragraphs 50-53.

28. TEC was aware of the reasons for the delay in closing. In mid-April, 2018 AES proposed, and OpsMobil accepted, a solution to effect the closing whereby holdbacks for unpaid adjustments credited to the vendor in the Interim Statement of Adjustments of \$150,000 (the "**Unpaid Holdback**"), for encroachments in respect of the Whitecourt facility of \$75,000 (the "**Encroachment Holdback**"), and for delivery of all required environmental reports and performance of any environmental remediation work of \$250,000 (the "**Environmental Holdback**"), would be held in trust from the cash to close. On May 10, 2018 Mr. Mizera had a conversation with Mark Horrox of TEC regarding these closing issues. Mr. Mizera and Mr. Horrox renegotiated and reached an understanding regarding a final closing, the basic terms of which are contained in an email Mark Horrox sent to OpsMobil on May 10, 2018. In essence, the unpaid adjustments in the Statement of Adjustments would be assured to be paid by TEC, the Encroachment Holdback extinguished and the Environmental Holdback confirmed and allowed. In this same email, TEC represented that it continued to be in favour of the final closing of the Purchase and Sale Agreement, and TEC instructed OpsMobil to close the same.

- Mizera Affidavit, Exhibit "C" at Paragraphs 54-57, and Exhibit "O".

29. All of the closing documents have been prepared in an agreed form and are ready for signature by the parties. Included in the closing documents are a no-interest letter from TEC, and an undertaking from Stikeman Elliot LLP (counsel to TEC) regarding the discharge of TEC's encumbrance from the assets. The form of these documents have been agreed by all parties.

- Mizera Affidavit, Exhibit "C" at Paragraphs 59 and 60, and Exhibit "P".

30. AES has tendered to counsel to OpsMobil the entire cash to close in the amount of \$1,631,415.00 (less the agreed environmental holdback of \$250,000), together with duly executed signature pages for

AES of the agreed closing documents. These funds and the AES transactional documents were delivered in trust that OpsMobil deliver to AES the following:

- (a) the TEC no interest letter;
- (b) undertaking of Stikeman Elliot LLP;
- (c) consent to surrender of the Whitecourt facility; and
- (d) the closing documents required to be executed by OpsMobil.

- Mizera Affidavit, at Paragraph 8 and Exhibit "D".

31. AES remains ready, willing and able to close the Purchase and Sale Agreement as agreed, and to honour its obligations thereunder. Ryan Tobber of OpsMobil has advised that OpsMobil is willing to forthwith enclose the Purchase and Sale Agreement, but does not do so as a result of the threatened financial consequences and other coercion of TEC.

- Mizera Affidavit, at Paragraph 10.

32. The only matter preventing the closing of the Purchase and Sale Agreement is the delivery by TEC of the documents it has committed and agreed to deliver.

- Mizera Affidavit, Exhibit "C" at Paragraph 65.

33. On June 6, 2018 OpsMobil executed an acknowledgement which confirmed the following:

- (a) the Purchase and Sale Agreement and the Transition Services Agreement are and continue to be valid and enforceable agreements;
- (b) TEC was aware of the terms and conditions of the Purchase and Sale Agreement and the Transition Services Agreement and consented to OpsMobil entering into such agreements;
- (c) TEC has refused to deliver the no-interest letter and discharge its encumbrances against the Business, notwithstanding the earlier agreement and commitment of TEC to do so;
- (d) TEC has recently asked OpsMobil to "unwind" the transaction in respect of the Business;
- (e) It is in the best interests of OpsMobil to complete the transaction with AES concerning the Business, and OpsMobil wishes to do so; and
- (f) TEC has directed OpsMobil not to release to AES the accounts receivable generated by the Business which are trust funds.

- Mizera Affidavit, Exhibit "C" at Exhibit "Q".

Misconduct of TEC

34. TEC has obstructed the closing of the Purchase and Sale Agreement and has acted in bad faith.

- Mizera Affidavit, at Paragraph 25.

35. The Affidavit of Ryan Tobber filed in the Defendants' CCAA proceedings on July 3, 2018 contains evidence concerning the misconduct of TEC. This evidence is summarized in the chart below:

Evidence of Ryan Tobber	Affidavit Reference
Charging exorbitant fees and leaving OpsMobil with inadequate financing	Paragraph 21
Restricting OpsMobil's access to credit by blocking accounts which caused a default to CRA	Paragraphs 22-23
Depriving OpsMobil of funds by restricting access to the line of credit	Paragraph 25
Unilaterally increasing interest rates and taking control of all of the revenue and expenditures of OpsMobil	Paragraph 26
Depriving OpsMobil of working capital and causing a loss of about \$25MM in contracts and causing OpsMobil to enter into costly third party leases	Paragraphs 29-30
Blocking the sale of the aviation business	Paragraph 32 and Exhibit "B"
Causing a collapse of the Estevan oilfield branch	Paragraph 33
Depriving OpsMobil of a functioning line of credit	Paragraph 38
Charging exorbitant fees notwithstanding reduced financing commitment	Paragraphs 41 and 44
Withholding the consent to amalgamation for improper purposes	Paragraph 50
Causing the breach of the Tidewater LOI	Paragraph 59
Blocking the Bullmoose financing	Paragraph 60
Taking complete control over Ranch's access to funds and managing the affairs of Ranch	Paragraph 61
Refusing reasonable funding requests which were accretive to the collateral base of TEC	Paragraph 62
Threatening Mr. Tobber personally with financial repercussions	Paragraph 66
Sweeping funds earmarked for payroll	Paragraph 70
Presenting unrealistic and unachievable forbearance terms	Paragraph 71

III. LAW AND ARGUMENT

36. For the reasons which follow AES respectfully submits that this Honourable Court should not appoint a receiver over the Business as it is neither just nor convenient to do so. In the alternative, this Honourable Court ought to adjourn the issue of the receivership of the Business until questioning on Affidavit is complete (should TEC submit any evidence which responds to the evidence of AES) and to allow AES to apply for the relief set out in paragraph 4 above.

ADVERSE INFERENCE

37. TEC has filed numerous Affidavits in these proceedings, however in none of them does TEC lead any evidence about the acquisition of the Business by AES, or lead any evidence which contradicts the evidence of AES. As a result this Honourable Court must draw an adverse inference against TEC. The inference to be drawn is that AES cannot impeach the evidence in the Mizera Affidavit.

38. The Alberta Court of Queen's Bench in *Simmons v Koenig* cited the leading textbook on the law of evidence,, J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* to state the rule relating to adverse inferences:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party.¹

39. As stated in *R v Solomon*, "the failure to call a witness or produce evidence can lead to an invitation for the trier of fact to draw a conclusion respecting some aspect of the opponent's case."² The Alberta Court of Queen's Bench in *Crooked Post Shorthorns v Masterfeed Inc.* lays out a number of factors to consider before drawing an adverse inference:

- a. Whether there is a legitimate explanation for the failure to call the witness;
- b. Whether the witness has material evidence to provide;
- c. Whether the witness is the only person or the best person who can provide the evidence; and
- d. Whether the witness is within the 'exclusive control' of the party, and is not 'equally available' to both parties'.³

40. These factors dictate drawing an adverse inference against TEC. The TEC witnesses have provided substantive and lengthy affidavit evidence, however, they have failed to address the AES purchase of the Business, or respond to the Mizera Affidavit which was filed on June 29, 2018, even though TEC has filed two affidavits since that date. There is no legitimate explanation why TEC's witnesses could not have responded to the issues raised in the AES Affidavit, and TEC's own employees are the parties who would be in the best position to provide any evidence responding to the issues raised in the Mizera Affidavit.

¹ *Simmons v Koenig*, 2001 ABQB 152 at para 100 [TAB 1], citing J Sopinka, SN Lederman and AW Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworth's, 1999), 2nd ed. at 297.

² *R v Solomon* [2002] OJ No 5128 (SCJ) at para 31 [Solomon] [TAB 2]

³ *Crooked Post Shorthorns v Masterfeed Inc.*, 2008 ABQB 641 at para 230 [TAB 3].

41. As a result of TEC's failure to address the AES purchase of the Business or to respond to the Mizera Affidavit in any way, this Honourable Court ought to draw an inference that TEC does not have any evidence to contradict AES, or the evidence it has on these issues would be harmful to TEC.

42. In addition, the evidence contained in the Mizera Affidavit has not been contradicted, and so, respectfully, it must be accepted in full by this Honourable Court.

THE COURT SHOULD NOT APPOINT A RECEIVER OVER THE BUSINESS

43. Should this Honourable Court dismiss the Defendants' CCAA application and proceed with the receivership application of TEC, the ultimate issue before the Court becomes whether it is just and convenient to appoint a receiver over the Business in the circumstances. Given the unusual facts of this case and the unique position of AES, the Court must also consider and decide the following issues in order to decide the ultimate issue:

- (a) whether there is any point in appointing a receiver given AES is operating the Business as a prudent owner who is incentivized to preserve its value, and therefore the collateral is not in jeopardy, and there is no evidence of eroding value;
- (b) whether the Court can appoint a receiver over property which is alleged to be trust property;
- (c) whether the Court *should* appoint a receiver over the Business now, given that AES will forthwith apply to this Honourable Court for an order compelling specific performance and closing of the PSA, vesting the Business in AES free and clear of all claims and encumbrances, and declaring that AES is entitled to a constructive trust over the Business;
- (d) whether the balance of prejudice justifies appointing a receiver given the irreparable harm AES and the Business will suffer as a result;
- (e) whether TEC has disentitled itself to equitable relief from this Honourable Court due to its inequitable misconduct and bad faith dealings with AES and OpsMobil; and
- (f) whether the issue of the receivership of the Business must be adjourned to allow AES to question on the Affidavits TEC has filed.

The Business is not in jeopardy

44. Appointing a receiver over the Business is unnecessary given that AES is operating the Business as a prudent owner who is incentivized to preserve its value. As such, the collateral is not in jeopardy and its value is not eroding. Moreover, there is no evidence that the Business is in jeopardy or its value eroding. Rather the uncontradicted evidence from the Mizera Affidavit indicates the exact opposite is true.

45. In *Nutrasweet Kelco Co. v Royal-Sweet International Technologies Ltd. Partnership*, the Court declined to appoint a receiver because it held that the debtor's property was not in peril.⁴ Further, the

⁴ 1997 CarswellBC 1141 (BCSC) at para 7 [*Nutrasweet*] [TAB 4].

Court stated that seizure of the security would seriously impair the legitimate business efforts and expansion plans of the defendant.⁵

46. In *997724 Ontario Inc. v 407430 Ontario Ltd.*, one of the reasons the Court refused to grant a receivership order was that there was no evidence that the property was in peril or jeopardy.⁶

47. Here there is no evidence whatsoever that the assets of the Business are in jeopardy. Rather, the uncontested evidence before this Court is that AES has been in possession of the Business for 8 months and counting, and that AES has invested in the Business and it is generating revenue. In addition AES has grown and improved the Business. In short - AES is operating the Business as a prudent owner with a view to preserving and increasing its value. Appointing a receiver would irreparably harm the efforts that AES has made to grow and develop the Business and its goodwill. Consistent with the foregoing authorities, the Court should not appoint a receiver over the Business given the evidence before the Court.

The Court cannot appoint a receiver over trust property

48. In bankruptcy proceedings, trust property does not form part of the debtor's estate and as such is not divisible among the bankrupt's creditors.⁷ While a trustee may hold legal title to the trust property, he or she does not hold the beneficial interest in it.

49. The same principle applies in the context of receivership. In *Re Redstone Investment Corp.*, the Court heard a dispute between the receiver and a third party asserting a constructive trust over loans.⁸ The Court ultimately found that the debtor received the loan in trust and that the loan remained "the subject of that trust obligation in the Receiver's hands."⁹

50. AES has a pending claim asserting a constructive trust over the Business and express trust in respect of the accounts receivable. Courts have held that unjust enrichment is a concept which may be used in commercial cases.¹⁰ Justice Winkler in *Re Brown & Collett Ltd.* stated that the concept of unjust enrichment is appropriate for promoting "honest dealing and sound commercial conscience."¹¹

51. As a result of the foregoing it is respectfully submitted that this Honourable Court cannot, and should not, appoint a receiver over the Business. AES recognizes that it needs to finally establish the validity of its constructive trust claim and will do so expeditiously as it is in the interest of all parties to resolve this issue promptly. AES notes that for the reasons which follow, the mere assertion of a constructive trust is sufficient for the Court not to appoint a receiver over the disputed property, and in this case the Court ought not to do so. The same reasoning applies to the unresolved express trust and specific performance claim of AES.

A receiver should not be appointed where there are serious issues to be tried

52. A receiver should not be appointed over the Business given that AES will forthwith apply to this Honourable Court for an order compelling specific performance and closing of the Purchase and Sale Agreement, vesting the Business in AES free and clear of all claims and encumbrances, and declaring that AES is entitled to a constructive trust over the Business. If AES is successful in either of these, the

⁵ *Nutrasweet* at para 8.

⁶ 1994 CarswellOnt 323 at paras 38 & 39 [TAB 5].

⁷ *Bankruptcy and Insolvency Act*, RSC1985, c B-3, s 67(1)(a) [BIA] [TAB 6].

⁸ 2015 ONSC 533 [Redstone] [TAB 7].

⁹ *Redstone* at para 74.

¹⁰ *Re Ascent Ltd.*, 2006 CarswellOnt 116 at para 16 [TAB 8].

¹¹ 1996 CarswellOnt 619 at para 57 [TAB 9].

Business will not form part of the property of the debtor, and so it ought not be subject to the appointment of a receiver.

53. Where it is established that there are serious issues to be tried, courts have refused to appoint a receiver. In *Canadian Imperial Bank of Commerce v Jack*, the Court declined to grant the bank's motion to appoint a receiver.¹² The borrower argued that there were serious issues to be tried. The Court agreed stating:

It is but stating the obvious to say that the appointment of an interim receiver-manager is extraordinary relief which, as it were, prejudices the conduct of a litigant and, accordingly, should only be granted cautiously and sparingly where there is a showing of serious potential prejudice of jeopardy to the creditor's right to recover on its claim and security interests.¹³

54. For these reasons, and the reasons which follow, AES respectfully submits that it has demonstrated there are serious issues to be tried with respect to its entitlement to specific performance and constructive trust. This is sufficient to prevent the appointment of a receiver over the Business.

i. Specific performance

55. The test for specific performance requires a court to consider whether damages are an adequate remedy.¹⁴ This consideration includes considering the uniqueness of the property and the extent to which it is readily replaceable.¹⁵ The Supreme Court of Canada in *Southcott Estates Inc. v Toronto Catholic District School Board* stated that specific performance will be awarded when the property sought has a "peculiar and special value."¹⁶

56. Here the subject matter of the Purchase and Sale Agreement is an entire business, being the Business, which is unique. The Business has its own customers, contractual arrangements, employees, and goodwill. It cannot be replaced with substitute property and damages for its loss are not an adequate remedy, particularly after AES has owned and operated the Business for 8 months. This is a serious issue to be tried.

ii. Constructive trust

57. To prove a claim in unjust enrichment there must be: 1) an enrichment; 2) a corresponding deprivation; and 3) an absence of a juristic reason.¹⁷

58. A straightforward economic approach governs the first two elements.¹⁸ To demonstrate an enrichment, the plaintiff must show that he or she gave something to the defendant, and that the defendant has retained it.¹⁹ The benefit must be tangible, restorable to the plaintiff *in specie* or by money, and it need not be retained by the defendant permanently.²⁰ The second element requires the plaintiff to

¹² 1990 CarswellOnt 3055 [*Jack*] [TAB 10].

¹³ *Jack* at para 12.

¹⁴ 101090442 *Saskatchewan Ltd. v Harle*, 2014 SKCA 6 at para 116 [101] [TAB 11].

¹⁵ 101 at para 116.

¹⁶ 2012 SCC 51 at para 41 [TAB 12], citing *Semelhago v Paramadevan* [1996] 2 SCR 415, 136 DLR (4th) 1 [TAB 13].

¹⁷ *Kerr v Baranow* [2011] 1 SCR 269 at paras 36 - 45 [*Kerr*] [TAB 14].

¹⁸ *Kerr* at para 37.

¹⁹ *Kerr* at para 38.

²⁰ *Kerr* at para 38.

demonstrate that the defendant's gain corresponds to the plaintiff's loss.²¹ The third element requires that the benefit and corresponding deprivation did not occur because of a valid juristic reason.²²

59. If the plaintiff proves all three of the elements of unjust enrichment, the plaintiff will be entitled to a remedy: a monetary award or a constructive trust.²³ The court in *Peter v Beblow* recognized that a constructive trust may be an appropriate remedy for unjust enrichment "where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed."²⁴

60. The enrichment of TEC and OpsMobil results from their failure to close, and the efforts of AES over the last 8 months to grow and improve the Business, and to operate it and generate revenue. AES has been correspondingly deprived (with a lack of juristic reason) as a result of the failure of the purchase to close have unjustly enriched TEC and OpsMobil. In fact, there is a juristic reason for the parties to close – the Purchase and Sale Agreement. There is no juristic reason for the current state of affairs.

61. A monetary award would be an inadequate remedy for the unjust enrichment, and so a constructive trust over the Business would be the appropriate remedy. AES respectfully submits there is a serious issue to be tried with respect to its constructive trust claim to the Business, and so it would be inappropriate to appoint a receiver over the Business.

62. The Court ought not appoint a receiver until the issues of specific performance and constructive trust are resolved as, if AES is successful in either, the Business will not form part of OpsMobil's estate. There are serious issues to be tried here as well, as demonstrated by the fact that AES has issued a Statement of Claim against OpsMobil and TEC seeking this relief. Further, AES has already been awarded interim relief pursuant to the Preservation Order, which specifically finds AES has suffered irreparable harm.

The balance of prejudice does not justify appointing a receiver

63. The balance of prejudice does not justify appointing a receiver given the irreparable harm AES and the Business would suffer as a result. Conversely, there will be no harm to TEC or Opsmobil if the Business is exempted from the receivership until the entitlement of AES can be determined by the Court. Based on the evidence before the Court, AES will operate the business prudently and responsibly during any interim period. Additionally, the Preservation Order gives all parties comfort that the accounts receivable of the Business paid into the ATB trust account will be safeguarded. In short, there is no prejudice to anyone in not appointing a receiver over the Business now.

64. Conversely, appointing a receiver will negatively impact, and may destroy entirely, the Business and the goodwill growth and other positive developments AES has executed since it gained possession of the Business on November 1, 2017.

65. In balancing the effect of a receivership on those affected, courts have recognized that the fact that a debtor is engaged in active business is a relevant factor weighing against appointing a receiver as the effect of a receivership is likely to be more drastic on the debtor.²⁵

²¹ *Kerr* at para 39.

²² *Kerr* at para 40.

²³ *Kerr* at para 47.

²⁴ [1993] 1 SCR 980 at para 24 [*Peter*] [TAB 15].

²⁵ *General Electric Canada Real Estate Financing Holding Co v Liberty Assisted Living Inc.*, 2011 ONSC 4707 [TAB 16], citing *Stroh v Millers Cove Resources Inc.* (1995), 85 OAC 26 (Ont Div Ct) at para 7 [TAB 17]. In

66. The Court in *Fisher Investments Ltd. v Nusbaum* stated:

One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window of the business that the proprietors are not capable of managing their own affairs. If the business has to be sold, which is probable, the appointment could have a detrimental effect upon the price received.²⁶

67. Here there is no concern about the competence of the proprietors of the business, as OpsMobil is not operating it. Rather, the uncontroverted evidence is that AES has grown and developed the Business and its goodwill. Further, AES has invested, and continues to invest, substantial capital in the operation of the Business. AES has committed to numerous long-term leases, customer contracts and vendor obligations. If the Business is subject to receivership, there is a substantial risk that AES will lose its investment, efforts and value which it has added to the Business. Other stakeholders would also be detrimentally affected including employees, vendors, landlords, the companies whom AES services, and the public that in turn benefits from those companies.

68. For these reasons it is respectfully submitted that the balance of prejudice does not support the appointment of a receiver over the Business. Rather, the balance of prejudice dictates preserving the *status quo*.

TEC has disentitled itself to equitable relief due to its inequitable misconduct

69. The appointment of a receiver is an equitable remedy. The Court in *1468121 Ontario Ltd. v 663789 Ltd.* stated that "the appointment of a receiver is an equitable remedy and, as such, the conduct of the parties may be relevant."²⁷

70. Courts have confirmed that the *BIA* is an equitable statute and that the exercise of discretionary powers under it is subject to the application of the clean hands doctrine.²⁸ In *Re Stanford International Bank*, the Court stated that "a party seeking to have the Court grant a discretionary measure must have acted in good faith and all of its actions must be beyond reproach in regard to the object of its motion."²⁹ In its decision, the Court cited *Re SaarGummi Quebec Inc.* in holding that the exercise of discretionary powers under it is subject to the application of the clean hands doctrine:

[TRANSLATION]

[92] A seventh criterion that is not taken from the *Bankruptcy Act* but rather from the general exercise of discretionary powers of the Superior Court is that a party coming before the Court asking it to exercise judicial discretion must be in good faith and have "clean hands."

...

[117] When an applicant requests that the Superior Court exercise its judicial discretion, he must present himself with "clean hands."

deciding to appoint a receiver in *Stroh*, the Court stated: "In the first place, the company is not an operating company and the impact of receivership will not be the same as it would be if it was engaged in active business."

²⁶ *Fisher Investments Ltd. v Nusbaum*, 1988 CarswellOnt 180 at para 7 [TAB 18].

²⁷ *1468121 Ontario Ltd. v 663789 Ontario Ltd.*, 2009 CarswellOnt 1128 at para 28 [TAB 19].

²⁸ 2009 QCCS 4109 [*Stanford*] [TAB 20]. In *Stanford*, the Court considered an application under s. 268(6) of the *BIA* to recognize a foreign representative.

²⁹ *Stanford* at para 9.

[118] This clean hands doctrine dates from the eighteenth century and has been applied many times in Canada and in Quebec. The doctrine developed out of a concern for equity, and indeed, the *Bankruptcy and Insolvency Act* is an equitable statute.³⁰

71. TEC directly negotiated with AES concerning the acquisition and closing of the Business and, amongst other things, continuously assured AES and OpsMobil that title to the Business would be transferred free and clear of any encumbrances of TEC. TEC has now reneged on its promises and seeks receivership over the Business it negotiated to sell AES free and clear of TEC encumbrances. This Honourable Court should not appoint a receiver over the Business in the circumstances.

72. Although AES takes no position with respect to the appointment of a receiver over the assets of the defendants other than the Business, AES notes there is a litany of other evidence demonstrating misconduct on the part of TEC. This evidence is relevant given the equitable remedy sought by TEC, and given that the Court should consider all of the evidence in making its determination.

73. As a result of TEC's inequitable misconduct and bad faith dealings with AES, TEC has disintitiled itself to the equitable relief of receivership in respect of the Business.

TEC may be liable for OpsMobil's losses

74. A further reason this Honourable Court ought not grant a receivership is that TEC may be liable for OpsMobil's losses for breach of its fiduciary duty owed to OpsMobil. Where "special circumstances" are present, a lender may owe a fiduciary duty to a borrower.³¹ In order to establish the existence of a fiduciary relationship between a lender and a borrower, the borrower has the onus of demonstrating:

- 1) that advice was provided and that the advice was relied upon;
- 2) that the lender was aware of this reliance;
- 3) that the lender derived a benefit from the transaction; and
- 4) that the relationship was one of a confidential nature.³²

75. Throughout the negotiation of the Purchase and Sale Agreement, TEC acted as "lender in possession" of OpsMobil. TEC was aware of OpsMobil's reliance on the actions of TEC in asserting that the Business was controlled by TEC, asserting the value of the business, and renegotiating a higher price for the Business than initially negotiated between AES and OpsMobil. TEC directly benefitted from a higher purchase price.

76. For this reason as well the Court should not appoint a receiver in respect of the Business.

A receiver should only be appointed in extreme cases

77. The "appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly."³³ In *McMurtry v McMurtry*, in declining to appoint a receiver, the Court held that the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which

³⁰ *Sanford* at para 14, citing *Re SaarGummi Quebec Inc.*, 2006 QCCS 3151 at paras 92, 117 & 118 [TAB 21].

³¹ *Scavarelli v Bank of Montreal*, 2004 CarswellOnt 115 at para 27 [Scavarelli] [TAB 22]

³² *Scavarelli* at paras 36 & 37.

³³ *Paragon Capital Corp. v Merchants & Traders Assurance Co*, 2002 ABQB 430 at para 27(i) [TAB 23].

prejudges the conduct of a litigant, and should be granted sparingly.³⁴ The appointment of a receiver for this purpose is effectively execution before judgment, and to justify the appointment, there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy.³⁵ As it relates to the Business, this is not an extreme case warranting the appointment of a receiver.

ALTERNATIVELY, THE COURT SHOULD ADJOURN THE ISSUE OF RECEIVERSHIP OVER THE BUSINESS

78. In the alternative, and in the event TEC elects to submit evidence which challenges the evidence of AES or speaks to the issues raised by AES, this Honourable Court ought to adjourn the issue of the receivership of the Business until questioning on the Affidavit of TEC is complete. Rule 6.7 of the Alberta Rules of Court gives the right to question on an affidavit.³⁶

79. An adjournment of the application for the appointment of a receiver over the Business is appropriate to allow for AES to make a cross application in these proceedings for an order (i) directing specific performance of the obligations of OpsMobil and TEC under the Purchase and Sale Agreement, (ii) vesting the Business in AES free and clear of claims against OpsMobil and the encumbrances of TEC, and (iii) that OpsMobil holds the Business as constructive trustee for AES.

80. AES will conduct any such Questioning and make its application diligently, and in accordance with any time frames directed by this Honourable Court. AES respectfully submits it would be an error to appoint a receiver over the Business without the Court first hearing the application of AES and determining whether AES is entitled to this relief given that if any of this relief is granted the Business will not form part of the OpsMobil estate.

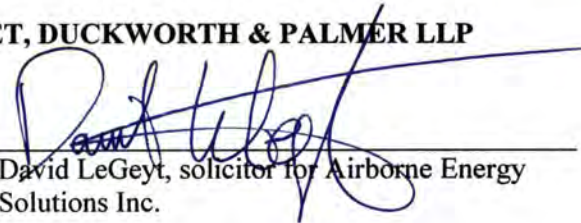
IV. CONCLUSION

81. For all of these reasons AES respectfully submits that, in respect of the Business only, the receivership application ought to be dismissed or adjourned.

All of which is respectfully submitted this 9th day of July, 2018.

BURNET, DUCKWORTH & PALMER LLP

Per:


David LeGeyt, solicitor for Airborne Energy
Solutions Inc.

³⁴ 2013 ONSC 7259 at paras 5 – 7 [*McMurtry*] [TAB 24]. The Court in *McMurtry* cited principles from *Anderson v Hunking*, 2010 ONSC 4008 [TAB 25] which state that the appointment of a receiver to preserve assets for purposes of execution is extraordinary relief (para 15(a)).

³⁵ *McMurtry* at para 5.

³⁶ *Bourque v Tensfeldt*, 2017 ABQB 519 at para 20 [TAB 26].

V. TABLE OF AUTHORITIES

TAB

1. *Simmons v Koenig*, 2001 ABQB 152
2. *R v Solomon* [2002] OJ No 5128 (SCJ)
3. *Crooked Post Shorthorns v Masterfeed Inc.*, 2008 ABQB 641
4. *Nutrasweet Kelco Co. v Royal-Sweet International Technologies Ltd. Partnership*, 1997 CarswellBC 1141 (BCSC)
5. *997724 Ontario Inc. v 407430 Ontario Ltd.*, 1994 CarswellOnt 323
6. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
7. *Re Redstone Investment Corp.*, 2015 ONSC 533
8. *Re Ascent Ltd.*, 2006 CarswellOnt 116
9. *Re Brown & Collett Ltd.*, 1996 CarswellOnt 619
10. *Canadian Imperial Bank of Commerce v Jack*, 1990 CarswellOnt 3055
11. *101090442 Saskatchewan Ltd. v Harle*, 2014 SKCA 6
12. *Southcott Estates Inc. v Toronto Catholic District School Board*, 2012 SCC 51
13. *Semelhago v Paramadevan* [1996] 2 SCR 415, 136 DLR (4th) 1
14. *Kerr v Baranow* [2011] 1 SCR 269
15. *Peter v Beblow* [1993] 1 SCR 980
16. *General Electric Canada Real Estate Financing Holding Co v Liberty Assisted Living Inc.*, 2011 ONSC 4707
17. *Stroh v Millers Cove Resources Inc.* (1995), 85 OAC 26 (Ont Div Ct)
18. *Fisher Investments Ltd. v Nusbaum*, 1988 CarswellOnt 180
19. *1468121 Ontario Ltd. v 663789 Ontario Ltd.*, 2009 CarswellOnt 1128
20. *Re Stanford International Bank*, 2009 QCCS 4109
21. *Re SaarGummi Quebec Inc.*, 2006 QCCS 3151
22. *Scavarelli v Bank of Montreal*, 2004 CarswellOnt 115
23. *Paragon Capital Corp. v Merchants & Traders Assurance Co.*, 2002 ABQB 430

24. *McMurtry v McMurtry*, 2013 ONSC 7259
25. *Anderson v Hunking*, 2010 ONSC 4008
26. *Bourque v Tensfeldt*, 2017 ABQB 519

Tab 1

2001 ABQB 152
Alberta Court of Queen's Bench

Simmons v. Koenig

2001 CarswellAlta 213, 2001 ABQB 152, [2001] A.J. No. 249, 104 A.C.W.S. (3d) 232, 12 M.V.R. (4th) 263

Ian Simmons (Plaintiff) and Freia Asta Koenig (Defendant)

Nash J.

Heard: February 5, 2001
Judgment: March 1, 2001
Docket: Edmonton 9603-10985

Counsel: *Glen J. Johnson, David C. Witten*, for Plaintiff
Mathew F. Wesolowski, Robert J. Katzell, for Defendant

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Evidence

X Witnesses

X.4 Competence and compellability

X.4.f Failure to testify

X.4.f.ii Adverse inference

Motor vehicles

XI Evidence

XI.2 Actions in tort

XI.2.b Proof of negligence

XI.2.b.v Miscellaneous

Torts

XVI Negligence

XVI.2 Duty and standard of care

XVI.2.b Standard of care

Headnote

Motor vehicles --- Evidence — Actions in tort — Proof of negligence — General

Plaintiff was travelling eastbound on highway when defendant changed into his lane directly in front of him — Defendant's car struck ridge of snow and spun out of control — Plaintiff's car spun out of control and struck defendant's car — Plaintiff sustained soft tissue injury to his neck and shoulder which developed into chronic myofascial pain syndrome and depression — Plaintiff brought action for damages for personal injury — Action dismissed — Defendant not liable — Plaintiff was required to prove that actions or inactions of defendant leading to collision fell below standard of care expected in circumstances — No evidence existed that defendant crossed from lane in which she was travelling to two lanes over in one movement — Plaintiff's testimony was inconsistent with his testimony during examination for discovery — Plaintiff was attempting to reconstruct events of accident — Onus remained with plaintiff to prove negligence, as defendant produced explanation equally consistent with negligence and with no negligence — Plaintiff failed to discharge onus — Even if defendant was negligent in deciding to drive through ridge of snow, no causal connection existed between her negligence and plaintiff losing control — Defendant's negligence, if any, was irrelevant.

Negligence --- General principles — Duty and standard of care — Standard of care

Plaintiff was travelling eastbound on highway when defendant changed into his lane directly in front of him — Defendant's car struck ridge of snow and spun out of control — Plaintiff's car spun out of control and struck defendant's

car — Plaintiff sustained soft tissue injury to his neck and shoulder which developed into chronic myofascial pain syndrome and depression — Plaintiff brought action for damages for personal injury — Action dismissed — Defendant not liable — Plaintiff was required to prove that actions or inactions of defendant leading to collision fell below standard of care expected in circumstances — No evidence existed that defendant crossed from lane in which she was travelling to two lanes over in one movement — Plaintiff's testimony was inconsistent with his testimony during examination for discovery — Plaintiff was attempting to reconstruct events of accident — Onus remained with plaintiff to prove negligence, as defendant produced explanation equally consistent with negligence and with no negligence — Plaintiff failed to discharge onus — Even if defendant was negligent in deciding to drive through ridge of snow, no causal connection existed between her negligence and plaintiff losing control — Defendant's negligence, if any, was irrelevant. Evidence --- Witnesses — Competency and compellability — Failure to testify — Adverse inference

Plaintiff was travelling eastbound on highway when defendant changed into his lane directly in front of him — Defendant's car struck ridge of snow and spun out of control — Plaintiff's car spun out of control and struck defendant's car — Plaintiff sustained soft tissue injury to his neck and shoulder which developed into chronic myofascial pain syndrome and depression — Plaintiff's physiotherapist noted in plaintiff's chart that "subjective complaints did not correlate with objective findings" — Plaintiff brought action for damages for personal injury — Plaintiff did not call certain doctors and treatment providers as witnesses at trial — Adverse inference drawn from failure to call physiotherapist and to call someone to interpret chart notes — Many of plaintiff's complaints were subjective and several witnesses noted contradiction between objective symptoms and subjective complaints — Adverse inference drawn that testimony of witnesses not called would not have supported plaintiff's case.

ACTION by plaintiff for damages for personal injury arising out of motor vehicle accident.

Nash J.:

Introduction

1 Ian Simmons seeks general damages against Freia Asta Koenig for personal injuries that he sustained in a motor vehicle accident which occurred on January 2nd, 1996. Liability is not admitted by Ms. Koenig.

2 Mr. Simmons alleges that as a result of the collision on January 2nd, 1996 he sustained a severe soft tissue injury to his neck and right shoulder which developed into chronic myofascial pain syndrome and a depression/anxiety disorder.

3 Mr. Simmons claims \$455,238.00 in damages for this accident under the following headings: pain and suffering, future loss of income, cost of future care, special damages, past loss of income.

Issues

4 The issues that were raised during this trial are:

1. credibility,
2. liability,
3. causation,
4. the nature and the extent of the injuries,
5. the quantum of damages, both general and special.

Circumstances of the Collision

5 On January 2nd, 1996, at approximately 6:35 a.m., Mr. Simmons and Ms. Koenig were proceeding eastbound, in their separate vehicles, on the Whitemud Freeway (Freeway) approaching Calgary Trail, otherwise known as 104th Street, in Edmonton, Alberta. Mr. Simmons was driving in lane number 3 at approximately 65 to 70 kilometres per hour. Ms. Koenig, who was driving a 1989 Mazda 626, was traveling in lane number 2 at approximately the same speed. There are three lanes eastbound on the Whitemud Freeway which become four lanes at the approach to the exit ramp onto Calgary Trail southbound. Lane number 3 is the third lane south of the median that divides the eastbound and westbound lanes of the Freeway. Lane number 4, which is the merge lane onto Calgary Trail southbound, starts where 111th Street merges onto the Freeway. Mr. Simmons and Ms. Koenig both intended to exit off the Freeway onto Calgary Trail southbound.

6 The road condition was poor due to an overnight snowfall. The graders had plowed the Freeway. There was a ridge of snow dividing lanes number 3 and number 4 that had been left by the graders. Mr. Simmons was driving a Jeep YJ, a four-wheel drive which was equipped with mud/snow tires and steel rim wheels. The area was well lit by street lights although it was still dark outside. The ridge of snow, according to Mr. Simmons, was 2 feet high and approximately 6 to 8 feet wide.

7 Mr. Simmons testified that Ms. Koenig's vehicle was approximately one-and-a-half to two car lengths ahead of him, traveling in lane number 2. Directly behind her vehicle and traveling beside Mr. Simmons was another vehicle.

8 Mr. Simmons testified that suddenly, without signaling, Ms. Koenig, who was two to three car lengths ahead, changed into his lane directly in front of him, cutting him off. The passenger side of her vehicle struck the ridge of snow and spun out of control. He testified that in an effort to avoid a collision he lightly touched the brakes of his vehicle and swerved, resulting in the front passenger side of his vehicle striking the snow ridge at the same spot as the Koenig vehicle. His vehicle spun out of control in a counterclockwise direction, and slid diagonally towards the curb. The front passenger side of his vehicle then struck the front passenger side of Ms. Koenig's vehicle which was spinning in a clockwise direction. The collision occurred while both vehicles were in lane number 4 west of the 106th Street overpass. Mr. Simmons' vehicle stopped, facing in a northwest direction, and Ms. Koenig's vehicle stopped with the front of the vehicle facing in a southeast direction. The vehicles were approximately 2 to 3 feet apart.

9 Mr. Simmons testified that the collision occurred on the Freeway, east of the 111th Street merging lane but west of the 106th Street overpass. He testified that he was shaken up and stunned following the impact but did not lose consciousness. He was wearing his seat belt. He did not strike his head or any other part of his body. He drove to work, but during the morning he developed increasing pain and stiffness in his neck, right shoulder and elbow. He left work at approximately 10:00 a.m. He filed a report with the Edmonton City Police, and then attended at the office of Dr. Soetaert where he obtained a prescription for Ibuprofen and Flexeril (muscle relaxant).

10 Ms. Koenig denies emphatically the allegation by Mr. Simmons that she cut him off and caused him to lose control of his vehicle. She testified that when she was west of the 106th Street overpass, she checked in her rear view mirror and noticed that there were vehicle headlights behind her in either lane number 3 or lane number 4. She waited until the vehicles had passed her and then, when the lanes were clear, she changed into lane number 3, east of the 106th Street overpass. She then noticed the ridge of snow. She had not noticed it earlier because there was a dip in the road approaching the 106th Street overpass and everything was snow covered. She stated that she would not have cut anyone off. Because of the road conditions, she was traveling at 60 km/h and the speed limit was 80 km/h. Everyone was traveling slower. She testified that she had three seconds in which to make a decision whether to continue eastbound on the Freeway or drive through the ridge of snow to exit onto Calgary Trail southbound.

11 She decided to drive through the ridge of snow. The passenger front wheel of her vehicle struck the ridge of snow causing her vehicle to spin out of control, spinning in a clockwise direction. Her vehicle spun once on the Freeway

and spun half way around again, landing on the ridge of snow at the point of divergence where the Freeway exits onto Calgary Trail southbound. Traffic continued to flow by, and no vehicles were required to stop. The point of divergence is a small area that is located between lanes number 3 and number 2 at the off ramp. When her vehicle finally stopped, the front of the vehicle was facing westbound and slightly to the south.

12 Ms. Koenig testified that she had been stopped for a few seconds when she saw Mr. Simmons' vehicle slowly sliding towards her, four or five car lengths away. She grabbed the steering wheel of her vehicle with both hands to brace herself for the collision. She felt a bump and a jolt as Mr. Simmons' vehicle struck her vehicle. Both drivers exited from their vehicles and exchanged pertinent information. Ms. Koenig borrowed a shovel from Mr. Simmons to dig her vehicle out of the snow. Both vehicles were operable. Ms. Koenig did not sustain any injury or muscle soreness as a result of the collision.

13 There were no independent witnesses to the accident. The police did not attend at the scene to investigate, nor were there any photographs or measurements taken at the scene immediately following the accident. There were no photographs taken of the damage to the Jeep YJ and only a single photograph was taken of the damage to the Mazda. Each of the vehicles sustained damage to the passenger (right) front and side resulting in actual repair costs of \$2,901.74 to Ms. Koenig's vehicle and \$1,204.97 to Mr. Simmons' vehicle.

14 The accident report that Mr. Simmons filed with the Edmonton City Police reads:

At about 6:35-6:40 a.m. while going eastbound on the White Mud Freeway between 114 Street and Calgary Trail South, while approaching the Calgary Trail off ramp a car pulled into my lane in front of me then proceeded to try to get through the two foot snow plow drift between the lanes when the car hit the snow pile. The car slid clockwise in front of me and was right sideways, I braked and tried to go around on her right side but as soon as I got the wheels turned a little in the snow pile it spun me around causing our front passenger side to collide.

The accident report was entered as an exhibit to permit cross-examination of Mr. Simmons on the issue of credibility.

Background

15 Mr. Simmons was born on February 23rd, 1967 and was 29 years old at the time of the accident. He was single and had no children. He was employed by Titan Electric and Controls (Titan) as an industrial journeyman electrician and worked at the Esso Strathcona Refinery, earning \$18.15 per hour. He left high school in 1983 with a Grade 10 education. He completed the 4th year of the NAIT electrical course on March 8th, 1995.

16 Mr. Simmons has not worked as a journeyman industrial electrician since the accident. He received short term disability benefits through Manulife Insurance from January 2nd, 1996 to April 30th, 1996, inclusive. He received long term disability benefits until April 1998 when he was assessed as being capable of returning to work.

17 In September 1997, Mr. Simmons became a full-time student at NAIT in the "Pre-Tech" course, which is a one-year course that is a prerequisite for registration in the Lab Technician/X-ray Technician course which was scheduled to commence September 1998 and run for 14 calendar months. Mr. Simmons took a math course during the summer of 1998, and in September 1998 he entered NAIT's Engineering Design and Drafting program. In November 1998 he withdrew from the program. He is currently unemployed, single, receiving Social Assistance, and living with his parents on their farm which is located north of Morinville, in Alberta.

18 Mr. Simmons has been unable to play golf, mountain bike, camp, go kayaking, weightlift or play racquetball, activities that he enjoyed prior to the accident. In April 1996 his brother moved in to assist him financially and to assist him with the housework. He is currently financially destitute. Prior to the accident he was financially stable, had a girlfriend, and had friends. He enjoyed working for Titan.

19 Mrs. Sylvia Simmons testified that before the accident her son came to the farm every weekend or every second weekend to help his father on the farm. After the accident, he was no longer able to help out on the farm.

20 Ken Reinbold, who is employed as an electrical supervisor with Titan, testified that Mr. Simmons worked on and off as a journeyman electrician for several years; that he was a competent electrician and dependable worker.

Injuries

21 Mr. Simmons testified that following the accident he experienced a burning, sharp, stabbing pain in his neck, a throbbing pain in his wrist, and a sharp pain in his elbow. Dr. S. Soetaert, whom he saw the morning of the accident, prescribed muscle relaxants. X-rays that were taken on January 4th, 1996 did not identify any abnormality in the cervical spine or right shoulder girdle. Mr. Simmons testified that he suffered severe headaches every day for two years, headaches which started at the base of his skull, spread to the front, the sides, behind the temple and into his sinus. The severity of the headaches increased in their intensity as his neck progressively became more painful. He took four to eight Tylenol a day for the pain. He continues to have restricted range of motion in his neck. He experienced difficulty in sleeping because the neck pain and headaches were so severe. He lost 20 to 25 pounds of muscle mass because he was unable to continue with his weightlifting program and with his physical activity.

22 Mr. Simmons testified that his shoulder and neck muscles tighten due to the burning pain in his neck and the severe headaches. His shoulders are elevated around his ears. His main complaint, he testified, is the neck pain. It is the stiffness and soreness of his neck that has severely restricted his activities and his ability to work and to enjoy life. The pain is constant; it varies only in intensity.

23 On November 25th, 1995, Mr. Simmons was treated for a right upper extremity strain due to bending electrical cable (a work related injury). He alleges near recovery by January 2nd, 1996.

24 There was no evidence that Mr. Simmons had previously suffered from any significant depressive episodes. There was no evidence that he suffered from psychological problems that pre-dated the collision.

25 On December 18th, 1999, Mr. Simmons was involved in a motor vehicle accident when his vehicle was struck on the driver's side door by another vehicle that failed to stop for a stop sign. He testified that he had regained 50 percent range of motion in his neck by December 19th, 1999. His headaches increased in severity and intensity following the accident, and his pre-existing injuries were aggravated. However, I do not have to consider that accident.

Medical Evidence

26 Mr. Simmons, in the four years following the collision, has attended on numerous medical professionals for the treatment of his injuries. They include Dr. Getting, his family physician; Dr. Peter Chiu, a rheumatologist; Dr. D. Vincent, an anaesthesiologist; Dr. James Nicas, a physiatrist; Dr. B. Govender, a family physician; Dr. Peter Hum, a family physician, Dr. R. Gervais, a psychologist; Dr. Broad, a neurologist, Dr. S. Soetaert, a family physician, and Dr. Hoffman, who specializes in occupational medicine. He has attended at the Canadian Back Institute (CBI), and for physiotherapy at Callingwood Physical Therapy and Hy's Centre Physical Therapy.

Dr. Getting

27 Dr. Getting is a general practitioner who specializes in family medicine. Mr. Simmons was his patient from November 28th, 1995, when he saw him for a work related injury, until August 1996. In September and October 1996 Mr. Simmons saw Dr. Govender, and from October 23rd, 1996 until November 1998 he was treated by Dr. Hum.

28 On November 28th, 1995, Dr. Getting found tenderness over Mr. Simmons' right upper trapezius muscle, both right epicondyles and lateral right wrist. His diagnosis was right arm tendonitis, epicondylitis, a right upper extremity strain caused by the repetitious motion of bending electrical cable. He prescribed anti-inflammatory medication, muscle relaxants and physiotherapy, and recommended that Mr. Simmons not return to work until December 4th, 1995. On November 28th, 1995, on behalf of Mr. Simmons, Dr. Getting completed a Physician's Report for the Worker's Compensation Board (WCB) indicating that the estimated date of return to pre-accident work for Mr. Simmons was December 4th, 1995. He concluded that Mr. Simmons was disabled as a result of this injury and incapable of performing his duties at work. On December 11th and 12th, 1995, Mr. Simmons' physical condition remained unchanged although he had a good range of motion in both shoulders. An x-ray of his right shoulder and wrist, taken on December 11th, revealed that there were no abnormalities. Dr. Getting prepared and submitted Physician's Progress Reports to WCB on December 11th and 12th, 1995.

29 In the Physician's Progress Report for WCB dated January 4th, 1996, Dr. Getting wrote that Mr. Simmons "was not completely better but able to consider returning to work when involved in a motor vehicle accident." Mr. Simmons had not taken time off work for his work related injury, but testified that he assumed lighter duties at work. Dr. Getting noted in that same report that there were no complicating factors affecting Mr. Simmons' recovery and that the estimated date of his return to work was now February 1, 1996. Dr. Getting testified that before the motor vehicle accident, Mr. Simmons' major complaint concerned his right shoulder, elbow and wrist. He had not complained of pain in his neck. In the WCB report dated January 6th, 1996, Dr. Getting wrote, "tender upper right trapezius" and "tendonitis/query myofascial pain." Dr. Getting testified that Mr. Simmons' neck muscles were affected after the accident. He conceded that the diagnosis of myofascial pain related to the shoulder injury because it was too early a diagnosis to have made about any injuries arising as a result of the motor vehicle accident. He testified that he continued to complete and file the WCB Reports because Mr. Simmons continued to have minor shoulder and wrist problems after the motor vehicle accident, and these were work related.

30 Dr. Getting testified that chronic pain syndrome occurs when unexplained pain continues beyond the normal recovery period. In the Attending Physician's Statement dated January 10th, 1996 Dr. Getting wrote that Mr. Simmons has been unable to work since November 28th, 1996 when the symptoms first appeared. The diagnosis is "tendonitis/epicondylitis right shoulder, neck, partially as a result of work injury." In an Attending Physician's Statement also dated January 10th, 1996, Dr. Getting changed the date of total disablement from November 28, 1995 to January 2nd, 1996. He was unable to explain why he had changed the date. A cervical spinal x-ray taken on January 8th, 1996 revealed no evidence of fracture, dislocation or arthritic changes, no soft tissue calcification and no bony destruction. The shoulder was normal.

31 Dr. Getting completed several WCB reports per month on behalf of Mr. Simmons until April 1996. The diagnosis remained the same: "Tender cervical; R. trapezius; tendonitis, myofascial pain; no complicating factors affecting recovery," unable to return to work until June 1, 1996, according to the WCB report dated April 3, 1996.

32 On January 29th, 1996, Dr. Getting referred Mr. Simmons to Dr. Chiu, a rheumatologist. In his referring letter he wrote, "I think Ian's problems may have been due to myofascial pain. I think that is what he has now. I am particularly concerned about him going on to develop chronic pain syndrome." He testified that he did not recall what injury he was referring to, and agreed that it was too early to have expected Mr. Simmons to have recovered from the soft tissue injury that he sustained in the motor vehicle accident. Dr. Getting testified that by July 10th, 1996 Mr. Simmons had "fairly good range of motion of his cervical spine" although he was still complaining of pain. Dr. Getting testified that a "good range of motion" meant that Mr. Simmons was able to rotate his neck to the side, backwards and forwards.

33 Dr. Getting recommended to Mr. Simmons on March 8th, 1996 that he attend the CBI, a recommendation that was seconded by Dr. Chiu. However, despite the recommendations of both doctors, Mr. Simmons failed to keep his appointment with the CBI in April 1996 and did not attend until March 1997.

34 Dr. Getting also testified that the traumatic soft tissue injury that Mr. Simmons sustained as a result of the accident was the injury to his neck. Mr. Simmons told him that just prior to the accident his shoulder was almost back to normal. According to Dr. Getting, the accident aggravated the injury to his shoulder, which eventually recovered, leaving him with the pain in his neck. He did testify on re-examination that the WCB Reports should have indicated that the motor vehicle accident was the complicating factor to his recovery. He had no explanation as to why he did not mention it in any of the WCB Reports.

35 In a report dated April 29th, 1996, Dr. Getting wrote:

...his pre-collision disability was virtually resolved before his motor vehicle accident. His pre-collision disability was centered upon his right arm and his post-collision disability is connected with his neck. I feel that his current disability is entirely due to his motor vehicle accident and I also feel most strongly that he is making very slow progress because he has no money to pay for medications. He has to rely on myself for samples which I am most willing to supply to him, but I do not always have samples of medications I would like to use for his problem. If he does not receive the correct treatment I feel that he is likely to go on to develop chronic pain syndrome and make a very protracted recovery.

36 In May, Dr. Getting examined Mr. Simmons three times. Mr. Simmons complained of the pain in his neck, he was tender over the right side of his cervical paraspinals, and had a fair range of motion of his cervical spine. Dr. Getting testified that when he used the term "fair range of motion," he meant that it was not a full range of motion but somewhere between poor and normal. On May 21, 1996, Dr. Getting wrote that "he was tender over the right cervical paraspinal muscles with good range of motion of his cervical spine." Dr. Getting testified that when he used the phrase "good range of motion," it meant that the patient was able to rotate his neck to the side, backwards and forwards; in other words, a normal range of motion. On May 28th, 1996, Mr. Simmons told Dr. Getting that his neck was improving. Dr. Getting found tenderness over the right and left cervical paraspinals, with fair range of motion of his cervical spine. On June 17th, July 2nd, July 10th and July 17th 1996, according to the chart notes made by Dr. Getting, Mr. Simmons' condition remained unchanged. He continued to have tenderness over the right cervical paraspinal muscles, with fairly good range of motion of his cervical spine. On July 24th, 1996, when Dr. Getting updated his findings, he concluded that Mr. Simmons' pre-accident injury had resolved itself.

37 On July 24th, 1996, Dr. Getting wrote:

I strongly advise that this man receive some consistent therapy, otherwise I am concerned that he may develop chronic pain and may take many years to recover. He also obviously has had considerable stress with his financial worries which seem to be somewhat resolved at this stage.

38 July 17th, 1996 was the last time that Dr. Getting saw Mr. Simmons.

Mary Wood

39 Mary Wood, a physiotherapist at Hys Centre Physical Therapy, assessed Mr. Simmons on July 24th, 1996. He complained to her of persistent neck pain, a constant stabbing pain to his neck and constant suboccipital headaches. He told her that all movements of his head aggravated the pain. She observed that there was marked restriction in the range of motion of his neck and that he displayed very guarded movement of his head, neck, arms and upper trunk. More particularly, she described Mr. Simmons' physical presentation in her report as follows:

Posture: right shoulder girdle - very elevated.

Head - side flexed to right. Very guarded movement. Did not turn neck but turned whole body instead.

Segmental testing was difficult due to the amount of spasm found in the right neck muscles.....He had thickened deep spasm indicating long term increased muscle tone in the C7-T2 area, with numerous trigger points in the right upper fibres of trapezius and levator scapulae muscles.

40 Ms. Wood concluded that Mr. Simmons' symptoms were consistent with his complaints. She felt that his prognosis was poor and recommended that he attend physiotherapy twice a week. Mr. Simmons attended once a week during the months of August, September and October 1996. He told her that he could not attend regularly because of financial constraints. She found that a treatment called spray and stretch was effective in releasing his right trapezius muscle temporarily. She last saw him on October 17th, 1996.

Dr. Govender

41 Dr. Govender did not testify. His chart notes were admitted as evidence. Mr. Simmons was seen by Dr. Govender several times during September and October 1996. Dr. Govender, a family physician, first saw him on September 10th, 1996 and referred him to the Gross Rehabilitation Centre. On October 11th, 1996, Dr. Govender diagnosed him as suffering from severe musculoligamentous strain to cervical spine and posterior shoulder girdle with intermittent pain.

42 Dr. Govender had previously treated Mr. Simmons for a myriad of complaints prior to September 10th, 1996. As early as February 7th, 1989, Mr. Simmons complained to Dr. Govender of pain in his right shoulder, right neck and right elbow caused by lifting heavy items at work. Dr. Govender, upon examination, wrote: "tender over R cervical area over right trapezius over right shoulder." On November 15th, 1989, Mr. Simmons complained of constant headaches, and Dr. Govender completed a disability certificate for Mr. Simmons in which he wrote that Mr. Simmons would be unable to return to work until November 25th, 1989. On July 14th, 1993, Dr. Govender diagnosed Mr. Simmons as suffering from a muscular strain as a result of pulling cable while at work. He wrote: "tender over R side of neck, R shoulder, R low back area - limited range of motion." He recommended that Mr. Simmons take one week off from work due to his injury. On July 24th, 1995, Mr. Simmons complained to Dr. Govender of headaches.

Dr. Hoffman

43 Dr. Harold Hoffman is a medical doctor and a medical consultant with a special interest in Occupational Medicine. He works at the Gross Rehabilitation Centre which operates a comprehensive rehabilitation program. He did not testify, and his report dated November 29th, 1996 was entered by consent. He saw Mr. Simmons once, on November 28th, 1996, on a referral from Dr. Nicas. His observations of Mr. Simmons, who complained to him about a constant neck pain that increased in severity after he had been up for two hours, are found in his report dated November 29th, 1996:

Demonstrated the right shoulder to be elevated in relation to the left shoulder. There was increased mass in the left trapezius muscle at the junction of the neck and the shoulder. He had considerable tenderness and firmness of the muscles in the right paracervical muscles and the right trapezius ridge muscles. The left neck muscles and left trapezius muscles were mildly tender. His neck had an obvious limitation of movement. When he walked, he took on a very rigid gait because of his neck stiffness. When talking, he was required to move his trunk to accommodate for the limitation of movement of his neck. The neck range of motion was flexion 28 degrees, extension 28 degrees, lateral flexion 10 degrees bilaterally, rotation 30 degrees bilaterally. The posterior thorax demonstrated no tenderness over the thoracic spine or scapula.

44 Dr. Hoffman's diagnosis was that Mr. Simmons had sustained a "musculoligamentous strain of cervical spine" from the motor vehicle accident.

Dr. Chiu

45 Dr. Chiu is a rheumatologist who defined chronic pain as pain and disability beyond what was expected, a discrepancy between the subjective symptoms and the objective symptoms. He conducted a physical examination of Mr. Simmons on February 21st, 1996, and noted that Mr. Simmons had 25 percent range of motion in his neck and "diffuse posterior neck soft tissue tenderness on both sides and in addition both the trapezius muscles were tender." He could not recall whether Mr. Simmons' range of motion was restricted by his complaints of pain or by muscle spasming. He testified that he relied on Mr. Simmons' cooperation and honesty to determine the range of motion. Dr. Chiu recommended physiotherapy, the continued use of muscle relaxants, and that Mr. Simmons attend at the Canadian Back Institute.

46 Dr. Chiu examined Mr. Simmons on June 3rd, 1996, and testified that his condition had improved. His range of movement of his neck was 70 percent of normal in all directions, his right shoulder was no longer causing him a problem, and he was able to bench press 80 pounds. Mr. Simmons, however, complained of a corresponding increase in the pain in his neck with the increase in his range of motion. When Dr. Chiu examined Mr. Simmons, he found that his neck mobility was decreased objectively. Mr. Simmons "had diffuse posterior neck soft tissue spasm and tenderness." Dr. Chiu believed and relied on Mr. Simmons' complaints of pain in making his diagnosis. An x-ray taken at that time indicated that there were no arthritic changes in his neck or any bony structural problem. Dr. Chiu testified that the majority of soft tissue injuries settle in six months. He also noted that any abnormal findings were confined to Mr. Simmons' neck, that his right shoulder region was within normal limits.

47 In summary, by June, July 1996 both Dr. Getting and Dr. Chiu had recorded significant improvement in Mr. Simmons' cervical range of motion. In particular, on June 3rd, 1996, Dr. Chiu found 70 percent range of motion. In July 1996, Dr. Getting found almost full range of motion. Dr. Nicas, on July 16th, 1996, in between the visits to Dr. Getting and Dr. Chiu, found a marked limited range of motion. Neither Dr. Chiu nor Dr. Getting, who moved to England in August 1996, examined Mr. Simmons after July 1996.

Dr. Nicas

48 Dr. James A. Nicas, a physiatrist, was qualified as an expert in physical medicine and rehabilitation medicine, specifically soft tissue injuries, the diagnosis and treatment of pain disorders associated with soft tissue injuries. He first saw Mr. Simmons on April 30th, 1996 upon a referral from Manulife Financial Company which was the insurer for Mr. Simmons' employer. In a report dated April 30th, 1996, Dr. Nicas wrote:

He has very severe posterior cervical headaches, which are very frequent and almost constant. Associated with these headaches, he has marked limitation of range of motion of his neck, especially lateral movement and rotation to the right. He has severe right shoulder pain, particularly on any movements above shoulder height.....

His right elbow, which was quite painful on the lateral aspect over the lateral epicondyle is slowly improving..

49 Dr. Nicas conducted a physical examination, the results of which are set out at p. 3 of that report:

Examination of neck: He had considerable muscle spasm of the paracervical muscles bilaterally - worse on the right, as well as muscle spasm of upper trapezius muscles, upper interscapular muscles, levator scapulae and rhomboid major - again worse on the right.

Range of motion of his neck was markedly limited by the muscle spasm, but there were no trigger areas of any myofascial pain that I could palpate. All neck movements including forward flexion, backward extension, bilateral/lateral flexion and lateral rotations were limited well over 50 percent.

...

Examination of both shoulders: He had a functional range of motion both actively and passively, but he had very marked pain of the right shoulder on any movements above shoulder level, including abduction, forward flexion and external rotation.

50 Dr. Nicas concluded that, "there was soft tissue musculoligamentous injury of posterior neck, right shoulder girdle muscle." He testified that pain is subjective; it is a sensation that can be measured if one can locate the trigger points. Myofascial pain is marked by trigger points. He found no trigger points until April 1998, over two years after the accident.

51 In a Medical Legal Report dated October 5, 1996, Dr. Nicas wrote:

I saw him again on 16 July 1996. He still had a very marked limitation of all neck movements, particularly lateral rotation bilateral and painful movements of his shoulder above shoulder height on the right.....

I last saw him at the University Health Services on 24 September 1996 and there had been no change. He still had marked limitation of his neck movement, as well as pain on elevation of his right shoulder in abduction and forward flexion above 90 degrees.

52 The results of Dr. Nicas's examination on September 24th, 1996 were inconsistent with the findings of Dr. Chiu and Dr. Getting, both of whom stated that by July 1996 Mr. Simmons' shoulder had healed, he was not experiencing any problem with his right shoulder. In the Attending Physician's Statement that he completed for the insurance company on September 24th, 1996, Dr. Nicas wrote as his diagnosis, "severe musculoligamentous injury cervical spine and R posterior shoulder girdle. Pain/spasm neck and R shoulder. Marked limitation of neck movements and R shoulder."

53 Dr. Nicas saw Mr. Simmons on December 10th, 1996 and on January 14th, 1997. According to Dr. Nicas, Mr. Simmons' condition remained unchanged from September 24th, 1996.

54 On August 19th, 1997, when Dr. Nicas examined Mr. Simmons, he noted that he "still had very marked muscle spasm of the trapezius muscles bilaterally, of the paracervical muscles bilaterally, worse on the right side with marked limitation of all neck movements particularly of any movements of rotation and flexion."

55 On April 7th, 1998, Dr. Nicas saw Mr. Simmons again and found that:

...he was still having considerable muscle spasm with stiffness and he was having muscle contraction headaches....His range of motion was still quite limited well over 50 percent in all directions including forward flexion, backward extension, bilateral/lateral rotation and lateral flexion. He had several definite trigger points in these spastic muscles, particularly the right upper trapezius and the right paraspinal muscle at the base of his neck. He now had normal shoulder movements, but had pain on hyper-abduction of his right shoulder above shoulder height.

56 Dr. Nicas examined Mr. Simmons again on December 1, 1998, and noted that Mr. Simmons "continues to have chronic neck and upper interscapular pain. Any turning of his neck to either side causes severe muscle contraction headaches.....He was unable to finish this semester because his severe pain was causing him to miss too many classes."

57 Dr. Nicas's opinion can be found at p. 3 of his Medical Legal Report dated December 21, 1998:

He has chronic pain syndrome with marked life disruption and I would suggest that he attend a pain management program to help him deal more readily with his functional disability. At the present time, he is not even fit to do sedentary work as he has great difficulty sitting for any length of time, and he certainly has very marked limitation of neck movement, particularly side movements and lateral rotation. Regarding a chronic pain management program, I would suggest admission to the Gross Rehabilitation Centre as they are accredited by CARF which is an international association which accredits chronic pain programs in Canada and the United States.

58 Dr. Nicas defined chronic pain as pain that persists three to six months after all medical and ancillary treatment has been performed and the patient continues to have chronic pain at that site. He testified that when a muscle is irritated, it goes into muscle spasm and tightens and it becomes very difficult to move the muscle. Muscle spasms are present in muscles where there has been an injury.

Dr. Broad

59 Dr. Broad, a neurologist, did not testify but his report was entered in evidence by consent. In a letter to Dr. Vincent dated October 30th, 1997, Dr. Broad wrote:

There are no associated radicular symptoms and there are no symptoms suggestive of a myelopathy.

On examination he has a slight loss of range of movement in his neck with some vague tenderness but no muscle spasm. There are no positive neurological findings. The foraminal compression test is negative. The rest of the neuromuscular examination is unremarkable, as is the general examination.

60 Dr. Broad, in summary, concluded that there was a slight loss in the range of neck movement and no muscle spasm. There was a history of cervical strain, there was incidental degenerative joint disease in keeping with his age, there was no need for further investigations and no need for restrictions on his activity. He concluded that Mr. Simmons sustained "an uncomplicated cervical strain and considering the findings on his MRI, I would place no restrictions on his activities whatsoever." He thought that with an improvement in his activity and fitness level, that he would be able to resume a normal level of activity including work.

61 Dr. Nicas testified that while Dr. Broad was an excellent neurosurgeon, he disagreed with Dr. Broad's opinion. Dr. Nicas, who had reviewed other reports, testified that in his opinion Mr. Simmons' complaints and symptoms were authentic. His opinion remained unchanged after reviewing the video surveillance tapes, although he did concede that he was surprised that Mr. Simmons was able to turn his head as much as he did.

Dr. Roger Gervais

62 Dr. Gervais is a psychologist who has been involved in the treatment of chronic pain for 15 to 17 years and who is involved in pain/stress management counseling. His major interest is pain disability management. Mr. Simmons was referred to him for pain and stress management counseling. Between October 29th, 1996 and April 3rd, 1997 Dr. Gervais conducted nine pain stress management sessions with Mr. Simmons. He testified that it was important for Mr. Simmons to be honest and candid, and he administered the symptom validity tests for confirmation. Mr. Simmons completed the tests in a valid and forthright manner. There are built-in tests to ensure that the results are valid and that there was no attempt by Mr. Simmons to exaggerate. He concluded, after administering a battery of tests, including biofeedback, that Mr. Simmons was not malingering and was not exaggerating his complaints. The objective testing, according to Dr. Gervais, did not support the contention that Mr. Simmons was malingering.

63 When Dr. Gervais initially assessed Mr. Simmons on October 29th, 1996, Mr. Simmons complained of neck pain extending to the shoulders. Dr. Gervais described him as depressed, angry and frustrated. The right shoulder was continually elevated, which Mr. Simmons described as an involuntary reaction. His neck and shoulder pain were

aggravated by any activity: bending, sitting for too long, housework and driving. He complained of constant headaches. The severity of the neck pain caused his shoulder to elevate.

64 When Dr. Gervais reviewed the surface electromyographic (EMG) recordings from Mr. Simmons' right and left posterior cervical regions, which were obtained on November 8th, 1996, he wrote in his Medical Legal Report dated July 16th, 1997:

Mr. Simmons was able to demonstrate some reduction in activity but overall maintained elevated levels of 31.9 microvolts. This level of activity suggests significant muscle bracing, guarding or spasm which appears to be partially under voluntary control.

65 On July 15th, 1997, EMG recordings were again obtained from Mr. Simmons' right and left posterior cervical regions, and Dr. Gervais wrote in the Medical Legal Report at p. 7:

These findings are quite consistent with the earlier surface EMG findings from November 1996 and suggest that Mr. Simmons continues to have significant muscle bracing, guarding or spasm in the neck and shoulders.

66 Dr. Gervais did not see the video surveillance tapes prior to formulating his opinion. He did concede that the video surveillance tapes would support a conclusion of voluntary muscle bracing or guarding of the right shoulder and neck by Mr. Simmons.

67 Dr. Gervais stated that Mr. Simmons did make some progress during the pain and stress management counseling sessions in reducing the excessive muscle activity that Dr. Gervais observed in his right shoulder. He expressed an interest in pursuing the pre-technology program at NAIT, with the intention of entering biological sciences, medical x-ray or laboratory technology. However, at the conclusion of the counseling sessions, Mr. Simmons had made little progress and continued to report significant pain and functional restrictions. He concluded that Mr. Simmons was quite frustrated and demoralized about his situation and that biofeedback training was of some limited benefit to him.

Dr. D. Vincent

68 Dr. D. Vincent was qualified as an anesthesiologist, with a special interest in pain intervention management which he defined as the non-surgical identification and treatment of pain. He saw Mr. Simmons on several occasions during the period October to December 1996, inclusive, on a referral from Ms. Wood. Dr. Vincent's treatment of Mr. Simmons overlapped with that of Dr. Gervais. In a report to Mary Wood dated October 18th, 1996, he wrote:

His posture is very obviously guarded with significant muscle spasm noted especially in the right lower cervical region at the junction of the neck and the shoulder area extending all the way down the thoracic spine to about T6. The same changes were noted on the right side but much less so. His neck was maintained in neutral position and with inclinometer assessment forward flexion was 40 degrees, extension was 50 degrees. Right lateral flexion was severely limited at 20 degrees, left lateral flexion 20 degrees as well. Right lateral rotation and left lateral rotation limited to 30 degrees.

69 Dr. Vincent, upon palpitation of Mr. Simmons' muscles, found that there was a significant amount of muscle spasm in the lower cervical area and the shoulder. There are three techniques to grade muscle spasm, one of which is clinical palpation. There are three grades of muscle spasm, and Mr. Simmons was grade three - very hard. Dr. Vincent's diagnosis was that of chronic myofascial pain syndrome as a result of a flexion extension injury of the cervical spine. He treated Mr. Simmons with myofascial trigger point injection therapy which consisted of injections of Cortisone, a steroid, into the muscles, to relax the muscle and alleviate the pain. The steroid treatments were unsuccessful in alleviating the pain and the symptoms, although the muscle groups did relax temporarily. He referred Mr. Simmons to Dr. Broad, a neurosurgeon.

70 Dr. Vincent reviewed the results of a CT scan of Mr. Simmons' cervical levels C5 to T2 taken November 1996, an MRI scan taken December 3rd, 1996, and concluded that there were degenerative changes of the cervical spine with disc space narrowing at the C6-7 level and proliferative spurring on the right at both C5-6 and C6-7, which he interpreted as indicative of disc disease likely as a result of the motor vehicle accident. His opinion conflicts with that of Dr. Broad. Dr. Vincent is neither a radiologist or neurologist, nor an orthopaedic surgeon. He did not examine the x-ray that was taken on January 6th, 1996 but accepted the interpretation of the radiologist. He cannot recall whether he reviewed the MRI, but he relied on the radiologist and agreed that the interpretations of different radiologists may differ. Dr. Vincent did not view the video surveillance tape of Mr. Simmons that was taken in October 1996.

Canadian Back Institute

71 In April 1997, Mr. Simmons attended at the Canadian Back Institute and participated in an intensive rehabilitation program. Mr. Simmons testified that he felt that he benefitted from the program and that he gave it his all. This contradicts statements that he made to Dr. Gervais that he felt that the CBI was a joke and that he did not feel that he was benefitting from the treatment; that the CBI was a waste of time and did not really help. Following the completion of the program at the CBI he returned to work at Titan, doing light duties for four hours per day. He indicated to Dr. Gervais on April 25th, 1997 that he considered it was a waste of time to return to work. Documentation from the CBI was entered but not for the truth of the contents. No witnesses were called from the CBI to detail Mr. Simmons' treatment and progress.

Dr. Hum

72 Dr. Peter Hum is a medical doctor with an expertise in family medicine and the diagnosis and treatment of soft tissue injuries. A small percentage of his practice involves the diagnosis and treatment of soft tissue injuries.

73 Dr. Hum first saw Mr. Simmons as a patient on October 23rd, 1996. Mr. Simmons told him that there had been minimal improvement in his condition since the motor vehicle accident and that he was taking a muscle relaxant and antidepressants. Dr. Hum saw Mr. Simmons again on November 4th, 1996, and he noted that there was moderate right trapezius tenderness with decreased range of movement of Mr. Simmons' cervical spine in all directions.

74 On November 22nd, 1996 the Plaintiff told Dr. Hum that he was experiencing significant headaches and disturbed sleep after receiving his first injection from Dr. Vincent. Mr. Simmons displayed a moderate restricted range of movement especially right turning. He told Dr. Hum that he could not afford his medications and was still awaiting approval for massage therapy.

75 On January 10th, 1997, Dr. Hum observed that the maximum reduction in range of movement of Mr. Simmons' cervical spine involved lateral flexion. On physical examination, Dr. Hum found that Mr. Simmons was tender across the right trapezius area. Dr. Hum gave him a renewal prescription for Elavil. On February 18th, March 12th, April 9th and May 27th, 1997, Mr. Simmons' condition remained unchanged. Dr. Hum wrote on May 27th 1997, "He was still experiencing significantly reduced range of movement in his cervical spine and spasming across the right trapezius muscles." He concluded that Mr. Simmons had sustained a soft tissue injury to his cervical spine and right shoulder from which he was slow to recover.

76 Dr. Hum saw Mr. Simmons again on June 17th, 1997, after he had returned to modified duties at work and after he had completed the program at the CBI. He observed that Mr. Simmons' range of movement in his neck had deteriorated. On September 12th, 1997, Mr. Simmons' condition apparently remained unchanged. There were no further appointments and no contact with Dr. Hum until March 30th, 1998 when Mr. Simmons attended at his

office complaining of headaches. On May 15th, Dr. Hum noted that there appeared to be a slight improved range of movement and slightly decreased tenderness in his neck. On June 12th, 1998, the condition of Mr. Simmons' neck remained unchanged; he was maintaining only approximately 40 percent of normal movement. His pain level remained unchanged. On July 21st, 1998, Mr. Simmons complained of increasing headaches and increasing neck pains. He was seen on September 12th, 1998 and again on October 15th, 1998, at which time he complained of unbearable headaches which he described as diffuse, constant and throbbing. The condition of his neck remained unchanged, the range of movement remained the same. Dr. Hum last saw Mr. Simmons in his office on November 10th, 1998. In a Medical Legal Report dated August 10th, 1999 he wrote:

.....Ian is a 32 year old male patient who had sustained soft-tissue injury to his neck and shoulder as a result of a motor vehicle accident dated January 2nd, 1996. He has improved very little since the accident. He is quite disabled as a result of this accident from a functional and occupational basis. Unfortunately, he is a non-surgical candidate. It is unlikely that he will be able to engage in any physical activity or employment involving strenuous activities such as lifting and bending. Vocational assessment would be helpful as to what he can or cannot do. Also in the future he would benefit from ongoing psychological counseling due to the drastic change over the last few years. He would be best to maintain an active exercise routine.

77 Dr. Hum testified that he believed that Mr. Simmons' symptoms and complaints were genuine and that there was no evidence of malingering. When the examinations were conducted, he found tenderness, swelling, and sometimes the muscle was warm to the touch, all indications to him that the muscle was in spasm. Dr. Hum viewed the surveillance video tapes but he could not recall whether it was before or after he formed his opinion.

78 Dr. Hum was cross-examined extensively about a form that he completed following Mr. Simmons' second motor vehicle accident in December 1999 in which he wrote, "80% improved prior to 2nd MVA but now worse than ever," and, "80% improved from 1st MVA" in the same form. Dr. Hum testified that the figure was 50 percent and not 80 percent. However, I am satisfied, after listening to the evidence and comparing other notations of Dr. Hum where 8 looks like 8 and 5 looks like 5 that his notations on this form were 80% and not 50%.

79 No medical doctors examined Mr. Simmons from December 1998 until after his second motor vehicle accident in December 1999.

80 Several civilian witnesses were called on behalf of the Defendant to testify about their observations of Mr. Simmons in a non-clinical setting. Nicole Beaudoin is the managing director of Bay Medical Assessments, which is a company that arranges for independent medical assessments. She is responsible for the day-to-day operation of the company. She consults with the client, either an insurance company or a lawyer, who wants to arrange for the assessment of a litigant, reviews the information and refers the litigant to the appropriate medical expert to conduct the assessment. The medical experts are not under contract to Bay Medical Assessments. She subsequently reviews the Medical Assessment Reports.

81 Ms. Beaudoin scheduled an appointment for Mr. Simmons with Dr. Greenhill. On August 11th, 1999, Mr. Simmons attended at Bay Medical Assessments. Ms. Beaudoin testified that she was struck by his physical appearance. He held both his shoulders elevated up around his ears and moved his body en masse in a block. His appearance impressed her as being extremely unusual. When she spoke to him, she realized that he had mistakenly attended at Bay Medical Assessments, believing that was the location of Dr. Greenhill's office. She provided him with directions to Dr. Greenhill's office, and she continued to watch him from her office window as he was leaving the building. She observed Mr. Simmons walking with his shoulders hunched to his ears, not moving his upper body. Once he reached his vehicle, which was angle parked in front of the building, his posture underwent a metamorphosis. His shoulders dropped, he opened the door, bent to enter his vehicle, moved his head to the left to avoid hitting it as he entered the car. There was no obvious

restriction in the range of motion of his neck or torso. He looked over his shoulder to the left as he backed his vehicle out of the angled parking spot. That afternoon Dr. Greenhill conducted his examination of Mr. Simmons.

Dr. Greenhill

82 Dr. Greenhill, an orthopaedic surgeon, described his initial observations of Mr. Simmons as follows:

He holds his neck in a rigid posture and slightly extended. He moves the neck only a few degrees in any direction when asked to make any neck movement. Neck flexion is nil, extension about 15 degrees, lateral flexion 10 degrees to right or left, rotation is 15 degrees to right or left.

He holds the right scapula (shoulder blade) elevated and there is palpable spasm in the upper right trapezius muscle fibres and the muscles superomedial to the upper scapula. However, when performing shoulder movements such as forward elevation and circumduction the muscle spasm relaxes and the scapula returns to a normal level. He has a full range of active right shoulder movement, abduction and rotation externally and internally these being the same as in the opposite shoulder.

83 Dr. Greenhill reviewed the medical reports including the reports from the Canadian Back Institute. He concluded that it was unlikely that the accident would cause Mr. Simmons to suffer a severe, long-lasting injury. At p. 7 of his Independent Medical Assessment Report, he wrote:

The findings of my own examination support the contention that his muscle spasm is to a large extent voluntary. Initially there is a very marked elevation of the right shoulder blade when he is standing and yet this rapidly relaxes during shoulder movements. He holds his neck almost completely rigid during all phases of my examination which is a most unusual finding so long after an injury especially when there are many reports of a far greater range of movement in the interval since the accident. The position of neck extension which he assumes is also not the position of maximal neck comfort which a person would naturally assume if trying to lessen the neck pain.

84 In Dr. Greenhill's opinion, Mr. Simmons sustained a soft injury to the neck which should have improved within three to six months after the accident, allowing him to return to work, and complete recovery should have occurred within a year of the accident. However, Dr. Greenhill also concluded that if Mr. Simmons has the limitation of neck movement he exhibited and the pain that he described, then he has impairment of 4 percent of body. He subsequently revised his opinion after viewing the video surveillance tapes, and in a letter dated June 14th, 2000 he wrote:

...the person depicted shows no evidence of neck or shoulder girdle disability. The abnormal elevation of the right shoulder, which was present when I examined him August 11, 1999 is not present in either tapes and the neck movement in both tapes is far in excess of what he was showing when I examined him.

85 Dr. Greenhill testified that in the video surveillance tapes which were taken in October 1996 and September 1997, Mr. Simmons did not display any underlying restriction in the range of movement of his neck and therefore the 4% impairment of body was no longer a valid assessment. He also testified that when he examined Mr. Simmons, he found total restriction in the range of movement in the neck, complete inhibition versus the partial restriction described by other physicians in their reports, and that such an extreme is not normal.

Dr. Clarke

86 Dr. Ian Michael Clarke was qualified as an expert in chronic pain management and able to give expert opinion in the area of psychology and psychiatry as it relates to chronic pain management. He defined chronic pain management as the assessment and treatment of chronic pain. He testified that chronic pain syndrome is not a term that is used by chronic pain specialists to diagnosis a condition in which the subjective complaints of pain do not translate into physical symptoms. It is a common diagnosis of general medical doctors who have no training in chronic pain.

87 Dr. Clarke examined Mr. Simmons on May 8th, 2000. In his report dated the same day he wrote:

On examination Mr. Simmons maintained a "hunched" position with both shoulders elevated and his neck held rigidly in extension. Nonetheless he was able to remove his jacket and a T-shirt for examination without obvious difficulty. His neck was very short and muscular. All head movements were accomplished by turning his trunk in the appropriate direction rather than moving his head. All neck muscles were "*rock hard*" and rigid. This was particularly marked on the right side where the muscle tension included the muscles around the right scapula. Movements of the right shoulder were limited, especially abduction, by discomfort in the right suprascapular muscles and those on the right side of the neck.All the neck muscles were rigid including those in the lateral and anterior part of the neck and neck movements were almost nil. There was no extension at all and gentle attempts to coax some movement in that direction resulted in movement of the whole body. Flexion was 5 percent or less. Rotation to the left was strongly resisted in both flexion and extension and virtually nil. Gentle attempts to encourage this movement produced complaints of pain on the right side of his neck. Rotational movements to the right in flexion and extension were limited to about 30 degrees and resulted in complaints of pain on the same side. Mr. Simmons' arms looked completely normal and there appeared to be no sensory changes. He told me that he had noticed transient slight weakness in the left hand after the second accident but this was now normal. His muscles were well developed and power appeared to be completely normal in all the muscles of both arms. Testing flexion at the elbow on the right resulted in complaints of left shoulder pain and testing the left produced right-sided complaints. Mr. Simmons physical appearance was very dramatic and, in my opinion, far beyond what one would expect from any conceivable injury he might have suffered in either of these two accidents. He presented a caricature of someone with a neck injury which could only be produced by conscious action (although possibly by now *maintained* by training and habit.)

Videotape Surveillance

88 The Defendants introduced videotape surveillance evidence. The videotape surveillance was admitted without the necessity of having to call the private investigators to authenticate the tapes. There are three video surveillance tapes, the first taken in October 1996, eight minutes in length; the second taken on September 19th, 1997, and the third taken on September 29th, 1997.

89 In October 1996, Mr. Simmons is seen walking with his brother in a mall. His arms are swinging freely at his side, his shoulders are not hunched or elevated around his ears, nor is his right shoulder in an elevated position. There is nothing unusual in his appearance. He is shown in a video store, reaching up for a videotape. There is no apparent restriction in the range of movement of his right arm. He enters his vehicle, and when backing out of the parking space turns his head freely from side to side, checks over his left and right shoulder as he backs his vehicle out of the parking space. His brother is seated in the front passenger seat. There is no apparent restriction in his ability to rotate his head. Mr. Simmons, upon viewing the videotape, testified his physical appearance and ability was not accurately depicted. He testified that probably he had done nothing all day except rest and that was why his shoulders were not elevated.

90 In the second videotape Mr. Simmons is shown sitting on the floor in front of a locker at NAIT on September 19th, 1997. He was partially obscured by the door of the locker. He is shown getting up from the floor with no obvious restriction in his movements, carrying several books in his left arm; his neck moves freely with no apparent restriction in his range of motion, his shoulders are normal, they are not elevated, and he walks jauntily down the hallway.

91 In the third video surveillance tape, which is 45 minutes long, Mr. Simmons was sitting on the floor in front of his locker at NAIT on September 29th, 1997. His legs were stretched out in front of him and there were several books in his lap. Mr. Simmons was bent over the books, and was intermittently reading and writing. He drank from a can of pop, with no visible restriction in the range of movement of his neck. When he drank from the can of pop or when he looked up at students passing by him in the hall, his head tilted back freely. When students stopped to talk to him, they

remained standing and he remained seated. He conversed with them with his head tilted back, looking up. Mr. Simmons remained in this position, seated on the floor in front of his locker, from 10:57 a.m. to 11:16 a.m. When he finally rose to his feet, he did so normally, without any apparent difficulty or discomfort. He returned to the location at 11:26 a.m. and remained seated in front of his locker until 11:54 a.m., again without any apparent difficulty or restriction in the range of movement of either his neck or his shoulder. His right shoulder was not elevated.

92 This video surveillance tape contradicts the testimony of Mr. Simmons during the trial and at the Examination for Discovery in February 1998 that while attending NAIT, as a student, he held his books at eye level because if he bent over his books to read or to write, the pain in his neck increased in intensity resulting in severe headaches. His right shoulder was not elevated, which contradicts the testimony of many of the physicians. In fact, his right shoulder was not elevated in any of the video surveillance tapes. These tapes demonstrate that Mr. Simmons was able to move his neck with a normal range of movement when not formally examined in a clinical setting. There was no evidence of an elevated right shoulder. He was depicted walking and moving normally in October 1996 and in September 1997.

93 Dr. Greenhill, after formulating an opinion based on his review of the medical report and his examination of Mr. Simmons, reviewed the video surveillance tapes. He testified that there was no evidence of neck or shoulder girdle disability, no abnormal elevation of right shoulder, and Mr. Simmons' cervical range of motion far exceeded the range of motion that he had observed when he examined him.

94 Dr. Nicas, who also viewed the surveillance tapes, conceded that he was surprised at the cervical range of motion exhibited by Mr. Simmons, certainly in excess of what Dr. Nicas had observed during his treatment of Mr. Simmons. However, he maintained his initial diagnosis, that Mr. Simmons, as a result of the accident, suffered a soft tissue musculoligamentous injury, or a hyperextension/flexion whiplash-type of injury and chronic pain-type of syndrome. He stated in a letter dated August 2, 2000, which was written after he had the opportunity of viewing the video tapes:

He had some fairly good movements of his neck when he was sitting. He also had fairly good movements of his neck when he was driving his jeep. However, he was quite stiff in movements when he was selecting video tapes from the video store, he moved his neck and upper back as one unit.

95 Dr. Ian Clarke also viewed the surveillance videotapes after he had examined Mr. Simmons and formed his opinion. In a letter dated June 12th, 2000 he wrote:

In none of these sequences does he show any of the "hunched" appearance I saw when he visited me. Throughout the tapes he moves his head in all directions with no obvious limitation. I viewed the tapes very carefully and was unable to detect any sign of impairment whatsoever. If the picture I observed on his visit to me had been the result of an accident in January 1996 it is difficult to explain why there should have been a period of at least a year in the middle of this time when he appeared to have no disability at all. Common sense and knowledge of the healing process suggests that an injury in 1996 which was still producing physical signs and symptoms in 2000 should have demonstrated continuous limitation over that period even though natural healing would almost certainly have allowed some steady improvement. This has not been the case and strongly suggests to me that Mr. Simmons' current appearance is simulated rather than the results of any pathological process caused by the accident in question. That this behaviour can be sustained for a relatively prolonged period (e.g. during a long medical examination) and is more likely the result of repetition (i.e. rehearsal) rather than relapse.

Although it is true that a variety of signs and symptoms can be produced by unconscious psychological processes following an accident the fact that they are unconscious rarely results in any remission and the disability produced is just as "real" as if it were the result of an organic disease. This is clearly not the case with Mr. Simmons.

In short, these tapes support my original opinion that Mr. Simmons' presentation and complaints are the result of voluntary process. I am less convinced than I was before that there is any unconscious component to it.

96 Don Yurchuk is the Registrar and the Dean of Student Services at NAIT, and has held this position since 1979. He met with Mr. Simmons on at least six to eight occasions. He promised Mr. Simmons a position in the combined Lab/Tech program for September 1998 subject to his successful completion of the prerequisite courses. Unfortunately, Mr. Simmons did not complete the maths course and was required to take another maths course through Continuing Education. By the time NAIT received his transcript, the course was full and he chose, as an alternative, the Engineering Design and Drafting course. He withdrew from that course on November 27th, 1998, giving as his reason on the Clearance Withdrawal Form that he was needed at home. Mr. Yurchuk testified that he did not notice anything unusual about Mr. Simmons. There was nothing about Mr. Simmons' presentation or demeanour that suggested that he was suffering from any physical disabilities.

Subrogated Claim

97 Manulife Financial paid short term disability benefits to Mr. Simmons for the period from January 2nd 1996 to April 29th, 1996, inclusive, at the rate of \$432.00 per week for a total amount of \$7,344.00. Mr. Simmons was then paid long term disability benefits until April 28th, 1998. The subrogated claim for Manulife Financial is \$52,393.18, which includes the short term disability and long term disability benefits paid to Mr. Simmons.

Adverse Inference

98 The Defendant submitted that an adverse inference should be drawn where Mr. Simmons has failed to call material witnesses, specifically Steven Silver, Dr. Govender, Dr. Broad, Lois Wilhidal, and treatment providers from the CBI. Steven Silver, a physiotherapist, administered physiotherapy treatment to Mr. Simmons from January 1996 until March 1996. On February 14th, 1996, his chart notes read, "subjective complaints do not correlate with objective findings," and on February 21, 1996, his notes read, "full passive range of motion." It is contended by the Defendant that he is a material witness because there is a discrepancy between Mr. Simmons' objective symptoms and subjective complaints. Dr. Govender's chart notes were produced but not his opinion. He was the only physician who treated Mr. Simmons both before and after the accident. He saw him several times during the fall of 1996. The treatment providers at the CBI should have been called to explain the notes that were admitted in evidence. Dr. Broad examined Mr. Simmons on October 30th, 1997 and contradicts Dr. Vincent concerning the degenerative changes in Mr. Simmons' neck. Lois Wilhidal was the vocational consultant hired by Manulife to oversee Mr. Simmons' rehabilitation. The reports and notes made by these witnesses and admitted in evidence were not admitted for the truth of the statements contained within them.

99 In the Discharge Report prepared by the CBI, dated April 25th, 1997, the following observation was found: "He demonstrated inconsistent fluctuations with regards to his cervical spine range of motion on a week-to-week basis." In the Comprehensive Rehabilitation Assessment dated March 11th, 1997, the following comments were found:

It should also be noted that an inconsistency was observed with regards to Mr. Simmons cervical rotation. During the physiotherapy assessment, Mr. Simmons was observed to have approximately 2/3 of normal rotation mobility, or a moderate restriction. However, during the functional assessment, Mr. Simmons demonstrated with severe rotation restrictions.

And further at p. 4:

Mr. Simmons demonstrated a statistically inconsistent effort with regards to his isometric strength testing based on the values obtained for his average to peak force ratios.....Mr. Simmons did not demonstrate the biomechanical and physiological changes normally associated with someone providing a consistent and maximal effort.

100 Where counsel has failed to call relevant witnesses, the court will sometimes draw an inference that the evidence that has not been called would not have been helpful or would have been detrimental to their case. The rule is well stated

in J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworth's, 1999), (2nd) ed., at 297:

In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and who does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case or at least would not support it.

An adverse inference will not be drawn if there is an adequate excuse for not calling the witness. It is within the discretion of the court to decide whether the excuse is adequate.

101 The leading case is *Levesque v. Comeau*, [1970] S.C.R. 1010 (S.C.C.) where the Plaintiff failed to call certain medical evidence in a personal injury case. Pigeon J., for the majority, stated at p. 1012:

Appellant Lola Levesque's expert examined her for the first time more than a year after the accident and after she had consulted several doctors and undergone different examinations in the meantime. She alone could bring before the Court the evidence of those facts and she failed to do it. In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case.

102 In *Schuttler v. Anderson*, [1999] A.J. No. 481 (Alta. Q.B.), the court did draw an adverse inference in circumstances where the Plaintiff's pre-accident condition and immediate post-accident complaints were in issue, and the Plaintiff failed to call several physicians who had treated him post-accident. The court referred to and applied the rule in *Levesque v. Comeau*, *supra*. The court also referred to *Smith v. Smart* [1999] 1 W.W.R. 702 (Alta. Q.B.) which was cited for the proposition that no adverse inference should be drawn where the defendant is at liberty to call the plaintiff's physicians. The court in that case refused to draw the adverse inference because the physicians' reports were admitted in evidence and their findings and opinions were not relevant to the issues. The failure of the plaintiff to call other medical witnesses did not result in an adverse inference because the court agreed with the plaintiff that the defendant should have called the witnesses since it was their position that the slip and fall was an intervening cause of the plaintiff's condition and therefore the defendant had the onus of proving that defence.

103 In *Beger v. MacAstocker Estate*, [1996] A.J. No. 985 (Alta. Q.B.), Ritter J., who refused to draw an adverse inference, summarized the law at para 54:

Generally the rule is that the party alleging a fact should prove it to the degree appropriate in the circumstances. This is particularly so when the party had within his or her control clear proof available of any fact in issue. The parties should call that evidence or explain why it is not called and the Court is entitled to expect, in the case of a disputed fact, that the party who has control over the proof will call it. Courts are entitled to clear proof of such if available and the expense is not prohibitive.

104 Mr. Simmons contends that the court should not draw an adverse inference and relies on *Materi v. Confederation Life Insurance Co.*, [1999] A.J. No. 528 (Alta. Q.B.) where the court, in refusing to draw an adverse inference for the failure of the plaintiff to call a number of medical witnesses, stated at para. 88:

There was full disclosure to the ASEPB of the names of the medical practitioners who treated Ms. Materi. I assume that there was also full production of any medical records relating to the treatment which the ASEBP wanted. The ASEBP would certainly have the right to such production. There was also disclosure well prior to trial as to which medical professional Ms. Materi intended to call to give evidence and the substance of their anticipated evidence. If there was some medical person whom the ASEBP thought had relevant evidence to provide, they could have called him or her. Indeed, in the case of Dr. Sherbaniuk, they did so. Ms. Materi did call the doctors who have

had the most significant involvement in her treatment. It would not have been practical to call many more. In these circumstances I am not prepared to assume that any particular medical witness was not called because their evidence would damage Ms. Materi's case.

105 Mr. Simmons submits that *Schuttler v. Anderson*, supra, is distinguishable because in that case the plaintiff had a significant pre-accident history.

106 The Plaintiff can avoid the consequences of this inference by serving a notice under Rule 296.1 which reads:

296.1(1) When, in law, an adverse inference might be drawn from the failure of a party to call a witness, that party may serve on any other party a notice of persons not to be called.

(2) A notice under this Rule shall be served not less than 30 days before the trial commences.

(3) The party on whom the notice is served shall, within 15 days of service of the notice, serve on the other party a statement setting out any objection to the intention not to call a person.

(4) If the party on whom the notice is served does not respond to the notice of intention not to call a person, the failure to call that person is not to be found adverse to the case of the party serving the notice.

(5) When a party objects to the intention not to call a person, the cost of calling that person shall be paid by the party who objected, whatever the result of the cause, matter or issue, unless the Court determines that the objection was reasonable.

(6) Rule 548 does not apply so as to allow the Court to abridge the time mentioned in subrules (2) and (3).

107 The object of Rule 296.1 is to reduce the length of the trial and the number of witnesses required to testify at a trial. If a litigant decides that a witness is not necessary to prove a case, but realizes that failing to call the witness may result in an adverse inference, a notice can be served on the opposing side that the witness will not be called to testify. If the other side objects, then the cost of calling that witness will be borne by opposing counsel unless the court determines that the objection is reasonable.

108 In this case, Mr. Simmons served the Defendant with a notice pursuant to Rule 296.1 that he would not be calling as witnesses Dr. Govender, Dr. Broad, Stephen Silver, anyone from the CBI or Lois Wilhidal. The Defendant served a Notice objecting to the failure to call Dr. Broad, Dr. Govender and Steve Silver or anyone from CBI.

109 Steven Silver, as early as February 1996, makes a chart notation, "subjective complaints do not correlate with objective findings." Given that many, if not all, Mr. Simmons' complaints are subjective, given that several witnesses noted the contradiction between the objective symptoms and subjective complaints, I am prepared to draw an adverse inference from the failure of the Defendant to call Mr. Silver. Similarly, I draw an adverse inference for the failure to call someone from CBI to interpret the chart notes. I draw an adverse inference for the failure to call Dr. Govender and Dr. Broad; that the testimony of these witnesses would not have supported Mr. Simmons' case.

Liability

110 Mr. Simmons submits that Ms. Koenig breached several sections of the *Highway Traffic Act* including that she failed to operate her vehicle with due care and attention, drove at an unreasonable rate of speed having regard to the nature and use of the highway, and changed lanes when it was unsafe. She drove through the ridge of snow to lane number 4, not slowing down, and placed Mr. Simmons in an emergency situation, forcing him to react when she lost control of her vehicle.

111 Ms. Koenig submits that she was faced with a sudden unforeseen change in road conditions when she saw the ridge of snow as she was changing lanes. She was traveling at a reduced speed, had checked for traffic, waited for the cars to

pass before making her lane change. She submits that Mr. Simmons has not established that she was negligent, and even if negligence is established, there is no causal connection between her vehicle spinning out of control and the collision.

The Law

112 Allen Linden, in his text *Canadian Tort Law*, Butterworth's (5th) ed., 1993, at p. 93 sets out what must be established in an action for negligence: (1) the plaintiff must suffer some damages; (2) the damage suffered must be caused by the conduct of the defendant; (3) the defendant's conduct must be negligent, that is, in breach of the standard of care set by law; (4) there must be a duty recognized by law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss, or stated another way, the damage should not be too remote a result of the defendant's conduct; (6) the conduct of the plaintiff should not be such as to bar recovery, that is, the plaintiff must not be guilty of contributory negligence and must not voluntarily assume the risk.

113 Numerous cases were cited on the issue of liability. In *Hargrove v. Stright* (1990), 285 A.P.R. 440, 113 N.B.R. (2d) 440 (N.B. Q.B.), Creaghan J. observed:

The fact that a collision occurs and that damage results does not as a consequence give rise to a presumption that one or the other or both drivers were negligent. Some accidents, and the damage that results, have an effective cause other than a breach of the duty the law imposes. The duty is to operate a motor vehicle in a reasonable, prudent and lawful manner. The law does not impose a standard of perfection in the sense that the accident might have been avoided if one of the drivers had acted in a certain manner that could be seen to perhaps have avoided the accident as seen after the fact.

114 The mere fact of a collision on a highway between two vehicles does not automatically give rise to an inference of negligence. It will depend on the circumstances. The skidding of a vehicle on a highway by itself is a "neutral" fact equally consistent with negligence or no negligence. *Gauthier & Co. v. R.*, [1945] S.C.R. 143 (S.C.C.).

115 The principle established by *Gauthier & Co. v. R.*, *supra*, is that where a defendant produces an explanation as equally consistent with negligence as with no negligence, the plaintiff must establish negligence by a preponderance of evidence on a balance of probabilities.

116 In *Abbott v. Dunham* (1976), 22 N.S.R. (2d) 209 (N.S. T.D.) and 31 A.P.R., the plaintiff skidded sideways and the defendant skidded in trying to avoid the plaintiff, with a resulting collision. The defendant was held wholly at fault for traveling too close to the plaintiff in slippery conditions. The Nova Scotia Court of Appeal dismissed the appeal.

117 A driver, when faced with a sudden emergency situation for which he or she is not responsible, cannot be held to a standard of conduct which one sitting in the calmness of a courtroom might later determine was the best course. *Gill v. Canadian Pacific Railway*, [1973] S.C.R. 654 (S.C.C.).

118 In *Spratt v. Edmonton (City)*, [1942] 2 W.W.R. 456 (Alta. T.D.), MacDonald J. observed at p. 457:

Conduct which ordinarily would constitute negligence may be excused if it is carried out under the spur of a sudden emergency. But a person whose negligence brought about or contributed to the creation of the emergency cannot escape liability by invoking this rule.

119 This decision was cited recently by Clarke J. in *Elliott v. Hill Bros. Expressways Ltd.*, [1998] A.J. No. 524 (Alta. Q.B.) in which Clarke J. concluded that there was no contributory negligence where the plaintiff's attempt to steer back onto the highway was carried out under the spur of a sudden emergency. At p. 12:

I am satisfied that this is a case of sudden emergency where the agony of an impending collision with the overturned tractor-trailer unit excuses Mr. Elliott from "adopting a remedial course which mature consideration demonstrates to have been mathematically proper." See *Reinke v. Weisgerber and Whalley* (1974) 3 W.W.R. 97 at 104.

120 In *March v. Foley*, [1998] N.J. No. 199 (Nfld. T.D.), Mr. Seelish's vehicle was forced off into a snow bank on the side of the road during a winter snowstorm. Unable to extricate the vehicle, he put on his four-way flashers and waited for help to arrive. Mr. Foley was operating a tractor trailer which jackknifed and left the road, almost colliding with Mr. Seelish's vehicle. Ms. March's vehicle collided with the back of Mr. Foley's trailer. The claim against Mr. Seelish was dismissed. His vehicle was off the road at the time of the accident and he did not drive in a negligent manner. The court stated at para. 13:

The burden is on the Plaintiff (Defendants here) to establish by a preponderance of evidence that the Third Party's negligence was the effective or partial cause of the accident.

121 In *Coates v. Lutes*, [1988] N.B.J. No. 835 (N.B. Q.B.), the plaintiff's vehicle went out of control due to icy road conditions and ended up in a ditch with the front of the vehicle projecting out of the ditch slightly onto the road. The defendant lost control of his vehicle on the icy road and struck the plaintiff's vehicle. Both actions were dismissed. The Court concluded that the loss of control on an icy patch of the road did not, in the circumstances of the case, constitute negligence.

122 In *Sterling v. Dykens*, [1994] N.S.J. No. 22 (N.S. S.C.), and in *Pelton Bros. Transport Ltd. v. Taim*, [1995] O.J. No. 2281 (Ont. Gen. Div.), liability was apportioned where the plaintiff was not in complete control of his vehicle and was found to have contributed to the accident.

Analysis

123 The question of liability gives rise to two issues:

1. Was Ms. Koenig's conduct negligent, that is, a breach of the standard of care set by law?
2. Was Ms. Koenig's conduct the effective or partial cause of the accident?

124 Events at the time of a motor vehicle accident unfold quickly and suddenly. It is for this reason that it is frequently difficult for witnesses to reconstruct the circumstances of an accident accurately. In this case there were no independent witnesses or physical evidence to assist in the reconstruction of the accident.

125 Kevin L. Huberdeau, an engineer, testified on behalf of Ms. Koenig. He was qualified as an expert in accident reconstruction engineering. He reviewed the Examination for Discovery transcripts of Mr. Simmons and Ms. Koenig, the damage repair estimates of the vehicles, a copy of the collision statement of Mr. Simmons, and a simulation of vehicle motions prepared in PC Crash and M-SMAC computer programs. He concluded that the accident could not have occurred as described by Mr. Simmons and was more consistent with the statements of Ms. Koenig for the following reasons:

1. The Jeep could not have rotated "counter-clockwise" from a right-steer maneuver into the section of deep snow that would induce unbalanced forces on the right side of the vehicle.
2. The collision as suggested by Simmons would have occurred at vehicle speeds that do not match with the post-event vehicle resting distances of four(4) feet described by Simmons.
3. Time-Distance analysis would indicate that the Jeep YJ would enter the deep section of snow to the right, at a point that would be significantly farther east than the point the Mazda would have entered, contrary to the statements of Simmons.
4. If I accept the fact that Simmons entered the section of snow to the west of the location where Koenig did, then a conservative time-distance analysis would indicate that Koenig would be at least 8.5 car lengths in front of Simmons when she entered his lane, and likely much further, contrary to the notion that Koenig "suddenly" crossed his path.

5. Had the collision occurred as Simmons suggests, the vehicle damages would have been entirely different and substantially reduced than indicated by the actual vehicle damages.

6. The severity of the subject collision would have been greater for the Mazda than the Jeep based on the vehicles' mass differences. A conservative estimate for the change in velocity of the Jeep was calculated to be approximately 10.0-15.0 km/h, based on experience.

7. My analysis would indicate that the collision sequence is more consistent with the statements of Koenig.

126 This report was reviewed by David J. Daren who is a licensed professional mechanical engineer with 12 years' experience in accident reconstruction. He was critical of the report and the conclusions of Mr. Huberdeau for a number of reasons which I do not intend to detail here. He concluded that:

Huberdeau erroneously concluded that the Simmons and Koenig vehicles came into contact that induced damages to the right front and sides of both vehicles and that the collision was head on, affirming the collision sequence of Koenig. Neither of these two conclusions is supportable: There were no frontal damages sustained by the Simmons Jeep and the frontal damages sustained by the Mazda were cosmetic.

Examination of the available background information by the writer revealed that the collision was not head-on: the collision occurred with the right side of the Koenig Mazda in the area of the right front wheel contacting the right side of the Simmons Jeep in the area of the right front wheel, in the manner suggested by Simmons.

The collision occurred between 'hard spots' on the sides of both vehicles; the wheels and their suspensions (and axles). Often, these structures transmit high forces with little measurable damage. In this case, without being able to observe the vehicles before repair and assess the extent of vehicle damages (including the frame damage on the Mazda) it is difficult to accurately determine the severity of the collision.

127 Mr. Huberdeau's report was prepared in June 2000. Mr. Simmons, at the trial, testified that his vehicle spun clockwise when it hit the ridge of snow. During the Examination for Discovery in November 1997 he testified that his vehicle spun in a counterclockwise direction. At trial, he testified that he struck the ridge of snow in approximately the same location as Ms. Koenig's vehicle. At the Examination for Discovery, he testified that he struck the snow ridge further back from Ms. Koenig's vehicle. The facts upon which Mr. Huberdeau bases his opinion are undermined by Mr. Simmons' testimony at trial. The report prepared by Mr. Huberdeau does not assist the court in a determination of liability because his opinion is partially based on the testimony of Mr. Simmons at the Examination for Discovery. I therefore do not propose to consider this report on the issue of liability.

128 The issue is whether Ms. Koenig, in changing from lane number 2 to lane number 3, cut off Mr. Simmons, caused him to lose control of his vehicle as he tried to avoid a collision with Ms. Koenig's vehicle. The issue is one of credibility. Mr. Simmons and Ms. Koenig have two mutually exclusive accounts of the accident. The testimony of Ms. Koenig was not impeached during cross-examination. Mr. Simmons' testimony, however, was impeached repeatedly. For example, he testified during the Examination for Discovery that when his vehicle struck the ridge of snow it spun in a counterclockwise direction, almost two-thirds of the way around, with the front end of his vehicle pointing north. [p. 48, ll. 12-22; p. 53, ll. 10-21].

129 Mr. Huberdeau, however, noted in his report that the vehicle would spin in a clockwise direction and at trial Mr. Simmons testified that his vehicle spun in a clockwise direction. At the Examination for Discovery, Mr. Simmons testified that he struck the ridge of snow further back from where Ms. Koenig's vehicle did. [p. 49, ll. 16-17] At trial, he stated that he struck the ridge of snow at the same location. He testified at the trial that he believed that Ms. Koenig's vehicle was still moving at the time of the collision whereas at the Examination for Discovery he testified that he could not say whether her vehicle was still moving at the time of the impact or whether it was stopped. [p. 48, ll. 6-8; p. 52, ll. 2-11]

130 At trial, Mr. Simmons testified that the eastbound lanes were graded and in good condition except for the 2-foot high and 6-foot wide snow ridge between lanes number 3 and number 4. However, at the Examination for Discovery, on November 14th, 1997, he testified that the road was "pretty sloppy from the snow" and the middle lane was a little better than the outside lane. [p. 41, ll. 1-14]

131 The law is clear. The fact that there was an accident does not establish that Ms. Koenig's conduct was negligent. A driver's duty is to operate a motor vehicle in a reasonable, prudent and lawful manner. To find negligence, there must be an established breach of duty that was the effective cause of the collision. The mere fact that a collision takes place on a highway does not in itself give rise to any inference of negligence on the part of either vehicle involved. *Gauthier & Co. v. R.*, *supra*. The principle that emerges from *Gauthier & Co.*, *supra*, is that where a defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence remains with the plaintiff. The plaintiff must therefore prove her case by a preponderance of evidence on a balance of probabilities. To establish negligence, the plaintiff must prove on a balance of probabilities that the actions or inactions of the defendant leading to the collision in the particular circumstances then prevailing fell below the standard of care expected in those circumstances. *Jones v. King* (1993), 108 Nfld. & P.E.I.R. 160 (Nfld. T.D.). In this case, there is no evidence that Ms. Koenig crossed from lane number 2 to lane number 4 in one movement.

132 I was impressed with the testimony of Ms. Koenig, who testified in a clear, concise, straightforward manner and whose testimony was not impeached during cross-examination. I am satisfied that Ms. Koenig was driving in a reasonable manner and exercising caution having regard to the conditions. I accept her evidence that she waited until the lanes were clear before changing from lane number 2 to lane number 3, and I accept her testimony that she did not cut Mr. Simmons off when she changed lanes. I accept her evidence that the accident occurred east of the 106th Street overpass and that her vehicle came to rest in the divergent part of the Freeway. I accept her evidence that her vehicle was stopped for a few seconds before she was struck by Mr. Simmons' vehicle. I accept her evidence that she did not see the ridge of snow until she was in lane number 3, and after two to three seconds decided to drive through the ridge of snow.

133 I do not accept the testimony of Mr. Simmons on the issue of liability. His testimony was inconsistent with his testimony during the Examination for Discovery. He has, in my view, attempted to reconstruct the events of the accident.

134 Ms. Koenig's explanation of the events was equally consistent with negligence and with no negligence, and the onus was on Mr. Simmons to prove negligence. He failed to discharge that onus.

135 The evidence established that Ms. Koenig was faced with a sudden change in road conditions when she saw the ridge of snow after she changed from lane number 2 to lane number 3. Her decision to change into lane number 4 was made in a matter of seconds. She was driving at a reduced speed and was satisfied that there were no cars in lane number 4. I do not accept the testimony of Mr. Simmons that Ms. Koenig attempted to change from lane number 2 to lane number 4 in one movement. Even if Ms. Koenig was negligent when she decided to drive through the ridge of snow, there was no causal connection between her negligence and Mr. Simmons losing control of his vehicle. Therefore, her negligence, if any, is irrelevant. Ms. Koenig has offered an explanation for the accident that is consistent with no negligence on her part, and I accept her explanation. I cannot, on the evidence and the relevant law, find her liable on a balance of probabilities for negligence and I must accordingly dismiss Mr. Simmons' action against her.

136 Mr. Simmons has failed to establish that the Ms. Koenig was negligent and that the collision between the two vehicles was caused by the negligence of Ms. Koenig.

Damages

137 I will, however, consider Mr. Simmons' claim for damages.

Causation

The Law

138 In *Athey v. Leonati* (1996), 203 N.R. 36 (S.C.C.), the court states at p. 43:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury. The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. Where the "but for" test is unworkable, the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury. In some circumstances an inference of causation may be drawn from the evidence without positive scientific proof. The plaintiff need not establish that the defendant's negligence was the sole cause of the injury. The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient if the defendant's negligence was a cause of the harm.

139 The onus is on Mr. Simmons to establish that the complaints that he suffered after the accident were not an extension of his pre-accident condition:

...The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position" which is the plaintiff's loss.

140 Mr. Simmons must prove all of the elements of an action founded in negligence on a balance of probabilities. This includes proof that the negligence of Ms. Koenig caused or contributed to any of the injuries suffered by him. If the accident was a possible, not a probable, cause of the injury, then Mr. Simmons has not proven his case: *Chaban v. Olson*, [1999] A.J. No. 719 (Alta. Q.B.) at para. 41.

General Damages

141 Mr. Simmons submits that as a direct result of the collision on January 2, 1996 he sustained a severe soft tissue injury to the neck and the right shoulder and went on to develop chronic myofascial pain syndrome and a depression/anxiety disorder. He has been unable to continue with full-time employment as a journeyman electrician and his occupational alternatives are permanently limited. Mr. Simmons submits that he has testified honestly and his complaints of pain are supported by the objective findings of many of the physicians who examined and treated him during the four years following the accident, including Dr. Chiu, Dr. Hoffman and Dr. Vincent. The physicians concluded that his complaints were valid and he was not a malingerer. Mr. Simmons submits that he has no motive to lie about the nature and the extent of his injuries, to fake his injuries. As a result of the accident, he is disfigured, has lost his career, is in debt and is financially destitute. He has done everything that was recommended to him by the doctors.

142 The Defendant submits that Mr. Simmons has been untruthful, deceitful and has misrepresented his injuries to the doctors and other care givers prior to and after the accident. Mr. Simmons is not above being untruthful, deceitful and misrepresenting the facts to suit the circumstances and his needs.

Credibility

143 Mr. Simmons must establish his claim on a balance of probabilities. A key issue in this trial was the credibility of Mr. Simmons. There was evidence that Mr. Simmons had been untruthful on several occasions prior to the trial and during the trial. His credibility during the trial was impugned in many areas. He was evasive in answering questions during cross-examination and was instructed on several occasions to answer the question.

144 Mr. Simmons lied on his resume when he stated that he had completed high school in 1983. I do not accept his explanation that the intended meaning was that he had finished attending high school. It was argued that these were minor inconsistencies. I disagree. These misrepresentations are evidence that Mr. Simmons has not been truthful in the past if it advances his position. He indicated that he had completed Business Maths at NAIT when he had failed the course. Mr. Simmons testified that he did not work during the week of January 2nd to January 5th, 1996. However, the employment records from Titan indicate that he did work that week, 8 hours per day, and was paid for that week. As an hourly employee, he was entitled to be paid only if he worked.

145 When questioned about his finances, Mr. Simmons was evasive in answering the questions. Several times he did not respond to the question. His answers were inconsistent with testimony that he had given during examination-in-chief and were contradictory to answers that he had given during Examination for Discovery. When confronted with inconsistencies during cross-examination, he frequently had no explanation. Mr. Simmons, throughout, appeared to have a selective memory.

146 Mr. Simmons testified that he received short term disability until the end of April 1996 at which time he went on long term disability until the end of April 1998. He received, from Manulife Financial, for the month of January 1996 the amount of \$1,728.00; the amount of \$3,085.71 for the period January 30th to March 19th, inclusive, and the amount of \$2530.29 for the period March 20th to April 29th, inclusive, a total of \$7,344.00. Mr. Simmons was unclear in his testimony as to when he received the benefits. He testified that he recalled receiving a partial payment of \$500.00 during the month of February, although the evidence indicates that he received the three payments in the amounts previously mentioned. The first payment in February was for the amount of \$1,728.00, the second payment in April for \$3,085.71, and the third payment in May for \$2530.29. Mr. Simmons testified that he received the three cheques at the same time. It contradicts his evidence that he only had \$900.00 on which to live during the period January to April 1996, inclusive.

147 Mr. Simmons was not candid with Dr. Getting. In December 1995, Dr. Getting completed three reports to WCB in which he stated that Mr. Simmons was not capable of returning to work until December 6th, 1995. On January 10th, 1996, he wrote a letter to WCB in which he stated that Mr. Simmons had been unable to work since November 28th, 1995 which contradicts the evidence of Mr. Simmons that he continued to work after he injured his shoulder.

148 I have concerns about the substance of Dr. Getting's opinion that Mr. Simmons was likely to develop chronic pain syndrome as a result of the injuries sustained in the accident. Dr. Getting was not qualified as an expert in chronic pain syndrome. However, Dr. Getting, as early as January 6th, 1996, two days after the accident, was concerned about Mr. Simmons developing myofascial pain in relation to his shoulder injury. On January 29th, 1996, he referred Mr. Simmons to Dr. Chiu because he was concerned that Mr. Simmons would go on to develop chronic pain. The evidence is contradictory because Mr. Simmons had told Dr. Getting that his shoulder was substantially recovered prior to the accident. Dr. Getting changed Mr. Simmons' date of disablement on the WCB forms from November 28th, 1995 to January 4th, 1996 and was unable to explain why the change in date. On July 17th, 1996, Dr. Getting wrote that Mr. Simmons had good cervical range of motion. Dr. Chiu made a similar finding. Inexplicably, when no longer a patient of Dr. Getting and Dr. Chiu, after July 1996, Mr. Simmons' condition and symptoms increased in severity.

149 I am satisfied, based on the testimony of Dr. Getting and Dr. Chiu, that by July 1996, Mr. Simmons had good cervical range of motion. This is supported by the video surveillance taken October/November 1996.

150 Mr. Simmons lied to Ms. Woods when he told her that he could not afford to attend physiotherapy twice a week. He was receiving long term disability payments in the amount of approximately \$2,000.00 per month net. During the period January 1996 until December 1998, inclusive, he continued to operate his vehicle and averaged 13,270 kilometres per year or 53,115 kilometres in four years. His brother was living with him and contributing to the monthly living

expenses. Mr. Simmons testified that he replaced the bumper on his Jeep at a cost of \$90.00 in April 1996. During cross-examination he changed his story, testifying that the bumpers were made and installed at home.

151 Mr. Simmons testified that his condition improved after attending the CBI. Dr. Gervais, however, testified that Mr. Simmons told him that the CBI was a waste of time, a joke, and his condition did not improve.

152 Mr. Simmons was not truthful during the Examination for Discovery about his pre-accident health. He stated on November 17th, 1997 that he had never suffered from headaches prior to the accident. However, the chart notes of Dr. Govender indicate that on July 24th, 1995, less than six months before the accident, Mr. Simmons attended at Dr. Govender's office complaining of headaches. In November 1989 he complained to Dr. Makinen about his headaches. During the Examination for Discovery on November 17th, 1997 and again in February 1998 Mr. Simmons stated that he had not experienced any problems with his neck prior to the January 2nd, 1996 accident. He told Dr. Chiu that he had not had any problems with his neck. Dr. Govender's chart notes indicate otherwise. In February 1989, Mr. Simmons complained to Dr. Govender of "pain in his right shoulder, right elbow, right side of neck," and Dr. Govender wrote, "tender over R cervical area over right trapezius over right shoulder." On June 18th, 1993, Dr. Govender's chart notes indicate, "pulling cable.....Sat. 12.6.93...felt pull between both shoulder blades and back; tender over R side of neck, R shoulder, R low back area - limited range of motion." Mr. Simmons, according to Dr. Govender's chart, did not return to work for one week as a result of this injury. Mr. Simmons testified that he could not recall taking one week off work. Mr. Simmons suffered from rheumatoid arthritis in his hands and knees.

153 Mr. Simmons blamed the inconsistencies between his testimony during the Examination for Discovery and the chart notes of Dr. Govender on his lack of memory. However, he testified at trial that he had reviewed the medical records and reports. As a result, his memory at trial was better than at Examination for Discovery.

154 There were inconsistencies in the medical evidence. In a Medical Legal Report dated July 24th, 1996 Dr. Getting wrote that the pre-accident injury had resolved and Mr. Simmons had a fairly good range of motion in his neck. One week later, when Ms. Wood examined Mr. Simmons, she wrote that his right shoulder was elevated, he did not turn his neck but turned his whole body instead; his head was flexed to the side, guarded movement. Dr. Nicas examined Mr. Simmons on July 16th, 1996, and wrote, "very marked limitation of all neck movements, particularly lateral rotation bilateral and painful movements of his shoulder above shoulder height on the right." Dr. Chiu, after examining him on June 3rd, 1996, wrote, "Exam of his shoulder and upper extremities were unremarkable. He had normal range of movement in both shoulders." Dr. Nicas saw him again on September 24th, 1996, and wrote, "he still had marked limitation of his neck movement, as well as pain on elevation of his right shoulder in abduction and forward flexion above 90 degrees." On November 28th, 1996, Dr. Hoffman noted that Mr. Simmons' right shoulder was elevated, when he walked he took on a rigid gait because of his neck stiffness, and when he talked he was required to move his trunk to accommodate for the limitation of movement of his neck. In the video surveillance during October and November 1996 there was no evidence of an elevated right shoulder or restricted range of motion of Mr. Simmons' neck or the rigid gait described by Dr. Hoffman. Neither Dr. Chiu nor Dr. Getting in any of their reports mentioned an elevated right shoulder. As early as March 19th, 1996, Dr. Chiu wrote, "he currently has good range of motion of his shoulders."

155 The observations of Dr. Getting and Dr. Chiu in July 1996 concerning Mr. Simmons' shoulder, contrast with the observations of Dr. Nicas, Dr. Hoffman and Ms. Wood during that same period.

156 The surveillance tapes are inconsistent with Mr. Simmons' clinical presentations. There is a significant contrast between the observations of Mr. Simmons' treating physicians and the observations of Ms. Beaudoin on August 11th, 1999 and the observations of Mr. Yurchuk in the 15 months that Mr. Simmons attended NAIT, enrolled as a full-time student. Dr. Clarke testified that such an inconsistency is rare if there is an underlying physical cause and also if there is an underlying psychological cause. The disability will be consistent; it will vary only if the disability is simulated. Dr.

Clarke, after reviewing the video surveillance tapes, stated that he could not detect any signs of impairment nor was there any sign of the "hunched" appearance that Dr. Clarke saw on May 8th, 2000. In weighing that evidence, I am taking into account that Mr. Simmons was involved in an accident in December 1999 and had injured the left side of his neck, head, shoulder and jaw. Dr. Clarke concluded that "Mr. Simmons' presentation and complaints are the result of a voluntary process."

157 Mr. Simmons testified at Examination for Discovery on December 14th, 1998 that he exercises at home for approximately one and one-half hours every day. He does one-half hour of cardio, 20 minutes of stretching, and 30 minutes of moderate weights. By the summer of 1998 he was doing bar bell curls using a 50 pound weight; alternate arm curls using 30 pound weights, reverse curls using 20 pounds, bench press using 100 pounds, bent over rows using 100 pounds, leg extension using 60 pounds, leg curls using 20 pounds, standing calf raises with 40 pounds, and seated calf raises. Dr. Nicas, in his Medical Legal Report dated December 21, 1998, stated that Mr. Simmons "has been greatly disabled functionally" and was not fit to do even sedentary work. That opinion is inconsistent with the exercise program described by Mr. Simmons who attempted to minimize the significance of that evidence by testifying that he took frequent rest periods.

158 I found the testimony of Ms. Beaudoin credible and extremely compelling. She was an independent witness with no motive to lie. She had an unobstructed view of Mr. Simmons as he left the building. Mr. Simmons was oblivious to the fact that he was under observation. The evidence of the private investigator does not refute, rebut or cast doubt on her observations.

159 Ms. Beaudoin was cross-examined on her observations, on the possibility of bias toward the defendant insurance company. I am satisfied, after carefully listening to Ms. Beaudoin, after observing her manner and demeanour, that she accurately and truthfully related to the court her observations of Mr. Simmons. I have no hesitation in accepting her evidence in its entirety.

160 Ms. Beaudoin's evidence directly contradicts the testimony of Mr. Simmons and Dr. Greenhill's initial observations of him. Her testimony, the video surveillance tapes and the testimony of Mr. Yurchuk confirm Dr. Clarke's conclusion that there was a voluntary component to Mr. Simmons' restricted range of movement. Dr. Clarke testified that where a disability is simulated, it cannot be maintained for 24 hours per day but will come and go where there is a voluntary component.

161 The videotapes contradict the testimony of Mr. Simmons and Dr. Hum, who in a report dated August 10th, 1999 wrote:

...Ian is a 32 year old male patient who has sustained a soft-tissue injury to his neck and shoulder as a result of a motor vehicle accident dated January 2, 1996. He has improved very little since the accident. He is quite disabled as a result of the accident from a functional and occupational basis. Unfortunately, he is a non-surgical candidate. It is unlikely that he will be able to engage in any physical activity or employment.

162 The video surveillance contradicts Mr. Simmons' testimony that when he was studying, he had to hold his books at eye level to read; otherwise, he would get severe, painful headaches. The testimony of Ms. Beaudoin, of Mr. Yurchuk, and the video surveillance tapes establish that when Mr. Simmons was in a non-clinical setting, when he was not being examined by a medical caregiver, there was no obvious restriction in the movement of his head, no elevated right shoulder, no "hunched" appearance.

163 Mr. Simmons testified that Mr. Yurchuk promised to hold a position for him in the Lab Technician/Medical Technician course. Mr. Yurchuk testified Mr. Simmons did not fulfill the academic requirements to enter the course. Mr. Simmons testified that NAIT agreed to modify his course load because of his disability. Mr. Yurchuk testified he was carrying a full course load.

164 The opinions of the physicians and medical care givers who examined and treated Mr. Simmons for four years depend upon Mr. Simmons' veracity; how accurate and truthful he was in describing his symptoms. This enabled them to make an accurate diagnosis and propose a suitable treatment program. The role of the physician is to treat a patient for an injury or an illness. The physician never assumes that a patient is lying. Dr. Getting stated that what the patient relates is part of the analysis. Pain is extremely difficult to measure; an individual's experience of pain is subjective and it is important for the patient to be honest and candid with the physician. Dr. Nicas stated that the accuracy of his medical opinion is based on the accuracy of the information that he receives from his patient and it is not the physician's function to determine whether a patient is lying. Dr. Chiu, the rheumatologist, testified that while secondary gain may raise his suspicions, he does not approach a patient thinking that the patient is faking the symptoms. The evidence is predominately subjective. The presence of muscle spasms during some of the examinations does not advance Mr. Simmons' case. I am satisfied on the evidence that there was a voluntary component to the muscle spasms. I am satisfied on the evidence that the restricted cervical range of motion that he exhibited during many of the clinical examinations was the result of a voluntary process.

165 Doctors Chiu, Getting, Nicas, Hoffman, Hum and Gervais, as well as Ms. Wood, all testified that they believed that Mr. Simmons was honest. There were no signs of malingering. I have had the benefit of listening to Mr. Simmons testify and undergo cross-examination. I must weigh all of the evidence, not just the evidence of Mr. Simmons, in determining what weight to attach to his testimony, and whether to accept all, none or part of his testimony.

166 I have carefully reviewed the testimony of Mr. Simmons and listened to him attentively during his testimony. I observed his manner and demeanor. Throughout his testimony there were examples where he was not truthful, exaggerated the degree of seriousness of his injuries, and was evasive and unwilling to answer questions during cross-examination. There were inconsistencies in his testimony, many of which have already been detailed.

167 I place no weight on the cross-examination of Mr. Simmons concerning his receipt of Social Service benefits and his understanding of his obligations.

168 I am satisfied, based upon the medical reports of Dr. Clarke and Dr. Greenhill, the contradictions in Mr. Simmons testimony, the videotapes, the testimony of Mr. Yurchuk and Ms. Beaudoin, that Mr. Simmons has grossly exaggerated, and at times lied about, the seriousness of any injuries that he sustained in the 1996 accident. *Sekhon v. Gill* (1991), 61 B.C.L.R. (2d) 273 (B.C. C.A.) considered the effect of the plaintiff's lack of credibility on a personal injury claim. Southin J.A. stated at p. 278:

In the absence of other authority, I am not prepared to hold that, as a matter of law, a plaintiff who, in fact, has suffered damage from the negligence of the defendant is by a finding that he has lied about the extent of his injuries to be deprived of compensation for the injuries he, in fact, had for two reasons: First determining credibility is often a daunting task, which in civil cases is determined on a balance of probabilities. Odd though it may seem to a layman, a finding by a judge on a balance of probabilities, that he does not believe a witness is not the equivalent of a finding that, by his evidence, that witness has attempted to commit a fraud on the Court. The latter is a graver finding which requires more compelling evidence than does the finding of credibility which often is upon a knife edge.

Secondly, such abuse of the court may be better addressed either by an order depriving the plaintiff of costs or, in extreme circumstances, by ordering the plaintiff to pay the costs of the defendant.

Thirdly, assuming without deciding, that the principle alluded to by Mr. Justice D.B. McKinnon does, in fact exist, I am of the opinion that a defendant who desires to put it forward as a bar to recovery by an injured plaintiff must raise the allegation of fraud in the Court below in order that the learned judge can address the question of whether the evidence meets the stringent requirements of a finding of a deliberate attempt to commit a fraud on the court.

This statement of principle was adopted by Johnstone J. in *Alnashmi v. Arabi*, [2000] A.J. No. 569 (Alta. Q.B.).

169 The defendant has not raised the allegation of fraud specifically against Mr. Simmons. However, the difficulty with which I am now faced, given my findings on the credibility of Mr. Simmons, is whether there is any objective evidence or any other evidence to support Mr. Simmons' claim. In my view, there is little objective proof supporting his claim. It is difficult to sift through the evidence and to separate the truth from the lies and the gross exaggerations to determine whether he did suffer some injury and to what extent. Southin J. (as she then was) stated in *Le v. Milburn*, [1987] B.C.J. No. 2690 (B.C. S.C.) at para. 2, which was referred to in *Alnashmi v. Arabi*:

When a litigant practices to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame...

170 What objective proof there is I find wanting given the predilection of Mr. Simmons to either lie to his doctors, or be less than candid with his doctors, including Dr. Getting and Dr. Chiu. There is evidence that the range of motion, the muscle spasms, have a voluntary component. The evidence does not meet the civil standard of proof on a balance of probabilities.

171 Mr. Simmons' claim for general damages is therefore dismissed.

Action dismissed.

Tab 2

2002 CarswellOnt 4526
Ontario Superior Court of Justice

R. v. Solomon

2002 CarswellOnt 4526, [2002] O.J. No. 5128, [2002] O.T.C. 1042, 56 W.C.B. (2d) 313

Her Majesty the Queen, Respondent and Michael Solomon, Appellant

Hill J.

Heard: November 1, 2002
Judgment: December 12, 2002
Docket: 6021/02

Counsel: *J. Patton*, for Respondent
D. Harris, for Appellant

Subject: Criminal

Related Abridgment Classifications

Criminal law

[XIII Offences against the person and reputation](#)

[XIII.27 Impaired driving/care or control](#)

[XIII.27.c Proof of impairment](#)

[XIII.27.c.iii Miscellaneous](#)

Headnote

Criminal law --- Offences — Impaired driving/care or control — Proof of impairment — General

Accused driver was charged with impaired driving with blood alcohol level "over .80" — Accused testified that he consumed 10 drinks average per week — Defence counsel was not allowed to re-examine accused at trial to explain that his memory was refreshed from notes made two days after charges — Accused testified that he did not recall whether he paid for bar tab with credit card or cash, but that payment by cash would account for lack of record — Accused was convicted at trial — Accused appealed — Appeal allowed and conviction set aside — New trial was ordered — Trial judge erred in misapprehending evidence regarding driver's weekly alcohol consumption and in using misapprehension as reason to convict — Trial judge erred in prohibiting defence counsel from re-examining accused to bring out prior consistent statement — Trial judge erred in drawing adverse inference from misapprehension of evidence of bar tab payment.

APPEAL by accused from conviction for impaired driving with blood alcohol level "over 80".

Hill J.:

Introduction

1 The appellant appeals his conviction on an "over .80" charge raising three grounds of appeal:

- (1) The trial judge erred in misapprehending the Appellant's evidence of his weekly consumption of alcohol and then erred in using this misapprehension as a main reason to reject the evidence to the contrary defence.
- (2) The trial judge erred in not permitting defence counsel to re-examine the Appellant in order to bring out a prior consistent statement.

(3) The trial judge misapprehended the evidence with respect to whether the Appellant paid his bar tab by Visa or cash and erred in drawing an adverse inference from the failure to produce a receipt.

2 Despite the learned trial judge's thoughtful and detailed reasons for judgment, the appeal has sufficient merit to warrant a new trial.

The Evidence as to Appellant's Weekly Consumption of Alcohol

3 Analysis of the appellant's submission of material misapprehension of the evidence by the trial judge respecting Mr. Solomon's average weekly consumption of alcohol requires precise reference to the evidence.

4 In his examination in-chief, the appellant was asked by his counsel:

Q. And could you tell us what kind of a drinker you are, what — in terms of are you a non-drinker normally, an alcoholic or a social drinker? How would you describe yourself?

A. I drink once a week, which I guess I don't know if — who considers that social. I don't ...

Q. Some might consider that a social drinker. Now, if we go back for let's say a year prior to this alleged offence, how many drinks on the average would you have a week roughly?

A. Roughly ten.

Q. A week.

A. A week.

Q. And what kind of drinks would they be?

A. Usually beer.

5 The appellant further testified in-chief that on the date of the offence, at an establishment known as Sharkey's, he consumed 3 ¹/₂ pints of Molson Canadian beer and "one shot" of a liquor concoction called a Broken Down Golf Cart.

6 In cross-examination, the prosecutor elicited the following testimony:

Q. Now, sir, you see, just coming back to the whole notion of averages and numbers of drinks, I heard in your examination in-chief that you drink once a week, correct, give or take?

A. About, yeah.

Q. And you say that you average ten drinks a week.

A. Sure.

Q. Does that mean you average on that one night a week ten drinks?

A. No.

Q. Okay. So that must mean that you drink...

A. Well...

Q. ...more than once a week, correct?

A. Well, I — I don't — I mean, if I have a beer, you know, one day with dinner or something like that, I'm not going to consider that drinking, or if I'm just staying at home watching a hockey game.

Q. Okay. So — but if — so you don't consider that drinking?

A. Well, if I've...

Q. So you can agree with me then, when you told my friend...that you drank once a week, in reality, you drink more than once a week, except what you consider to be drinking...

A. I could on any...

[Objection by Defence Counsel]

.....

Q. Let me rephrase this, sir. So when you told my friend ...you only drank once a week, what you really meant to say was you drank more than once a week, but once a week you had more than what you would consider to be a very minimal amount of alcohol, correct?

A. That's correct. We're talking — I mean, we're talking about averages here. We're saying, you know, since you've been 19, about how many times do you drink a week? I mean, we're talking about averages, we're not talking about specifics, right?

Q. You can agree with me, you weren't being specific with [Defence Counsel], correct?

A. Well, not specifically every single time I drink and just limit that to once a week, no.

7 Other defence witnesses, including a bartender who served the appellant on the relevant date, provided evidence as to their knowledge of the appellant's alcohol consumption in the hours before his vehicle was stopped by the police. Two of the witnesses' testimony relating the pattern of Mr. Solomon's drinking supported the appellant's account of what he had to drink.

8 The defence called Dr. Kadar, a toxicologist, as an expert witness to provide opinion evidence as to the blood/alcohol level of an individual of Mr. Solomon's age and physical characteristics who consumed the alcohol described by the appellant in the relevant number of hours before being stopped by the police at the relevant point in time. The expert witness testified that he would expect the appellant's blood/alcohol level to be zero to 49 milligrams of alcohol per 100 millilitres of blood. On cross-examination, the expert having been asked to assume the correctness of the intoxilyzer readings of 139 and 138 mg of alcohol/100 ml blood, testified that the individual in question would have consumed 10 alcoholic beverages, for example, nine beers and a shot of liquor.

9 In her reasons for judgment, the trial judge stated:

The accused, Mr. Solomon, indicated that he drank once a week, roughly 10 drinks per week usually beers.

.....

He was asked, "How do you recall four pints and one shot five days after the incident, why is it marked in your brain?" The answer was, "Mike held a very solid pattern, he kept a very strict pattern, he always had the same number of things." I would note that evidence in light of the evidence that Mr. Solomon gave initially on examination in-chief that once a week he has 10 drinks.

.....

Doctor Kadar testified it would take a total of 10 drinks to get a reading of 130 milligrams percent at the time of that first test. The accused admitted to his counsel he drinks once a week, roughly 10 beers.

I also note that both witnesses that came, Mr. Simmon[d]s [friend of appellant] and Mr. [Teague] [bartender] indicate that this is a person of consistence, this is a person of pattern, he always does the same thing. I just note that in respect to this business of him drinking 10 beers once a week.

We have heard evidence from the bartender and a friend that he sticks to a pattern. That is some evidence that I have to consider quite heavily. The admission to drinking once a week, 10 beers and that he sticks to a pattern. It certainly casts some doubt on this evidence that I have heard that on this occasion he was drinking half the amount he usually drinks.

.....

It was suggested to this individual [the bartender], as I said, that he knew five days later it was four points and one shot because he, the accused, kept a very strict pattern. He would always have the same number of things. Again, that evidence in light of the accused[']s own evidence that he drinks once a week and has 10 beers.

10 The Appellant's Factum describes the alleged error of the trial judge in this way:

It is the position of the Appellant that the trial judge focused exclusively on the examination in-chief evidence without any reference or reliance on the cross-examination. In truth, the cross-examination could not, in the circumstances, reasonably be viewed separately from the in-chief. The trial judge put the evidence to a use which it could not reasonably bear.

.....

It is well settled that a misapprehension of evidence which is then used as a reason to convict is grounds for a new trial. This is what happened in this case. Over and over again in her reasons, the trial judge referred to the Appellant's in-chief evidence on weekly consumption and juxtaposed this with his and the other defence witnesses' evidence with respect to consumption on the night in question. The implication, eventually made explicit, was that the evidence to the contrary of consumption putting him under "80" was not worthy of belief as it was inconsistent with evidence of weekly consumption: 10 beers, one night a week. No where in her reasons for judgment did the trial judge make even passing reference to the clarification made by the Appellant in cross-examination and, on the face of it, accepted by the Crown.

.....

It was probably not open to the trial judge, in view of the entirety of the trial record, to find that the Appellant habitually drank 10 beers once a week. Any ambiguity in the evidence in-chief was swept away by his explanation in cross-examination. Evidence can be explained such that no finding based on the original assertion can be maintained.

.....

Furthermore, a trial is not like a game of tag where, once a witness fails to achieve pristine clarity, they become "it" and a finding of fact based only on the fatal words is warranted. Most witnesses are unaccustomed to the dynamics of a court of law. Counsel do not always ask neat and compact questions which convey the intended meaning. Communication between counsel and witnesses can become obscured. Language is itself imprecise. Mistakes and ambiguity which require clarification are part of the process of drawing out evidence from witnesses. Segregation and compartmentalization of evidence to divide in-chief evidence from a later explanation for it is unfair to the witness and leads, with respect, to unreasonable findings and misapprehensions of evidence.

Even beyond this, it appears from the omission of any reference to it in her reasons, that the trial judge simply forgot about the cross-examination evidence on point. Even if it was within the realm of a reasonable finding that the Appellant drank 10 beers once a week, which it has been submitted it was not, the cross-examination explanation had to be carefully considered and analysed. But the trial judge did not even acknowledge its presence.

.....

A new trial is required. The trial judge rejected the evidence to the contrary defence based on her ultimate rejection of the Appellant's credibility. She disbelieved his evidence that he only drank four and a half drinks based at least partially on her erroneous conclusion that he admitted drinking 10 beers each time he drank. If the trial judge had not misapprehended the evidence, she would not have seen this as a true inconsistency. The unreasonable, misapprehended finding having played a significant role in the finding of guilt, the conviction must be vacated.

11 The initial question of appellant's trial counsel (not Mr. Harris) requiring the appellant to self-describe as a non-drinker, an alcoholic or a social drinker, was not especially helpful. The appellant's response that because he would "drink once a week" he was a "social" drinker is open to more than one interpretation including:

(1) the appellant consumes alcohol once a week only

(2) the appellant drinks alcohol outside his residence at a party or a licensed facility once a week.

The first interpretation emphasizes "once a week" while the second emphasizes the "social" categorization first suggested by counsel. With the follow-up question, a more focused interrogatory, the appellant committed to a total average weekly consumption of 10 beers. Depending on the interpretation of the first question, the combined effect or meaning of the testimony is that Mr. Solomon weekly drinks 10 beers at a sitting (interpretation #1) or drinks a total of 10 beers a week split between his residence and a social environment (interpretation #2).

12 In cross-examination, the appellant specifically denied that he ever drank 10 alcoholic beverages "on...one night". This response supports the social drinking or second interpretation as I have described it. At a point, where further clarification was sought, the appellant and Crown counsel spoke over one another and the meaning was unfortunately lost. When the prosecutor, quite fairly, persisted in his pursuit of clarification of the matter, the appellant testified that he had not attempted to relate to his own counsel "every single time" he drank in a week.

13 On appeal, it was common ground between the parties that in cross-examination the trial prosecutor clarified the appellant's evidence as to his pattern of alcohol consumption. Indeed the Crown's factum recognizes this point at para. 12:

The Appellant agreed with the suggestion by the Crown that what he really meant to say was that he drank more than once a week but once a week he had more than what he would consider to be a very minimal amount of alcohol.

14 At six points in the reasons for judgment, the trial judge refers to Mr. Solomon drinking 10 beers once a week. In two instances only does the court refer to that evidence as the testimony given exclusively in-chief.

15 It is unclear from the trial judge's reasons whether she accepted the evidence of the witnesses Simmonds and Teague confirming the appellant's own testimony that he followed a strict pattern of 5 drinks as the alcohol he consumed when he was out drinking. In other words, the court either:

(1) accepted the witnesses' evidence that a pattern was invariably maintained and used the appellant's in-chief examination to find the pattern was 10 drinks at one sitting

or

(2) rejected the witnesses' evidence respecting pattern consumption because that testimony differed from Mr. Solomon's in-chief testimony that he had 10 drinks whenever he consumed alcohol.

If the court took the first approach, the trial judge must have rejected the defence witnesses' evidence as to the number of alcoholic drinks in the stated consumption pattern *and* the appellant's evidence in cross-examination that he never drank 10 alcoholic beverages on a single occasion. If the court adopted the second analysis, the trial judge rejected not only the defence witnesses' testimony that any pattern existed but also the appellant's evidence that he never had a 10-drink evening.

16 In these circumstances, the trial court, in my respectful view, was obliged to articulate why it relied upon the appellant's in-chief testimony to the exclusion of the clarification elicited in cross-examination. It is not apparent whether the trial judge failed to consider the effect of the cross-examination testimony, misunderstood the impact of that evidence or otherwise misapprehended the totality of the relevant evidence, or rejected the clarification and if so, the basis for such rejection is not apparent. The court's adoption of an approach to the "evidence to the contrary" issue that Mr. Solomon consumed 10 alcoholic drinks at any one outing proved disastrous to the defence's discharge of proof. On this critical point, I am unable to conclude whether the trial court properly directed itself to all the evidence bearing on the relevant issue and whether there existed a legitimate and reasonable path of reasoning for the trial court's conclusion that Mr. Solomon follows an invariable pattern of consuming 10 alcoholic drinks at a time. As a result, this ground of appeal must succeed: see generally, *R. v. Sheppard* (2002), 162 C.C.C. (3d) 298 (S.C.C.), at 316-7; *R. v. G. (G.)* (1995), 97 C.C.C. (3d) 362 (Ont. C.A.) at 378-9; *R. v. Feeney* (1997), 115 C.C.C. (3d) 129 (S.C.C.), at 148-9.

Refusal to Permit Re-examination

17 In re-examination of the appellant, trial counsel sought to have Mr. Solomon refer to a memo he made shortly after arrest detailing his alcohol consumption. To this end, trial counsel posed this question:

Now, Mr. Solomon, the Crown when he cross-examined you, on numerous occasions he made reference to the following, "You have no reason to remember this place and what happened," "You have no reason for you to remember, you didn't pay any particular attention to what you had to drink," "Your memory as to quantities of what you had to drink would be better the night of this matter, rather than a year later." Did you at any time after the night in question, did you ever have occasion to record your recollections in the form of typewritten notes or statements?

The Crown objected to the proposed re-examination and the trial judge refused to permit further questioning of the appellant.

18 In oral submissions, counsel for the appellant read various passages of the cross-examination of Mr. Solomon including whether there was any "particular reason for [him] to sit there and count the number of beers [he] had". This is not a conventional recent fabrication assertion but a traditional type of cross-examination designed to show that *at the time of consuming alcohol* there was nothing sufficiently remarkable about the occasion for the defendant to keep track of the number of drinks consumed. The proposed re-examination would be entirely irrelevant to this line of inquiry by the prosecution. The Respondent Crown's Factum response to this ground of appeal makes these points:

15. It is submitted that the trial judge did not err in not permitting defence counsel to introduce notes of the Appellant for the first time on re-examination.

16. The issue of existence of notes should have been canvassed in chief when the Appellant testified as to how much he had to drink on the evening of October 7, 2000.

17. It is submitted the Crown was entitled to cross-examine the Appellant on that issue.

18. The grounds upon which defence counsel sought to introduce the statement were, "And I was going to ask him, number one, when he made the statement, and, two, whether or not he refreshed his memory from the statement before he testified".

19. It was on this basis that the trial judge ruled that the introduction of the statement upon re-examination would be improper.

19 Curiously, however, on a subsequent day of the trial proceeding when a defence witness during in-chief examination expressed that he was "not quite sure" about the time he was dropped off home by Mr. Solomon, a different prosecutor

objected to defence counsel seeking to refresh the witness' memory in examination in-chief from his witness statement given within days of the event.

20 This said, the relevant cross-examination of the appellant included, however the following passage:

Q. I'm also going to put to you, sir, that your recollections as to how much you had — that your recollection has to how much you had to drink would have been better the night in question than it would be one year after a particular night in question, correct?

A. Correct.

Q. So that if you give contradictory testimony as to how much you had on a particular evening, once the night of, once a year later, certainly the night of would be fresher in your mind, correct?

A. True, if somebody specifically was asking me as detailed as you are right now.

21 A fair interpretation of this exchange is that the prosecutor was endeavouring to suggest that statements of the appellant to the police on the date of his arrest either at the scene of arrest or in the intoxilyzer testing room were at odds with Mr. Solomon's account at trial as to his alcohol consumption. It was in this regard that defence counsel submitted to the trial judge:

DEFENCE COUNSEL: Your Honour, this statement that I have in front of me is a typewritten statement. It was made by this witness on a date just following his arrest, and it wouldn't have been proper, I would submit, I don't think it would have been proper for me to try to introduce it in examination in-chief, the same way as if a police officer tried to introduce notes that he had made, let's say a day or two after the event, Your Honour wouldn't allow him to do that in-chief.

But where my friend cross-examines my client and suggests to him the reason why his evidence is not worthy of belief is because he's testifying a year later to something that happened a year ago, and unlike the police, who made reliable notes, his evidence should not be believed, because he doesn't have any other way of remembering, other than just to say, I remember what happened a year later. So I would submit that entitles me on re-examination logically, to show why he would have a way of remembering. And I was going to ask him, number one, when he made the statement, and, two, whether or not he refreshed his memory from the statement before he testified.

THE COURT: But that should have been done on examination in-chief... It's improper to do so on re-examination.

DEFENCE COUNSEL: Well...

THE COURT: And it would only be for the purposes of assisting his memory, refreshing his memory. I don't know what other use you wish the court to make of it, and that's certainly when it should have been done, if you felt there was some area that he was having problems with his recollection or something that he wasn't able to answer in your questions. And I failed to see how when the Crown raises the issue about his recollection on the date of the events as opposed to now, that now entitles you to allow him to refresh his memory from a memorandum or a statement that he has written.

DEFENCE COUNSEL: Your Honour...

THE COURT: It's just not accurate that he should be able to do that.

DEFENCE COUNSEL: I don't under — I don't see on what basis I could have introduced it in-chief.

THE COURT: I'm not asking you to introduce it, but if in fact the issue of you becoming aware that his ability to refresh his memory about some aspect of his case is lacking, you're aware of the memo. You can assist him by — at least allowing the Crown to see that statement and then allowing him to refresh his memory from it, but you didn't, and now you're asking him to make reference to this statement on re-examination. The Crown will not have the benefit of looking at that statement and cross-examining him in respect of his refreshing of his memory from it, and you're making conclusions from the statement. It's improper...and I just won't allow it.

.....

DEFENCE COUNSEL: Well, Okay. You see — but it's either one or the other, because the Crown is able to suggest and create the false impression that my client is just trying to remember something that happened a year ago, even though the truth is that he's provided a detailed typewritten statement shortly after the event. So the truth doesn't get to come out... I just feel it's so important that Your Honour isn't left with this false impression that my client is just sitting there trying to recall something that happened a year ago. This is the impression that my friend has left. I'm trying to correct that impression on re-examination.

THE COURT: No, it's improper...and I'm not going to allow it.

22 The submission of trial counsel for the appellant was correct. In examination in-chief, Mr. Solomon did not equivocate as to the quantity of alcohol consumed on the relevant date. He had no need, at that point, to have his memory refreshed by his own counsel. The making of the note to memory contributed nothing to the narrative. In these circumstances, the defence would not, as a matter of law, be justified in introducing a prior consistent statement during in-chief examination either to establish consistency or to refresh a memory not requiring refreshment. However, once the prosecution asserted that the appellant's memory would be better a year prior to trial, implicitly suggesting deterioration of memory or a present account falsely composed to meet the exigencies of the case, it was open to the defence to demonstrate that the appellant's present recall had been assisted by a contemporaneous record made shortly after his arrest: see generally, *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.) at 470; *R. v. O'Connor* (1995), 100 C.C.C. (3d) 285 (Ont. C.A.) at 295 (leave to appeal refused [1996] 1 S.C.R. viii (S.C.C.)). The trial court had a discretion to allow further cross-examination for the Crown to explore the circumstances of the appellant making the memo shortly after he was charged.

23 The Crown was not called upon in oral argument to respond to this ground of appeal. Given that the appeal succeeds on other grounds, the respondent was not called upon to make additional submissions before deciding the appeal.

The VISA Payment Issue

24 The appellant submits that the trial court:

- (1) misapprehended the evidence as to whether he used cash or his VISA to pay for the alcohol he consumed
- (2) erroneously drew an adverse inference against the appellant for failure to produce the liquor bill or tab, failure to check his VISA records, and failure to account for the non-production of a VISA receipt.

25 The evidence of the appellant and the bartender was that Mr. Solomon was permitted to run a tab and settle up at the end of the evening. The appellant testified that before he left the bar he "went up to the bar and got [his] tab" paying for not only his own drinks but for those of his friend, Mark Simmonds, as well. When asked in cross-examination whether he took a copy of the receipt, he answered "I took it, but I probably just threw it out". The prosecutor then inquired as to the manner of payment:

Q. So other than when you're paying the bill — how did you wind up paying the bill?

A. At the end before we left, I went up to the bar and got my tab.

Q. Okay. Now, did you have your own tab?

A. Mine and Mark's together.

Q. Yours and Mark's. Did you wind up taking a copy of the receipt?

A. I took it, but I probably just threw it out.

Q. Okay. You took it, but you probably just threw it out. How did you pay for that?

A. I — either cash or VISA. Probably cash.

Q. Probably cash. But you're not sure whether or not you paid cash or VISA, correct?

A. No, no, I don't remember.

Q. It's fair to say that VISA keeps tabs of your — or keeps track of your payments, correct?

A. True.

Q. And you understand here at some point in time, how much you had to drink has become a very relevant issue, correct? Sir, you can't nod at me. You've got to say yes or no.

A. Oh, sorry. Yes.

Q. That's fine. So you can agree with me that if you're not sure whether or not you paid VISA for your tab, it probably would have been smart for you to check to see your VISA bill to see how much you paid and try and cross-reference how much you remember having with how much you paid on VISA?

A. I'm guessing while I was going through all this, I probably would have at the time thought about that and having — since I know I didn't look through VISA records, then I must have known at the time that I paid with cash.

Q. Okay. You must have known...

A. This — this was a year ago. I mean...

Q. That was a year ago.

A. Right.

Q. But, sir, you can agree with me, you've never been charged — this is your first time around the criminal system, correct?

A. Yes, yes.

Q. And I'm guessing a lot of this probably comes as a bit of a shock to you?

A. All of it.

Q. Okay. And I'm guessing you're probably finding a little bit of this daunting.

A. Yes.

Q. I'm going to put to you, sir, if you had really suspected you only had three, and if there was a chance you would have paid with VISA, you would have thought about it and you would have gone and checked your records, wouldn't you?

A. I probably would have.

Q. Okay. But you don't remember doing that, do you?

A. I didn't do it, so I probably didn't pay with VISA.

Q. You didn't do it, so you probably didn't do it (sic). You can agree with me, sir, that when you tell me, I didn't do it, so I probably didn't do it, doesn't make a whole lot of grammatic sense that — you're — it's taking a very strong position saying, I didn't look at it, and then you tell me, so I probably didn't do it, which goes from being very strong to being equivocal. What is it, did you look at the VISAs?

A. I didn't look at the VISAs.

Q. Okay.

A. And I did pay with cash.

Q. You did pay with cash. Now, just prior to this, you had just indicated to this court that you may have paid with VISA or you may have paid with cash. So now your answer is you for sure paid with cash, correct?

A. I paid with cash.

.....

Q. Now, do you have an exact recollection as to how much the bill was?

A. No.

.....

A. And I — I could only prove — I can only say I was served four pints. Like, that — to me, that's what I was going — I couldn't — If I — as far as I was concerned, what I thought, if I said, you know, I never finished the last one, it would kind of be like, well, yeah, it was served to you. That's — this was just my own assumption, so I...

Q. So you said you stuck with four pints, because....

A. I ordered four...

Q. ...you knew that's what you could prove.

A. Yeah.

Q. You ordered four and that's what you had, correct?

A. Yes.

Q. But you knew that that was all you could prove and that's....

.....

So you're saying then that you knew you could — you ordered four pints...

A. Yes.

Q. ...correct? And you knew you could prove that you ordered four pints, correct?

A. Yes.

Q. That being said, you didn't check your VISA bill to see if you paid by VISA or cash, correct?

A. Like I said, if I at the time [I] knew that I paid with my VISA, then I would have checked my VISA bill.

26 Mr. Teague, the bartender at Sharkey's, testified that Mr. Solomon, as a regular, could have run a tab whether he ultimately paid by cash or credit card. The witness was not examined by either party as to how long a "tab" or bill is kept by the restaurant or the period of time when a replacement copy of the tab would be available.

27 Mark Simmonds, a defence witness, testified initially in his cross-examination that he believed his drinks were paid for by the appellant's credit card. Under subsequent questioning, Mr. Simmonds gave this evidence:

Q. I just want to be clear, do you remember whether it was cash or credit card that night?

A. To tell you the truth, honestly, I don't.

Q. Okay. So if you said it was credit card earlier when I asked you, you were just guessing?

A. Yes. I — yes.

.....

Q. So you can't recall, sir. Is that right?

A. Yes.

28 In reasons for judgment, the court summarized the appellant's testimony relating to manner of payment and checking his VISA statement. The trial judge further observed:

He then went on to say, yes, except when I was paying the bill. He did not have the bill for the Court when he testified, he did not even know if he paid visa or cash. He did not know how much he paid on this occasion. He made no effort to check his visa records. He made no efforts to get a replacement copy of the tab from the bartender or from Sharkey's, he is a regular and certainly, it would seem that it would be reasonable to be able to do so. His explanation is not reasonable. He leaves the Court with the impression he does not want the Court to see the tab and the amount of drinks that were paid for on that tab. If there is a visa receipt, are all very important pieces of evidence in this defence and they are missing and that absence is not satisfactorily accounted for and lessens this evidence to the contrary and lessens the weight that I can give to it.

.....

He [Mark Simmonds] indicated that we matched each other. I assume that means drinking. He referred to the tab being paid with a credit card, he changed his mind and could not decide if it was paid by cash or credit even though they share the same tab. Again, I have already commented on the importance of this tab and importance of any credit card receipt and its absence has already been commented on by the Court.

29 I am unable to accept the submission at para. 34 of the Appellant's Factum that the only reasonable inference the trial judge could come to on the evidence was that Mr. Solomon paid cash and that "He [the appellant] was not unsure of it, using the fact that he had not checked his VISA records as an aide memoire". On the textual record of the appellant's testimony on the payment issue, there is equivocation — not a settled response. The trial judge held the advantage of seeing and hearing the relevant cross-examination of the appellant and the witness Simmonds' backtrack on the credit card payment issue and accordingly could reasonably have come to the conclusion that the appellant paid by cash or VISA.

30 The appellant's submission complaining of the adverse inference is set out in para. 35 of the Appellant's Factum:

...the trial judge clearly drew an adverse inference from the failure to produce a Visa receipt or a copy of the tab. It is well established that to draw such an adverse inference compromises the presumption of innocence and the onus of proof. Although the evidence to the contrary presumption places an evidentiary onus on the Appellant to

raise a reasonable doubt, the trial judge's error cast a higher obligation on him to meet a persuasive or legal burden. This error is reversible.

The Supplementary Submissions of the Appellant add these further points:

- (1) no authority "outlines in any clear way when the inference is permissible and when it is not"
- (2) the probative significance of an absence of evidence permits a non-evidentiary inference only
- (3) the trial judge erred in the following respects:
 - (a) the court exhibited no self-instruction as to the caution necessary in drawing the inference
 - (b) the court did not evaluate whether there existed "valid reasons" for not producing the documentary evidence
 - (c) the court improperly placed an onus on the appellant to adduce corroborative evidence
 - (d) the court failed to consider whether evidence was adduced by the defence of relatively equivalent value, i.e. calling the bartender to testify
 - (e) the adverse inference reasoning received undue prominence in the court's decision
 - (f) "at the worst, the only inference that [could] be drawn [was] that the receipt would have been unfavourable to the Appellant".

31 Failure to call a witness or to produce evidence can lead to an invitation for the trier of fact to draw a conclusion respecting some aspect of an opponent's case. However, the nature of the reasoning consequential on such a failure varies according to context and in particular the matter sought to be proven, whether the alleged defaulting party held a burden of persuasion, and the circumstances of the non-production itself. For example:

- (1) Lack of production of evidence capable of confirming a material aspect of the testimony of a prosecution witness otherwise subject to a *Vetrovec* caution often results in a trier of fact accepting that the danger of being persuaded on the witness' unconfirmed evidence alone subsists thereby defeating the Crown's discharge of its burden of persuasion.
- (2) An adverse inference can be drawn that the evidence if it had been called would have been unfavourable to the other's case: *R. c. Jolivet* (2000), 144 C.C.C. (3d) 97 (S.C.C.), at 109-111; *Vieczorek v. Piersma* (1987), 36 D.L.R. (4th) 136 (Ont. C.A.) at 140-1; *R. v. Zehr* (1980), 54 C.C.C. (2d) 65 (Ont. C.A.) at 73.
- (3) An adverse inference may be drawn that had the evidence been produced it would not have been helpful to the other's case: *R. c. Jolivet*, *supra* at 110-1; *R. v. D. (J.C.)* (1995), 98 C.C.C. (3d) 496 (Ont. C.A.) at 508.
- (4) Proof that the accused, as the alleged defaulting party, deliberately suppressed the witness' testimony or destroyed the physical evidence may lead to an after-the-fact (consciousness of guilt) inference circumstantially contributing to proof of guilt.

32 With respect to examples #2 and 3, the authorities do not articulate when, during a criminal trial where the prosecution carries the burden of persuasion by proof beyond a reasonable doubt, a trial court can infer the relevant facts from the absent witness/evidence would be unfavourable to a party's case as opposed to "not helpful". The adversity of the former inference is more detrimental. It appears the adverse inference operates to detract from the credibility of the party's discharge of proof whether described as a persuasive or evidentiary burden as opposed to weighing in on the scales as affirmative evidence. A number of jurisprudential lessons have developed relating to the drawing of an adverse inference from a failure to call a witness or to produce other evidence:

(1) The evidence in question should be peculiarly within the power of one party to produce: *R. c. Jolivet*, *supra* at 110; *Levesque v. Comeau*, [1970] S.C.R. 1010 (S.C.C.), at 1012; *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287-8; *R. v. Rooke* (1988), 40 C.C.C. (3d) 484 (B.C. C.A.), at 512; J.H. Wigmore, *Evidence in Trials at Common Law* (Chadbourn ed., 1979) at § 286, 288, 2486.

(2) An adverse inference should not be considered unless it relates to a material matter in circumstances when it would be natural for the party to produce the evidence if the facts exposible by the witness or evidence had been favourable — where the evidence would be comparatively unimportant, or cumulative, or inferior to that evidence already available on the relevant point, the evidence is easily dispensed with on general grounds such as expense and inconvenience: *R. v. Rooke*, *supra* at 518, 520; *R. v. S. (C.R.)* (1998), 133 C.C.C. (3d) 559 (N.S. C.A.), at 571; *R. v. Koffman* (1985), 20 C.C.C. (3d) 232 (Ont. C.A.) at 237; Wigmore, *Evidence in Trials at Common Law*, *supra* at § 287.

(3) The decision whether to draw the inference should take into account whether it is appropriate to do so considering any explanation reasonably available, i.e. defence advocacy and counsel's conduct of the case: *R. c. Jolivet*, *supra* at 113; *R. v. Zehr*, *supra* at 68-9, 72-3; *R. v. Rooke*, *supra* at 520; *R. v. Koffman*, *supra* at 237; *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.), at 499; *R. c. Plamondon* (1991), 65 C.C.C. (3d) 402 (Que. C.A.), at 433 (leave to appeal refused [1991] 3 S.C.R. x (S.C.C.)); Wigmore, *Evidence in Trials at Common Law*, *supra* at § 290.

(4) The inference should be drawn only with the greatest of caution: *R. v. Witter* (1996), 105 C.C.C. (3d) 44 (Ont. C.A.) at 55; *R. v. D. (J.C.)*, *supra* at 508; *R. v. Zehr*, *supra* at 68; *R. v. Charrette* (1982), 67 C.C.C. (2d) 357 (Ont. C.A.) at 359; *R. v. S. (C.R.)*, *supra* at 570; *R. v. Belowitz* (1990), 56 C.C.C. (3d) 402 (Ont. C.A.) at 411; *R. v. Koffman*, *supra* at 237.

(5) Bearing in mind the division of responsibilities between the Crown and the defence in a criminal case (*R. c. Jolivet*, *supra* at 110), the inference may nevertheless be applied against the defence in rare instances: *R. c. Jolivet*, *supra* at 114; *R. v. Witter*, *supra* at 56; *R. v. D. (J.C.)*, *supra* at 506-7; *R. v. Zehr*, *supra* at 68.

(6) Unlike the after-the-fact inference arising from deliberate suppression or destruction of evidence, the adverse inference here does not permit an inference of guilt: *R. v. Bennett*, [1997] O.J. No. 170 (Ont. C.A.) at para. 1-3; *R. v. Rooke*, *supra* at 526-7; *R. v. Koffman*, *supra* at 238; Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (2nd ed) at 298; *R. v. Taylor*, [1995] O.J. No. 154 (Ont. C.A.) at para. 2-3; Wigmore, *Evidence in Trials at Common Law*, *supra* at § 290.

(7) Where an adverse inference is drawn, it should not achieve undue prominence: *R. v. Koffman*, *supra* at 237.

33 Drawing an adverse inference against an accused in a criminal trial raises the danger of placing a burden of adducing evidence on the defence: *R. v. Sanchez-Ruiz* (1991), 68 C.C.C. (3d) 500 (N.B. C.A.), at 505. The accused is not required to call a particular witness or to produce corroborative evidence: *R. v. Brown*, [1999] O.J. No. 1786 (Ont. C.A.) at para. 1; *R. v. Sanchez-Ruiz*, *supra* at 515-6; *R. v. Belowitz*, *supra* at 411-2; *R. v. Koffman*, *supra* at 496; *R. v. Wilson* (1996), 107 C.C.C. (3d) 86 (Ont. C.A.) at 95; Wigmore, *Evidence in Trials at Common Law*, *supra* at § 2487, 2489.

34 The evidentiary presumption in s.258(1)(c) of the *Criminal Code*, that the blood/alcohol content of the accused is the same at the time of the alleged offence as the content established by a subsequent intoxilyzer test (the presumed fact), is a rebuttable presumption. The process of rebuttal by evidence to the contrary is frequently described in terms of the accused merely being required to raise a reasonable doubt as to its existence: *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321 (S.C.C.), at 325-6; *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.), at 330; *R. v. Phillips* (1988), 42 C.C.C. (3d) 150 (Ont. C.A.) at 168-9; *R. v. Crosthwait* (1980), 52 C.C.C. (2d) 129 (S.C.C.), at 138; *R. v. Moreau* (1978), 42 C.C.C. (2d) 525 (S.C.C.), at 534; *R. v. Gilbert* (1994), 92 C.C.C. (3d) 266 (Ont. C.A.) at 277, 280-1. It is generally accepted that evidence to the contrary, where accepted, is capable of raising a reasonable doubt where it emerges not only from the

accused but also from evidence adduced by the Crown: *R. v. Proudlock*, *supra* at 138; *R. v. St. Pierre* (1995), 96 C.C.C. (3d) 385 (S.C.C.), at 398.

35 In the present case, the evidence to the contrary said to rebut the evidentiary shortcut asserted by the Crown arose from evidence adduced by the defence case. In effect, the appellant carried a persuasive burden to raise a reasonable doubt to defeat operation of the presumption to prove the presumed fact: see Wigmore, *Evidence in Trials at Common Law*, *supra* at § 2487-2491. As a general rule, the defence should have to call witnesses beneficial to its case: *R. v. Cook*, *supra* at 495. As the s.258(1)(c) presumption operates in the prosecution's favour, the defence fails to adduce evidence to the contrary at its peril.

36 The trial court elected to draw one or more adverse inferences based on:

- (1) a failure "to check" VISA records
- (2) a failure to produce in evidence
 - (a) a replacement copy of the tab
 - (b) the tab or "bill"
 - (c) a VISA receipt.

37 The appellant provided an explanation for not checking his VISA records, that he in fact paid cash, an explanation not disputed by Mark Simmonds depending on the court's view of the totality of this evidence. It is unclear whether the trial court took account of the appellant's testimony that he paid cash in concluding that he "made no effort to check his VISA records". The same evidence would of course be relevant to the lack of production of a VISA receipt.

38 The bartender witness was not examined by either party as to the bar's preservation of the "tab" or to circumstances of availability of a "replacement copy of the tab". Register receipts maintained by the bar where cash payment is made may well not include a customer's identity or descriptions of the beverages served. Given the bartender's testimony as to the appellant's pattern drinking and his recall of the events of the relevant date, it is not apparent that relatively equivalent evidence from the bar was not in fact produced by the defence on the alcohol consumption issue. This explanation of defence conduct of the case deserved consideration.

39 While the trial judge limited the adverse inference(s) to the issue of evidence to the contrary and not to guilt itself, it is not clear that the court properly restricted its use of any inference(s) to the credibility of the defence evidence as to alcohol consumption. The court's reference to its "impression that [the appellant] does not want the Court to see the tab" suggests impermissible employment of the circumstance of non-production as after-the-fact conduct positively contributing to proof of the alcohol described by the prosecution.

40 In conclusion, while a trial court can, in appropriate cases, draw an adverse inference against the defence in an "evidence to the contrary" analysis, on account of failure to call a witness or to produce evidence, the record here does not support that any adverse inference could be, or indeed was, properly drawn by the trial court.

Result

41 The appeal is allowed, the conviction is set aside, and a new trial is ordered before a differently constituted summary conviction trial court. It is expected that counsel will agree to an appearance option failing which the Crown can apply for issuance of the necessary process.

Appeal allowed; conviction set aside; new trial ordered.

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Tab 3

2008 ABQB 641

Alberta Court of Queen's Bench

Crooked Post Shorthorns, A Partnership v. Masterfeeds Inc.

2008 CarswellAlta 1523, 2008 ABQB 641, [2009] A.W.L.D. 1697,
[2009] A.W.L.D. 1742, [2009] A.W.L.D. 1799, [2009] A.W.L.D. 1801

**Crooked Post Shorthorns, A Partnership and Seaborn
Seeds Inc. (Plaintiffs) and Masterfeeds Inc. (Defendant)**

D.A. Sirrs J.

Heard: October 1, 2007 - January 25, 2008

Judgment: October 15, 2008

Docket: Red Deer 0310-00313

Counsel: Sydney A. Sabine for Plaintiffs

Michele H. Hollins, Q.C. for Defendant

Subject: Torts; Corporate and Commercial; Contracts; Property; Evidence; Civil Practice and Procedure

Related Abridgment Classifications

Commercial law

[V](#) Sale of goods

[V.5](#) Statutory contract

[V.5.g](#) Condition

[V.5.g.ii](#) Implied condition

[V.5.g.ii.C](#) Sale by description

[V.5.g.ii.C.1](#) What constitutes

Evidence

[X](#) Witnesses

[X.4](#) Competence and compellability

[X.4.f](#) Failure to testify

[X.4.f.ii](#) Adverse inference

Torts

[XVI](#) Negligence

[XVI.3](#) Causation

[XVI.3.a](#) General principles

Torts

[XVI](#) Negligence

[XVI.3](#) Causation

[XVI.3.f](#) Miscellaneous

Torts

[XVI](#) Negligence

[XVI.3](#) Causation

[XVI.3.a](#) General principles

Torts

[XVI](#) Negligence

[XVI.3](#) Causation

[XVI.3.f](#) Miscellaneous

Headnote

Torts --- Negligence — Causation — General principles

Farmers operated livestock farm and seed businesses — Farmers stated that day after feeding new ration to cattle sickness developed — Farmers claimed vet visited within two weeks — Farmers claimed that some cattle were penned and continued to be fed feed, with worsening symptoms — Within one month farmers claimed to stop using ration, but cattle worsened — Cattle were put to pasture to "flush" them — Farmers, through farm and seed businesses, brought action against manufacturer of ration for negligence and breach of Sale of Goods Act — Action dismissed — Ration was possible cause of sickness only — Causation not shown — Farmers tended to exaggerate evidence in order to impose liability — Farmers refused to test hay — Genetic defects possible cause of some problems — Documentation of expenses lax — Claim of extra work hours due to sickness was exaggerated — Vet not contacted for several weeks — Vet records did not corroborate extreme sickness during relevant period — If symptoms were as described, veterinary opinion not necessary — Composition of ration did not create nexus sufficient for liability — Manufacturer did not provide required label regarding selenium levels, but farmers knew contents — Cattle consumed acceptable levels of selenium, and selenium was not cause of injury — Weeds in ration not cause of illness — Mycotoxins in feed were unlikely present on delivery — Only small levels of mycotoxins present — Unlikely adverse minerals or urea caused problems — No proof that unaccounted portion of feed was toxic urea — Feed testing and other useful tests not done — Complex mixture of ration did not cause injury — Doctor who felt complex mixture was problem relied on exaggerated symptoms — Not meeting Canadian Food Inspection Agency labelling requirements not proof of causation — Extra weight of feed, although source of concern, was not causation — No evidence ration resulted in reduced calving — Few complaints from manufacturer's other clients — Poor breeding and toxins from other food sources were possible causes of injury — Mobility issues likely genetic — Farmers did not complain about feed being moist on delivery and made no comment about ration to manufacturers for several weeks — "But for" test not made out.

Commercial law --- Sale of goods — Statutory contract — Condition — Implied condition — Sale by description — What constitutes

Farmers operated livestock farm and seed businesses — Farmers stated that day after feeding new ration to cattle sickness developed — Farmers claimed vet visited within two weeks — Farmers claimed that some cattle were penned and continued to be fed feed, with worsening symptoms — Within one month farmers claimed to stop using ration, but cattle worsened — Cattle were put to pasture to "flush" them — Farmers, through farm and seed businesses, brought action against manufacturer of ration for negligence and breach of Sale of Goods Act — Action dismissed — Ration was not inadequately described contrary to Sale of Goods Act — Although protein exceeded description, this was not negative — Any harmful substances in ration not present in sufficient quantity to alter description of goods — Ration was not unfit for sale and was of merchantable quality.

Evidence --- Witnesses — Competence and compellability — Failure to testify — Adverse inference

Farmers operated livestock farm and seed businesses — Farmers stated that day after feeding new ration to cattle sickness developed — Farmers claimed vet visited within two weeks — Farmers claimed that some cattle were penned and continued to be fed feed, with worsening symptoms — Within one month farmers claimed to stop using ration, but cattle worsened — Cattle were put to pasture to "flush" them — Farmers, through farm and seed businesses, brought action against manufacturer of ration for negligence and breach of Sale of Goods Act — Action dismissed — Failure to call vet who provided treatment during relevant period created adverse inference against farmers — Vet was available to testify — Evidence from other vet did not remedy deficiency — Memo from vet not sufficient evidence — No adverse inference from not calling ranch hand, as he could have been examined in discovery but was not — No records that vets visited to treat general malaise in year after feed used, and little third party evidence regarding cattle health.

Torts --- Negligence — Causation — Miscellaneous

Farmers operated livestock farm and seed businesses — Farmers stated that day after feeding new ration to cattle sickness developed — Farmers claimed vet visited within two weeks — Farmers claimed that some cattle were penned and continued to be fed feed, with worsening symptoms — Within one month farmers claimed to stop using ration, but cattle worsened — Cattle were put to pasture to "flush" them — Farmers, through farm and seed businesses, brought action against manufacturer of ration for negligence and breach of Sale of Goods Act — Action dismissed — Seed corporation's claim lay in negligence only as farming corporation had purchased ration — Not reasonable to foresee that

farmers would use valuable seed grass fields to pasture cattle after health problems arose — Not financially sensible to use grass as pasture — Any damage could have been lessened by building pens to keep cattle in smaller area — Farmers continued to graze cattle even after it was reasonable to do so — No profits had been shown from seed venture.

ACTION by farmers for negligence and statutory remedy under *Sale of Goods Act*, arising out of allegations of defective feed ration.

D.A. Sirrs J.:

1. Undisputed Facts and Plaintiffs' Allegations

1 The first Plaintiff is Crooked Post Shorthorns ("CPS"), a purebred shorthorn cattle operation run as a partnership between Tom Seaborn, his wife, and his son, Kirk Seaborn. The second Plaintiff is an incorporated company called Seaborn Seeds Inc. ("Seaborn Seeds") which raises, cleans and sells grass seed. The Plaintiffs operate both businesses from their family farm near Rocky Mountain House, Alberta.

2 In the early 1960's, Tom Seaborn attended university and graduated with a Bachelor of Science in Agriculture.

3 After graduating, he was employed as a District Agriculturist until 1985 when he resigned to operate his grass seed business in Rocky Mountain House full time. He has attended numerous courses and seminars around the world enhancing his knowledge of native grass seeds. Through the 1970's and 1980's, Tom Seaborn also raised purebred sheep.

4 Kirk Seaborn grew up living on his father's farms. After high school, he attended Red Deer College and has 2 ¹/₂ years towards a Bachelor of Science degree. He has also attended courses at Michigan State University on cattle embryo implants, AI, cattle production and carcass and structure evaluation. Since 1994, he has been raising cattle on the Seaborn Family farm.

5 The Defendant is a livestock feed manufacturer with feed mills located throughout Canada. It has a feed mill in Red Deer, from which CPS purchased the feed in question in this lawsuit, an 18% Heifer Ration (the "Ration"), on approximately February 26, 2001. The order was placed through Keith Warner, a dealer who carried Masterfeeds products.

6 The Ration was a derivative of an existing product, a 16% heifer ration called Masterline 16% Heifer Ration (Ex. 3). At Tom's request, the protein in that formula was increased to 18% and Rumensin, the brand name for the medication Monensin, was added (Ex. 4, 5).

7 In August of 2000, Tom requested a further change, namely the substitution of soya meal for canola (Ex. 7). This product was now known as the Seaborn 18% Heifer Ration (2ECP) and its formula (the "Formula") is at Exhibit 10. Although that formula is dated August 29, 2000, it was never changed again in the BRILL system used by the Defendant and is therefore the same formula used to manufacture the Ration (Dyke, pp. 3823-3850, 3974-3982).

8 CPS had previously purchased feed from Masterfeeds as follows:

Aug. 1999, Mr. Warner sold an undetermined quantity of the Master line 16% heifer ration.

Nov. 30, 1999 (Ex. 4): one tonne of 18% heifer ration (3ECP) with rumensin.

Aug. 29, 2000 (Ex. 12): 6.5 tonnes of 18% heifer ration (2ECP) without rumensin.

Dec. 1, 2000 (Ex. 15, 16): 4.5 tonnes of 18% heifer ration (2ECP) with rumensin.

9 Once an existing product, like the Seaborn 18% Heifer Ration, is ordered, the system generates a Feed Mixing Order (Ex. 42). This is the "recipe" provided to the production crew that tells them how much of each ingredient is required.

Most of the ingredients are measured and added by the computerized system, with the exception of some that are added in small quantities and therefore done by hand. Once the production is complete, the computer generates a Run Summary (also called a Batching Summary Print) that shows the actual amounts of the ingredients added by the computer and automatically calculates any deviation (Ex. 44). The system also generates a corresponding feed label (Ex. 45).

10 The Ration was manufactured on February 26, 2001 at 6:51 p.m. It was delivered to the Seaborn farm the next day by Barry Dorscher of Colt Trucking and loaded into a new wooden bin.

11 In February, 2001, CPS had 18 yearling heifers, fifteen of which were Crooked Post breeding stock and 3 others. In addition Crooked Post had 40 bred cows.

12 The Seaborns began to feed the Ration on the evening of February 27, 2001 to their 18 yearling heifers (4lbs/head/day), to their cows (at 6lbs/head/day) who had already delivered their calves (i.e. lactating cows), as well as to a few specific cows earmarked for embryo flushing and transfer (10lbs/head/day). Of the 40 cows, 5 cows calved after March 22nd when CPS stopped feeding the Ration (Diana 371, Winnie Miami 15F, Hope 4F, Ruby Rose 68, and Bessie 328), and it is in issue whether Cactus Flat 27E or Minnie 36J, who had their calves on March 20th and March 22nd respectively, ate the feed and I will deal with this issue later in this Judgment.

13 Tom Seaborn testified that on February 28th he noted the cattle in the heifer pen had dark scours, were acting differently, lacked the zest to eat and were stressed and had mobility problems. Thus from March 1st to March 3rd, the Seaborns say they mixed the Ration with some pellets from the December load of pellets. By March the 2nd, the Seaborns report that cows, calves and yearling heifers all had dark scours and attempts to treat the calves with antibiotic had no favourable effect. From March 4th to March 8th, the Seaborns report that they stopped feeding the Ration to the yearling heifers, feeding them 2lbs of barley per day instead. On March 8th the yearling heifers were reintroduced to the Ration at 2lbs/head/day mixed with 2lbs/head/day of barley. The Seaborns report that they then noted the scours to reappear and some animals to have problems walking, suffer a loss of hair, and suffer convulsions. To remedy these problems the Seaborns indicate that they isolated these animals and fed them more of the Ration, which seemed to compound the problems.

14 On about March 11, 2001, the veterinarian Dr. Ryan Wennekamp came out to the farm. He examined and treated two specific animals over the next two weeks for magnesium/calcium deficiency, the details of which are discussed, *infra*. There is no evidence to indicate that the Seaborns discussed the many problems they say they had with the many other animals in their herd with Dr. Wennekamp on March 11, 2001 or at any other time.

15 On March 22, Dr. Wennekamp or Dr. "M" again attended at the Seaborn farm to treat cow #41, on which date Kirk Seaborn indicates that Dr. Wennekamp or Dr. "M" suggested it might be the feed and they thus decided to pull the Ration.

16 On March 23, 2001, the Seaborns pulled the Ration completely and substituted a grain supplement thereafter. Tom contacted Warner, who in turn contacted Masterfeeds. A number of samples of the Ration were taken, including some by the Canadian Food Inspection Agency ("CFIA"). Masterfeeds also took and tested samples of the Ration. Between April 2001 and the trial, the Ration was tested numerous times by various laboratories. Attached hereto is Appendix A, a table summarizing the sampling and testing done.

17 Following the removal of the Ration on March 23, 2001, Tom Seaborn alleges that regarding the cattle that ate the Ration:

1. Scours diminished and the appetites improved;
2. The cattle continued to waste;
3. Milk production of the cows was poor;

4. Cows' and heifers' coats were poor and unhealthy looking;
5. The cattle had mobility problems and no desire to move;
6. Calves developed pot-bellies;
7. After 2001, calf distribution was extremely skewed;
8. Cattle were babied through more feed and pasture seclusion and close monitoring but did not improve.

18 The Seaborns contend that the Ration caused such damage to their cows and heifers that they became weakened and were unable to support their own good health or the health of their calves in subsequent years. They have concluded that the only way to rebuild their herd is to sell off their breeding stock for slaughter and purchase new purebred breeding stock.

19 Cattle are identified by their time of birth. An ear tag, e.g. 4J, means it was the fourth calf born in the year 1999. H, J, K, L indicate the years 1998, 1999, 2000 and 2001, respectively.

2. Analysis of Contentious Issues and Fact Finding

A. The Nexus between the Ration and the Initial Sickness in the Cattle Lack of Independent Witnesses Between February 28 and March 22, 2001

20 Tom Seaborn testified that there was almost an immediate deterioration in the health of the cattle upon the introduction of the Ration. The Ration was introduced the evening of February 27, and on February 28 he noticed the heifers were suffering from scours, their appetite was waning, they were losing their zest, they seemed to be stressed, and their mobility was affected. On February 28 he concluded it was a difference in the feed that was causing these problems. In reaching this conclusion he was able to compare the bulls and cows that had yet to calf with the first year heifers and cows with calf, as the bulls and cows without calf were not fed the Ration and did not show any of the above symptoms.

21 The evidence that the heifers and cows with calf suffered these immediate severe symptoms upon being introduced to the feed comes solely from the testimony of Tom Seaborn and Kirk Seaborn. As to the accuracy of their observations, the following points are troubling:

1. It was Dr. Lewis's opinion if this many of the Crooked Post herd was affected with scouring, they would have sought out the services of a veterinarian.
2. On February 20, Kirk Seaborn obtained some calf guard single dose vaccine from their veterinarians, a vaccine to protect newborn calves from scours, however following February 28, there is no record of any additional purchases of scour medicine until March 9.
3. Neither Dr. Wennekamp or Dr. "M" testified.

They were independent witnesses of events at CPS during the relevant time.

At the time of trial, Dr. Wennekamp was a practising veterinarian in Alberta.

The Plaintiffs chose to introduce evidence by an undated letter written by Dr. Wennekamp (which I have concluded was written in the Summer of 2002) addressed "To Whom It May Concern" and other related documents.

The documents in my view raise a number of issues:

a. When was Dr. Wennekamp at the CPS ranch?

It is clear (Ex. 182, p. 33) that he was there on March 11 and 23, treating cow "Tag 41" and "4F" respectively.

He may have attended on March 19 or March 20 to get a blood sample from "Tag 41" (Ex. 182, p. 19 shows a blood test on "Cow 41" occurring at 1:14 a.m. on March 20, 2001.)

b. The patient profile (Ex. 182, p. 27) shows Dr. Wennekamp treating an unidentified cow and a calf on March 22, 2001. Dr. Bertagolli testified that these dates could be the dates of billing versus the attendance dates, so this treatment could have also occurred on the March 19th or 20th visit.

c. Dr. Wennekamp treated two cows and a calf, and perhaps a third unidentified cow. The 2 or 3 cows were each diagnosed with magnesium/calcium deficiency and prescribed magnesium/calcium supplements.

Although Dr. Wennekamp's blood tests caused him to suspect liver damage in "Tag 41" and "4F" (he says the high Alk P and total Bilirubin may indicate possible liver damage), there is no evidence that these 2 cows were subsequently treated by a veterinarian for anything.

d. Dr. Wennekamp's physical exam showed no significant abnormalities in "Tag 41."

e. Dr. Wennekamp says that Tom Seaborn told him that aflatoxins were found in the feed. No aflatoxins were detected in the testing of the feed.

f. Dr. Wennekamp makes no comment concerning the general bad health of the CPS herd. He makes no comment of evidence of rampant scours or complaints of scours in the CPS herd in March 2001.

g. In May 2002 and again in August 2003, Dr. Wennekamp does post-mortems on calves, discovering ruptured and perforated ulcers, most likely due to *C. Perfringenes*. At Ex. 183, he refers to this as "a common finding in this herd." Thus, Dr. Wennekamp was involved treating the CPS herd for at least 2 years after March of 2001. Also, no one testifies as to the significance of his diagnosis. As late as May 2005, when Dr. Jensen tests 7J56 and 6J49, a copy of the test results are sent to Dr. Wennekamp (Ex. 32).

h. On March 22, Dr. "M" is shown treating "Tag 41" (Ex. 182, p. 27). Also, "M" is shown treating cattle at CPS on 6 occasions over the next year. (Ex. 18T, p. 16).

Exaggeration

22 The defence alleges that the Seaborns were more intent on having an answer for everything rather than providing reliable, objective evidence, often exaggerating or misstating facts; distracting from their credibility. In my view, in the trial there were numerous situations which support a finding that Tom Seaborn was personally convinced that the Ration was responsible for all the problems in his cattle herd. The following are indicative that he and Kirk exaggerated much of their evidence to support this view:

1. Although the proof of whether the Ration was the cause of the problems in the cattle herd was an issue in the trial, many of the Plaintiffs' witnesses continuously preface their remarks with "after the feed" rather than "post-March 1, 2001".
2. The testing done by the Seaborns was, with the exception of some initial veterinary tests on the cattle and Dr. Jensen's tests, restricted to tests on the feed or tests on the Ration.
3. When asked why he did not conduct a "feed test" of the Ration on some separate cattle, in an effort to substantiate his allegation that it was the feed that caused the problems in the cattle, Tom Seaborn took the position that as the

Ration was owned by Masterfeeds, it was their responsibility to conduct such a feed test. In my view, this supports a belief that he was convinced that the Ration was the problem and it was for Masterfeeds to prove otherwise.

4. In April 2001, in a discussion with Larry Siefried, Mr. Siefried told him, "As we are shipping you a new load of feed, I wouldn't use the old feed." Mr. Seaborn heard this answer as Mr. Siefried saying to him that he, Larry Siefried, would not feed the February Ration to his own cattle, or in other words that Mr. Siefried knew there was something drastically wrong with the Ration.

5. 36J

Initially, the Seaborns believed that they had stopped feeding the Ration on March 26, 2001. Their document, Ex. 180, p. 6, reveals 36J eating the Ration from March 22 to March 26. Kirk Seaborn testified that later in the proceedings they discovered that they, in fact, stopped feeding the feed after a visit of their veterinarian on March 22, and they stopped feeding the feed that day. From the evidence it is clear that it was Kirk's responsibility to care for and feed the animals in the calving barn. Although Kirk initially testified that a cow and calf would receive only hay and water while in the calving barn, he later changed his evidence to indicate that on some occasions a small quantity of the Ration was fed to the cow in the calving barn and he could not be sure whether 36J received any of the Ration. In Tom Seaborn's evidence, he offered that the time of birth of 36J's calf could not be ascertained, and thus it was possible that 36J received a feeding on the morning of the 22nd, the evening of the 22nd, and the morning of March 23 before the Ration was cut off.

In my view, he had no way of knowing this as Kirk was responsible for the calves and cows in the calving barn and he was simply speculating in order to "shore up" the position that 36J had been drastically affected by the eating of the Ration. In Kirk Seaborn's evidence relating to 36J and 36J's progeny (Ex. 12, p. 7), he described 36J as having good growth and being structurally sound but did not have another good thing to say about 36J or its progeny. When confronted with this, Tom Seaborn testified that Kirk had said that 36J was better than the others and said some good things about her, which in my view, he did not. In addition, notwithstanding that Tom Seaborn was not responsible for the day-to-day operations of the calving barn and notwithstanding that Kirk indicated that the feeding of the Ration stopped on March 22, Tom Seaborn offered that there was a high likelihood that 36J was fed the Ration. When Tom Seaborn was confronted with an answer he gave at examination for discovery that in normal circumstances the cows do not get the heifer ration in the calving barn, Tom Seaborn testified that he was not referring in this answer to the J cows, which were in fact first-calving heifers, in his answer. He said, in fact, that although the cows would not get the Ration, it was quite likely that the J heifers would receive some of the Ration in the calving barn. It was pointed out to him that he made no such distinction at the examination for discovery, but nevertheless he maintained that his answer at discovery meant cows excepting the first-calving J heifers.

6. July 20, 2002 Video

A. This video was taken with the intent to portray the dismal condition of the Seaborn herd on July 20, 2002. However, in my view, for the most part, the animals looked and behaved well but Tom Seaborn's description of the pictures indicates otherwise. From this video, I noted the following:

- a. In describing a pile of manure, Tom Seaborn described it as big, saying that during the past Winter they had to use a lot of bedding to look after problems like cows losing hair. Notwithstanding Tom Seaborn's description, there was no way for the Court to determine whether this was an abnormal amount of manure.
- b. In reference to a cow that had just calved, Mr. Seaborn referred to it as a cow from the USA and then offered, "we only go for the best." This statement seemed to infer that CPS travel to the USA to buy the best cattle when in fact they purchased many cattle in Alberta and there is no indication that they paid top price for cows in the USA.

c. In describing cow 41 as having mobility problems, the film did not support Tom Seaborn's description as I observed the cow to be walking okay and to be easily stepping over fallen trees and even Tom Seaborn then stated that 41 seemed to be "walking pretty good today."

d. Notwithstanding all of the problems that Tom Seaborn had described in the herd and the need for separating the cattle, there was scant evidence that CPS had constructed any additional pens. In fact, the film showed a bull roaming with the cows and their calves.

7. CPS's Decision to use the Seed Grass Fields as Pasture

In April or May of 2001, Tom Seaborn testified that they were frustrated and flustered over the condition of the CPS herd. Because they were not sure of the cause of the condition of the cattle, Tom Seaborn testified that he feared they might be inflicted with an undiagnosed disease.

Thus, they wanted to segregate the sick cattle, but wanted to keep a close eye on them. Except the existing pastures 29, 30 and 32 (Ex. 120T), the farmyard was surrounded by seed grass fields. Thus, although it proved to be expensive pasture, the Seaborns let the sick cattle pasture in some seed grass fields. Tom Seaborn stated it would also benefit the sick cattle by "flushing" their innards with some fresh grass.

Although under the pressure of the Spring of 2001, this decision may have made some sense, in my view, over the Summer of 2001, it should have become apparent that this expensive decision was not a practical solution because:

- a. No contagious disease was detected in the herd.
 - b. Pastures 29, 30 and 32, according to Tom Seaborn, were sufficient to provide for a herd twice the size of the CPS herd.
- Pastures 29, 30 and 32 thus could have been fenced to segregate the cattle.
- c. The Seaborns had other remote pasture available in which at least the healthy cattle could have pastured.
 - d. No opinion was sought from a veterinarian that pasturing in seed grass fields was beneficial to the CPS herd's health.
 - e. The Seaborns had a good source of hay from baling their seed grass fields.

The use of the seed grass fields in 2002 and 2003, in my view, displays a willingness by the Seaborns to exaggerate their predicament.

8. Hay

Mr. Seaborn through his actions is either protective of his hay or again shows that he was convinced that it was the Ration that caused the problem in the cattle and thus there was no need to test the hay.

On April 17, 2001 Robert Barry offered to test Mr. Seaborn's hay but Mr. Seaborn protested that because it was a byproduct of the grass seed business and consisted of many different varieties of grass it should not need testing. No evidence was provided by Mr. Seaborn at trial as to the basis for this seemingly irrational response. At examinations for discovery Mr. Seaborn was asked for a sample of his 2004 hay but gave a response that he was unable to differentiate the hay in accordance with the year it was harvested. At trial he testified otherwise, and when pressed as to why he gave a different answer at discovery, he stated that at discovery he saw nothing relevant about the 2004 hay crop so he provided this answer simply to avoid a useless task.

As explained by other witnesses in the trial, hay can contain mycotoxins, minerals, selenium, and varying levels of protein (in this case the protein level would be expected to be low because of the lack of seed and weed seeds).

9. Moisture Level of Ration

Tom Seaborn testified that there was so much moisture in the Ration when it was delivered on February 27th that when he peered into the doorway of the bin it caused his glasses to "fog up." Tom Seaborn also testified as to his understanding of the importance of being sure not to harvest his grass seed or the hay unless the moisture levels were below a certain percentage and yet he failed to mention the high moisture levels to the truck driver on February 27th or to Mr. Warner when he finally made his complaint about the Ration on March 23rd, 2001.

10. Field 26

Mr. Seaborn's evidence was that as a result of the problems arising from the Ration they have had to permanently convert field 26 to pasture. He was unwilling to concede that this would have been necessary in any event as they expanded their herd to 85 or 100 cows.

11. Shorthorn Genetics

At Ex. 16T, CPS lists 21 animals that exhibited limping problems after February 26th, 2001. Again, according to Tom Seaborn, the cause of these problems was the Ration. The Court heard evidence that the shorthorn breed has declined in popularity as ranchers moved to European purebreds and that one of the criticisms levied against the shorthorn breed is that they have a weak leg structure which affects their mobility. Kirk Seaborn testified that they started with a group of Canadian cows that had weak udder structure, inadequate or poor carcass qualities and especially weak leg and foot structures. To remedy this the Seaborns sought out bull power and cows with better structure and leg strength and, in their opinion, with the purchase of the Canadian rights to Boston's bull power and good cows from the Waukaru herd, they noticed calves with better udders and cattle with stronger leg and foot design. Their evidence to the Court seemed to portray that in a few short years they had eliminated the genetic defects of the shorthorn purebred cattle of having weaker leg structure and mobility problems, thus the nexus to their mobility problems after February 27th, 2001 was solely the Ration.

12. Claim of Seaborn Seeds

The entire claim of Seaborn Seeds lacks any documented record of the actual expenses. The attempts by Tom Seaborn to reproduce his losses at a later date resulted in numerous situations stating "we believe or we felt we lost", and the purchase and sale of grass seed at the highest possible expense, leaves a distinct impression that this claim is exaggerated.

13. Extra Labour

Another example of this exaggeration is Tom's estimate that for two years, Kirk, Tom, and his wife Sharon each worked an additional 6 to 7 hours per day, 365 days per year, as a result of the feeding of the Ration to the cattle, even though neither CPS nor Seaborn kept any detailed records of their increased workload.

14. Web Page

Exhibit 89T is the 2007 web page of CPS.

20K is described as the herd matron with great EPDs and 31K is described as the near perfect cow. These two cows were Ks so they were heifers in February and March 2001 and were exposed to the Ration from February 28 to March 22 except for the period March 4 to March 8, 2001.

At trial, Kirk Seaborn described the many problems with 20K and 31K.

On p. 5, Ex. 46, Kirk Seaborn has described the 2002 observations of the K heifers who ate the Ration in March of 2001 as:

1. CP20K "calving difficulties." 20K developed pulmonary edema; calf was ill; the calf was castrated in the Fall of 2002 due to an undescended testicle; 20K re-bred late. 2002-2003 calf interval 434 days.
2. CP31K — sickly calf; 2002-2003 calving interval will be 384 days (at p. 10, calf 24M had scours treated March 18, 2002).

Kirk's evidence at trial in reference to Ex. 12, p. 5 regarding (1) 20K was:

1. Calf 7M — poor performance, light coat.
2. Calf 55W — poor performance, unhealthy look.
3. Calf 61P — late calf.
4. 3 years with no calf, then tried to salvage her by doing embryo flushes.

Regarding (2) 31K was:

1. 37N — mobility trouble at 3 years culled.
2. 43P — looking to cull.
3. 34R — body condition not good.
4. 64S — late calf.
5. 74T and 75T — late twins will be culled.

Either 20K and 31K did not suffer any liver damage and made an amazing recovery, something that was not argued by CPS, or the symptoms of 20K and 31K have been exaggerated.

In addition, the website features Cow 2P as being at the top of her breed for EPD traits and 37N as being in the top 1% of the breed, although their grandmother and mother, respectively, were exposed to the Ration. The web page does not feature any of the progeny from the 5 or 7 cows that did not eat the Ration.

15. 5 Cows that Did Not Eat the Ration

The following cows had not calved by March 22, 2001 and thus could not possibly have been affected by eating the Ration:

1. Novyk Finest Hope 4F calf 34L born April 14, 2001
2. C. P. Winnie Miami 15F calf 35L born April 16, 2001
3. Waukaru Ruby Rose calf 36L born May 5, 2001
4. WPS Bessie 328 calf 37L born May 26, 2001
5. WPS Dianna 371 calf 38L born June 1, 2001

23 Kirk Seaborn testified that there was nothing unusual about them, but they would usually cull these cows because they were late calfers.

24 On Ex. 14T CPS lists 34L and 35L as having damaged market potential for such things as poor weight gain, poor closing, poor milk production, unsightly physical effects, poor productivity and damaged EPDs.

25 Ex. 30T, pp. 28-32 show:

WPS Bessie calving in 2003 and 2004, WPS Dianna calving in 2002, 2003, 2004; C. P. Winnie Miami calving in 2002; Novyk Finest Hope calving in 2002, 2003 and 2004; Waukaru Ruby Rose calving 2002-2007.

26 Although these cows, with the exception of C. P. Winnie Miami, continued for a number of years to calf at CPS, little evidence was provided to compare the performance of these cows and their progeny to the rest of the herd.

27 None of the progeny are featured on the website of CPS (Ex. 89T) although 2 of the K heifers, 20K and 31K, are featured. Waukaru Ruby Rose seems to have been a purchase from Waukaru Farms and from Ex. 30T, p. 37 would seem to still be at CPS and yet is not featured on the website.

28 The lack of any evidence to compare the performance of the cows and progeny who ate the feed to those who did not, in my view, permits CPS to exaggerate the symptoms of the allegedly affected cows and progeny.

16. Veterinarians' Involvement Post-March 28, 2001

Following the removal of the Ration on March 23, 2001, there is no evidence that CPS consulted their veterinarians to diagnose a general malaise that affected most of the herd.

Following March 23, 2001 for the next year, the vet records (Ex. 18T, pp. 16-18 and Ex. 182, pp. 20 and 29) reveal:

1. 5 visits to CPS;
2. 5 prescriptions of Nuflor;
3. 4 post-mortems;
4. 649 having breeding problems in July 2001;
5. A 7-month old bull calf having problems bearing its weight on its front legs;
6. A prescription for 45 doses of calf guard;
7. A red heifer with breathing problems;
8. A caesarean;
9. A weak shorthorn cow that staggered and was depressed; Diagnosed with milk fever and treated with Magnesium/Calcium.

The veterinarian records do not corroborate severe sickness being prevalent in the CPS herd for the year following the consumption of the Ration.

17. Other Independent Witnesses

Dr. Coppock became involved in May of 2003. CPS did not call any witnesses to verify the alleged problems in the CPS herd between February 28, 2001 and May 2003. Dr. Bertagolli testified but he did not indicate whether he made any observations of the CPS herd during this time period.

Bob Barry and Wayne Bond attended at CPS on April 17, 2001, and Mr. Bond attended a second time with Mr. Hopfe on December 18, 2001, but provided no evidence of observing problems in the CPS herd.

Gordon MacLeod attended at CPS on or about March 26, 2001, but he did not testify that he observed the CPS herd.

There was evidence of the sale of cattle that were exposed to the feed to third parties who were later upset by the performance of their purchases, yet none were called to describe the alleged defects.

During this time, CPS had a hired hand, Jonathan, who did not testify. Although the hired hand had returned to his home outside of Canada, and his attendance would have been costly, he was someone who had observed the herd on a daily basis.

In my view, Dr. Wennekamp was in the best position to testify as to visible problems in the CPS herd, but any of the above individuals could also have verified the Seaborns' testimony, however they were either not shown the herd, asked about their observations, or were not called as witnesses.

B. Conclusion on the Initial Observations of the Symptoms of the CPS Cattle by Tom and Kirk Seaborn

29 Considering the factors set out above and:

1. The alleged extreme symptoms shown by the heifers the day after they were exposed to the Ration and yet no call was made to a veterinarian;
2. The fact that CPS failed to call Mr. Warner earlier than March 23, 2001 to express their concerns;
3. Tom Seaborn testified that on March 1, he was sure it was the feed but he continued to feed the Ration and it was only after Dr. Wennekamp, on March 22, 2001, suggested that it may be the feed that is affecting the cattle, they stopped feeding the Ration. Then, Tom testified that in April, they did not know what was wrong with the herd, it could be a contagious disease, so they decided to "flush" some of the cattle by pasturing them in a seed grass field, field 33. In my view, if the cattle had the symptoms described by the Seaborns on March 1, 2001, they would not need a veterinarian to tell them it was the feed and they would not be thinking their herd could be affected by disease.
4. Although Kirk Seaborn's evidence was more reasonable and balanced than his father's, the video, Exhibit 148T, of Kirk Seaborn taking samples of the Ration to be sent to Dr. Jacobsen, in my view, clearly illustrates that Tom is in control and Kirk follows his commands. Kirk Seaborn, in my view, respected his father's opinions on most matters, and has sought to support his father's version of the events at CPS from February 27, 2001. Thus I believe he has adopted his father's exaggerations as being fact.

30 It is my view that Tom and Kirk Seaborn have exaggerated the symptoms of their cattle between February 28th and March 22nd and that those symptoms would be better described as set out in Ex. 80 describing the cattle of Holt Agri. Ltd. as some "cows eating poorly and loose manure". CPS chose to handle the situation themselves using a common practice when cattle react to a new feed of mixing the new batch of feed with a prior batch the cattle were used to and this procedure for the most part was successful thus there was no need to discuss the scours issue with Dr. Wennekamp on March 11, 2001.

31 Having reached this conclusion, and because most of the experts for CPS relied upon Tom Seaborn's description of the cattle between February 28 and March 22, 2001, it has had an effect on the weight I have placed on the testimony of

those experts. (For example, Dr. Coppock stated that an important connector for him was the dark-coloured diarrhea and he was told animals showed aggressive behaviour, abnormal gait and posture, and docile behaviour.)

32 In my view, it is important to note at this point, that if I had accepted as accurate, Tom and Kirk Seaborns' evidence of the maladies that inflicted the CPS herd between February 28 and March 23, 2001, then using common sense I would also have concluded that "but for" the negligence of CPS, they would not have suffered any damages, i.e. they were the sole cause of their misfortune. This conclusion would have been reached considering the following:

1. On February 28, 2001, CPS had both barley and some of the December Ration to feed their cattle.
2. There is no evidence that the Defendant was too busy to replace the Ration in short order.
3. On February 27, 2001, both Tom and Kirk Seaborn had concerns about the moisture level of the Ration. As heard in evidence, moisture levels of feed are a usual concern of ranchers. Tom Seaborn testified that he immediately knew it was the feed.
4. Overnight, the CPS heifers were inflicted with dark scours. These scours were not familiar to Kirk Seaborn. (He was familiar with light brown milk scours.) In these circumstances, I, like Dr. Lewis, am of the view that a reasonable rancher would have consulted a veterinarian. Dr. Coppock testified that on these facts, if he had received a phone call in March 2001, he would have "cautioned the producer that the feed would be suspect for sure."

CPS did not call Mr. Warner or Masterfeeds to seek any direction.

5. It is relevant to me that on February 27, Masterfeeds shipped a load of feed
6. to Holt Agri Ltd. (Ex. 80). On March 6, 2001, they complained that the dairy ration resulted in their cows eating poorly and having loose manure.

Masterfeeds replaced the Holt Agri feed. The Plaintiffs did not call as witnesses anyone from Holt Agri. Considering that the Holt Agri feed was made the day following the Ration and was fed for 5-6 days and no one testified as to the long-term effects on the Holt Agri dairy herd, I would have chosen to draw an adverse inference that Holt Agri's herd suffered no long-term effects from a 5-6 day feeding period.

33 In short, if CPS had stopped feeding the Ration in early March 2001, they would not have suffered any damages.

34 Having concluded that the Plaintiffs have not established a nexus between the introduction of the Ration and the initial sickness in the cattle, I now turn to determining whether the composition of the Ration nevertheless makes this nexus.

C. Nexus Between Composition of the Ration and the Sickness in the Cattle

35

(1) **Selenium:** a non-metallic element occurring naturally in various metallic sulphide ores and characterized by a variation of its electrical resistivity with intensity of illumination (*Canadian Oxford Dictionary*, 2d ed.).

36 From the above and the evidence of this trial, I understand selenium to be an electrolyte that exists in various amounts in the soil and from the soil is transmitted into grasses, and to be essential ingredient in a mammal's diet, however, consuming too much selenium can result in laboured breathing, diarrhea, ataxia, lameness, anorexia, emaciation, hoof deformities, liver sclerosis, kidney damage and loss of hair (Ex. 33, p. 10).

37 The contentious issue before the Court is whether the CPS herd consumed too much selenium and whether the source of that selenium was the Ration.

38 The Canadian Food Inspection Agency, CFIA, (Ex. 100T) sets out the levels of supplemental selenium permitted in livestock feed for cattle as being:

1. Complete feeds: .3 mgs. per kg. (or expressed another way, parts per million-ppm).
2. Limit-fed feeds at a level not to exceed an intake of 3 mgs. selenium per head per day for beef cattle.

39 The Court heard conflicting opinions from various witnesses as to whether the Ration was a complete feed or a limit-fed feed because on its face, it would appear that a limit-fed feed would permit Masterfeeds to add more selenium to the Ration provided that a cow's intake each day did not exceed 3 mgs. of selenium total.

40 A complete feed is defined in the CFIA regulations as a feed when provided with hay and water would provide all the nutritional requirements necessary for the maintenance of a cow's life. From the evidence, I have no doubt that the Ration was a "complete feed." However, I am of the view that it is also a limit-fed feed.

41 In my view, a limit-fed feed could mean one of two things:

1. Limited by the quantity fed per head.
2. Feed fed for a limited time period.

42 In either case, the Ration would qualify as a limit-fed feed as the label (Ex. 45) of the Ration seems to indicate being fed to a 363 kg. animal at a rate of 1.8 kgs. per day and it is limited to a time period by reference to it being a "heifer ration" which would suggest it is limited to being fed to a calf after weaning until the heifer has its first calf. The Ration was described as a growth formula and as such I infer that it was for growing young cattle, e.g. heifers, and the feeding of the Ration to mature cattle would involve a waste of the nutrients that are included to promote growth.

43 As Mr. Perron testified, the fact that the Ration is a limit-fed feed does not exclude it from having to be registered if it contains more than .3 mgs. per kg. of selenium.

44 In my view, nothing much turns on whether the Ration is a complete feed or a limit-fed feed or both, but rather the issue is whether the Ration contained excessive amounts of selenium so as to adversely affect the health of the Seaborn animals.

45 The selenium tests conducted in this case reflect parts per million both as a dry sample and as an as-fed sample. As Mr. Perron explained that Table 4 of the CFIA regulations were expressed in "as-fed" figures, I have decided to only refer to the "as fed" results. The tests by A & L Canada Laboratories on August 14, 2007 provided "as fed" results of 1.72 and 1.48 parts per million selenium (Ex. 50, pp. 65 and 66). Bodycote Testing on August 31, 2007 obtained test results of 1.1 parts per million selenium (Ex. 121T). In his evidence, on behalf of Bodycote Testing, Mr. Lessard testified that the confidence level factor for uncertainty of 5% should be applied to the range of selenium, but does provide a result of .9 to 1.3 parts per million selenium in his testing. A margin of error was not calculated by A & L Canada Laboratories on their results and I have determined by using the same calculation, the low result of 1.48 parts per million could in fact be reduced to 1.3 parts per million. Thus, for the determination of the level of selenium in the Ration, I am satisfied that 1.3 parts per million is reasonable.

46 1.3 parts per million is four times the limit set out in the CFIA regulations of .3 parts per million and would thus appear to be excessive. However, a number of factors need to be considered:

1. The .3 parts per million limitation simply requires registration of the feed with CFIA which in itself requires a veterinary letter of approval for the feed.

2. A CFIA review summary of Table 4 published on October 5, 2007 (Ex. 104T, p. 2), specifies "this Table was not intended to set absolute nutritional limits for livestock feeding programs but rather to establish safety ranges for the vitamin and mineral nutrients listed as a basis to exempt foods from registration. Establishment of the nutrients and their ranges are largely based on the nutrient levels and common use at the time for standard/average feeds in a production setting. Minimum and maximum levels are determined by consulting published references such as the National Research Council (NRC guidelines) and were not intended to extend to the outer limits of safety."

Current Review of Selenium Levels

47 Ex. 104T goes on to say that "Table 4 maximums would reflect a maximum nutritional value versus a maximum tolerable concentration." At p. 10 of this Review Summary of Ex. 104T, the recommendation of the NRC is to increase the amount of selenium that may be added before registration is required from .3 to 1.2 parts per million. Thus using the NRC recommendation, by my calculations, the Ration contained .1 part per million, too much selenium, and thus upon approval of the proposed new regulations would still require registration. CFIA does not indicate whether this new level of 1.2 parts per million would be a maximum safe amount of selenium to be fed or is simply a maximum nutrition level.

48 As previously indicated, the CFIA nutrition recommendations set 3 mgs. per head per day as the upper limit for all sources of selenium for cattle. Dr. Christopherson, in his report, at Ex. 33, p. 10, also refers to the [NRC 2000](#) report setting 3 mgs. per head per day as being the suggested upper limit for supplementation of selenium to cattle. Using these recommendations as a benchmark and following the calculations of CPS and Ex. 25T, p. B, by my calculations, the selenium being 1.3 parts per million and being fed to heifers at 4 lbs. per head per day on an as-fed basis would provide 2.35 mgs. per day added to the cowlick component of .375 mgs. per day and the vita sel component of 1.25 mgs. per day would provide the Seaborn heifers with 3.975 mgs. per day which would be .975 mgs. per day in excess of the present recommended upper limits of CFIA and NRC.

49 Masterfeeds submits that the Seaborns themselves are to be blamed for having ignored the three labels warning them not to combine sources of selenium. In this regard, I am not satisfied that the Seaborns received a copy of the label for the Ration prior to April of 2001 and thus Masterfeeds would be in breach of the statutory standard in that the CFIA regulations that require a label to be provided with every load of feed. In this trial, Masterfeeds produced Ex. 45 as being the label that was provided to the Seaborns. Tom Seaborn denies receiving this label with any of the four shipments of the 18% heifer ration on November 30, 1999, August 29, 2000, December 1, 2000 or February 28, 2001. Notwithstanding the emphatic evidence of Barry Dorscher and Diane Seguin, I am not satisfied that a label was delivered to the Seaborns because Ex. 45 in the bottom right hand corner indicates a date of manufacture of 03-01, being March of 2001. At trial, Masterfeeds provided no explanation concerning this date which of course would be after the delivery of the Ration. Neither was there any evidence of a label being produced prior to March 1 nor was there any reason that a new label being produced for the February 28 Ration because the February 28 Ration was the same as the December Ration.

50 Notwithstanding Masterfeeds' failure to provide Seaborns with a label, I am satisfied that Tom Seaborn knew that the Ration contained selenium. By his own evidence in November 1999, when he placed his first order with Keith Warner, he stated he believed the feed to contain a "standard mineral package" which would have in my view meant he knew it contained selenium; however, Mr. Seaborn should be able to assume that the selenium content of the Ration should not exceed either .3 or .5 parts per million being the CFIA limit, (if he had pursued obtaining a label which in my view, he should have.) At levels of .3 or .5 parts per million of selenium, again using Ex. 25T, p. B, I have calculated the heifers would be consuming either 2.2 mgs. per day or 2.68 mgs. per day which would be below the NRC and CFIA limit of 3 mgs. per day and thus notwithstanding the warnings on Exhibits 175 and 177 that the vita sel and cowlick are not to be used with other supplements containing selenium, CPS, through good luck rather than good management, would not have been exceeding the 3 mgs. total selenium per animal per day. In my view, CPS could not be held to be negligent for combining the 3 sources of selenium, not knowing that the Ration might contain 1.3 parts per million selenium rather than the .5 parts per million indicated on the label (even if they had the label).

51 As previously indicated, the maximum limits set by NRC and CFIA are suggested upper limits for supplementation of selenium for nutritional purposes versus a maximum tolerable concentration. There is no evidence before the Court to show that 3.975 mgs. per day selenium per animal is dangerous. Dr. Christopherson and his report, Ex. 33, p. 10, states:

Although pre-ruminant calves were able to tolerate milk, replaced or containing 5 parts per million selenium in the dry matter for 45 days, reduced weight gain, feed conversion and packed cell volume (PCV) resulted from 10 parts per million selenium in dry matter and 40 parts per million in the dry matter for 12 days caused feed refusal but no mortality.

52 Dr. Christopherson also references a publication entitled, "Mineral Tolerance of Animals (NRC) 2005" that suggests that the maximum selenium concentration in feed should be no more than 5 parts per million.

53 In this case, the selenium levels from the cowlick, vita sel and the Ration did not exceed 5 parts per million and I accept Dr. McAllister's opinion that although the tolerance levels between what is an accepted quantity of selenium and a quantity that is toxic is a narrow margin that in accordance with the scientific research provided to me, the cumulative amounts of selenium being fed to the CPS cattle in this case was not too high and does not explain the alleged symptoms in the cattle. Notwithstanding Dr. Coppock's opinion that rumensin is known to increase the absorption of selenium, I agree with Dr. McAllister, that the levels of selenium in the cattle's diet was not the cause of CPS's problems.

Weed Seeds, specifically Pennycress, (otherwise known as stinkweed) and Wild Mustard

54 Especially since the demise of the crow rate, feed grains in Western Canada have been cleaned prior to shipment producing an increased quantity of screenings being available for feed in Alberta. The screenings consist of small grain seeds, broken grain seeds, chaff and weed seeds. The base for the Seaborn 18% heifer ration consisted of barley screenings. Tests of the Ration provided the following results:

1. CFIA-this sample revealed .1% injurious weed seeds by weight (Ex. 112T).
2. Seed Check Technologies Inc.-Mr. Morgan Webb of Seed Check testified regarding this report (Ex. 69T) which sets out that in 100 gms. of Ration, he identified 10 wild mustard seeds and 72 stinkweed seeds, and in total approximately 200 weed seeds.
3. Windsor Laboratories conducted 3 tests as follows:
 - a. September 19, 2002 identified weed seed fragments at 4%.
 - b. April 12, 2003 identified weed seed fragments at 5%, and in particular, stinkweed at 3%.
 - c. October 14, 2004 identified weed seed fragments at 8%.

55 There is a dispute as to whether the Ration contained a large amount of weed seed. Dr. Makowski testified that, in his opinion, even 4% was a very high percentage of weed seed fragments. However, Dr. Makowski resides in Mechanicsburg, Pennsylvania and he testified that 1% of weed seeds is acceptable in feed in Pennsylvania. Such does not seem to be the case in Alberta for as Dr. McAllister testified, screenings containing more than 6% weed seeds would simply be classified as level 2 screenings. In relation to weed seeds in the screenings, the Canadian Grain Commission has set standards for "feed screenings" (Ex. 102T). No. 1 Feed Screenings permit 6% of the screenings to consist of weeds, chaff and dust; No. 2 Feed Screenings permit 10%; Wild Mustard Seed is limited in both No. 1 and No. 2 Feed Screenings to 2%. CPS has submitted that s. 19 of the Feeds Regulations, 1983, SOR/2006-147, s. 4 only permits 15 seeds per 30 gm. sample, and that in this case we would have the equivalent of 21 seeds in a 15 gm. sample, and thus the Ration was contrary to the feed regulations. As is pointed out, however, by CPS, the feed regulations are more concerned about viable weed seeds than the effect of the weed seeds on the health of the cattle if consumed, i.e. if seed screenings contain too many whole weed seeds that are thus viable, the likelihood of the cow then transporting the weed seeds to a pasture

and planting them in the form of "cow pies" would have the adverse effect of polluting crops. CPS submits that as Seed Check measured only viable seeds, there would be more mustard and stinkweed seed present that had been crushed in the manufacturing process. In this regard, I accept the opinion of Dr. McAllister that there would be few crushed stinkweed seeds because they are so small, that they would slip through the sieve in the Masterfeeds' hammer mill and would thus likely not be crushed. I am not satisfied that the pellet process would crush the stinkweed seeds. Mr. Vary testified that the CFIA statutory limit is 0.5% for injurious weed seeds. Thus, the test done by CFIA would appear to contain 1/5 of the allowable limit of stinkweed and wild mustard seeds.

56 Mr. Webb did not testify whether in his opinion the Ration contained a large amount of weed seeds. It is difficult to compare the various tests because the CFIA results were a percentage by weight, providing a result of 0.1%, Dr. Makowski's reports were done on some basis of a combination of weight and volume and Seed Check's report was done on a counting of number of seeds. Thus the Court was unable to determine whether the CFIA result is in fact lower than the results obtained by Windsor Labs and Seed Check Laboratories.

57 As the evidence is not clear on the point and no witness testified from a Canadian perspective that they were alarmed by the quantity of weed seeds in the Ration, I am drawing no adverse inferences from the quantity of weed seeds in the Ration.

58 Thus the Court is left with the Windsor lab report that determined the Ration contains 3% stinkweed and Seed Check's discovery of 10 wild mustard seeds and the opinion of Dr. Coppock that in his opinion a 3% level of stinkweed could cause liver damage and toxicity to the thyroid, which injuries would cause diarrhea, trouble drinking water, deliberate walk and weak calves.

59 Stinkweed and wild mustard are in the Brassica family of plants. Brassica seeds are classified as injurious weeds because of their toxicity. The poisonous principal is known as glucosinolate which form isothiocyanats and Allyl isothiocyanates and nitriles. The nitriles in particular are toxic to the liver. It is Dr. Coppock's evidence that the stinkweed and mustard seeds were poisons that started or triggered the damage to the cattle's liver which, together with inappropriate levels of other substances, damaged the cows' livers. In his view Masterfeeds created a "complex mixture" which caused a chain reaction that caused the CPS cattle to suffer irreparable damage to their livers and thyroid.

60 Dr. Coppock garners some support in relation to his opinion that the presence of some mustard and 3% stinkweed could cause injury to cattle livers when fed over 20 days in that Dr. Smith did not rule out such a possibility, but rather indicated that it would be difficult to say without determining the richness of the isothiocyanats (the compound in the mustard family that causes the burning sensation) and that in order to give an opinion on this, further testing of the stinkweed would be necessary; however, Dr. Smith also gave no scientific basis for this opinion, and as the Plaintiffs have submitted, there are good reasons to question Dr. Smith's credibility, especially outside the area of mycotoxins and thus his opinion on the isothiocyanats is in my view but an educated guess.

61 Dr. McAllister disagreed with Dr. Coppock's opinion of 3% stinkweed being a serious problem for in his opinion ruminants can break down glucosinolates and a cattle's stomach would adapt easily to consuming 3% stinkweed. In his opinion for cattle to suffer problems in a feeding period of less than one month, 15-20% levels of stinkweed in the Ration would have been necessary. Dr. McAllister provided no scientific basis for his calculation of 15-20% over a 20-day period being toxic and thus, at best, I would give his opinion limited weight as being an "educated guess."

62 Dr. Christopherson provided his opinion that it was not clear whether the presence of Brassica seeds in the Ration might have been an interacting factor.

63 In my view, Dr. Coppock's determination of a threshold of 3% is another "educated guess."

64 He referred to some scientific research in Saskatchewan in which he was actually involved. In one case cows were exposed to 400 bushels of mouldy mustard seed in a slough, resulting in five cows aborting and one cow being sick. In the other case 60 cows of a Charolais herd were exposed to an unknown amount of commercially grown oriental

mustard that had swept off a combine and dumped in piles in a pasture where the cattle were grazing, resulting in the herd developing bloody diarrhea and three of the cows dying 24 hours later. Although the after-the-fact exposure of these two herds of cattle to mustard seed does not reveal the quantity of mustard seed the cattle actually ate, in both cases the cattle were exposed to unlimited amounts of pure mustard seed, unlike CPS's experience of being exposed to approximately 3% of the seed contained in a Ration. Although these two tests make it clear that exposure to pure mustard seed can result in dire effects on a cattle herd, they provide no support that cattle cannot consume small quantities of stinkweed.

65 In the literature provided to the Court in Ex. N for identification, one case refers to a substantial injury to the rumen, abomasum, reticulum and brain and the other case refers to lesions on the abdominal cavity, haemorrhages of the cecum and colon and edema of the small intestine.

66 Dr. Coppock did refer to another article dealing with stinkweed poisoning. The article indicated that after eating hay containing between 25-100% stinkweed, cattle suffered cholic and some abortions. This test showed that the Allyl isothiocyanate (highest amount in the seeds) is sufficient to cause sickness and 65 mg./kg. of body weight could cause death. In CPS's case, of course, there were no abortions, no deaths, and no cholic reported.

67 None of the articles refer to liver ailments. Thus I see no basis for these tests to assist Dr. Coppock in reaching his conclusion that 3% stinkweed would cause liver injury to the CPS cattle or any other injury for that matter. Unlike Dr. McAllister, Dr. Coppock chose not even to give a percentage range of stinkweed composition that might cause liver damage. Also he did not choose like Dr. Smith to qualify his 3% opinion that it would depend upon the richness of the isothiocyanates. It is just too convenient that his opinion is that 3% is too much stinkweed in the Ration just happens to be the very same as the only test done to measure percentage of stinkweed in the Ration (Ex. 50, p. 36).

68 From the evidence surrounding the operations of Seaborn Seeds, I am of the view that the Seaborns took great pains to eradicate weeds from their fields and thus it is doubtful that if stinkweed was present in the seedgrass fields that it would be a factor in this case. Thus I put no weight on the discovery of some stinkweed seeds being present in the Seaborn seed cleaning process.

69 In my view, the evidence before me lacks sufficient scientific evidence to satisfy me on a balance of probability that the presence of mustard seed or stinkweed seed in the Ration was the likely cause of the ailments suffered by the CPS cattle.

The Ration Contained Mycotoxins

70 In January of 2002 Central Testing Laboratory conducted two tests (Ex. 50, pp. 65 and 66) that detected T2 toxin of 0.215 and 0.190 ppm, Zearaleone at 0.036ppm and 0.045ppm and vomitoxin (don) at 0.5ppm and 0.5ppm. In December of 2002 Veterinary Diagnostic Laboratory at North Dakota State University tested a sample of the Ration and the results were negative for any mycotoxins. In June of 2003 the same lab at North Dakota State University tested the Ration and discovered 1.32 ppm zearaleone equivalents (Ex. 50, p. 31).

71 Mycotoxins are toxic chemicals produced by mould growing in feed stuffs. In this case two possible sources of the mycotoxins were identified, the screenings used in the Ration and the discovery of aspergillus glaucus and aspergillus candidus by Dr. Jacobsen in the samples sent to him in June of 2003.

72 It is the allegation of CPS that Masterfeeds was negligent in the manufacture of the Ration, shipping it with a moisture level in excess of 14.5%, thus resulting in mould growth in the Ration in the bin or that the screenings used to make the feed contained mycotoxins even before the manufacture of the Ration.

73 I have problems with CPS's position that the mycotoxins could have originated from the Ration being too moist when it was delivered by Masterfeeds.

74 The Ration was manufactured February 26, delivered February 27 and on February 28 the Seaborns reported widespread dark scours in their heifers. Although Dr. Coppock in his report at p. 27 indicates "studies showed fungal mould growth eating and decay rapidly occurred in the pellets", I can find no reference in Dr. Jacobsen's report that suggests the process that he described was rapid or would occur in 3 or 4 days. Dr. Jacobsen does indicate that if the fungus *A. Glaucus* was present, it is more probable than not that sterigmatocystin was present, but no evidence is given as to whether this would form in two or three days. This of course does not rule out the prior presence of the mycotoxin sterigmatocystin in the screenings.

75 The samples were taken June 8th and 9th of 2003 at which time the Ration had been in the CPS bin in excess of two years. CPS has admitted that the roof hatch of the bin leaked. At Ex. 3, p. 14, Tom Seaborn refers to "one sample labelled 'samples of the drip' were taken at a location directly below where the bin had leaked moisture close to the roof hatch". In Dr. Coppock's report at Ex. 53, p. 15, he states "the clump is limited to the surface and the clumping is attributed to dripping of water entering because of a snow dam around the fill hatch." At trial, CPS's witnesses made no effort to explain the extent of the leak around this fill hatch. (In cross-examination, Dr. Coppock stated he did know how the leak occurred and provided an opinion that it was not much water.) Even if the leak is limited to melting snow, then the Spring of 2001 and Spring of 2002 and Spring of 2003 could have all provided leakage into the bin. Dr. Jacobsen offers his opinion that as most of the water would be absorbed in the upper levels of the Ration, "I do not believe the moisture originated from the roof drip contributed to the microbial activity observed in samples C-3 and C-4". His opinion is based on the assumption that the Ration had too high a moisture content upon delivery and if so then the moisture could have originated from the pellets. The problem with this opinion is that in April of 2001 Norwest Labs tested two samples of the pellets for moisture content and determined the content was 11.4 and 11.5% (Ex. 50, pp. 46 and 48). Also the diagrams of pp. 42 and 43 of Ex. 53 show the Ration in the bin having a high point of a pyramid just below the roof hatch, which in my view would permit water to run down the sides of the pellets and permeate the C-2, C-3 and C-4 levels of the entire bin provided that sufficient water entered the bin. The Plaintiffs have failed to describe the extent of the leak to the Court, and I thus have drawn an inference that there was sufficient leakage to cause the C-3 and C-4 levels to become too moist.

76 Thus on the evidence before me I have concluded that the mycotoxins located in the Ration originated from the screenings and not from the delivery of pellets that were too moist by Masterfeeds.

77 On behalf of CPS, Dr. Coppock concedes that the mycotoxins shown on the Central Testing lab report would generally not be considered toxic to cattle but suggests that the discovery of mycotoxins indicates that there are probably other mycotoxins present that have not been detected and the mixture of mycotoxins can be unpredictable.

78 From Dr. Coppock's research, he and other scientists have discovered that if mycotoxins are discovered, it is likely that other undetected mycotoxins are present. In this case, the only other test (Ex. 50, p. 44) discovered no toxins present. In my view, if science suggests that other mycotoxins are likely present, then additional tests were warranted to discover the mycotoxins. In the absence of some test results, I am not prepared to assume the existence of other mycotoxins. In my view, the Plaintiffs have not met the onus of proof necessary in this regard.

79 Dr. McAllister's opinion was that the cumulative levels of mycotoxins at 5 to 10 parts per million could be toxic and as the tests of Central Testing Laboratory in this case are less than one part per million, they would appear to be within a tolerable level.

80 Dr. Smith's opinion was that none of the levels of mycotoxins indicated here would be expected to have deleterious effects on the cattle; however, after much posturing which included denials that he had written certain articles about mycotoxins that bore his signature, Dr. Smith admitted that:

1. Although science has made some advances in the study of mycotoxins, mycotoxins continue to mystify scientists. There is much to learn about them.

He agreed that a grain bin might contain mycotoxins which cannot be detected.

2. Mycotoxins might be present in one part of a bin but not in another and thus, escape detection on a sampling.

3. At this time, scientists know there are mycotoxins they have yet to identify.

4. Some mycotoxins have an ability to mask themselves and escape detection and most importantly, he agreed with Dr. Coppock, that there can be synergistic responses between different mycotoxins that make the mycotoxins combined more toxic than the individual components.

5. Studies of mycotoxins reveal that even when comparing similar quantities, one sample may be more toxic than the other.

81 Dr. Smith and Dr. Coppock have agreed that the combination of the mycotoxins present here in their individual form may be harmless but that their combination may provide an unpredictable result. In my view, the best that CPS can say is that a combination of mycotoxins present and undetected "cannot be ruled out" as the cause of the health problems in the CPS herd but does not provide CPS with the necessary proof on a balance of probabilities that the combination of mycotoxins were the cause of the medical problems in the CPS cattle herd. I, like Dr. McAllister, find it difficult to find on information that at present we are incapable of measuring, to conclude that a manufacturer was probably in breach of a contract or negligent.

82 In his evidence, Dr. McAllister testified about the market for mouldy Manitoba barley in the giant feedlots in Southern Alberta because of the amazing ability of cattle to digest and adapt to foreign substances in their feed without adversely affecting their health.

83 Considering all the above, in my view, even if the combination created an unpredictable mixture, the CPS herd was probably able to digest the small amount of mycotoxins present in the Ration.

Minerals and Urea

84 In Dr. Christopherson's report, Ex. 33, p. 9, he states:

Cobalt, zinc, potassium and manganese are, therefore, unlikely to have contributed to the adverse effects seen in the CPS herd.

85 In relation to iron and copper, Dr. Christopherson indicates again at p. 9:

While iron and copper were present in concentrations above the CFIA Table 4 Guidelines for maximum levels, it is not clear to what extent these would have contributed to the adverse effects seen in the CPS cattle.

86 In relation to whether Brassica seeds can increase liver iron accumulation, he states:

It's not clear whether, the presence of Brassica seeds in the Ration might have been an interacting factor.

87 At trial, Dr. Christopherson, when asked whether copper and iron would have contributed to the harm suffered by the CPS cattle, responded:

They would have, I believe, yes.

88 Unfortunately, this type of vague response was only too typical of Dr. Christopherson's report and his evidence.

89 Examples of his evidence that caused me concern are as follows:

1. At p. 9 of his report, he states that shorthorn cattle have lower needs for copper and from this suggests that it makes it unclear to him whether shorthorn cattle are susceptible to toxicity at high diet levels of copper.

2. Again at p. 9 of his report, he refers to a study involving sheep being predisposed to copper poisoning but admits it is not helpful by indicating that there is no information relating to the same problem with cattle.

3. At p. 6 of his report, he indicates that when cattle eat more feed and there is not the expected growth rate, that it suggests a long-term impact on the animal and then states that any attempt of an explanation would be speculative but provides an explanation that it might involve chronic damage to the organ system such as the digestive tract, kidney and liver, etc.

4. At p. 9 of his report, again Dr. Christopherson states that Brassica poisoning can apparently increase liver iron accumulation. He goes on to state also that it is not clear whether the presence of Brassica seeds in the Ration might have been an interacting factor.

5. When being cross-examined, he initially stated that in cases of mineral toxicity, he would suspect that there would be cattle deaths but then in reexamination, changed this to say that it was possible that no deaths would occur. His use of the word "suspect", in my view, indicates that he stated that there was a possibility of cattle deaths and then states that there is a possibility they would not occur, lacks any precision.

90 At p. 12, in his summary of his opinions, he states that the higher than expected concentrations of copper and iron would not have helped the situation, although at p. 11, he states:

It is not clear whether the high levels of urea, iron, copper and selenium in a diet together with other toxins might have caused some of the problems through additive effects.

91 On at least one occasion, he admitted ignoring certain lab results in his calculations when those results were lower and less favourable to his findings in support of the Plaintiffs.

92 In regards to Dr. Coppock's "complex mixture" theory, in his evidence Dr. Christopherson indicated that:

1. There were possibly additive effects.

2. He could not totally rule out the possibility that there was an accumulation.

3. The iron and Brassica elements in the Ration could have interacted and although he did not know how much Brassica there was in the Ration, he could not rule out the possibility of interaction.

93 I was also concerned about his willingness to find high levels of urea based upon the Norwest Lab reports. Dr. Christopherson did not err in his reading of the report from Norwest Labs (Ex. 50, p. 52) as I am satisfied it was a reporting error by Norwest Labs; however, when I consider the following:

1. That the lab report showed Urea-N as 2.04% when the Ration was supposed to contain 2%.

2. His conclusion was that the Urea-N is crude protein and was 6.39 times higher than called for. This number is close to the 6.25 multiplier factor used to convert Urea-N to Urea-N as crude protein.

3. The amount of the urea prills indicated as being added to the Ration in the batching summary print supports a 2% Urea-N as crude protein finding.

4. Dr. Christopherson's results, which showed the Ration to contain 55% Urea-N as protein, which is much higher than the recommended 33% and could be toxic.

5. Dr. Christopherson's suspicions were aroused enough for him to phone the Norwest Labs to verify the method that Norwest was reporting Urea-N; however, when he was told what he wanted to hear, he neglected to get the name and qualifications of the person with whom he spoke or to get a followup confirming letter.

94 It is my view that Dr. Christopherson knew that the lab report was in error.

95 Dr. Christopherson suggests that other factors may have played a part, that higher than expected concentrations of copper and iron would not have helped the situation and made comments about a theory of a complex mixture, all of which lack a probability standard. In my view, Dr. Christopherson had an inclination to suggest things could not be ruled out or were possible and making suggestions without any supportive scientific basis.

96 Although Dr. Christopherson is not required to meet the rigorous tests needed to establish a scientific fact, in my view, his opinion that the high levels of urea and selenium likely contributed to some adverse effects in the CPS herd lacks the factual foundation needed to reach a standard of probable cause.

Urea-N and Urea-N as Protein

97 The Plaintiffs allege that as the Ration contained crude protein of 23.1%, when it was supposed to contain only 18%, the most rational explanation of the excess of 5.1% and the most likely ingredient to contribute to the excess protein would be 234 kgs. of urea and they suggest that there is no other rational explanation.

98 To make such a determination, in my view, I would have to reject the results of the 2 separate tests for urea in the Ration. The Plaintiffs urge the Court to do so because of the following:

1. Although samples were taken by Mr. MacLeod in April of 2001, and CFIA did a mineral analysis, the conclusion of which was that the Ration contained equivalent crude protein of 2.26%, the test level for urea was low (approximately .9%) and as the test had no margin of error, these test results are meaningless and should be given no weight.

2. Norwest Labs conducted tests for Urea-N in May of 2001 obtaining results of 1.94 and 2.04 on an as-fed basis. In regard to these results, the Plaintiffs say:

That Norwest Labs actually correctly reported these results as Urea-N and to obtain the Urea-N as crude protein, the amount should be multiplied by 6.25 and if this is done, it explains the 5.1% extra protein in the Ration.

99 The Plaintiffs urge me not to accept Mr. Mrazek's evidence because:

1. Mr. Mrazek's evidence cannot be corroborated because all of the records that indicate the methods used at the lab were destroyed in 2005.

2. Mr. Mrazek had done tests for years for Masterfeeds and he was a friend of Mr. Dyke of Masterfeeds, Red Deer.

3. When Mr. Mrazek made the change at Mr. Dyke's request in December 2001, he was seeking favour with Mr. Dyke.

4. That notwithstanding that Mr. Mrazek now lives in Thailand, he may well be seeking work as a lab consultant in the future and thus has a motive to favour Masterfeeds in this lawsuit.

5. That after making the change in December 2001, Mr. Mrazek did not follow his standard practice of forwarding a new certificate of analysis showing the correction of the error to Masterfeeds.

100 In order to reach this conclusion, it would be necessary for me to reject the evidence of Mr. Mrazek. Mr. Mrazek testified as follows:

1. To January 2006, he was an employee of Norwest Labs for 20 years.
2. Tests for urea in feed was unusual. He would do 4 or 5 tests per year for feed mills.
3. That he knew the certificates of analysis were wrong and should show Urea-N as protein but they, in fact, only showed Urea-N; however, the few feed mills for whom they did these tests were aware of this idiosyncrasy and it did not cause any confusion.
4. That in December 2001, as a result of complaints from an employee of Masterfeeds, he actually made the necessary changes to their computer program to commence showing Urea-N as protein rather than as Urea-N.

101 While the Court did not have the opportunity to observe Mr. Mrazek as he testified over the telephone from his home in Thailand, it was clear to the Court that he has no intention of returning to Canada and had no basis to favour Masterfeeds in this lawsuit. His answers in the many areas upon which he was cross-examined revealed that he was a forthright and cooperative witness providing worthwhile evidence into many areas of the operations of the laboratory. I have no doubt that he was truthful and although he permitted a practice frowned upon in the scientific community in reporting urea results, I accept that his few customers who sought testing for urea were satisfied with his explanation as to the reporting of urea results.

102 I cannot ignore the fact that the quantity of urea prills in the batching summary (Ex. 42), the CFIA test results and the Norwest Labs' test results all support a determination that the Ration contained 2% ECP.

103 On the issue submitted by the Plaintiffs that there is no other rational conclusion for the explanation of the 5.1% protein, there is no evidence before the Court as to the protein content of weed seeds which have been quantified as high as 8% in the Ration and could thus make up as much of 1,000 kgs. of the Ration.

104 In any event, notwithstanding that the Court does not have proof of the makeup of the additional 5% protein, in my view, the lab results of Norwest Labs and CFIA have proven to the satisfaction of the Court that the 5.1% protein was not urea based. On the basis of the test results of Norwest Labs and CFIA of 1.94, 2.04, and 2.26% ECP, I find that the Ration was the average of these 3 tests or 2.08% or .08% higher than the 2% indicated on the label.

105 In my view, the problem in the CPS herd was not as a result of urea toxicity.

Complex Mixture

106 Dr. Coppock gave his opinion that although the individual components in the feed may not be identified as the cause of the problems in the CPS herd, the effect of the wild mustard and pennycress in the feed acted as a trigger and lowered the benchmark for the effect of the other components in the feed. In other words, he indicated that the field pennycress seeds were the trigger, but other compounds that are in the feed, excessive mineral, and in his opinion more likely than not, mycotoxins would have contributed to this mixture or toxic effects (although Dr. Coppock actually testified that "in my opinion more likely not mycotoxins", I am satisfied that he meant to say "more likely than not"). I understand the argument of the Plaintiffs in this regard is that:

1. The stinkweed actually caused liver damage and then the liver was less able to deal with the elevated iron, copper and selenium components of the feed. That is, once the liver has been damaged then even what is normally considered safe levels of iron, copper and selenium would contribute to the problems.
2. In addition, Dr. Coppock testified the benchmark for urea would be decreased. There would be problems with urea in these cattle with this gastric mixture even at the 2.08% level in the Ration.

3. In this Ration, the rumensin would also increase the selenium absorption and thus the selenium problem with the Ration is exacerbated in that the animals are absorbing more of the selenium than is usual. Dr. Coppock also provided his opinion that selenium is interactive with the toxic effects of the stinkweed.

107 In summary, the Plaintiffs say that the Ration was comprised of a complex chemical mixture of toxic stinkweed seeds, mycotoxins, excessive selenium, copper and iron, creating complex biological interactions that would alter the toxicology of the other chemicals in the mixture causing the adverse symptoms experienced by the CPS cattle.

108 Dr. Coppock points to the liver damage in the CPS herd as being the common thread that supports this opinion in that the liver damage rendered the animals unable to properly process the other components in the feed and suppressed the proper function of their immune system.

109 I find the theory of Dr. Coppock lacking for the following reasons:

1. Dr. Coppock relied heavily upon the Seaborns to accurately relate the symptoms of the cattle to him to reach his conclusion that the CPS herd suffered widespread liver damage from eating the Ration. In fact, in my view, the Seaborns exaggerated the symptoms that the cattle suffered from February 28 to March 22, 2001.

2. The other experts did not give any strong endorsement of this opinion. Dr. Christopherson did not "totally rule out the possibility that there was accumulation." Dr. Smith testified there was no scientific data to suggest interaction between pennycress and mycotoxins.

The Plaintiff has argued that an article by Dr. [Smith in 1989](#) suggests otherwise. In this article (T.K. Smith 1990, p. 1001), he states ". . . the possibility mycotoxins or phytotoxins, the presence of which may result in a synergistic response and greater toxicity than would be expected based on chemical analysis of the contaminated feedstuffs" (Dowd 1988).

Dr. Smith testified that this was Dowd's opinion, not his.

In my view, Dr. Smith is again saying that the scientific community has a lot to learn about the combining effects of mycotoxins and by quoting Dowd's comment on the issue, he is not adopting the position as proven scientific fact.

3. The lack of further testing by the Plaintiffs to support this theory:

(1) No testing was done for thyroid damage to the CPS herd although Dr. Coppock testified that the stinkweed could inhibit production of the thyroid hormone and potentially damage the thyroid gland.

(2) Testing the Colostrum of the Cattle

Dr. Coppock testified that the liver damage could adversely affect the colostrum provided by the mothers to calves and thus could be the cause of the "weak calf" syndrome. Dr. Lewis testified that for colostrum to be affected would require severe liver damage and he would expect that not only would a cow not conceive in such circumstances but the cow would lose weight and die. Of course, the cows in the CPS herd that ate the Ration did not die. A test of a sampling of colostrum in 2002 to 2007 would have helped prove which theory prevailed in the CPS herd.

(3) Liver Testing

Dr. Coppock testified that liver damage was irreparable and irreversible.

In relation to the tests done by Dr. Wennekamp on "Tag 41" and "4F" in March of 2001, Dr. Coppock states that there is liver damage. In relation to Dr. Jensen's test in May 2005 on 7J56, Dr. Coppock states, "yes, there is a liver problem or liver dysfunction."

Dr. Jensen, who is both a rancher and a veterinarian, provided some opinions on liver damage to cattle in the CPS herd:

- (i) In his view, the blood report on Cow 41 in March of 2001 by the Clearwater Veterinary Clinic "strongly indicates liver damage." His opinion is much stronger than Dr. Wennekamp's comment of "may indicate possible liver damage."
- (ii) From his observation of 6J49 and 7J56, talking to the Seaborns, review of the records of CPS and the blood test results, it is his opinion that these cows suffered permanent organ damage. He provides this opinion notwithstanding that the laboratory in each case recommended that urinalysis tests be done to verify the blood test indications.
- (iii) Although he is not a toxicologist, he also provides a rather weak opinion that it appears that the animals received toxic material that caused permanent damage to the cattle's organs and systems. In providing this weak opinion, it is my view that he was tainted by the Seaborns' exaggerated comments of the herd's symptoms in March of 2001.

Dr. Coppock says, "Blue Ridge Maureen," who on a necropsy was found to have focally extensive chronic hepatitis, is the result of an old fibrotic lesion consistent with previous liver damage.

Dr. Lewis expressed some different opinions. In his view, the liver has a wonderful ability to regenerate if damaged. Also, he explained that cattle can have liver damage and still perform okay, and that they can be slaughtered and eaten, except the diseased liver (Ex. 130T). From his opinions, I have concluded that the extent of the liver damage is important to determine if it would adversely affect the cows' progeny in relation to 4F and Tag 41. Dr. Wennekamp does not appear very concerned about liver damage as he does not suggest further testing. Dr. Lewis suggested he would have recommended a urinalysis in these circumstances.

In relation to 6J49 and 7J56, the laboratory recommended that urinalysis tests be done. The test on 7J56 would also be to rule out diarrhea as the cause of hypoalbuminaemia.

In my view, from March 2001 to May 2005, the results of the preliminary tests needed followup testing to verify suspicions and to determine the severity of any liver damage.

(4) Autopsies with gross pathology reports to show alleged liver damage were not conducted by CPS.

(5) No tests were done to look for the sterigmatocystin mycotoxin that Dr. Coppock suspected was present.

4. Dr. Coppock identified a number of calves that he stated fell within his failure to thrive theory. This failure to thrive theory is supposedly caused by the mother's liver and thyroid damage, causing the malnourishment of the calf in the womb, in the colostrum provided by the mother cow, and the milk from the mother cow. As explained by Dr. Lewis and Dr. McAllister, if such was the case, the weakness of the calf would make it susceptible to infection and the infection would lead to the calf's death. If such was the case, in Dr. McAllister's and Dr. Lewis's opinion, the cause of death would be shown as infection. They testified that in none of the calf deaths did the necropsy show infection as the cause of death.

5. In my view, the evidence did provide some support for infection being a cause of death.

(1) In an undated letter addressed to "whom it may concern" (Ex. 183, p.19), Dr. Wennekamp diagnosed a calf, 60N, to have a perforated abomasal ulcer, "most likely due to *C. Perfringenes* infection, a common finding in this herd." In Ex. 182 he refers to an unidentified calf having an abomasal ulcer, the most likely cause of which was *C. Perfringenes*. Dr. Wennekamp did not testify. Did he mean that the CPS herd was afflicted with abomasal ulcers, or *C. Perfringenes*? Was he saying that this infection was the cause of death?

There is no other evidence of *C. Perfringenes* in the CPS herd. Thus, I put no weight on Dr. Wennekamp's suggestion that 60N died from an infection.

(2) Dr. Coppock testified that 24N had a liver infection, that because the calf's immune system was not functioning, antibodies were ineffective and the calf died. The necessary report (Ex. 57T, p. 26) indicated that there was no evidence the calf died of WMD disease, and although there is reference to chronic liver ailments, the cause of disease in 24N is shown as "possibly *E.coli*." The pathologist makes no finding that 24N's cause of death was infection. I cannot agree that the necropsy report supports Dr. Coppock's opinion.

(3) Also, there is a lack of evidence in the form of veterinary bills, treating CPS calves for infectious diseases. In my view, there is little factual support for Dr. Coppock's theory that the calves suffered from infection because they were inflicted with failure to thrive syndrome.

6. There are no scientific studies in evidence that support Dr. Coppock's complex mixture theory. No evidence was produced of widespread unexplained illnesses in cattle herds that could be linked to the feed they ate. Dr. McAllister gave his opinion that in general cattle have an amazing ability to digest and adapt to all kinds of feed. Cattle can even break down mycotoxins in their first two stomachs which contain microbial enzymes which assist by a chemical process that break down the toxins and if the toxins are at low levels, the stomach can adapt. He also testified that cattle in feedlots can adapt to consuming and digesting large quantities of grain provided the increases in grain are introduced gradually. There is scant scientific evidence before this Court to support Dr. Coppock's theory that complex mixtures of minerals, mycotoxins, and noxious weeds have proven to be a cause of illness in cattle herds.

7. Dr. Coppock, himself, testified that the toxic effects of the mixture could not be predicted. The Plaintiffs argue that because of the fact that in a complex mixture the toxicity of the whole may be greater than the toxicity of the individual parts and as the effect of a complex mixture may be unpredictable, it may be impossible to provide an accurate indication of the toxicity of the Ration by tests of the Ration. Because of this, Dr. Coppock testified that the best way to test the feed was to conduct a feed trial.

I have no evidence to support that the Plaintiffs could not afford to conduct a feed trial and the Plaintiffs certainly did not need Masterfeeds' consent to conduct the feed trial. The Plaintiffs had at their disposal the Ration, cattle and barns to conduct the feed test and although they would have been required to employ expensive educated scientists to conduct the feed study, it would have been over a relatively short period of time, 3 weeks. Considering the alleged losses of the Plaintiffs, the expense of a feed trial would have been relatively minor in this lawsuit.

As Dr. Coppock lacked the information from any prior scientific studies that supported his theory that the Brassica seeds provided the trigger to weakened livers of the cattle, and the excessive minerals and mycotoxins caused further permanent damage to the livers, in my view, CPS should have conducted feed tests where some test cattle were fed the Ration for 23 days and the results then carefully tabulated. If the Plaintiffs' theory was correct, the cattle used in the feed trial should have suffered thyroid and liver damage and related illnesses.

110 In my view, Dr. Coppock gave other good reasons to reject his theory, and reduce the weight to be given to his evidence:

1. Although tests for meat meal in the Ration proved negative, on the strength that Masterfeeds' computer printout revealed that no flush occurred between the layer chicken feed and the Ration, he provided his opinion that the Ration would contain "trace" levels of meat meal. In my view, this unsubstantiated opinion was neither material nor relevant as there is no indication that this herd suffered from BSE, let alone that the testing did not discover any presence of meat meal.
2. From his experience working at a feed mill while going to college or high school, he sought to be recognized as an expert on the manufacturing records of feed mills.
3. A substantial quantity of dead flies were discovered inside the door of the bin storing the Ration in May 2003. Brassica seeds have fumigant traits. He thus concluded the flies died from stinkweed fumes. There is no evidence of dead flies in the bin from February 2001 until June 2003. If Dr. Coppock is correct then were there no fumigants in the Ration in 2001 and 2002? In my view, without further testing of the flies, this indicates Dr. Coppock's willingness to conclude whatever supports his theory and to reject other plausible causes, i.e. the dead flies in a grain bin in Alberta could have other causes e.g. a cold Winter.
4. Reference was made to his suspicion that ergots were present. The evidence indicated that these ergots are visible to the eye, yet no tests detected their presence.
5. Reference was made to running 15920 hog feed, containing Emytryl premix. No test results revealed the Ration to contain Emytryl.

111 Dr. Christopherson and Dr. Coppock seemed too willing to provide opinions and innuendos to leave an impression with the Court that you "cannot rule this out" rather than providing proof on a balance of probability of the basis for suspicious circumstances.

112 For these reasons, I reject the Plaintiffs' theory that "a complex mixture" in the Ration caused the problems in the CPS herd.

D. Nexus Between the CPS Hay and the Ration

113 Although Mr. Barry for the most part had a poor recollection of his involvement in this case on behalf of Masterfeeds, I accept his evidence in relation to his offer to test the CPS hay because of the memorable and curious response from Mr. Tom Seaborn as to why the hay did not need to be tested. In April 2001, while Mr. Barry was in attendance at CPS and obtained a sample of the Ration, he was told by Mr. Tom Seaborn that the hay did not need to be analyzed because it was a byproduct from the seed business. In effect, the hay was the chaff that remained after the grass seed was combined by Seaborn Seeds. In my view, this response is so lacking in logic that most people would remember it.

114 At examinations for discovery in 2005, Mr. Tom Seaborn was again asked for a sample of his 2004 hay. He declined to provide a sample stating that he could not differentiate between the years that the hay was baled. At trial, he had a different version, testifying that he could in fact differentiate the age of his hay in accordance with the years that it was baled and stored. At trial, his explanation as to the two different versions was that at discovery he considered the request of Masterfeeds' counsel for a sample of the 2004 hay to be irrelevant because it had nothing to do with the hay fed in 2001 and thus his response was to avoid doing something that was irrelevant.

115 I think Mr. Tom Seaborn was wrong and there were numerous reasons why an analysis of his hay was relevant and in some cases could have bolstered the case of CPS:

1. In his evidence, Tom Seaborn indicated that Seaborn Seeds like to cut their seed grasses early in order that the hay would have the highest protein and energy content possible. Considering this evidence beside that of Dr. McAllister who indicated that hay that is fed to cattle minus the seeds would contain 7 to 11% less protein, an analysis would have provided some indication as to whether this hay was high or low in protein. If the analysis,

in fact, determined that the hay was low in protein content, such evidence would have aided the Defendant in its contention that the hay had a "dilution" effect on the high protein content of the Ration. Considering that the Ration was 5.1% higher than the 18% indicated, if Dr. McAllister was correct, then the hay contained 7 to 11% less protein because there were no seeds and the net effect would be that the cows' overall diet would be quite normal so far as protein content is concerned.

2. An analysis of the hay would have given the mineral levels contained in the hay. If the mineral levels were low, again Masterfeeds would have had some evidence to support their "dilution" effect. However, if the mineral levels were high, such results could have aided CPS in its position that the accumulative effect of the minerals in the hay and the Ration caused the cattle to be sick and "but for" the high mineral levels in the Ration this sickness would not have occurred.

3. Dr. Smith, too, suggested that the hay should have been tested for mycotoxins. In his opinion, had the hay contained some of the same mycotoxins as were found in the Ration, although the quantities of mycotoxins in the Ration were not substantive enough to cause the CPS cattle to be ill, again the cumulative effect of the mycotoxins in the hay and the Ration may have been enough to tip the scales in favour of CPS and "but for" the mycotoxins in the Ration, the cattle would not have been ill.

4. The Seaborns testified that in February/March 2001 all the cattle were being fed the same hay; however, the cattle that allegedly became ill were segregated from the bulls and cows that had not calved.

Thus it was feasible for the Seaborns to be feeding different hay. A test of various bale samples of the Seaborns' hay in 2001 would have removed this suspicion.

116 The onus to prove this case on a balance of probabilities lies with CPS, and thus their decision to neither test their hay themselves or to accept the offers of Masterfeeds to test the hay must result in any inferences I draw concerning the hay to be adverse to CPS.

117 Cattle eat a lot of hay. By Dr. Coppock's evidence, a heifer will consume 2% of its body weight in forage each day and a cow slightly more.

118 Although Mr. Perron testified that Table 4 limits already contained a calculation to account for the elements contained in hay crops, in my view, the hay from Seaborn Seeds would contain less than average elements because of the lack of seeds and thus I am satisfied that the Seaborn Seeds' hay would have some dilution effect on the elements in the Ration.

119 Although the Court lacks any scientific proof that the hay was the cause of the problems in the CPS herd, neither does CPS have any evidence to substantiate that the Ration had some cumulative effect and that "but for" the deficiencies of the Ration, the CPS cattle would not have been ill.

E. Nexus Between the Ration and the CFIA Statutory Standards

120 In Dean F. Edgell's text, *Product Liability Law in Canada*, (Toronto and Vancouver: Butterworths 2000), at p. 30, he refers to *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.), where the Supreme Court found that there is no common law tort of breach of statute. If a statute does not create a cause of action, the courts ought not to do so.

121 In reference to another Supreme Court of Canada case, *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.), at p. 31, he quotes:

Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence.

122 In February of 2001, we were 2 years pre-BSE. Gordon MacLeod, a program specialist with CFIA, testified at that time that feed mills were inspected every 3 years but he did not know the last time that Masterfeeds Red Deer had been

inspected. No evidence was provided when the most recent inspection took place nor of the results of that inspection. From Mr. MacLeod's evidence, I concluded that upon an inspection being completed, a report is delivered setting out any deficiencies noted and that CFIA then "looks for compliance" which I took to mean that they seek from the feed mill a letter acknowledging that the deficiencies had been corrected, rather than seeking compliance through laying charges against the feed mills for breach of the regulations.

123 On March 26, 2001, Mr. MacLeod attended at CPS in response to a complaint about the Ration. He took samples which he sent to the CFIA lab in Ottawa for analysis. A certificate was returned dated March 10, 2003 (Ex. 50, p. 33) which was for the most part, unremarkable. In any event, Mr. MacLeod did not do any followup investigation as a result of the testing. The test results showed ECP levels and injurious weed levels to be within acceptable limits. Of note, there did not seem to be any testing to determine whether the mineral levels in the Ration exceeded CFIA limits.

124 On March 27, 2001, Mr. MacLeod obtained a copy of the Seaborn 18% Ration label and proceeded to issue a report on the feed label to Masterfeeds seeking compliance with the following:

1. The label should reveal that the Ration was in pellet form.
2. The label should indicate a guarantee of the quantity of ECP.
3. Because a label indicates a selenium level higher than the Table 4 limits, the Ration required a veterinarian's approval and subsequent registration with CFIA, and the feeding rates on the label should show a range of animal weights rather than just one animal weight.

125 Again, the label reports sought compliance and no charges were threatened.

126 In my view, in 2001 pre-BSE, the relationship between feed mills and the CFIA was one of mutual respect in which CFIA sought voluntary compliance with any breaches of its regulations. This "laissez faire" relationship had no semblance of insisting upon strict compliance in order to impress the international community. The CFIA in my view was acting as an overseer, responding to complaints.

127 In relation to setting limits for vitamins and minerals, in 2001 and even in 2007, CFIA made it clear that they were setting nutritional levels rather than setting the outer limits for safety i.e., levels above those recommended would be a waste of money to the farmer as the animal would simply excrete the excess. None of the tests conducted by CFIA in March of 2001 show the Ration to contain the upper limits for copper, iron or selenium as were indicated in Ex. 50, p. 48, in the Norwest Labs' test results. The conclusion I draw from this is that, as CFIA has indicated, the upper limits they set for minerals were not meant to be outer levels for safety.

128 For these reasons, CPS, in my view, can find no support for a proposition that Masterfeeds was in breach of the CFIA statutory standards and because of such breach, that the Ration was the cause for the problems in the CPS herd. It is merely some evidence of negligence.

F. Illness in the CPS Herd and the Presence of 63 kgs. of Alien Material

129 Sometime in February of 2001, CPS ordered 13 tonnes of the Ration from Masterfeeds Red Deer.

130 The records of Masterfeeds' Run Summary (Ex. 41) show that on February 26, 2001, Masterfeeds manufactured 13,186.85 kgs. of the Ration.

131 When the Ration was loaded onto the Colt truck, the Ration showed a weight of 13,250 kgs. (Ex. 54). Thus, there is an additional 63 kgs. of material loaded onto the truck than was manufactured.

132 Mr. Martin of Colt Trucking testified that if feed was over its expected weight, it would not be shipped until Masterfeeds figured out why the load was overweight. In the evidence in this case, there is nothing to show that either

Masterfeeds or Colt Trucking were concerned about the 63 kg. overweight situation. In my view, it is common sense, that overages should cause concern because it would ordinarily mean that another feed had been erroneously mixed with the Ration.

133 Mr. Dyke provided an explanation for the overweight situation as being the weight of the water that would be introduced to the Ration mix in the form of steam introduced during pelleting to bond the pellets. In my view, this explanation is not plausible because it would be common practice to introduce steam to bond the pellets and thus just about every feed order would be overweight. In my view, the computer program would be used to factor in the weight of the steam and Masterfeeds provided no evidence that the weight of the water from the steam was factored in the computer program.

134 Thus, the Court has looked for another explanation for the 63 kgs. of alien matter.

135 Dr. Makowski of Windsor & Associates Laboratories conducted three separate tests on samples of the Ration on September 19, 2002, April 12, 2003 and October 14, 2004. The first two tests were conducted on samples taken by Ken Ziegler on July 10, 2002, and in my view, the discrepancy between the first two tests which although done on different dates came from the same sampling, was not significant. The third test was performed on a sample taken by Kirk Seaborn in September of 2004. This time, Dr. Makowski reported additional material, namely: molasses, cottonseed hulls, dried distillers' grains and fat (Ex. 50T, p.36). No additional testing was done to determine whether the distillers' grains, cottonseed hulls, molasses and fat were widespread throughout the Ration. None of these three substances were called for in the production of the Ration (Ex. 41). In my view all but the molasses could be accounted for by being part of the screenings.

136 CPS argues that the variation from the testing of the Ziegler samples versus the Seaborn sample is irrefutable evidence of the fact that the feed was not consistent. CPS gains some support for this position from the evidence of Dr. Makowski who had testified that there was no fat in the first two samples and the other substances also were not in the first two samples. As he testified in this regard, he stated that cottonseeds are very easy to identify. Although I agree that the testing provides some evidence of variation in the Ration, it provides no explanation as to how the molasses became intermingled with the Ration in the first place. The presence of this substance also provides evidence that some other feed was erroneously mixed with the Ration.

137 Molasses is an ingredient used in feed for dairy cattle. In the exhibits before the Court (Ex. 81 and Ex. 86) there is evidence of dairy cattle feed being manufactured by Masterfeeds on February 28th or in early March of 2001, but not in and around February 26, 2001. In my view, this would thus rule out the possibility that Colt Trucking mistakenly started to load 63 kgs. of a dairy cattle feed from the wrong storage bin at Masterfeeds prior to loading the Ration, as there is no evidence of a bin containing dairy feed at Masterfeeds on February 26, 2001.

138 In his evidence, Larry Siefried testified in relation to storage of feeds that it was not uncommon for feed to stick to the sides of storage bins or to become lodged in overhangs. Thus, in my view, it was possible that the bin that stored the Ration also contained a dairy cattle feed that was produced sometime prior and became dislodged at the time of loading the Ration onto the truck. If this occurred, I would have expected Dr. Makowski's third test to have also discovered the presence of corn, beet pulp or fish meal which are also common ingredients in the dairy feed and none were identified by Dr. Makowski.

139 Larry Siefried also testified that when feeds are mixed, residues of the feed stick to the drum of the mixer. Although he testified that he had not experienced any of this residue becoming dislodged, in my view, it is a more plausible explanation of the mysterious 63 kgs. of alien material than Colt Trucking erroneously loading some pellets from the wrong bin, dairy ration pellets becoming dislodged from the storage bin in which the Ration was stored, or simply that the 18% Ration varied in its ingredients from sample to sample. It is possible that both oil and molasses might mix with some distillers' grain and cottonseed hulls become stuck to the residue mass stuck to the drum of the mixer and 63 kgs. of this substance become dislodged as the Seaborn heifer ration was being mixed. In my view, it provides some explanation

as to why only these four substances were discovered in the third test, because the corn, beet pulp and fish meal may not have been a part of the ingredients that became stuck to the bottom of the mixer. If the mixture of distillers' grain, molasses and oil became dislodged shortly before the completion of the mixing of the Ration, it also explains why only one sampling of the pellets contained distillers' grain, cottonseed hulls, molasses and oil.

140 I am satisfied that the discoveries of Dr. Makowski in the third testing are evidence of a variation in the 18% heifer ration but there is no evidence before me that the Ration pellets were to be either homogenous or to all contain specific ingredients.

141 Although the variation provides evidence of how the additional 63 kgs. became mixed with the Ration and that Masterfeeds may have been negligent in its maintenance program and cleaning schedule of the mixer, in my view, it provides no explanation as to the illness of the cattle in the CPS herd because distillers' grain, molasses and oil seem to be common ingredients used in feeds for dairy cattle and there is no evidence that these ingredients are dangerous to the health of shorthorn cattle. Also, although cottonseeds often harbour aflatoxins, in this case, testing did not detect any aflatoxins in the Ration and thus, there is no evidence to indicate that the consumption of cottonseeds by shorthorn cattle could cause injury to their health. Thus I have determined that I need not determine the source of the extra 63 kgs. of material in the Ration, as it is irrelevant to the cause of sickness in the CPS herd.

G. The Nexus Between Delayed Calving Dates and the Ration

142 The allegation that the Ration must have affected the fertility of the CPS herd is very confusing. Tom Seaborn testified that when he picked cattle to buy at Waukaru Farms, he liked to buy late calfers because they were overlooked by other buyers as they were smaller and he thus got a better price; however, by 2001, Tom Seaborn testified that CPS's late calfers were culled from the herd. In the development of the CPS herd, in my view, this either means that the smaller Waukaru heifers were not bred during their first breeding season, they were bred as small heifers, or they were bred late. No direct evidence was provided on this point but if bred young or later in the year and in subsequent years bred earlier to achieve January or February birthing dates, in my view, the cows would have suffered considerable stress. At Ex. 5T, p. 3, CPS indicates that it expects at a minimum, the calving interval to be 365 days. Kirk Seaborn testified that cows would usually come into heat 3-4 weeks post-calving. In rebuttal, Kirk Seaborn testified that in 2001, they intended to AI the cows during their heat cycle in April. Also, as the cows did not show signs of coming into heat, the bull AAA 8K was introduced to the herd on April 22, 2001.

143 Kirk Seaborn's evidence was not that the CPS herd problems caused them to delay their breeding plans, but rather they intended to breed the cows during their April heat cycle. This plan to breed in April is inconsistent with Tom Seaborn's evidence that first calfers (J cows) were provided special care so they could be bred 3-4 weeks earlier to synchronize birthing dates the following year.

144 By my calculations, assuming that all cows were bred in April 2001, the 2002 M calves would be born in January 2002. In fact, Ex. 160 shows 11 cows conceiving in April 2001, but no calves were born in January 2002.

145 My review of Ex. 30T provides some evidence of the CPS herd's breeding performance.

146 Prior to the 2001 calving year, there does not seem to be any concerted effect or success in calving in January and February of each year. Dates of birth of some of the CPS cows, as per Ex. 30T, were as follows:

1. Waukaru Lass in 1999 was March 14.
2. Janells Scarlett in 1997 was March 6; in 1999, was April 1.
3. Eclair in 2000 was March 8 and although she calfed January 19 in 2001, she calfed in February each year to 2007.
4. Blue Ridge Maureen in 1996 was March 12; in 1997 was March 19; in 1999 was March 13. On February 29 in 2001, trying for January.

5. Enchanted Lady was March 8, 2000 and March 7, 2001.
6. C.P. 10H — In 2001 was March 14, after being February 18 in 2000.
7. Cactus Flat 27E — In 1999, 2000 and 2001 was between March 5 and March 20.
8. Goldie 43D — In 1996 and 1997 having February calves slipped to March 15, 1998.
9. Samantha 23E — After a late calf on March 25, 2000, she was chosen as an embryo recipient for 2001, for Minnie 649.
10. Goldie 29D — A consistent February birth cow except for 2001, January 15th.
11. Hot Spice 40F — Between 1999 and 2000 there was a 1.5 month delay to April 1, 2000.
12. Lassie 34 — born in Fall of 2003; between 2005 and 2007 had calves in March and April.
13. Dianna 371 — calf in May 2000, July 2002 and May 2003.
14. Winnie Miami 15F — calf in April 2001 and May 2002.
15. Hope 4F — calf in April 2001 and March 2003. Her early calves in 1998 and 1999 had reproductive problems.
16. Ruby Rose 681 — calf in May 2001, March 2002, April 2003 and April 2004.
17. Bessie — as she did not calve until May 2001, she did not eat the feed. In 2003 she had a calf on March 22 and in 2004 she had a calf on May 17.

147 The percentages and numbers of calves born in January, February and March in 2000, 2001 and 2002 are as follows:

	Jan %	Jan #	Feb %	Feb #	Mar %	Mar #
2000		0	0	48.8%	19	29.3% 11-12
2001	33.3%	12-13		17.9%	6-7	23% 8-9
2002		0	0	44.2%	18	17.3% 7

148 It appears from above, that as far as a tight calving interval of 60 days is concerned, 2001 was in fact the *worst* year for the Plaintiffs. In 2001 they only had 51% of their calves in a 60-day period. Contrast with that the 78.1% they had in 2000 and the 61.5% they had in 2003.

149 Dr. Jensen testified that for a two year old heifer to calve is very stressful for the animal and a second calf is often delayed by nature 21 days to a month.

150 Dr. Lewis testified that of the 33% of the cows who moved up their cycle to January 2001, he would expect nature to create a "rebound effect" from the stress on the cow, resulting in a slip back in the following year.

151 Dr. Lewis testified that a number of other factors can delay a return to heat, such as sickness, difficult birth of prior calf, vitamin or mineral deficiencies.

152 CPS created a graph purportedly to demonstrate that cows who ate the feed incurred delays in calving in 2002 (Ex. 5T, p. 5). This graph shows and Kirk Seaborn testified that the cows that did not eat the Ration gained 31 days. Tom Seaborn then testified that this was in error and should depict only 13 days' gain, and that it consisted of 3, 4 or 5 cows.

153 There were only 5 cows in this group, and one cow (4F) actually had a 2-week delay in calving. In Dr. Coppock's report (Ex. 53T, p. 24), he refers to 3 cows who did not eat the feed and had a favourable calving interval of 341 days +/- 17.9 days but there were 5 cows that CPS says did not eat the feed. In group 2, there were but 3 cows. Although the sampling is small, it is, in my view, some evidence that the cows that did not eat the Ration calved earlier than those that did.

154 Dr. Lewis testified that conception rates in cow herds is expected to be 90%. In 2001, 16 of 18 K heifers in the CPS herd conceived, or 89%. This is after eating the Ration from February 28 to March 22, except for the few days it was allegedly removed.

155 Dr. Lewis also testified that breeding by AI can delay conception because of missing heat cycles. In 2001, Kirk Seaborn testified that 41.7% of the herd was bred by AI.

156 From the evidence before me, the January 2001 33% calf crop was an anomaly in 2001. There are too many variables involved to determine that the Ration was the cause of the delay in subsequent years. Had CPS established a record over a number of years of a large percentage of January births followed by delays in 2002, it would have been easier to find that the Ration and related sickness in the herd was the cause of the delayed coming back to heat of the cows, but the records actually show calving prior to 2001 to be post-January. Tom Seaborn admitted that Ex. 5T, p. 5 exaggerated the gains by some of the cows that did not eat the feed. Thus, in my view, the evidence that the Ration caused a delay in the cows coming into heat after feeding the Ration is sorely lacking and I have concluded that no such nexus is warranted.

H. Expected Progeny Differences (EPDs)

157 Dr. Hensley testified for the Plaintiff concerning the use of EPDs in the purchase of cattle. He explained by keeping a data bank of the birth weight, weaning weight, yearling weight, meat tenderness, milk production and carcass structure as measured against the average, this data can provide useful information as to the genetics of important traits in cattle. However, even Dr. Hensley placed EPD data as fifth or sixth on his list of criteria in purchasing cattle. He referred to EPDs as a good negotiating tool because if the EPD data showed poor results, such a negative assists in negotiating a lower price.

158 Again, as with the birthing dates, in my view the EPD data is subject to too many vicissitudes and vagaries as to provide any useful information to prove that the genetics of the CPS herd was affected by eating the Ration.

159 The accuracy of the EPD data is affected by the following:

1. The EPD and data bank relies upon farmers to submit accurate data on the performance of their calves.
2. The EPD data relies on farmers to ensure that cattle that are treated differently or fed different feed are separated into different categories.
3. Both Dr. Hensley and Dr. Miller agreed that the major determinative factor of cattle performance is its environment. It was Dr. Miller's opinion that changes in cattle performance traits are only 25% determined by genetics and 75% determined by the cattle's environment.
4. A first calf heifer is not as good a milker as a mature cow, requiring adjustments to EPDs.
5. In the event of twins, cows providing milk for twins require an EPD adjustment.
6. Bulls grow faster than heifers and thus, there needs to be another EPD adjustment.

7. Farmers usually weigh the calves all the same day whether they are a year old or not, or have actually stopped weaning that day, and then an estimate is made for calculating either the weaning weight or the yearling weight.

8. As Dr. Miller suggested, if a group of cattle are ill, it probably has nothing to do with the genetics of its parents and more likely, to do with the environment and thus for accurate EPDs, the sick cattle should be removed from the EPD grouping.

160 Although in this case, CPS was able to point to an adverse effect on some of the EPDs of their and Waukaru Ranch's, in my view the results are so subjective, so uncertain, so subject to large margins of error to be of little value in determining the issues in this case and I have thus placed no weight on these results.

I. Masterfeeds' Standards

161 In February 2001, Masterfeeds used a quality control manual called "Consolidated Nutrition." Employees attended training sessions and received "on-the-job training on procedures to be followed in making feed." In 2001, the enforcement and recording of quality control standards was much less stringent than a year later when the extensive HAASP procedures were adopted by Masterfeeds. The HAASP procedures were not introduced because of the CPS incident or because of Masterfeeds experiencing a large number of quality control complaints from customers.

162 In my view, Masterfeeds had very few complaints. Exhibits 80 and 81 reflect the following complaints:

1. On March 27, 2000, a Mr. Butler complained of excessive fines and was credited \$350.
2. In November 2000, a Mr. Hillman complained of excessive fines and was credited \$384.30.
3. In January 2001, a Kerry Russel complained of problems when his backyard chicken flock stopped laying and some died. There is no record of the resolution of this complaint.
4. In March 2001, Holt Agriculture complained that his dairy herd was suffering from "loose manure and a lack of appetite after 5-6 days of feeding." Masterfeeds replaced Mr. Holt's dairy ration.

163 These few complaints, in my view, lead me to infer that customers generally were satisfied with the quality of feed they received from Masterfeeds.

J. Defendant's Alternative Theories

(a) Poor Management

164 The Defendant alleges that CPS was line breeding too closely which caused inbreeding and can be the cause of stillbirths, calf mortality, fertility issues and weaker calves. Dr. Miller testified that to prevent the effects of inbreeding, a bull should not be bred any closer than to its great granddaughter. Dr. Miller testified that the level of inbreeding can be determined by using mathematical equations, resulting in a coefficient that expresses the degree of separation between the genetic lines involved. His opinion was that he would not want the coefficient to exceed .03 although the practice of many breeders was a coefficient of .0625. A bull mating its great granddaughter would have the coefficient of .0625.

165 As an example, the defence provides 8K breeding his full sister, Minnie Capri 20K, producing the calf 61P, which would have a coefficient of .140625 being twice the level tolerated by most breeders. The defence has provided a breeding coefficient schedule within the time period of 2001 to 2006 of the CPS herd that shows approximately 100 animals having a coefficient greater than .03. (Attached hereto is Appendix B). CPS has answered this claim by indicating that in the time period 2001 to 2006, approximately 500 registered shorthorn calves were born and that the coefficient table thus represents only 20% of the calves born during this time period. Also, CPS points out that the most common effect of inbreeding are stillborn calves and as there were no stillborn calves in the CPS herd, it is very questionable whether the

inbreeding practice had any adverse effect on the CPS herd. CPS argues that there is a lack of evidence to support the theory of the CPS herd suffering from inbreeding and depression, and thus this theory should not be given any weight.

166 Secondly, the defence suggests that there may have been toxins in other food sources that caused the problem to the CPS herd. For example, Dr. Trevor Smith stated that hay is a much more common source of mycotoxins than pelleted feed. The defence points out that not only did CPS refuse the offer of the defendant to test its hay on two occasions, but also failed to test the hay themselves in order to provide the Court with this important information.

3. Additional Facts as Determined from the Evidence and Analysis of the Evidence

167

a. The Ration was delivered to CPS by Colt Trucking on February 27, 2001. Tom Seaborn was present when the Ration was unloaded. Notwithstanding their evidence, neither Kirk Seaborn or Tom Seaborn observed anything about the Ration being either warm or moist upon delivery. Also, neither Kirk Seaborn or Tom Seaborn made any comment about the condition of the Ration between February 27, 2001 and March 23, 2001. Even on March 23 when Tom Seaborn phoned Mr. Warner, he did not indicate any concerns or suspicions about the condition of the Ration upon making his complaint that the Ration was suspected to have caused sickness in the CPS herd. Prior to and on February 27, Colt Trucking did not provide a label or tag to CPS for the Ration; a label was first provided with the load of 18% heifer ration that was delivered as a replacement in the latter part of April, 2001.

b. During 2001, the CPS herd suffered a change in the health of the herd as follows:

- i. The CPS cows had a diminished appetite resulting in production of less milk, resulting in calves having lower weight gains.
- ii. Many animals had scruffy, dull coats with varying degrees of orange coloured hair standing out against the dark red colour hair.
- iii. Some animals lacked a square look and their backs swayed, hips protruded and spine protruded. Some cows with calf had noticeably small udders.
- iv. Waukaru Minnie 518 lost all her hair.

I am not satisfied that the mobility problems caused by foot, leg and hip problems were peculiar to 2001, and in my view, were probably caused by genetic defects common to shorthorn cattle.

27E and 36J did not eat the feed and both these cows and their progeny suffered similar problems to the cows that ate the Ration.

Also, the bulls and pregnant cows did not eat the Ration because it contained rumensin. However, the only evidence before the Court that the bulls and pregnant cows were not suffering from some malady in 2001 is the evidence of Kirk and Tom Seaborn, supported in some small regard by the fact that the veterinarian records do not show the treatment of bulls and pregnant cows for any malady, and as I have found that they have exaggerated their testimony, in my view, it is quite likely that they have overlooked any problems that their bulls and pregnant cows were suffering in 2001.

c. During this period of March and April, 2001, CPS had surprisingly few visits from their . veterinarians:

- i. On March 11, 2001, Dr. Wennekamp attended at CPS to treat an ataxic cow, Tag 41. There is no evidence that he observed or was told of any general malady in the CPS herd at this time. Tag 41 was treated for magnesium/calcium deficiency. As the cow did not improve on March 20, Dr. Wennekamp did some blood

tests and although these tests suggested to him some possible liver damage, neither he or Dr. "M" treated this cow for magnesium/calcium deficiency or anything else again.

On or about March 22, Dr. Wennekamp treated an unidentified cow and

ii. calf. Both the cow and calf were prescribed Nuflor for the treatment of respiratory problems. The unidentified cow was also diagnosed with magnesium/calcium deficiency.

On or about March 23, Dr. Wennekamp attended at CPS and treated

iii. another ataxic cow, Cow 4F. Blood tests of this cow, as with Tag 41, showed increased ALKP and Bilirubin, which again might suggest liver ailments, but the cow was treated for magnesium and calcium deficiencies.

From March 23 to April 30, 2001, the veterinarian records (Ex. 182)

iv. show the Clearwater Vet Clinic conducted a post-mortem on a fetus, did an evaluation on a bull for breeding soundness, and issued two prescriptions for Nuflor for the treatment of respiratory illnesses.

v. There is nothing in the evidence of the veterinary records or the testimony of Dr. Bertagolli to indicate the following:

(1) That the veterinarians connected the low magnesium and calcium levels in the three cows or the increased ALKP Bilirubin results with the Ration.

(2) That the veterinarians noted any general malaise in the CPS herd.

(3) That the Seaborns complained to the veterinarians of any general malaise in the CPS herd.

(4) That the veterinarians recommended that the CPS herd might benefit from exposure to a fresh pasture. There is no indication that the veterinarians were again contacted by the Seaborns concerning further treatment of Tag 41, Cow 4F, or the unidentified cow and calf.

d. As a result of discussions between Kirk Seaborn and either Dr. Wennekamp or Dr. "M" on March 22, 2001, CPS stopped feeding the Ration to the cattle on the evening of March 22, 2001. Cows 27E and 36J did not consume any of the Ration.

e. After Tom Seaborn made his general complaint to Keith Warner that he thought the Ration was causing problems with the CPS herd, nothing much happened until April 17, 2001 when Mr. Robert Barry of Masterfeeds attended at the CPS ranch and he was told by Mr. Tom Seaborn about some problems with scours in the cattle and some cattle having problems walking, but no evidence was provided as to Mr. Barry's observations of the CPS herd in April of 2001. While at CPS, Mr. Barry took two samples of the Ration from the front doorway of the bin and forwarded them to Norwest Labs for analysis. At the same time, he asked for a sample of Mr. Tom Seaborn's hay to conduct a similar analysis, but accepted Mr. Tom Seaborn's lame excuse as to why the hay did not need to be tested.

f.. The test results from Norwest Labs were unremarkable and thus, on December 21, 2001, Mr. Barry re-attended at CPS to obtain two more samples to test the Ration for toxins. The samples tested positive for toxins.

g. Some time around April 18, 2001, Masterfeeds delivered to CPS a replacement of the 13 tons of Seaborn 18% heifer ration, which CPS fed to their cattle without incident.

h. I am satisfied that as with their description of the sickness suffered by the CPS cattle from February 28 to March 23, that the Seaborns have exaggerated the problem, post-March 23, 2001. I am satisfied that something caused a departure in the cattle's health in March and April of 2001 and that the Seaborns did not know what the origin of the problem was, nor did they consult anyone about the problem. Sometime during the Spring of 2001 Tom Seaborn,

out of desperation, decided that the sick animals might benefit from exposure to some fresh grass and turned them out into Field 33, a field of Canada bluegrass. When the cattle did not improve, the Seaborns then opened other fields of seed grasses to pasture the CPS herd. Although Tom Seaborn testified that the existing pasture used for the CPS herd was adequate to house twice as many cows and calves as they had in 2001, the only explanation provided as to why CPS did not simply construct new fences or pens in the existing pasture in order to segregate the problem cows and heifers was that the Seaborns were too busy caring for the sick cattle to construct the segregation pens and that "flushing", the cattle with fresh pasture grass seemed like a good idea.

From April 30, 2001 to April 30, 2002, the Clearwater Veterinary Clinic did not, in my view, attend CPS to treat any general malaise in the CPS herd. Beginning at Ex. 182,

i. the Clinic shows travel expenses for 5 or 6 trips to CPS, 5 prescriptions for Nuflor to treat respiratory problems, a trip to do a C-section, treatment of a heifer for magnesium/calcium deficiency, treatment of a 7-month old bull for problems bearing weight on its front legs and 4 post-mortem examinations on calves that had died. In the 4 post-mortems, the veterinary clinic's notes indicate that the owner was concerned about mycotoxins and requested liver histories. In the post-mortems, none of the autopsies reflected anything significant concerning the liver that might have been the cause of death. Also, in relation to mycotoxins, the veterinarian doing the autopsy indicated that mycotoxins would not be detected from the autopsy and recommended the suspected feed be analyzed, which was not done.

Over the next 2 years, from May 1, 2001 to May 1, 2003, there is little evidence of third parties witnessing the problems in the CPS herd and no third party is called to testify as

j. to the herd's health during that time period, and thus the Court is left with Tom Seaborn and Kirk Seaborn's opinions as to the health of the herd. Because I am satisfied that both Tom Seaborn and Kirk Seaborn exaggerated the problems in their cattle herd, I have put little weight on their evidence unless it is corroborated. In particular, I do not accept the following:

(1) That 25% of the female and male calves born in 2002 had abnormal reproductive organs.

(2) Exhibits 180, 14T, 15T, 16T, 17T; 5T, 6T; 74T, 77T, 78T, 79T, 80T, 81T, 82T and 83T.

k In May of 2003, CPS engaged the services of Dr. Coppock who was instrumental in engaging Dr. Jacobsen, microtoxicologist. Dr. Jacobsen provided an opinion that from the samples provided to him, the Ration in the C-4 area sample contained excessive moisture producing fungi growth, consisting of *Aspergillus glaucus*, *Aspergillus candidus*, and *Rhizopus* which fungi produces the mycotoxin Sterigmatocystin. I have not accepted Dr. Jacobsen's opinion because of the following:

(1) The mycotoxin Sterigmatocystin was not discovered by any tests of the Ration.

(2) The sample tested by Dr. Jacobsen was taken 2 ¹/₂ years following the delivery of the Ration during which time the Plaintiff admits that the roof hatch to the bin was leaking, the extent of which is unknown.

(3) The samples taken by Robert Barry in April of 2001 were analyzed by Norwest Labs and found to contain 11.3 or 11.4% moisture and even allowing for the Ration to dry for approximately 1 ¹/₂ months that it was in the bin, I am satisfied that the moisture level of the Ration on delivery on February 28, 2001 was below the level for fungi to form.

l. In the Spring of 2002, the Seaborns again decided to use their seed grass fields as pasture for the CPS herd. Although Tom Seaborn indicated that there had been no noticeable improvement in the CPS herd from pasturing the cattle in these fields during the Summer of 2001, there is no explanation why the Plaintiffs did not seek out a less costly pasture facility for the herd. There is no evidence that they considered using some of their other lands

for pasture, considered using third parties' lands for pasture or considered penning or fencing their existing pasture so that they could segregate the sick cattle.

m. In my view, CPS has not proven on a balance of probabilities any connection between the composition of the Ration and the alleged sickness in the CPS herd as follows:

- (1) The levels of selenium in the Ration combined with the selenium levels in the cowlick and vita sel supplements were within tolerable limits.
- (2) The results of Windsor Labs' test of the Ration from October 14, 2004 identified penny cress, i.e. stinkweed seed components in the Ration composing 3% of the Ration, but no scientific studies were provided to the Court in which this quantity of stinkweed seed had previously caused sickness to cattle. Although Dr. Coppock testified that in his opinion 3% could cause problems, and Dr. Smith testified that it may depend upon the potency of the particular stinkweed seeds. In my view, both of these opinions fall within the "can't be ruled out" category as in the first place, there have been no scientific studies in this regard and in the second place, the stinkweed seeds in the Ration were not tested for their potency.
- (3) Central Testing Labs discovered small levels of mycotoxin in the Ration, T-2 toxin, Zearalenone and Vomitoxin (DON). No tests discovered the mycotoxin Sterigmatocystin and even if some are present, I find that its creation would be as a result of the leak in the bin roof. I accept Dr. Smith's opinion that the levels of mycotoxins detected in the Ration were not sufficient to cause illness in the CPS herd.
- (4) In relation to excessive levels of cobalt, zinc, potassium and manganese in the Ration, I accept Dr. Christopherson's opinion that they are unlikely to have contributed to the adverse effects seen in the CPS herd.
- (5) In relation to excessive levels of iron and copper in the Ration, although they exceeded the Table 4 Guidelines of the CFIA for nutritional levels only, I am not satisfied on a balance of probabilities from the evidence provided by CPS that the levels of iron and copper in the Ration were responsible for the adverse effects in the CPS herd because the Table 4 Guidelines clearly establish nutritional maximums rather than maximum health safety limits.
- (6) The level of Urea-N as protein (ECP) in the Ration was 2.08% or .08% higher than the 2% that the Ration was to contain. These levels of ECP do not explain the illness in the CPS herd.
- (7) Dr. Coppock provided an opinion that although the individual components in themselves may not have made the cattle ill, that in his opinion, the Ration contained a "complex mixture" and that the 3% level of penny cress acted as a trigger and lowered the benchmark for the effect of the other components in the feed and caused permanent injury to the organs of the CPS herd. CPS provided the Court with no scientific studies that had been conducted in the past to support Dr. Coppock's opinion. I accept Dr. McAllister's opinion that in general, cattle have an amazing ability to adapt to the feed that they are provided and their digestive system can process what they have eaten. There was no evidence provided to the Court of an entire cattle herd becoming ill from the feed they had eaten with the possible exception of cattle being exposed to pure mustard seed or mustard seed plants. In my view, the "complex mixture" is but a theory that "cannot be ruled out" and is woefully short of the standard of being the probable cause of the illness in the CPS herd.
- (8) As the CPS hay was not tested, the Court has no evidence to make a determination that the components of the hay together with the Ration may have caused the illness in the CPS herd.
- (9) The Ration contained 63 kgs. of material in excess of what Masterfeeds manufactured. I have been unable to determine the source of this alien product; however, the multiple tests of the Ration failed to disclose any component of the Ration that was not an acceptable component of cattle feed. Thus, I conclude that the excess product was not responsible for the illness in the CPS herd.

4. Conclusion from the Facts

168 From the facts, I am not satisfied on a balance of probabilities what the cause of the malady was that inflicted at least 35 of CPS's cows and 15 of their yearling heifers. In my view, it cannot be ruled out that all or some of these animals suffered from liver and/or thyroid problems as a result of eating the Ration. Also, it cannot be ruled out that the entire herd, including the bulls, could have been suffering from exposure to some bad or toxic hay; It cannot be ruled out that some of the animals could have been suffering from the effects of inbreeding; It cannot be ruled out that in 2001 the CPS cow and heifer herd suffered from a magnesium/calcium deficiency. (The cause of the deterioration of the CPS herd is an enigma.)

5. Review of the Law and Decision

169 The claim of CPS seeks damages arising from both the tort of negligence and breach of the implied warranties in the *Sale of Goods Act* R.S.A. 2000, c. S-2.

A. Negligence

170 Liability for negligence requires a breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another.

171 What is the standard of the duty of care? The law requires the Defendant to use "reasonable care" in the manufacture of the Ration and nothing more.

172 In *Hanke v. Resurfice Corp.*, [2007] 1 S.C.R. 333 (S.C.C.), Chief Justice McLachlin, writing for the Supreme Court of Canada, overturned the Alberta Court of Appeal and restored the trial judgment, confirming that the "but for" test was the proper test in that circumstance, even though there was more than one possible cause of the damage. While the plaintiff's carelessness would not have automatically absolved the defendant if the defendant had been negligent, the plaintiff had failed to prove that the defendant's design was in fact negligent.

173 At paras. 21 — 28, the Supreme Court of Canada in *Resurfice*, set out the following general principles regarding causation:

174 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute. This fundamental rule has never been displaced and remains the primary test for causation in negligence actions . . . The "but for" test recognizes that compensation for negligent conduct should only be made "where a *substantial connection* between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone". [emphasis added] [citation omitted] However, in special circumstances, the law has recognized exceptions to the basic "but for" test and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements:

First, it must be *impossible* for the plaintiff to prove the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors outside the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach. [emphasis added]

175 In relation to causation Sopinka J., as he then was in *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), at para. 27 stated:

Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pockets of the former . . .

176 In the manufacture of the Ration, in my view, there are a number of areas in which Masterfeeds may have failed to comply with the standard of care expected in the industry.

- a. The failure to determine the origin of the 63 kgs. of alien material before it was shipped on February 27, 2001.
- b. The unexplained presence of a few red pellets in the Ration, which were obviously hog feed.
- c. The failure to deliver a label or tag with the Ration.
- d. The delivery of a Ration containing excess protein and minerals.

177 As determined previously in the facts, I have concluded that none of these factors provide any plausible explanation for the alleged symptoms that were suffered by the CPS herd. On a "but for" test, the Plaintiff has failed to establish any relationship between these acts and the injury suffered by CPS.

178 Thus, CPS's claim in tort must fail.

B. Sale of Goods Act

179 The *Sale of Goods Act*, R.S.A. 2000, c. S-2 sets out the following implied conditions:

15 When there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description . . .

16(1) Subject to this Act and any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as provided in this section.

(2) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether the seller is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose.

(3) [inapplicable]

(4) When goods are bought by description from a seller who deals in goods of that description, whether the seller is the manufacturer or not, there is an implied condition that the goods are of a merchantable quality.

(5) Notwithstanding subsection (4), if the buyer has examined the goods there is no implied condition as regards defects that the examination ought to have revealed.

(6) [inapplicable]

(7) [inapplicable]

180 There are three implied statutory conditions pleaded by CPS and addressed herein, namely whether:

- (1) the Ration delivered corresponded with the description(s. 15);
- (2) that the Ration was reasonably fit for the purpose for which it was purchased (s. 16(2)); and

(3) that the Ration was of merchantable quality (s. 16(4)).

(i) *Goods Corresponding to Description*

181 Because this was a sale by description, the implied condition in s.15 of the Sale of Goods Act applies, namely that the ration needed to correspond to that description.

182 In *Bakker v. Bowness Auto Parts Co.* (1976), 68 D.L.R. (3d) 173 (Alta. C.A.); [1976] A.J. No. 64 the Alberta Court of Appeal per Clement J.A. stated regarding the equivalent of s.15 of the *Sale of Goods Act*, R.S.A. 2000:

at para. 15:

It is not, of course, every statement descriptive of some aspect of quality of the goods that can claim the support and operation of s.16. A sale by description is not defined by the Act, but it is clear that the description of which the section speaks is only that which, as a term of the contract, identifies the subject-matter of the sale. It was so said by Lord Diplock in *Christopher Hill Ltd. v. Ashington Piggeries Ltd. et al.*, [1972] A.C. 441 at 503:

The "description" by which unascertained goods are sold is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied. It is open to the parties to use a description as broad or narrow as they choose.

at para. 18:

It seems to me that if it is kept clearly in mind that the description for the purposes of s.16 is a matter of construction of what is contractually descriptive of the identity of the goods, there can be little difficulty in reconciling the cases which would otherwise appear to reach somewhat disparate conclusions . . .

and at paras. 21 and 22:

21. There is not a great deal of allowance to be made under s.16 for variation between the goods contractually described and the correspondence to it of the goods actually tendered. In *Arcos Ltd. v. E.A. Ronaasen & Son*, *supra*, Lord Buckmaster speaks of differences of such a trivial character as would justify them being disregarded by the Court. The matter was put somewhat more broadly by Lord Diplock at pp. 503-4:

But ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy. The key to section 13 is identification.

22. Whichever view is to be taken, [the court concluded that the antifreeze delivered did not correspond with what was contracted to be sold, therefore the Plaintiff was justified in rejecting the shipment and refusing to pay the purchase price].

183 The Plaintiff refers to the discussion in *Ashington Piggeries Ltd. v. Christopher Hill Ltd.* (1971), [1972] A.C. 441, [1971] 1 All E.R. 847 (U.K. H.L.) of *Pinnock Brothers v. Lewis & Peat Ltd.*, [1923] 1 K.B. 690 (Eng. K.B.). In *Pinnock Brothers* the court held regarding a sale of copra cake, where the goods were so adulterated with caster seed as to be poisonous to cattle, that the goods were not properly described as copra cake. In contrast, in *Ashington Piggeries Ltd.*, the majority of the House of Lords concluded that herring meal, albeit contaminated, was still identifiable as herring meal. The contamination was an issue of quality addressed by the implied conditions of merchantable quality and fitness for purpose, but did not breach the warranty of correspondence to description. The Plaintiff refers to Lord Dilhorne's judgment which dissented on this issue. Lord Dilhorne concluded at 467 that the difference between a poisonous and non-poisonous substance is more than a difference in quality: the goods are different in kind. The Plaintiff also refers to Lord

Hodson, in *Ashington Piggeries Ltd.* distinguishing *Pinnock Brothers* on the grounds that in *Ashington Piggeries Ltd.* the evidence did not support the view that something was added to the herring. Sodium nitrate was used as a preservative for the herring. It produced a chemical reaction, making the herring meal toxic. Lord Hodson at 449 states "The herring meal was contaminated but no poisonous substance was added to it, so as to make the description "herring meal" erroneous. Conversely, in *Pinnock Brothers* poisonous castor seed added to the copra cake resulted in a product that the court said no longer met the description of copra cake. Lord Guest describes *Pinnock Brothers* as similar to another case where the bone and meal contracted for contained an admixture of meat and bone meal and cocoa husks. Therefore it was not of the contract description of meat and bone meal. He goes on to say that (at least with reference to the latter case) "The quantitative approach was applied." (*Ashington Piggeries Ltd.* at 455.)

184 The description of the Ration in my view was as follows:

1. 18% protein; 2% of which was ECP.
2. Barley based.
3. To contain Soya meal, not Canola meal.
4. To include rumensin and a standard mineral package.

185 In my view, the Ration met this description.

186 The Ration contained 2.04% ECP. There is no indication that it was important that the ECP not exceed 2%, and .04% excess is not significant. The fact the protein exceeded 18% by 4.8% is also not relevant, unless the excess was ECP, which I have determined it was not. In my view, the relevance of this 18% requirement was to provide a minimum protein level the Ration was to contain. The Ration exceeded this minimum requirement to the benefit of CPS.

187 The tests of Windsor Laboratories of the Ration showed it to contain 47-50% ground barley. Even though the barley was part of screenings, it was, in my view, barley based.

188 Again, Windsor Laboratories revealed the Ration to contain Soya meal and not Canola meal.

189 Exhibit 37T shows rumensin as a "hand add" to the Ration. Exhibit 44 shows Beef (7.5) 5402 Micro which was described in evidence as a standard mineral package.

190 Further, I do not find that other substances were present in the Ration in an amount or of such a harmful nature that they compromise the identity of the Ration such that it failed to satisfy the description of the good that CPS contracted for.

191 Accordingly I do not find that implied condition in s.15 was breached.

(ii) Fitness for the Purpose

192 Section 16(2) applies only "where goods are of a description which it is not in the course of the seller's business to supply (whether the seller is the manufacturer of not)" and "where the buyer, expressly or by implication, makes it known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment." Three factors are therefore relevant: (i) the course of the seller's business; (ii) knowledge on the part of the seller of the purpose of the goods; and (iii) reliance on the seller's skill or judgment. If section 16(2) applies, there is an implied condition in the contract, that the goods shall be reasonably fit for the purpose made known to the seller by the buyer. G.H.L. Fridman, *Sale of Goods in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2004) at 170 and 180.

193 The Defendant argues that the ration was formulated for heifers and designed to be fed at 4 pounds per head per day. It concedes that in formulating the ration, Masterfeeds knew of this intended purpose. It argues however, that its

use as feed for cows (some receiving 6 lbs per day and others 10 lbs per day), or feeding it to newborn calves via creep feeders, was not communicated to Masterfeeds as required by the Act, therefore there is no implied condition that the Ration will be fit such purpose. This is disputed by the Plaintiffs, who argue that Warner's knowledge can be imputed to Masterfeeds based on an agency relationship between Masterfeeds and Warner. It is not necessary that I decide this issue, as in any case, I do not find the ration was unfit for the purposes that CPS used it.

194 Much was made of the fact that the Ration was a "growth" feed, and thus not meant to be fed to mature cows. It was described as a "heifer ration".

195 In my view Masterfeeds did not establish any such restrictions for the use of this cattle feed. It could be fed to all cattle except bulls and pregnant cows because of the presence of rumensin.

196 The Seaborns were aware that the Ration contained rumensin and did not feed it to their bulls and pregnant cows.

197 The fact that the Seaborns chose to feed a growth feed to their mature cows, and thus waste some of the nutrients did not make it unfit for a mature cow cattle feed. CPS argues that because the feed contained mycotoxins, pennycress and mustard seeds that it was unfit as a cattle feed.

198 CPS argues that because the feed contained mycotoxins, pennycress and mustard seeds that it was unfit as a cattle feed.

199 As previously stated, cattle have an amazing digestive system that can adapt and digest many things including mycotoxins and brassica seeds. I am not satisfied on the evidence that the presence of mycotoxins and brassica seeds made the Ration unfit as a cattle feed.

200 In my view, the Ration was fit for its purpose, a cattle feed, restricted only by the presence of rumensin.

(iii) *Merchantable Quality*

201 The defendant does not dispute that the condition of merchantable quality applies (i.e. because the Ration was bought by description from a seller who normally deals in goods of this description).

202 "Merchantable quality" is not defined in the *Sale of Goods Act*.

203 Fridman says that Canadian cases seem to adopt and approve the approach contained in the speeches of Lord Wright (G.H.L. Fridman, *Sale of Goods in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2004) at 193), Lord Wright's view as based on the idea of the utility of goods for the purpose for which they would be normally used, even if not for the purpose intended by the buyer. Hence if normally only used for one purpose the goods must be fit for that use, if normally used for different purposes, fit for any one, unless the buyer made known the particular use intended, when they would have to be fit for such intended use. In *Grant v. Australian Knitting Mills Ltd.* [1935 CarswellFor 2 (Australia P.C.)], Lord Wright said that whatever else "merchantable" might ordinarily mean, it did mean that articles sold, if only meant for one particular use in the ordinary course, was fit for that use. "Merchantable quality does not mean that the thing is saleable in the market simply because it looks all right: it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination". (Fridman, *supra*, at 191.)

204 In *Strandquist v. Coneco Equipment*, 1999 ABCA 357, 250 A.R. 38 (Alta. C.A.), the Alberta Court of Appeal reviewed the House of Lords in *Henry Kendall & Sons v. William Lillico & Sons Ltd.* (1968), [1969] 2 A.C. 31 (U.K. H.L.) regarding the test for merchantable quality. In *Strandquist* the plaintiff had argued that the test for merchantable quality was whether the goods "were of use to any reasonable purchaser". The Alberta Court of Appeal rejected this approach.

205 In *Strandquist* the Alberta Court of Appeal focussed on Lord Pearce's judgment in Kendall. The court in *Strandquist* states at paras. 24 — 26:

Lord Pearce added another qualification very relevant to the present case. He said that the meal which would kill young poultry or young pheasants would not be marketable unless it were accompanied by a very clear and explicit warning that it would kill such birds, as well as a warning that the strength of the toxin was unknown. He doubted very much that goods so labelled would have been marketable without a price abatement.

Worse still, that meal with that contamination sold without such a warning label was simply a hidden trap, as Lord Pearce pointed out. The absence of a warning label was a separate serious defect in quality. Goods which are merchantable if sold with a clear warning, may well not be merchantable if sold without one . . . He thought that goods sold without such a warning and without a price abatement could never be merchantable . . . That reasoning appeals to us . . .

206 However, the court in *Strandquist* then goes on to state in para. 26:

It [the qualification discussed in Lord Pearce's judgment] may well be an example of the salutary rule that a short formula of words cannot provide a safe definition of "merchantable" which can be used in all circumstances.

See Lord Reid in *B S Brown & Son v. Craiks Ltd.*[1970] 1 W.L.R. 752, [1970] 1 All E.R. 823, at 825 (U.K. H.L.). None of the legislatures which enacted the original *Sale of Goods Act* attempted such a definition.

207 The court in *Strandquist* also describes other tests for merchantable quality from the *Kendall* decision.

208 For example, Lord Reid, in *Kendall*, quoted (from a 1934 decision of Lord Wright) the test of whether goods were of use for any purpose for which they would normally be used. However he rejected this as a universal test unless qualified in three ways:

(a) to be merchantable, the goods must be commercially saleable under the description under which these goods were in fact sold;

(b) goods are not merchantable where they are sold under descriptions understood to refer to quality, and the quality is not the right quality, or the description is not right;

(c) the flawed goods are not merchantable unless some buyers knowing the facts would buy them without abatement of the price obtainable for such goods when in good order and condition and without special terms.

209 Lord Reid and Lord Morris both emphasized the word "normally"; it is irrelevant that someone somewhere knowing the facts would have bought the goods for some purpose which is not their normal use.

210 In *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 357 A.R. 139, 42 Alta. L.R. (4th) 118 (Alta. C.A.); leave to appeal refused 2005 CarswellAlta 573 (S.C.C.), the Alberta Court of Appeal held that the trial judge had not erred in finding that resin purchased by the description "high density polyethylene NT303" and which Don knew would be used by some respondents to manufacture pipe that would be installed by other respondents to carry natural gas, was not of merchantable quality. The Defendant had argued that the warranty of merchantable quality was not breached because the Plaintiff failed to prove that resin could not be used for any purpose other than producing pipe that carried natural gas. The Court of Appeal held that the argument that the pipe could still carry water or brine, especially since there was no evidence to support it, had no merit. The Plaintiff knew of the proposed use of the resin and that the pipe created from it would and did crack. Given the dangerous consequences of transporting natural gas through a pipe that would crack, the Court of Appeal held at para. 41, that the trial judge did not err in finding "*no reasonable buyer aware of the defects of pipe made with the resin would have bought it at any price.*"

6. Causation/Proof

211 By the *Sale of Goods Act*, the purchaser enjoys the implied conditions that the goods will be "fit for the purpose" and "of merchantable quality". It is not open to the vendor to prove that he exercised reasonable care or that the defect was undiscoverable because there is "strict" liability. S.M. Waddams *Products Liability*, 4th ed. (Toronto: Carswell 2002) at 76.

212 Lord Reid in *Henry Kendall & Sons v. William Lillico & Sons Ltd.*, *supra*, at 47, said with respect of the condition of fitness for purpose:

If the law were always logical, one would suppose that a buyer, who had obtained a right to rely on the seller's skills and judgment would only obtain thereby an assurance that proper skill and judgment had been exercised, and would only be entitled to a remedy if a defect in the goods was due to a failure to exercise such skill and judgment; but the law has always gone further than that. By getting the seller to undertake to use his skill and judgment the buyer gets under s.14(1) of the Act of 1893 an assurance that the goods will be reasonably fit for his purpose and that covers not only defects for which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment on the part of the seller would not have detected.

213 Similarly, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1 (S.C.C.) with respect to the condition of merchantable quality, the SCC said at para. 11:

No fault could be ascribed to Currie, which merely stored the asphalt after it was received from Gulf and sent it on in the same containers to the Plaintiff. However, this does not absolve Currie from liability under the *Sale of Goods Act* if it, in fact, supplied a product which was not of merchantable quality.

214 The Plaintiff need not prove the cause of the defect, it need only prove the defect existed when the product was delivered to it. (*Schreiber Brothers Ltd.*, *supra*, at para. 17.)

215 CPS relies upon *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78 (S.C.C.).

216 In *Schreiber Brothers Ltd.*, the Plaintiff installed a roof using asphalt that he had purchased from the defendant. The roof failed: large blisters formed. The cause of the blistering was an enigma. None of the witnesses (lay or expert) had seen anything like this before, and there had been no complaints from the Defendant's other customers or other suppliers. The trial judge found that the blistering could not be attributed to faulty workmanship on the part of the plaintiff and that the roof had failed in ordinary use, and this finding was not disturbed by the Court of Appeal. The trial judge concluded that since other probable causes had been eliminated, there was probably a latent defect in the asphalt, and held that the warranty of merchantable quality was breached. The Court of Appeal set aside the trial decision, on the grounds that it was incumbent on the Plaintiff to prove, even if not required to identify the defect, that a defect existed in the asphalt when it left the manufacturer. The Plaintiff had failed to meet this burden of proof. The Supreme Court of Canada restored the trial judge's decision. It stated as follows (the underlining is mine):

13 There is no doubt that the plaintiff purchaser, suing for damages for breach of the implied condition of merchantable quality, had the burden of proof, in the light of the pleadings, of excluding its faulty workmanship as a probable cause of the blistering of the asphalt. This it did, to the satisfaction of the trial judge and without challenge by the Court of Appeal. Again, in the light of the pleadings and of the evidence it was an obligation of the plaintiff to exclude other probable causes after the asphalt was delivered by Currie. The trial judge found that it had done so and, again, there was no remonstrance by the Court of Appeal. This leaves the question whether the existence of a defect in the asphalt, either when it left the Gulf plant or when it left Currie, the supplier, must be shown affirmatively or may be proved by inference from the evidence as a whole. Proof of a defect must be made, of course, whether the purchaser of the product is plaintiff, suing for damages, or is defendant, resisting an action for the price. The trial judge found, as I have already noted, that the asphalt reached the plaintiff in the same condition that it was in when it left the Gulf plant; in short, that the defect in the asphalt was not attributable to anything that Currie did or failed to do. The Court of Appeal accepted this finding as well

.....

15 *The Court of Appeal*, in placing upon the plaintiff a burden of proof to show that, although the asphalt failed as a product, there was a defect in it when it left the Gulf plant, *proceeded on the view that there must be a credible theory to account for the defect* and that Dr. Horsch's theory was incredible. *I do not think that, in the circumstances of this case, the absence of a credible theory that would indicate that the defect was in the manufacturing process or occurred before the asphalt left the Gulf plant is conclusive against the appellant.* The rejection of the gas theory of Dr. Horsch, a theory accepted by the trial judge, does not necessarily mean that the plaintiff fails. True, the gas theory was an element in the trial judge's conclusion in favour of the appellant but, it seems to me, that if the inference drawn by the trial judge is impermissible, in the light of the evidence of regularity adduced by the respondents, a greater burden of proof than proof on a balance of probabilities is cast on the plaintiff.

16 *This case can, of course, be looked at as exhibiting two possible causes of the defect, each of them unlikely in view of the evidence. We are still left, however, with the fact of a defect in respect of a product emanating from the respondents. The state of the evidence was such as to make it specially appropriate for the trial judge to make inferences from what was put before him.* He certainly canvassed all relevant evidence and did not misapprehend it in any material way. The concurrent findings of fact are cogent indicators that he took a proper approach. I do not think that his conclusion ought to have been disturbed on appeal on the basis on which the Court of Appeal proceeded.

17 *It appears to me also that the Court of Appeal treated the case before it as one sounding in negligence against Gulf rather than being a contract action against Currie.* If it were not for the reference by Weatherston J.A. to **Canadian William A. Rogers Ltd. v. Lucerne Metal & Plastic Products Ltd.**, it would be difficult to appreciate that this was an action under The Sale of Goods Act. As in the **Rogers** case, *it was enough here that the plaintiff show that a defect existed when the goods were delivered by Currie, without being required to prove the cause of the defect.* The Court of Appeal in the **Rogers** case accepted the trial judge's holding that the plaintiff had met that burden of proof. The Court of Appeal here should have come to a similar conclusion.

217 G.H.L. Fridman, *Sale of Goods in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2004) at 196 describes the onus of proof for merchantable quality as follows:

Where a buyer alleges that goods are not of merchantable quality it may not be necessary for the buyer to prove affirmatively that the goods were defective. The trial court is entitled to draw the inference of defective quality even though the cause of the defect remains unknown, as long as the buyer provides evidence from which the buyer's own faulty workmanship is excluded as a possible cause of the defect of the goods . . . The onus on the buyer is to establish the defective quality of the goods on the balance of probabilities, once the buyer has proved that the court should reject other probable causes of the alleged defect in the goods in question. In the absence of satisfactory evidence, no finding that the goods are not merchantable can be made.

218 In *Prolite Plastics Ltd. v. International Cooling Tower Inc.* (1987), 51 Alta. L.R. (2d) 299, 79 A.R. 110 (Alta. Q.B.), Justice Gallant considered a case where the plaintiff supplied two PVC header pipe assemblies to the defendant for installation in a cooling tower. The defendant staff had no experience with plastic pipe band, and when they were requested to change wooden headers to cover plastic ones, consulted the plaintiff for a price quotation. The plaintiff was aware of the nature of the defendant's work and the plaintiff's production adviser met with the defendant sales manager and the requirements were discussed. The headers were shipped by common courier and when they were loaded a pipe roll and reinforcing gusset was chipped. No cracks in the pipe were detected at the time. The defendant's foreman inspected the pipe and detected no cracks. He then proceeded to have the pipe hoisted into place. The foreman was experienced in the repair of water coolers and had received no special instructions relating to this pipe. Shortly after its installation, he noticed cracks in two separate locations on the pipe, one of which was immediately adjacent to the chipped gusset. A representative of the plaintiff was called to view the pipe and he concluded that the damage probably occurred on shipping and unloading and noted that the type of plastic pipes sent was not appropriate for the proposed application. At the direction of the plant owner, the defendant replaced the plastic from a steel assembly and returned the plastic to the plaintiff. The plaintiff brought an action in debt and the defendant counterclaimed for damages for breach of implied

conditions of fitness for the purpose and of merchantable quality based on the equivalent of s.16(2) and 16(4) of the *Sale of Goods Act*, RSA 2000, c. S-2.

219 In relation to the issue of whether the goods were of merchantable quality, the Court found that the defendant (plaintiff by counterclaim) had eliminated all other probable causes and that the Court was entitled to draw an inference that the probable cause was a latent defect from manufacturing or damage in unloading which was undetected until hoisting occurred. The Court concluded that the plaintiff had proved by inferences from the evidence as a whole that the header pipe in question was not reasonably fit for its purpose and it was not of merchantable quality.

220 In *Edmonton (City) v. Westinghouse Canada Inc.*, [2000] A.J. No. 252, 250 A.R. 385 (Alta. C.A.), McClung J.A. for the majority determined that where the cause of the damage cannot be determined on a balance of probabilities, and thus the cause is an enigma, it is not an error in law for the judge to refuse to draw an inference in favour of the plaintiff.

221 Fraser C.J.A. dissenting, says that the trial judge erred in her treatment of the onus of proof and evidentiary burden imposed under the *Sale of Goods Act* and therefore erred in her assessment of whether it was appropriate to infer that the transformer was defective when the seller delivered it to the buyer. However, I do not interpret even her dissent, to compel the trial judge to draw an inference in favour of the plaintiff in the circumstances of this case. Fraser C.J.A. states at paras. 15 and 16 [Italics added]:

The law is clear that if the City is relying on the *Sale of Goods Act*, the onus is on it to show that the transformer was defective and that the defect, latent or patent, existed when the transformer was delivered by Westinghouse. The City could discharge this burden on it by showing that the defect probably existed at the time of delivery and by producing evidence to exclude other probable reasons for the emergence of the defect [citation omitted]. However, the City is under no obligation to disprove all possible reasons for the emergence of the defect, but rather only those which are probable causes [citation omitted]. Once this has been done, the evidentiary burden shifts to Westinghouse to disprove that the explosion was caused by a defect in the transformer.

I am prepared to assume, for the sake of argument only, that once a plaintiff has excluded other probable causes for the emergence of a defect that a judge may draw an inference that the product was defective at the time of delivery but is not obliged to do so. I concede that central to this inference is the fact that the court must be satisfied that a defect does (or did) exist in the goods under scrutiny. But the real question here is how a plaintiff in the position of the City is to go about proving the existence of a latent defect. It is here that the trial judge erred.

222 Slatter J. (as he was then) considered *Edmonton (City) v. Westinghouse Canada Inc.*, *supra*, in his decision on appeal from the Provincial Court in *527353 Alberta Ltd. v. Stedelbauer Chevrolet Oldsmobile (1975) Ltd.*, 2001 ABQB 909 (Alta. Q.B.). In this case the Plaintiff (Respondent) sought payment for a failed clutch under a warranty agreement. Coverage was denied by the defendant who claimed the cause of the damage was abusive use. In his decision, Slatter J. concluded [that the provincial judge found "there was a failure" and the defendant failed to prove the cause was misuse]. At para. 24 Slatter J. states:

24 As the *Consolidated Bathurst Export Ltd.* decision points out, in setting the burden of proof in cases like this, one must not lose sight of the practicalities. There are hundreds of thousands of vehicles in all parts of North America covered by the General Motors Warranty. General Motors cannot possibly know the circumstances under which those vehicles are operated generally, or how they were being operated at the particular moment that a component failed. Only the consumer knows that. While it may be fair to resolve any ambiguities in the form of the warranty against General Motors, it is equally fair to call on the consumer to explain the circumstances under which the failure occurred. The consumer cannot try to conceal the cause of the failure: *Roy v. North American Warranty Co.* (1993), 20 C.P.C. (3d) 396 (Alta. Prov. Ct.). At the time the differential failed the truck was being operated by Nathan Satanove, the 16 year old son of the Respondent. Only he knows how the vehicle was being operated at the time of failure, yet he did not testify.

The Appellant went so far as to call the Respondents' mechanic when they did not do so, but I do not think that it is reasonable to expect the Appellant to have called the son Nathan as well. Where one party fails to call a witness under its control who is the only witness to the events in question, that is a classic situation for drawing an adverse inference. The inference is that the witness's testimony would not have assisted the party's case. The effect here was that the Respondents failed to "exclude other probable causes of the defect" as discussed in *Westinghouse Canada Inc.*, *supra*.

223 Should the court draw an adverse inference against the Plaintiff because the Plaintiff failed to call Dr. Wennkamp and the CPS ranch-hand (Mr. Tink) as witnesses?

224 Where a party has failed to call a relevant witness, the court will sometimes draw an inference that the evidence that has not been called would not have been helpful or would have been detrimental to that party's case. (*Simmons v. Koenig*, 2001 ABQB 152 (Alta. Q.B.)). The rule is stated in J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworth's, 1999), (2nd ed.), at 297:

In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and who does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case or at least would not support it.

225 The Supreme Court of Canada addressed such adverse inference in *Levesque v. Comeau*, [1970] S.C.R. 1010 (S.C.C.). The plaintiff failed to call certain medical evidence in a personal injury case. Pigeon J., writing for the majority, stated at para. 6:

Appellant Lola Levesque's expert examined her for the first time more than a year after the accident, and after she had consulted several doctors and undergone different examinations in the meantime. She alone could bring before the Court the evidence of those facts and she failed to do it. In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case.

226 The Plaintiffs rely on *Kamitomo v. Pasula* (1983), 29 Alta. L.R. (2d) 375, 50 A.R. 280 (Alta. Q.B.) as authority that one of the tests for determining whether an adverse inference should be drawn, is: "Could the witnesses who were not produced have produced much enlightenment?"

227 In *Kamitomo* the corporate defendant did not call as a witness, its employee who negotiated a lease between the parties and whose representations the parties argued amounted to a collateral contract or agreement of indemnity by the corporate defendant. The court stated (at para. 92):

It is clear that Mr. Sweeting could have provided enlightenment. He was the one who is alleged to have made the representations and he is best able to make answer to the allegations. In *Levesque v. Comeau* *supra*, the court accepted the principle that the failure to produce a witness whom one would naturally expect a party to call upon in proving its case should lead to the presumption that such evidence would adversely affect the party's case.

228 The court in *Kamitomo* relies on the following quote from *Panarctic Oils Ltd. v. Menasco Manufacturing Co.* (1983), 41 A.R. 451 (Alta. C.A.) for this test:

Again we are invited to draw adverse inference against the plaintiff from the absence of witnesses. It is said that the plaintiff was required to call all the passengers aboard the aircraft and that failure to do so must result in inferences adverse to the plaintiff. I am at a loss as to the inference to be drawn. Presumably all that the passengers would be qualified to do would be to describe the noise heard; they would not be qualified to state the result that good

airmanship would require from it. One or the other of them with happy gift of expression may have produced a more descriptive phrase than "thud" "bang" "crunch" "bump" "judder" "shudder". I would doubt that 17 more witnesses on this point would have produced much enlightenment. The trial judge declined to draw any inference from their absence and I respectfully agree with him.

229 Additionally the Plaintiff relies on the following quote from *Kamitomo* at para. 88:

The adverse inference is drawn not merely from the failure to produce, "but from non production when it would be natural for the party to produce" such evidence: *Wigmore*, vol. 2 at p. 199.

230 Wittmann A.C.J.Q.B. in *Howard v. Sandau*, 2008 ABQB 34 (Alta. Q.B.) at paras. 39-57 provides a useful summary of this principle, including several relevant Alberta cases. Cases subsequent to *Levesque* clarify that whether such an inference is drawn and the extent of the inference is in discretion of the trial judge. The question of whether to make such an inference depends on the specific circumstances, in particular:

- a. Whether there is a legitimate explanation for the failure to call the witness;
- b. Whether the witness has material evidence to provide;
- c. Whether the witness is the only person or the best person who can provide the evidence;
- d. Whether the witness is within the "exclusive control" of the party, and is not "equally available to both parties."

231 (Alan Mewitt and Peter Sankopp Witnesses (Toronto: Thompson Carswell, looseleaf) at 2-23, referred to at para. 44 of *Howard v. Sandausupra*).

232 Wittmann ACJQB says that regarding:

- a. Material evidence — Case law indicates that whether the witness has material evidence to provide is often determinative. In a number of cases, courts decline to draw an adverse inference due to the fact that the testimony of the absent witness would not be probative in the proceedings. (*Howard v. Sandausupra* at para. 45).
- b. Best evidence — When the witness does have material evidence to provide, particularly when that evidence constitutes the "best evidence" available, it is likely that the Court will draw an adverse inference (*Howard v. Sandausupra* at para. 47).

233 In *Howard v. Sandau* the Plaintiff sought support from the Defendant and claimed a constructive trust. The parties were not married and the duration and nature of the parties' relationship was a key issue. One of the disputed matters was whether Ms. Howard lived with Mr. Sandau during a particular period. Mr. Sandau testified that Ms. Howard lived in an apartment with her son during this period. Ms. Howard's evidence was that she leased the apartment for her son, but that she lived with Mr. Sandau during this period. The Plaintiff's son was 18 years old at the time in issue and was 23 years old at the time of the trial. Although he attended the trial, he was not called as a witness. With regard to the question of whether this witness was equally available to both parties, the Court in *Howard* states (at paras. 50, 51):

50. In drawing an adverse inference in *Levesque v. Comeau* [supra] Pigeon, J. explicitly noted that: "She alone could bring before the Court the evidence of those facts and she failed to do it." This statement indicates that a relevant factor in determining whether to draw an adverse inference is when a witness is in the exclusive control of one party, or is equally available to both parties.

51. This is not a case where "she alone" could bring before the Court the evidence of Eric Desjardins. The evidence could have been brought forward by Mr. Sandau at his behest. However, it is unreasonable to expect, absent evidence of any discord within a family, in cases such as this, that a party adverse to Ms. Howard would bring forward the evidence of Eric Desjardins at a trial. In this case, there is no right under existing discovery rules in

Alberta to discover a witness. It cannot be expected that Mr. Sandau would put Eric Desjardins on the witness stand without knowing his evidence. Eric Desjardins, absent evidence to the contrary, is in a position similar, but not the same as, an attending physician who is not called by a party.

234 The court in *Howard v. Sandau*^{supra}, at paras. 53-57, also discusses Rule 296.1(1) of the *Alberta Rules of Court*:

53. Rule 296.1(1) of the *Alberta Rules of Court* deals with adverse inferences. It states as follows:

296.1(1) When, in law, an adverse inference might be drawn from the failure of a party to call a witness, that party may serve on any other party a notice of persons not to be called.

.....

54. This Rule does not affect whether or not, in law, an adverse inference may be drawn. Rather, it acknowledges the existence of the adverse inference principle and provides a way for parties to avoid such inferences. This was addressed in *Wade v. Baxter*, [2001] A.J. No. 1471 (Alta. Q.B.) where Slatter, J. (as he then was) stated at paras. 18 and 19:

18. Prior to the enactment of this Rule, counsel often had a difficult decision to make with respect to the calling of witnesses. A witness might not be necessary to prove the case, but a party might call that witness just to avoid the risk of an adverse inference. If a witness was not called, the opposing party might be tempted to request an adverse inference, even if the witness was of minimal importance. This sometimes resulted in witnesses being called that no one really wanted, thereby lengthening trials.

19. The Rule is designed to provide a mechanism to help the parties identify which witnesses are really needed for the trial, and which can be safely excluded. The Rule itself does not create any adverse inference; it states that it applies "when, in law, an adverse inference might be drawn."

55. A failure to serve a notice may result in an adverse interest being drawn. In *Schuttler v. Anderson*, [1999] A.J. No. 481 (Alta. Q.B.), the Court discussed Rule 266.1. Noting that a notice had not been served in that instance, Lee, J. stated at para. 119:

No such notice was served here from which it must be presumed that the Plaintiff assumed the risk that an adverse inference might be sought and drawn.

235 The court in *Howard v. Sandau* held at para. 57:

57. Because Ms. Howard did not file a notice under Rule 296.1, she can be taken to have assumed the risk that such an inference will be drawn. Her son's evidence was on a material point that was in dispute. Significantly, similar to the situation in *Schuttler v. Anderson*, [1999] A.J. No. 481 (Alta. Q.B.), it was the best evidence available on that point. These factors point in favour of an inference being drawn.

236 The Plaintiffs argue that the court should not infer from the Plaintiffs' failure to call Dr. Wennekamp as a witness, that his evidence would be unfavourable to the Plaintiffs' case.

237 Dr. Bertagnolli testified that Dr. Wennekamp was no longer with Clear Water Veterinary Services; however he was currently living in Cochrane.

238 The Plaintiffs argue that Dr. Wennekamp would not provide "much, if any enlightenment" concerning the condition of the CPS herd following the feeding of the Ration, because:

a. The Plaintiff called Dr. Bertagnolli, the owner of Clear Water Veterinary Clinic, to testify concerning the records of the Clear Water Veterinary Clinic and the husbandry of CPS in general. Dr. Bertagnolli testified that he had provided veterinary services to the CPS herd since 1996 and continued to provide veterinary services to the CPS herd to the date of trial. Therefore he was the appropriate individual to call from the Clear Water Veterinary Clinic

concerning the CPS herd, as he was able to give evidence concerning the overall health of the herd both before and after the feeding of the Ration. Also considering his involvement with the herd over many years, he would have been much more familiar with the overall health of the herd during the relevant period, than Dr. Wennekamp, who only provided services for a limited period of time.

b. While Dr. Bertagnolli was not the person primary involved in providing veterinary care to the CPS cattle between February 27 — March 23, 2001, the veterinary records contain memorandum from Dr. Wennekamp relating to his activities involving the CPS cattle during that time period which adequately describe his observations, the tests taken and his tentative conclusions arising from his observations. In light of the memorandum from Dr. Wennekamp which formed part of the record and were admitted in evidence for the truth of their contents, without objection from the defence, there was no need to call Dr. Wennekamp as a witness. Calling him would amount to a duplication of the evidence of Dr. Bertagnolli.

c. "It is unlikely that Dr. Wennekamp could, after 6 years, recall and add anything to the evidence that has not already been included in his memorandum".

d. The memorandum prepared by Dr. Wennekamp is consistent with the evidence of Kirk and Tom Seaborn.

e. Dr. Bertagnolli indicated the location where Dr. Wennekamp was working at the time of trial. If the defence felt that Dr. Wennekamp had anything to add, they could have called him as a witness themselves. They did not do so. Therefore this is not an appropriate case for an adverse inference.

239 In my view, Dr. Wennekamp is a material witness who should have provided the best evidence for events and times critical to this litigation. Dr. Bertagnolli's testimony is not a satisfactory substitute for the personal knowledge of Dr. Wennekamp of these matters and these important time frames. In 2001 and 2002, Dr. Bertagnolli had little contact with the CPS herd. Because of such, he could not provide any testimony concerning the deterioration of the herd after March 1, 2001. Dr. Wennekamp was the veterinarian who was called out to CPS's ranch and attended to CPS's animals during the period that the Ration was fed. Further, as described in para. 21 of this judgment, there is evidence that Dr. Wennekamp was involved in treating the CPS herd for at least 2 years after March 2001. In fact, as late as May 2005, Dr. Jensen's test results were still being sent to Dr. Wennekamp.

240 As already discussed in this judgment, (see for example para. 21) many issues remain unanswered notwithstanding Dr. Wennekamp's memorandum, that could have been examined through *viva voce* evidence. Further to suggest that Dr. Wennekamp's evidence was adequately provided through his notes or memorandum (even if admitted for the truth of their content) ignores that "enlightenment" is often provided through rigorous examination and cross-examination of witnesses.

241 Further, the court's findings regarding credibility of the Seaborn's testimony underlines the need for evidence from an independent witness who could corroborate the Seaborns' evidence regarding the problems experienced during the period that the ration was fed. One would not only expect the Plaintiff to call but would assume that the best such evidence would be the testimony of the veterinarian who personally attended at the CPS farm to treat some of the cattle at the relevant time. Not only would the court benefit from Dr. Wennekamp's observations (and his training) but he may also have been able to provide important evidence regarding the information provided and advice sought from the Seaborns at this time.

242 No suggestion was made that Dr. Wennekamp would have been unable to attend as a witness.

243 With regard to the argument that no adverse inference should be drawn as the defence could have called Dr. Wennekamp, I do not find it reasonable to expect that the defendant would call the Plaintiff's veterinarian as a witness. There would be no right for the defendant to examine this witness in discovery. It cannot be expected that the Defendant would put Dr. Wennekamp on the witness stand without knowing his evidence. Also, by calling Dr. Wennekamp as a defence witness, the defendant would forego the right to cross-examine.

244 The Plaintiffs could have avoided an adverse inference, by serving the Defendant with a notice pursuant to R. 296.1 that they would not be calling Dr. Wennekamp.

245 Drawing an adverse inference against the Plaintiffs is appropriate in these circumstances: accordingly, I presume that the evidence of Dr. Wennekamp would adversely affect the Plaintiffs' case.

246 The Plaintiffs argue that with respect to the CPS ranch hand, Mr. Tink, no adverse inference should be drawn from their failure to call him as a witness, for the following reasons:

a. This witness is only one of several who can provide testimony regarding the state of the cattle at the material time. He is not a key witness, and he is not the natural or first witness that CPS would call to provide evidence on the cattle. There are other witnesses who it was natural to call ahead of this witness.

b. He was not a particularly helpful individual around the farm, and the Plaintiffs do not have a lot of respect for his work. Therefore his evidence would not likely be helpful as, in all likelihood, he would not be capable of making insightful observations about the cattle.

c. In light of this witness' incompetence as a cattleman, it was not worth the Plaintiff's time and money to bring this witness all the way from Australia for the trial.

247 By Rule 200(1)(e), the Defendants could have examined Mr. Tink in discovery, thus I draw no adverse inference from the Plaintiff's failure to call him as a witness.

7. Application of the Case Law to this Case

248 I have found as a fact that the cause of the alleged damage to the CPS herd cannot be determined on a balance of probabilities. The only evidence establishes possible causes. It is possible that the damage to the cattle was caused by a latent defect in the Ration, but there are also other possible causes which do not involve the Ration or involve the storage of the Ration after it had been delivered to the Plaintiff.

249 In *Edmonton (City) v. Westinghouse Canada Inc.*, the product was destroyed. In comparison, CPS was not precluded from conducting a "feed test". CPS controlled over 12 tonnes of the Ration on March 22, 2001.

250 If CPS had conducted a "feed test" on some cattle and the test results revealed the cattle suffered from permanent liver damage:

a. The court would have independent third party evidence of some latent defect in the Ration.

b. The inclination of Tom Seaborn to exaggerate the circumstances would not be relevant.

c. The existence of a latent defect in the Ration would easily be inferred.

251 CPS did not call Dr. Wennekamp or Dr. "M". Thus, although Dr. Wennekamp treated two sick cows for calcium/magnesium deficiency in March 2001, and another cow in September 2001, there is not sufficient evidence before the court to determine that calcium/magnesium deficiency was a probable cause of the illness in the CPS herd. CPS chose not to call Dr. Wennekamp. The court was denied Dr. Wennekamp's opinion as to the probable problems in the CPS herd.

252 Fraser C.J.A. in *Edmonton (City) v. Westinghouse Canada Inc.* *supra*, concedes that central to drawing an inference is that the court be satisfied there is a defect in the goods. In the case of CPS, I am not satisfied on a balance of probabilities that there is a defect in the Ration.

253 If the contents of the Ration were the cause of thyroid and/or liver damage to the CPS herd, then in my view Masterfeeds breached the implied conditions that the Ration was of merchantable quality and that it was fit for the purpose.

254 CPS contends that the Ration contained a latent defect when it left Masterfeeds' plant, and considering the mysterious severe illness that affected the CPS herd in March of 2001 and thereafter, the Ration is the most likely and probable cause.

255 In this case, I have determined that CPS has only proven that the Ration cannot be ruled out as a cause of the CPS herd's malady. Also, other causes cannot be ruled out. On the evidence before me it is very much an enigma what caused the CPS herd to deteriorate. Thus, because the Plaintiff has established there is no other probable cause, I could infer that there was a latent defect in the feed and it caused the herd's malady, as I have determined that the other problems are but possible causes.

256 In my view, this case is distinguishable on the facts from *Schreiber Brothers Ltd. supra*. As with Masterfeeds, the Defendant in *Schreiber Brothers* had not experienced this problem before; however, there is no evidence in the *Schreiber Brothers* case that the Plaintiff ignored available tests on the asphalt to solve the mystery of why the shingles failed.

257 In CPS's case, they did no testing for 2 ¹/₂ years (except the testing by North Dakota State University, which tests provided no support for the positions of CPS).

8. Factors I have Considered Important in Concluding Whether I Should Draw an Inference that the Ration Contained a Latent Defect

258

1. In March of 2001, although Dr. Wennekamp suspected possible liver damage in cows #4I and #4F, CPS did no followup testing, such as a urinalysis.
2. On two occasions CPS declined offers to test their hay.
3. No thyroid tests were done, after Dr. Coppock determined that stinkweed might affect the thyroid.
4. No colostrum tests were conducted after Dr. Coppock determined that liver damage had occurred.
5. Although the lab recommended urinalysis tests on 6J49 and 7J56, none were done.
6. No tests for the presence of Sterigmatocystin were done.
7. Neither Tom or Kirk Seaborn were credible witnesses.
8. CPS called no evidence from a third party who viewed the herd in 2001 or 2002, especially Dr. Wennekamp.
9. CPS failed to conduct a "feed test" to verify that the Ration had a latent defect.

259 In other words, by exaggeration and discrete selection of evidence, CPS has in part helped to create an enigma, and requests the Court to draw an inference in its favour, i.e. that the Ration contained a latent defect unless the Defence can establish some other probable cause.

260 In the circumstances of this case, from the lack of evidence that, in my view, CPS should have produced and the existence of other possible causes for the malady in the CPS herd, I will draw no inference that the Ration contained a latent defect.

261 Thus, I find that the Ration was of merchantable quality.

Seaborn Seeds

262 The contract to purchase the Ration from Masterfeeds was with CPS, a partnership, and not with Seaborn Seeds Inc. CPS was not a division of Seaborn Seeds Inc. Thus, there being no contractual relationship between Seaborn Seeds Inc. and Masterfeeds Inc., the implied conditions of the *Sale of Goods Act* RSA 2000, c. S-2 do not provide a remedy for Seaborn Seeds Inc.

263 Thus, the claim for damages for Seaborn Seeds is limited to a claim in negligence. Would a reasonable person have foreseen that the Seaborns would use their seed grass fields to pasture the cattle if they became ill from eating the Ration? In my view, like CPS, Seaborn Seeds has not proven that any of Masterfeeds' negligent acts caused Seaborn Seeds injury and it was not reasonably foreseeable that the Seaborns would use their valuable seed grass fields to pasture cattle.

264 In this regard, I have considered the following factors:

1. Tom Seaborn testified that the existing pasture at their farm site was adequate for 2 times the number of cattle that CPS had in 2001.
2. Seaborn Seeds Inc. was, in my view, a very profitable agricultural endeavour. Also, as Tom Seaborn explained, the preparation and maintenance of these fields in order to grow seed grasses was an intensive and expensive process. In my view, it would not make financial sense to use these seed grass fields as pasture unless CPS had no other alternative.
3. One of the reasons given by CPS for using the seed grass fields was that they sought to segregate the sick cattle. Although constructing pens in the existing pasture would have accomplished the same purpose, it was simply explained away by the Seaborns that they were too busy caring for the sick cattle to build the pens.
4. The Seaborns explained that they required the seed grass fields because they wanted to carefully observe the cattle and thus, needed them close to handling facilities. In my view, if the Seaborns sought to keep a close eye on the sick cattle, they could also have constructed pens in their existing pasture.
5. Tom Seaborn testified that he formed the opinion that it would help the sick cattle if they were "flushed out" with fresh grass that was available in the seed grass fields. At the time, he did not seek out any medical opinion for this theory, but rather by his own admission he did it out of desperation. Although this "flushing out" theory did not result in any improvement to the CPS herd, the Seaborns nevertheless proceeded to release the cattle over the Summer into 6 additional seed grass fields. Again, although this experiment resulted in little improvement to the CPS herd, the Seaborns proceeded to use these 7 seed grass fields as pasture in 2002 and 2003, rather than constructing pens to segregate the sick cattle.
6. In 2004, CPS was able to rent pasture land. No explanation was provided, in my view, that explained why after obtaining such little improvement in their herd from pasturing the cattle on the seed grass fields in 2001 the Seaborns did not seek out cheaper pasture land in the years 2002-2003.
7. The Seaborns' claim for damages caused by using the seed grass fields as pasture is \$1,040,000.00 from approximately 100 acres of seed grass fields or over \$3,000.00 per acre per year.
8. Prior to 2001, the CPS cattle operation had not shown any profit. Although, in my view, it is not surprising that CPS was not profitable in that they were in the process of building a shorthorn cattle herd with a view to making profits in the future, it could not be said that the profits from the CPS herd reasonably offset the expense of using the Seaborn Seeds' seed fields as pasture.

9. In my view, as Tom Seaborn stated, the move to use the seed grass fields was done out of desperation and an irrational belief that fresh pasture would cure the ailments in the CPS herd. It was just not a rational, intelligent, and reasonable solution. In my view, a reasonable person would not have foreseen that the Seaborns would use their very profitable seed grass fields as pasture should their cattle become ill from eating the Ration.

9. Conclusion

265 The Plaintiffs have failed to prove their cases. Their actions are dismissed.

10. Damages

266 Although I am not satisfied that the Plaintiffs have proven on a balance of probability that the Ration was defective and that the injury to the CPS cattle was caused by some latent defect in the Ration, having heard the evidence, I have decided to give my view on the damages that arise had the Plaintiffs proven their case.

267 In relation to calculations of damages by *Seaborn Seeds Ltd.*, the calculations of a number of troubling issues are as follows:

1. In the Statement of Claim issued February 26, 2003, there is no attempt to quantify the amount of the claim. From Exhibits 73T and 74T, it appears that Seaborn Seeds Inc. attempted to calculate their damages in February or March of 2006.
2. To calculate the loss of production, Seaborn Seeds Inc. had some cleaning records that they kept through the 1990s which they used to extrapolate the seed production for those years, and then attempted to compare it to the production of the 2001-2006 years which were determined by a form of inventory that the Seaborns kept to apply for government grant programs and to have a record of what amount of seed was available for sale. Also, Tom Seaborn recalled some crop productions from memory. Exhibits 71T, 72T and 73T are, in my view, very haphazard documents which leave me with very much uncertainty as to their accuracy.
3. In Mr. Tom Seaborn's evidence, in reference to Ex. 74T, I noted the following in regards to his calculations of losses from 2001 to 2006:
 - a. No record was kept of the time expended, chemicals used, or purchase of the pounds of seed used. Mr. Seaborn used terms such as "we felt it took 12 hours to do a mass cleanup", "we believed or felt we lost", "we believe we had a 70% reduction in 2002", "we felt the problems were diminishing", "we felt the average yield of the field was 467.5 lbs. per acre" and "we believe our expected yields were cut in half for the year 2002".
 - b. In relation to lost glyceria grandis grass field on Field 28, he simply believed the production was 10 lbs. per acre in 2000.
 - c. In relation to reseeding Field 33 with bluegrass, he calculated grass seed at \$144.00 per acre being "his number" because the seed was unavailable on the market.
 - d. Again, in relation to the glyceria grandis, it consisted of one acre in the field of Canada Bluegrass in Field 28 and although a very valuable grass, no effort was made to fence the area. This was also the case of one acre of sweet grass in Field 35. Mr. Seaborn sets his loss for the period 2001-2006 for the glyceria grandis at \$6,730.00 and for the loss of the sweet grass at \$10,240.00.
 - e. In his calculations, Mr. Seaborn makes no deductions for damaged seed, unsold seed, or income taxes.

268 For some reason, Seaborn Seeds Inc. sought no assistance from any accountants in calculating their losses for 2001-2006. Instead, they relied upon the subjective viewpoints of Tom Seaborn to tabulate their losses.

269 In addition to these calculations by Tom Seaborn, the financial statements for year-ends of April 30 for the years 1997 to 2004 are provided in Exhibits 98 through 105. By my calculations, for the years prior to the delivery of the Ration, 1997-2001, Seaborn Seeds Inc. averaged an after-tax income of \$142,000.00 and for the years 2000 through 2004, they averaged an income of \$114,000.00. Thus, on average for the years following the Ration, Seaborn Seeds Inc. had an annual income of \$28,000.00 per year less.

270 In my view, Ex. 74T was prepared by Tom Seaborn on an "educated-guess basis" as little effort was made over those years to keep records of time and expense. The income statements, in my view, provide a much more accurate statement of actual loss of Seaborn Seeds Inc. during this time period. As no statements were provided by Seaborn Seeds Inc. for 2005 and 2006, I have inferred that there were no losses in 2005 and 2006.

271 In my view, there was no justification whatsoever to use the seed grass fields as pasture after 2001, and thus at best a claim for losses would be limited to 2001 and 2002. Thus, had I concluded that the Ration was the cause of the CPS problems, I still would limit Seaborn Seeds' damages to \$56,000.00.

CPS

272 If I had determined that the Ration was proven to be the cause of the CPS problems, in my view it would not matter that there was no proof of negligence in the production of the Ration for if the product was the cause, something in the product caused the CPS cattle to become ill and thus it would not be of "merchantable quality" and Masterfeeds would be liable under the *Sale of Goods Act* RSA 2000, c. S-2.

273 In determining the damages incurred by CPS in accordance with my finding of fact, in my view, at the end of March 2001, they were uncertain as to whether the Ration inflicted their cattle herd. From the timing of the infliction and the feeding of the Ration together with Dr. Wennekamp or Dr. "M" informing them that it may be the feed and the veterinarian's advice that there may be possible liver damage when their cattle did not improve over the following Summer, urinalysis tests should have been done on a large sampling of the cattle that had eaten the Ration. From these test results, it would have provided the Seaborns with a guide as to which cattle needed to be immediately culled. They would then have the Winter to seek some replacements for these cattle. In this regard, from the fact of the number of top performers produced by CPS in a short period of time, both Tom and Kirk Seaborn have proven their ability to assess the favourable traits of shorthorn cattle and from this experience, it would make it easier for them to replace the cattle that had to be culled. Thus, some replacement cattle could have been purchased over the Winter of 2001-2002. After the birth of the calf crop in 2002, CPS should have conducted many tests of the colostrum of the cows giving birth, again to determine which cattle needed to be culled. By the Fall of 2002, in my view, CPS would have had a very good idea which of the herd needed to be replaced and could have attended the Fall cattle auctions in order to buy bred cows and heifers at the best sales. In my view, Seaborn Seeds Inc. was financing the CPS operation and thus although CPS had little to show for profits or savings, CPS had access through Seaborn Seeds Inc. to the capital necessary to pay the large cost to replace their cattle.

274 As this process was not followed, a determination must be made as to which cattle needed to be replaced.

275 Although the Ration was designated an "18% heifer Ration," it should have been reasonably foreseeable by Masterfeeds that CPS would feed the Ration to mature cows and calves. Although the heifer Ration was designated a "growth" Ration and thus, some of its nutrients would be wasted on mature cattle, there was nothing in the Ration or the label to warn that it should be restricted to be fed only to heifers. Both Keith Warner and Masterfeeds should have been aware that CPS was not buying any other Rations and that a cow/calf operation would thus quite likely be feeding the Ration to the mature cows and calves.

276 In relation to the 18 heifers, born in 2000 that were fed the Ration, CPS sold 10 of these heifers in 2001 and I am satisfied from the website that both 20K and 31K were not affected by the feed and thus 6 heifers needed to be replaced in the CPS herd. Of the 40 cows, I have determined that 7 cows did not eat the Ration as they had not calved. Of the

remaining 33 cows, 2 were sold in 2001, 2 were not owned by CPS, Blue Ridge Maureen was beyond her productive years, and 50DTR-55C was known to be a non-producer and was to be culled. Thus, CPS needed to replace 27 cows and 6 heifers.

277 I am not satisfied that the problems in the CPS herd intervered with the sire power. Although to avoid inbreeding, the introduction of different bulls is necessary, CPS was taking a risk of inbreeding and there was no evidence to indicate that they were intending to move away from this practice. Also, the purchase of semen interests was indicated as an inexpensive way to introduce new blood to the herd and CPS, in my view, could simply have swapped semen interests from one of their bulls to bulls from another herd.

278 Thus, in my view, by the Fall of 2002 CPS should have been looking to purchase 6 bred heifers and 27 bred cows.

279 As to the purchase price for these cattle, the Seaborns did not have a practice of paying top price and had been very successful in purchasing some very good animals. In regards to the amount to be paid to replace these animals, I have considered the following:

1. Mr. Jordan, of Waukaru Farms, testified that the top animal in his production sales of 2006 was \$13,800.00.
2. The average sale price for shorthorn females in 2002 was \$2,463.00.
3. CPS paid \$7,425.00 for Waukaru Prima Donna in 1998.
4. CPS paid \$4,505.00 for Waukaru Minnie in 1998.
5. In 2000, CPS paid \$4,400.00 for Waukaru Maria.
6. In 2000, CPS paid \$5,000.00 for Waukaru Minnie.
7. From CPS's past history of success in purchase of breeding stock, in my view, they could have replaced most of their breeding stock in 2002, for \$5,000.00 a head or for 33 head, \$165,000.00.
8. In addition to replacing the 27 cows, CPS would also be replacing the 27L calves born from the affected cattle in 2001. Also, the M calves of the 27 cows and 6 heifers in 2002 would require replacement, or a total of 60 animals would probably be culled. In theory, if CPS had these 60 animals and raised them as purebred shorthorn breeding stock, they too would have a market value of \$5,000.00 a head, approximately 2 years hence. In my view, although CPS should have been able to find 33 good purebred shorthorns over the period of the Fall of 2001 to the Fall of 2002, it would not be feasible to locate another 60 head and thus, they should be compensated in the form of lost profit of \$300,000.00 less CPS's costs per head of approximately \$500.00, or \$45,000.00 for 2 years for a total of \$255,000.00. Thus, the total to provide for lost profits and to replace the 33 head of cattle is \$420,000.00. CPS also incurred an increase in their veterinarian expenses between 2000 and 2004 of \$11,000.00.
9. In my view, the claim for increased labour for \$300,000.00 is so excessive that in my view it should not be allowed. The Seaborns kept no time records and then came up with an estimate that in 2001, Tom Seaborn, Kirk Seaborn and Mrs. Seaborn together worked an additional 22 hours per day, 365 days. When one considers that even working this extra time, they did not take the time to construct pens to segregate the sick cattle, it leaves the Court very troubled as to their claim for extra labour. In relation to increased facility costs, amounts expended for the care of the sick cattle, in my view, are as follows:

a. extra corral panels	\$ 4,297.51
b. fence line feeder and fencing	\$ 6,172.64
c. pasture double fence Field 28	\$ 2,159.47

Total

\$12,629.62

(No amount is warranted for the construction of the barn on Field 26, because contrary to Tom Seaborn's evidence, it is my view that CPS's plan to double the size of their herd would have required Field 26 and additional handling facilities including the barn on Field 26.)

Further Acquisition Costs

280 In my view, in order to replace the herd, the Seaborns would have to make one extra trip for 3 years during 2001, 2002, 2003 at a total expense of \$15,000.00.

Thrown-Away Costs

281 In my view, if the feed caused the deterioration of the CPS herd, it would definitely affect the reputation of CPS and the registration fees and advertising expenses for the years 1999, 2000, 2001 would be a wasted expense and CPS should be remunerated for \$9,482.00.

General Damages

282 For the stress, additional management effort, loss of esteem in the eyes of their peers, loss of sleep and enjoyment due to the problems with their herd, if they were caused by the Ration, damages should be paid at the amount of \$5,000.00 a year for 3 years or \$15,000.00.

Total Damages of CPS had I found that the Ration was the Cause of the Problems

a. Lost profits and replacing 33 head of cattle	\$420,000.00
b. Increase in veterinarian expenses (2000-2004)	\$ 11,000.00
c. Costs expended (facility) for care of sick cattle	\$ 12,629.62
d. Travel to replace herd (2001-2003)	\$ 15,000.00
e. Remuneration for wasted expense	\$ 9,482.00
f. General damages	\$ 15,000.00
Total Damages	\$483,111.62

283 If necessary, the parties may contact me to speak to costs provided it is done within 60 days.

Action dismissed.

Appendix

A

Appendix A

Table of Test Results

TABLE OF TEST RESULTS

Constituent or Element (who tested)	Sampling	Testing Facility	Date of Test(s)	Test Result	Evidence Reference	Interpretation of Test Results
Contaminant or DMN (Defendant)	Dec 18/01 by Bob Berry at farm (Berry, pp 5306-5308)	Central Labs (D)	Jan 9/02	Sample #1 = 0.5 ppm Sample #2 = 0.5 ppm	Exhibit 507, pp 41-43 Exhibit 95, p 3	CEIA limit = 5.0 ppm UN FAO limit = 5.0 ppm Central Labs limit = 2.0-10 ppm (see Argument, p 4)
1-2 toxin (Defendant)	Dec 18/01 by Bob Berry at farm (Berry, pp 5306-5308)	Central Labs (D)	Jan 9/02	Sample #1 = 215 ppb (215 ppm) Sample #2 = 190 ppb (19 ppm)	Exhibit 507, pp 41-43 Exhibit 95, p 3	UN FAO limit = 0.7-1.5 ppm Central Labs limit = 1.0 ppm (see Argument, p 4)
Zearalenone (Defendant)	Dec 18/01 by Bob Berry at farm (Berry, pp 5306-5308)	Central Labs (D)	Jan 9/02	Sample #1 = 26 ppb (0.16 ppm) Sample #2 = 45 ppb (0.05 ppm)	Exhibit 507, pp 41-43 Exhibit 95, p 3	CEIA limit = 10.0 ppm Central Labs limit = 5.0-10.0 ppm (see Argument, p 4)
1-2 toxin (Plaintiff)	Ken Ziegler (Alta Veterinary Diagnostic Lab (NDSU) N/A, para. 1-4)	Veterinary Diagnostic Lab (NDSU) (P)	July 16/02	Negative (at detection limit of 0.5 ppm)	Exh. 507, p 44 of 65	no mycotoxins detected

* N/A - Notice to Admit

Veterinarian or DON (Plaintiffs)	Ken Zeigler (Alta) Agriculture (Plaintiffs) NTA, paras. 1- 4)	Veterinary Diagnostic Lab (NDSU) (P)	July 1992	Negative (at detection limit of 0.5 ppm)	Exh. 507, p.44 of 65	no mycotoxins detected
Zoonotoxic open-abomas (Plaintiffs)	Ken Zeigler (Alta) Agriculture (Plaintiffs) NTA, paras. 10- 11)	Veterinary Medical Diagnostic Lab (Albionmont) (P)	Mar 24/03	1.32 ppm	Exh. 507, pp.31-32 of 65	Levels of zoonotoxic equivalents measured were considered to be "moderate", within an exposed range of 1:10 ppm. (see Argument, p.9)
allergenic (Plaintiffs)	Ken Zeigler (Alta) Agriculture (Plaintiffs) NTA, paras. 1- 4)	Veterinary Diagnostic Lab (NDSU) (P)	July 1992	Negative (with a detection limit of 0.02 ppm)	Exh. 507, p.44 of 65	no mycotoxins detected
Animal DNA (prohibited substances) (Plaintiffs)	cannot confirm sampling (appears to have been contaminated by Dr. Cyprock)	Genetic ID (Iowa)	Aug 5/03	Negative (with a detection limit of 25 ppm)	Exh. 507, p.29 of 65	no animal proteins detected
Injurious Weed Seeds (Prohibited Regulation 129(2))	Gordon Madood (CFIA) took samples on Mar 26/01	CFIA (Ottawa) (P)	Feb. 24/03	0.1% (by weight) was injurious weed seeds, 11 whole weed seeds in 4.43 gm (total 1488g)	Exh. 507, pp.33-34 of 65	10% of the Fresh Regulation prohibited seeds (1488g) could not contain more than 0.5% of injurious weed seeds by weight (see Argument, p.9)

Weed Seeds (Plaintiffs)	Ken Zeigler (Alla Agriculture) (Plaintiffs) (NTA, paras 1- 4)	Windsor & Associates	Sept 19/02	4% of sample was weed seed fragments	Exh. 507, p.35	see Argument, p.●
Weed Seeds (Plaintiffs)	Ken Zeigler (Alla Agriculture) (Plaintiffs) (NTA, paras 10- 11)	Windsor & Associates	Apr 12/03	5% of sample was weed seed fragments (3% Penstemon)	Exh. 507, p.36	see Argument, p.●
Weed Seeds (Plaintiffs)	Kirk Seaborn took this sample under Kirk's direction (NTA, paras 24, 25, p.●)	Windsor & Associates	Oct 14/04	8% of sample was weed seed fragments	Exh. 507, p.37	see Argument, p.●
Weed Seeds (Plaintiffs)	Kirk Seaborn took this sample under Tom's direction (NTA, para 24, 25, p.●)	Seedcheck Technologies	Dec 14/04	200 whole weed seeds in 100 gm sample (full tested for viability)	Exh. 507, p.38 of 66	Section ● of the Food Regulation, provides that a polluted feed can contain more than ● of viable weed seeds.
Feed Microscopy (mineral screen) (Defendant)	Bob Berry sample from Kirk 11/01 (NTA, para 24, 25, p.●)	Norwest Labs (Lethbridge) (D)	May 03	various	Exh. 507, pp 66-67 of 66	see Argument, p.●

Feed Microscopy (mineral analysis) (Plaintiff's)	Ken Zeigler (Alta Agriculture) Lab (NDSU) (P)	Animal Health Diagnosis Lab (NDSU) (P)	Aug 13/02	various	Exh. 50T, p 45 of 65	see Argument, pp. ●
Urea (Defendant)	Bob Berry sample from April 17/01 (Berry's pp. 5247-5290)	Northwest Labs (Lethbridge) (D)	May 8/01	Sample 422653 = 1.94% ECP* (as fed) Sample 422654 = 2.09% ECP* (as fed)	Exh. 50T, pp. 48, 52 of 65	Feed formulated to have 2% urea (as % of ECP) (see Argument, p. ●)
Urea (Plaintiff's)	Gordon sample from CTIA stock sample on Mar 26/01	CTIA (Ottawa)	Apr 20/01	2.26% ECP	Exhibit 13T (last page)	Feed formulated to have 2% urea (as % of ECP) (see Argument, p. ●)
Selenium (Defendant)	Allan Dyke sample from stock data (Dyke, p. ●)	Bodycote Testing	Aug 31/07	1.1 ppm	Exhibit 12T	Table IV of the <i>Feed's Regulation</i> , /983 prescribes a limit of 0.3 mg/kg added for selenium (see Argument, p. ●)
Selenium	Kel's Selenium sample under Toni's direction (NTA, para. 24; Toni, p. ●)	A. & L. Labs (Ottawa) (P)	Aug. 14/07	Sample South B = 1.72 ppm (or ug/g) (as fed) Sample South B = 1.48 ppm (or ug/g) (as fed)	Exh. 30T, pp. 53-54 of 65	Table IV of the <i>Feed's Regulation</i> , /983 prescribes a limit of 0.3 mg/kg added for selenium (see Argument, p. ●)

Appendix

B

Appendix B

**Breeding Coefficient Schedule
(time period 2000-2006)**

BOSTON PEDIGREE Inbreeding coefficient

9K	0.25
12T	0.0625
19T	0.0625
20K	0.0625
23L	0.0625
25T	0.0625
31L	0.25
33L	0.0625
44T	0.15625

BOSTON BODACIOUS PEDIGREE 12H 0.0625

3H	0.14062
4M	0.14062
4H	0.14062
8K	0
8P	0.14062
9M	0.14062
12M	0.14062
11L	0.14062
11M	0.14062
12H	0.14062
13L	0.14062
13P	0.14062
16L	0.14062
15M	0.14062
17L	0.14062
17M	0
18M	0.14062
19M	0.14062
18P	0.14062
21M	0.03125
23H	0.14062
24M	0.07031
24H	0.14062
25L	0.04688
25M	0.14062
25P	0.14062
26M	0.04688
27M	0.14062
27P	0.10938
28K	0.03125
29H	0.03125
30L	0.14062
31M	0.14062
31P	0.14062
32P	0.03906
33M	0.14062
34R	0.07031
35P	0.14062

3TM	0.07031
3PM	0.12028
4TM	0.04088
4SM	0.07012
4PM	0.14082
5TT	0.13081
5TT	0.13081

TRIPLE A BK	Bull
4R	0.10707
11T	0.13281
180P	0.07012
18P	0.14082
28P	0.07031
28P	0.07031
27T	0.10707
28P	0.07031
37R	
40P	0.05088
43P	0.03018
44M	0.03006
44P	0.07031
47M	0.07031
50M	0.07031
51M	0.03018
52P	0.07031
53P	0.07031
53M	0.14082
55P	0.13072
56M	0.07031
56P	0.14082
56P	0.07031
58M	0.03088
58P	0.02344
61P	0.14082
63P	0.03088
65P	0.03018
67P	0.10707
73P	0.10547
74P	0.10547

37M	Bull	0.07031
31R		0.15030
22S		0.12048
23S		0.10254
25S		0.20017
28R		0.18031
29T		0.02134

32R	0.09499
32R	0.1943
32R	0.15856
32R	0.15856
37B	0.16211
38R	0.15839
42S	0.14839
45T	0.20117
47T	0.03125
49T	0.18039
51B	0.16156
53B	0.10039
54T	0.16406
55B	0.20117
55S	0.18821
55T	0.16882
57T	0.0782
58S	0.09734
58T	0.12589
59B	0
60S	0.16039
61B	0.15039
61T	0.0782
62S	0.17679
64S	0.08510
64T	0.0782
65S	0.12989
65T	0.09499
66B	0.0752
66T	0.18039
68S	0.09125
70B	0.19852

8K	0.09125
34M	0.03516
35M	0.07821
36M	0.07821
38M	0.07821
39M	0.15625
12R BULL	0.14852
63T	0.21854
70T	0.06358
71T	0.16406
72T	0
15L BULL	0.14852

12M	0.10055
18M	0.13281
18M	0.06841
18M BULL	0
2K	0.125
22K	0.125
50 BULL	0
50J	0.125
50 BULL	0
50J	0.125

Tab 4

1997 CarswellBC 1141
British Columbia Supreme Court [In Chambers]

Nutrasweet Kelco Co. v. Royal-Sweet International Technologies Ltd. Partnership

1997 CarswellBC 1141, [1997] B.C.J. No. 1149, 71 A.C.W.S. (3d) 165

The Nutrasweet Kelco Company, a Unit of Monsanto Company, Plaintiff and Royal-Sweet International Technologies Limited Partnership and Royal-Pacific Investments (B.C.) Corporation, carrying on business as The General Partner of Royal-Sweet International Technologies Limited Partnership, Defendants

Low J.

Heard: April 30, 1997
Judgment: May 15, 1997
Docket: Vancouver C972075

Counsel: *Peter J. Reardon*, for the Plaintiff.
Douglas I. Knowles, for the Defendants.

Subject: Corporate and Commercial

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.3 Appointment

VII.3.b Application for appointment

VII.3.b.iii Grounds

VII.3.b.iii.A Just and convenient

Headnote

Receivers --- Appointment — Application for appointment — Grounds

Plaintiff appointed receiver under provisions of loan and security agreement with defendant — Defendant would not give up intellectual property that was security — Defendant attempted to pursue development of product in other countries — Plaintiff applied for court appointed receiver on grounds that if defendant's assets were not preserved by receiver they would be transferred out of Canada — Seizure of security would have seriously impaired defendant's legitimate business efforts and caused them irreparable damage — There was no evidence that value of patents as security would lessen after resolution of legal issues — Plaintiff provided no evidence that intellectual property was in peril or that patents would leave Canada and was not just or convenient for court to appoint receiver.

Under the provisions of a security agreement for a loan by the plaintiff to the defendant, the plaintiff appointed a receiver-manager. The defendant would not give up the property subject to the agreement, which consisted of patents and other intellectual property. The loan and general security agreement were part of a larger contractual relationship between the parties. The defendant alleged that the plaintiff had breached the larger agreement between them in many respects. The defendant advanced these claims in an action in another jurisdiction. In the meantime, the defendant was attempting to pursue development of the product subject to the patent in other countries. The plaintiff applied for the appointment of a receiver with the powers to hold and manage the defendant's property on the ground that if the defendant's assets were not preserved by a receiver, they would be transferred out of Canada.

Held: The application was dismissed.

The court may appoint a receiver-manager if it appears just and convenient to do so. The plaintiff had to show some peril to the property that was likely to result if a receiver-manager was not appointed. There were triable issues to be decided between the parties as to whether the loan was payable or whether the plaintiff was liable to the defendant. There

was no evidence that the intellectual property was in peril or that the patents would leave the country. Seizure of the security would have seriously impaired the legitimate business efforts of the defendant, and would have likely caused irreparable damage. There was no evidence to show that the value of the property subject to security would be any less after the resolution of the legal issues between the parties. The security was not in peril and it was not just and convenient to install a receiver- manager.

APPLICATION brought by plaintiff for appointment of receiver-manager.

Low J. [In Chambers] :

1 This is an application by the plaintiff for the appointment of a receiver-manager under s. 36 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 [R.S.B.C., c. 253, s. 39(1)], with powers to hold and manage certain personal property covered by a general security agreement registered under the *Personal Property Security Act*, S.B.C. 1989, c. 36 [R.S.B.C. 1996, c. 359]. The security is for a \$3.5M loan by the plaintiff to the defendant.

2 Under provisions of the security agreement the plaintiff appointed Deloitte & Touche Inc. as receiver-manager but the defendant would not give up the property, which consists of patents and other intellectual property. The patents relate to the extraction from the stevio plant of a natural sweetener known as stevioside and its refinement for distribution in worldwide markets. Canadian governments are involved in the project. The loan and general security agreement were part of a larger contractual relationship between the defendant and the plaintiff relating to the project. The defendant alleges that the plaintiff, or more particularly Monsanto which is the corporate entity, breached the larger agreement between them in many respects. These include failing to provide additional financing, failing to conclude purchase of an interest in the defendant partnership, failing to turn over certain technical information, wrongfully removing stevio seeds and not accounting for them and improperly using confidential information and proprietary interests. In a lawsuit in the State of Illinois these claims are advanced by the defendant with claims for considerable consequential relief. The same claims could probably be advanced by counterclaim in the present proceedings, but when this motion was argued the time for filing a statement of defence had not yet expired.

3 It is apparent that there are numerous litigable issues outstanding between the parties. It does not seem to be denied by the plaintiff that the defendant's damages, if breach of contract or other causes of action are proven here or in Illinois, might well exceed the amount owing on the loan. There are fair issues to be tried.

4 In the meantime, the defendant is attempting to pursue development of the product in other countries of the world, particularly in Southeast Asia. There has been some success through a subsidiary in Singapore wholly-owned by the defendant. It does not seem to be suggested that these efforts are in contravention of the overall agreement between the parties from which the plaintiff withdrew last year. Nor is it suggested that the defendant has been secretive about its efforts to promote the product worldwide.

5 Under s. 36 of the *Law and Equity Act*, a receiver-manager may be appointed by the court on an interlocutory basis if "it appears to the court to be just or convenient that the order should be made". The plaintiff must show some peril to the property will likely result if a receiver-manager is not put in possession of it: *Toronto-Dominion Bank v. First Canadian Land Corp.* (1989), 77 C.B.R. (N.S.) 189 (B.C. S.C.).

6 Applying these tests as commented upon in the cases, including the cases dealing with interim injunctions, I find that the plaintiff has not made out a case that it is just and convenient to install a receiver-manager. There is a triable issue between the parties as to whether the loan is payable or, in the alternative, whether it is offset by damages for which the plaintiff is liable to the defendant. The contractual relationship between the parties is complex and the loan and general security agreement are but a part of that relationship.

7 There is no evidence that the intellectual property is in peril. Warren B. Grayson, Deputy General Counsel for Monsanto, Chicago region, deposes that the plaintiff is concerned "that if the assets of [the defendant] are not preserved by the appointment of a receiver-manager, they will be transferred out of Canada" and be lost as security. There is no

evidence advanced in support of this assertion. In fact, according to the affidavit of Bruce C. Branch, the chief executive officer of the defendant, "process patent certificates were issued in numerous countries". There is no evidence to support the suggestion that the Canadian patents might somehow leave the country.

8 Seizure of the security would seriously impair the legitimate business efforts and expansion plans of the defendant. This would likely cause irreparable damage to the defendant. Availability of the patents to it is essential to its business. Indeed, the argument could be made that the defendant's efforts are adding to the value of the security. There is no evidence that their value will be any less after resolution of the legal issues between the parties than it is now. It is not shown that the security is in peril.

9 The motion for appointment of a receiver-manager is dismissed with costs to the defendant in any event of the cause.
Application dismissed.

Tab 5

1994 CarswellOnt 323
Ontario Court of Justice (General Division)

997724 Ontario Inc. v. 407430 Ontario Ltd.

1994 CarswellOnt 323, 29 C.B.R. (3d) 119, 51 A.C.W.S. (3d) 853, 8 P.P.S.A.C. (2d) 257

**997724 ONTARIO INC. v. 407430 ONTARIO INC., AL KATZMAN
ENTERPRISES LTD., 785097 ONTARIO INC. and 779176 ONTARIO INC.**

Spence J.

Heard: October 24, 1994
Judgment: November 23, 1994
Docket: Doc. B275/94

Counsel: *Murray B. Page* and *Lorne S. Silver*, for applicant.
David R. Service, for respondents.

Subject: Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.3 Appointment

VII.3.a General principles

Headnote

Receivers --- Appointment — General

Receivers — Appointment — Application brought under terms of debenture for appointment of receiver — Factual dispute between parties as to whether any amount owing under debenture — No evidence tendered to show that property in jeopardy because of failure to pay realty tax arrears — Application also not satisfying requirements of r. 14.05(3)(g), under which it was brought — Application dismissed — Ontario, Rules of Civil Procedure, r. 14.05(3)(g).

The applicant company was the assignee from IFFSL of its interest as a lender in a loan to RM and in the security held by IFFSL for that loan. In connection with the loan, RM had assigned promissory notes, guarantees and debentures to IFFSL. The applicant brought an application under r. 14.05(3)(g) of the *Rules of Civil Procedure* for the appointment of a receiver for certain property pursuant to the terms of the debentures given by the respondent companies owning the property. The applicant claimed that the debentures were in default, thereby entitling it to seek the appointment of a receiver. The applicant also claimed that, as the realty taxes on the property were not being paid, the property was vulnerable.

The respondent companies argued that the applicant had lost whatever rights it had under the security by reason of its foreclosure on the notes. They also argued that there was no amount owing under the debentures because of certain set-off rights in their favour.

Held:

The application was dismissed, without prejudice to the right of the applicant to seek the appointment of a receiver in other proceedings.

The debentures permitted the holder to seek the appointment of a receiver by the court. However, that provision in the debentures did not serve to override the applicable law, including the *Rules of Civil Procedure*. The application was unsuccessful because there was a factual dispute between the parties as to the amount outstanding, if any, under the debenture. Insufficient evidence was tendered for a determination to be made. Further, there was no evidence that the property was in fact in jeopardy because of the realty tax arrears. Finally, the application did not satisfy the requirements of r. 14.05(3)(g), under which it was brought.

Application for appointment of receiver.

Spence J.:

Order Requested

1 The applicant, 997724 Ontario Limited, seeks the appointment of a receiver pursuant to r. 14.05(3)(g) of the *Rules of Civil Procedure* for certain property of the respondents 407430 Ontario Limited ("407430") and Al Katzman Enterprises Limited ("Katzman") pursuant to debentures given by these companies dated August 19, 1988.

2 The applicant claims that the debentures are in default and it is therefore entitled to exercise its right to seek the appointment of a receiver.

Background

3 The applicant is the assignee from International Financial Freehold Services Limited, in trust ("IFFSL"), of its interest as lender in a loan to Ronald McCowan and the security held by IFFSL for that loan. The loan was for \$1 million with interest at 18-3/4 per cent per annum.

4 In connection with the loan, McCowan assigned to IFFSL:

(i) a promissory note from the respondent 785097 Ontario Inc. ("785097") for \$2,995,000 with interest at 10 per cent per annum;

(ii) a promissory note from the respondent 779176 Ontario Inc. ("779176") for \$5,000 with interest at 10 per cent per annum;

(iii) a guarantee by each of the respondents 407430 Ontario Ltd. ("407430") and Al Katzman Enterprises Limited ("AKEL") of the note from 785097;

(iv) a guarantee by each of 407430 and AKEL of the note from 779176;

(v) a debenture from 407430 given as security from both notes; and

(vi) a debenture from AKEL given as security for both notes.

5 785097 was the owner of 407430. 779176 was the owner of AKEL. The debentures created charges upon real property and business interests in Windsor ("property").

6 In connection with the IFFSL loan to McCowan, IFFSL also received an acknowledgment and consent (the "consent") dated May 1990 from the respondents and John Trecapelli, Sr., a related party. The consent acknowledged the assignment to IFFSL of the notes, the guarantees and the debentures. The consent acknowledged that there was \$3 million outstanding on these securities. Payments were directed to be made to IFFSL. Paragraph 8 of the consent provides as follows:

8. Al Katzman Enterprises Ltd. hereby acknowledges and agrees that in accordance with paragraph 9 of the Debenture and notwithstanding any subsequent set-off claims, the Debenture is and shall continue to be good and valid security for not less than \$1,000,000.00 principal and not less than \$500,000 accrued interest and that on or before August 19, 1992, in the event the assignment of the Debenture is still in effect, Al Katzman Enterprises Ltd. shall pay to IFFSL the sum of up to \$1,000,000.00 principal together with up to \$500,000 accrued interest, failing which the Debenture may be enforced.

7 Paragraph 7 of the consent sets out an acknowledgment and agreement in the same terms by 407430 with respect to the debenture given by it.

8 Subsequently, in December 1990, McCowan defaulted on the IFFSL loan. Pursuant to the provisions of the *Federal Property Security Act*, R.S.O. 1990, c. P.10, IFFSL foreclosed the interest of McCowan in the Debentures, according to the affidavit of Irwin Steinberg, a shareholder and one of the beneficiaries of the applicant, sworn October 7, 1994. His affidavit does not state that IFFSL also foreclosed the interest of McCowan in the notes, but that position is asserted in the applicant's factum. In related proceedings commenced by the respondents, they plead that they received a direction from IFFSL directing them to make all future payments under the notes and the debenture to IFFSL. The submissions of counsel proceeded on the basis that the interest of McCowan in the notes was foreclosed, as well as the interest in the debentures. I think that is the proper assumption for me to make.

9 Subsequent to the assignment to the applicant, in August 1994, the respondents ceased to make payments on the note. Earlier the respondents had paid interest on the note, which the applicant had applied against the interest obligation on the IFFSL loan. The applicants assert that they have never received any payments of principal on the IFFSL loan, which the respondents dispute.

10 The applicant made a formal demand for payment on the debenture in September of this year.

11 The applicant claims that the IFFSL loan is in default and it is entitled to exercise its rights under its security. The realty taxes are not being kept current, the applicant says, so the property is vulnerable.

12 The respondents contend that the applicant has lost whatever rights it would have had in respect of the security by reason of its foreclosure on the note. The respondents also say that, by reason of certain set-off rights in their favour which recently came to light, there is no amount owing under the debenture in any event.

13 The applicant contends that the consent effectively overrides these contentions and preserves the debentures as security for the IFFSL loan to the extent of the limits stated in the consent.

The Notes and Debentures

14 Section 65 of the *Personal Property Security Act* deals in part with acceptance by a secured party of collateral for an obligation in satisfaction of the obligation received by the collateral. Section 65(6) provides as follows:

If no effective objection is made, the secured party is, at the expiration of the thirty-day period mentioned in subsection (3), deemed to have irrevocably elected to accept the collateral in full satisfaction of the obligation secured, and thereafter is entitled to the collateral free from all rights and interests therein of any person entitled to notification under subsection (2) whose interest is subordinate to that of the secured party and who was served with such notice.

15 The submissions of counsel proceeded on the basis, impliedly, that the notes constitute collateral within the meaning of s. 65 and, explicitly, that the applicant exercised its rights under s. 65 to accept the notes in satisfaction of the obligation of McCowan on the IFFSL loan.

16 Counsel for the respondents submits that, by reason of the foreclosure and the provisions of s. 65(6), not only has any claim by the applicant against McCowan been extinguished but also that any claim that the applicant might have against the respondents under the consent has in effect been merged in the debentures. As a result of the foreclosure, the applicant received the debentures in substitution for the IFFSL loan and all other instruments such as the consent, which related to the IFFSL loan.

17 One way to express this contention is as follows. The applicant chose to take the notes and debentures under s. 65 of the Act. As a result of doing so, the applicant has no further claims against McCowan under the IFFSL loan, which is

deemed under s. 65(6) to be satisfied. On this basis, the applicant also has no claim on any other security which is intended to be available to the extent, and only to the extent, that the obligation of McCowan on the IFFSL loan is not satisfied.

18 Counsel for the applicant argues that the effect of s. 65(6) is simply to extinguish any claim by the applicant against McCowan but not against third parties.

19 No authorities were advanced by either counsel in support of their positions.

20 Section 65(6) clearly provides that the secured party is deemed to have elected to accept the collateral in full satisfaction of the secured obligation.

21 Paragraphs 7 and 8 of the consent each refer to para. 9 of the applicable debenture. Paragraph 9(f) provides in part as follows in the case of the debenture given by AKEL:

The third party to whom this Debenture, Note #1, Note #2 and the aforesaid 407430 Ontario Ltd. debenture is pledged shall agree in writing to be bound by the provisions of this Debenture, including, without limiting the generality of the foregoing, agreeing to be subject to the equities between the parties including any right of set-off in favour of any one of the Claimants as defined in section 10 hereof and that any monthly payments required to be paid pursuant to Note #1 and Note #2 may be withheld and not paid pursuant to such right of set-off, provided that on August 19, 1992 the Company and 407430 Ontario Ltd. shall be obligated to pay to such third party any amount owing by the Holder to such third party up to a maximum of \$1,000,000.00 of principal, in the aggregate, plus accrued interest, if any, up to a maximum of Five Hundred Thousand (\$500,000.00) Dollars, in the aggregate.

22 The debenture given by 407430 contains a provision to the identical effect. If the issue between the parties turned simply on the proper interpretation of para. 9(f) of the debenture, I think the proper interpretation would be as follows. The applicant, prior to its foreclosure, was the holder of a debt obligation from McCowan together with security for that debt in the form of an assignment of the notes and the debentures. As such, the applicant would be entitled to the benefit of para. 9(f). When the applicant took steps to obtain the benefit of its security by foreclosing on the note so as to become entitled to assert its claim under the notes and the debentures, those steps were in the nature of a realization on its security. Those steps, under s. 65(6) of the *Personal Property Security Act*, had the effect of releasing the debtor McCowan but not of altering the terms of the notes and the debentures so far as the interest of the applicant was concerned. To hold otherwise would mean the applicant, by realizing on its security, could lose the benefit of that security, which seems contrary to good sense — in colloquial terms, a "Catch-22". Thus, when the applicant seeks to assert its claim under the debentures, that claim should be governed by para. 9(f). In particular, the debenture should be regarded as security for the principal amount owing by McCowan to the applicant at the time the applicant realized on the notes and the debentures by foreclosing the interest of McCowan, up to the maximum amounts set out in para. 9, on and subject to the relevant terms and conditions in the debentures as modified by other agreements.

23 The consent is properly to be viewed as modifying the debentures in one important respect: it eliminates the effect, as between the applicant and the respondents, of any claims to set-off between the respondents and McCowan prior to the time of the consent (through the acknowledgment that \$3 million is owing) and subsequently.

24 It was submitted for the respondents that paras. 7 and 8 of the debentures are to be given a different interpretation. The claim is that each of those paragraphs provides that the debentures are good security up to the stated limits for amounts outstanding under the debenture to McCowan. On this basis, it is argued that the debentures do not now provide any security to the applicant because, by reason of the recently discovered set-offs in favour of the respondents against McCowan, no amount is, in fact, outstanding on account of their indebtedness to him. Quite apart from whether the assertion as to the recently discovered set-off has any merit, as to which no finding here is necessary, this argument is wholly unpersuasive. It fails to take into account the context of the paragraphs in a consent addressed to the applicant and the cross-reference to para. 9 of the debentures, which clearly contemplates that the amount of \$1 million in principal and \$500,000 in interest are referable to the debt of McCowan to the applicant and not the debt of the respondents

of the applicant. The argument also ignores the phrase "notwithstanding subsequent set-off claims." The argument is inconsistent with comments made by Mr. Trecapelli in his affidavit.

25 On the basis of the foregoing, the proper interpretation of the debentures is that on August 19, 1992, 407430 and AKEL, as the grantors of the debentures, became obligated to pay principal and interest to the applicant on the IFFSL loan up to the maximum set out in para. 9 of the debentures.

The Default Issue and Consequences

26 Under para. 9 of the debentures and paras. 7 and 8 of the consent, the obligation of 407430 and AKEL to the respondents matured on August 19, 1992. Payments in certain amounts were made thereafter until the cessation of payments in August 1994.

27 Paragraph 6(a) of the debentures provides as follows:

The Indebtedness shall immediately become payable and the security hereby constituted shall immediately become enforceable in each and every of the events following:

(a) if the Company makes default in payment of any of the Indebtedness of the Company to the Holder and such default is not remedied within fifteen (15) days following the date of such default.

28 Paragraph 7(b) of the debenture provides as follows:

If the security hereby constituted shall become enforceable, the Holder may, at its option:

.....

(b) apply to a Court of competent jurisdiction for the appointment of a receiver or receiver and manager to take possession of all or such part or parts of the Charged Premises as the Holder shall designate, with such duties, powers and obligations as the Court making the appointment shall confer; and the Company hereby consents to the appointment of such receiver or receiver and manager.

29 The applicant claims that it has not been paid any amount on account of principal and that interest is in arrears.

30 In proceedings between McCowan as plaintiff and IFFSL, 407430, AKEL and others as defendants, John Trecapelli stated in his affidavit dated June 18, 1993, that the maximum that could be due on the notes and debentures at that time was \$1,920,902. This appears to be the amount then outstanding under the terms of the instruments without reference to the state of the account owing in respect of the IFFSL loan to the applicants. Mr. Steinberg's affidavit of October 7, 1994, states that the applicant is owed \$1 million on account of principal and \$36,000 on account of interest to that date.

31 The parties made various submissions as to the calculation of the amount now outstanding on account of the IFFSL loan.

32 For the reasons set out below, I do not see how, on the evidence now available, the court can determine whether the loan is in default, even on the interpretation which I have concluded is proper in respect of the relevant provisions of the debentures and the consent.

33 As I understand the operation of the clause in the debenture concerning the security that it is to provide in the event of its assignment, and the related provision in the consent, the debenture secured in respect of the IFFSL loan, amounts payable under that loan up to a maximum of \$1 million principal and \$500,000 interest. To determine what amount is outstanding under the debenture in respect of the IFFSL loan, it would be necessary to know what amounts have been paid on account of the loan, whether by the respondents, McCowan, or others, and whether those amounts have been paid and received as principal or interest.

34 Since August 1992, it appears the applicant has received \$357,565.64 on the loan, which has been recorded as payment of interest. It appears the payments that have been made have been in the amount of \$26,834.61 per month.

35 From the mortgage amortization schedule provided by the respondents, it appears that, leaving to one side the set-off and related adjustments, 16 payments of \$26,834.61 plus one payment of \$4,821.73 were made after May 1990, the time of the IFFSL loan, up to October 19, 1991, for a total of \$434,165.73.

36 The evidence of the respondents does not supplement that of the applicants in such a way as to permit determination of the total amount paid on account of the IFFSL loan during the period from its making in 1990 to the making of the last payment in August 1994. Nor has there been any submission which would facilitate a determination of whether the payments were made on account of the principal or interest. The fact that the regular monthly payments under the debenture were blended payments of principal and interest with respect to the note owing by the respondents to McCowan does not seem to me to determine their characterization for purposes of the IFFSL loan. It appears not to be disputed that the terms of that loan contemplated only interest payments prior to maturity and principal on maturity. Accordingly, unless some other characterization was advanced by the respondents when the amounts were paid, it seems likely the amounts received would be characterized in accordance with the IFFSL loan repayment terms, but to apply that principle it would be necessary to have complete information about the payments. That has not been provided.

37 For these reasons, it is not possible to decide whether any amount is still outstanding in respect of the IFFSL loan under the debenture.

38 It is not disputed that realty taxes on the property are in arrears. Mr. Trecapelli's affidavit of October 17, 1994, states that the realty taxes are in arrears in the amount due for approximately one year. There is no evidence that the property is in peril or jeopardy by reason of the non-payment of taxes.

39 While the debentures permit the holder to seek the appointment of a receiver by the Court, the provision to that effect does not over ride the applicable law, including the court rules, as to the appointment of a receiver. The application in this case has the following significant impediments:

(i) There is a factual dispute between the parties as to whether any amount is outstanding under the debenture with respect to the IFFSL loan, and the evidence put forward by the applicant does not allow an informed assessment of the matter to be made.

(ii) There is no evidence that the property is in jeopardy by reason of the arrears of taxes.

(iii) The application here is brought under r. 14.05(3)(g), but that rule requires that the application be "ancillary to relief claimed in a proceeding properly commenced by a notice of application"; this requirement is not satisfied in the present case.

40 For these reasons, it appears to me that it is not appropriate at the present stage to appoint a receiver. Accordingly, the application for the appointment of a receiver is dismissed, but without prejudice to the right of the applicant to seek the appointment of a receiver in other proceedings.

41 Counsel may make submissions as to costs.

Application dismissed.

Tab 6

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)

R.S.C. 1985, c. B-3, s. 67

s 67.

Currency

67.

67(1)Property of bankrupt

The property of a bankrupt divisible among his creditors shall not comprise

- (a) property held by the bankrupt in trust for any other person,
- (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
 - (b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
 - (b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
 - (b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

- (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
 - (i) is not subject to the operation of this Act, or
 - (ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
- (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Note:

S.C. 1997, c. 12, s. 59(2), provides as follows:

(2) *Application*

Subsection (1) [S.C. 1997, c. 12, s. 59(1), which re-enacted s. 67(1)(b) and enacted s. 67(1)(b.1)] applies to bankruptcies in respect of which proceedings are commenced after that subsection came into force [on April 30, 1998].

67(2) Deemed trusts

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

67(3) Exceptions

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

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

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

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

Amendment History

1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32

Currency

Federal English Statutes reflect amendments current to May 23, 2018

Federal English Regulations are current to Gazette Vol. 152:10 (May 16, 2018)

Tab 7

2015 ONSC 533
Ontario Superior Court of Justice

Redstone Investment Corp., Re

2015 CarswellOnt 3286, 2015 ONSC 533, 251 A.C.W.S. (3d) 552, 26 C.B.R. (6th) 272, 3 P.P.S.A.C. (4th) 402

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

In the Matter of a Plan of Compromise or Arrangement of Redstone
Investment Corporation and Redstone Capital Corporation

Morawetz R.S.J.

Heard: October 31, 2014; November 12, 2014

Judgment: January 30, 2015

Docket: CV-14-10495-00CL

Counsel: Aubrey Kauffman, Zohaib Maladwala for Maplebrook Capital Corp.

Steven Graff, Ian Aversa for Grant Thornton Ltd., in its capacity as Receiver and Manager of Redstone Investment Corporation, Redstone Capital Corporation and 1710814 Ontario Inc. o/a Redstone Management Services

Geoff R. Hall for Warner Sulz Family Trust and Gino Martone (Investors in Maplebrook)

Subject: Estates and Trusts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

[XIX Companies' Creditors Arrangement Act](#)

[XIX.5 Miscellaneous](#)

Estates and trusts

[II Trusts](#)

[II.3 Constructive trust](#)

[II.3.a Elements of constructive trust](#)

Estates and trusts

[II Trusts](#)

[II.6 Miscellaneous](#)

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

R Co. and M Co. were involved in loan assignment arrangement — M Co. appointed R Co. as its agent to collect and enforce assigned loans — M Co. advanced funds to R Co., loans were made to borrowers, and R Co. collected payments and remitted them to M Co. — R Co. filed for Companies' Creditors Arrangement Act (CCAA) protection and stopped remitting payments to M Co. — Instead, R Co. kept payments in its general account (post-CCAA collections) — Receivership order was made — M Co. brought motion to compel Receiver to return funds, including post-CCAA collections — Motion granted — Funds were held in trust for M Co. — Because of CCAA stay, M Co. could not terminate agency arrangements with R Co., revoke R Co.'s authority as agent, retake assigned loans, and ensure that it received post-CCAA collections directly from borrowers — R Co. was not at liberty during status quo period to negate parties' proprietary rights by receiving post-CCAA collections in general account — Absence of agreement to hold funds in separate account is not necessarily determinative of whether debtor-creditor relationship is established — If post-CCAA collections were to form part of R Co.'s assets, R Co.'s creditors would receive windfall — R Co. had no beneficial entitlement to funds, and neither Receiver nor R Co.'s creditors could have any higher claim — Relationship between

M Co. and R Co. was not one of debtor-creditor — R Co. recognized assignment in favour of M Co. and there was no basis to alter this recognition after CCAA filing — To alter relationship would be inconsistent with principle that purpose of CCAA is to preserve status quo.

Estates and trusts --- Trusts — Constructive trust — Elements of constructive trust

R Co. and M Co. were involved in loan assignment arrangement — M Co. appointed R Co. as its agent to collect and enforce assigned loans — R Co. filed for Companies' Creditors Arrangement Act (CCAA) protection and stopped remitting payments on assigned loans to M Co. — Instead, R Co. kept payments in its general account (post-CCAA collections) — M Co. brought motion to compel Receiver to return funds owed by R Co. — Motion granted — Receiver to pay amounts to M Co. — Constructive trust imposed in M Co.'s favour — Absence of agreement to hold funds collected in separate account is not necessarily determinative of whether debtor-creditor relationship is established — If post-CCAA collections were to form part of R Co.'s assets, R Co.'s creditors would receive windfall — R Co. had no beneficial entitlement to funds, and neither Receiver nor R Co.'s creditors could have any higher claim — Relationship between M Co. and R Co. was not one of debtor-creditor — R Co. recognized assignment in favour of M Co. and there was no basis to alter this recognition after CCAA filing.

Estates and trusts --- Trusts — Miscellaneous

R Co. and M Co. were involved in loan assignment arrangement — M Co. advanced funds to R Co. so R Co. could make loan to certain borrower, but transaction did not close — R Co. filed for Companies' Creditors Arrangement Act (CCAA) protection — Funds advanced by M Co. (advance) were returned to R Co. — Receiver alleged advance was not held in trust for M Co. — M Co. brought motion to compel Receiver to return amounts allegedly owed by R Co., including advance — Motion granted — R Co. received advance in trust for M Co. — Advance remained subject of trust obligation in Receiver's hands — Actions of R Co. and M Co. established that there was intention to settle trust and impose trust obligations — Absence of specific trust account was not determinative — M Co. never parted with beneficial title to funds: they were conveyed to R Co. subject to equitable obligation to use funds to make loan to certain borrower, or to return funds to M Co. if transaction did not close — At time funds were returned to R Co., with R Co. operating under supervision of Monitor and court, obligations in favour of M Co. were even more definite — M Co.'s position should not be prejudiced during CCAA proceedings — In obiter, it was noted that requirements for Quistclose trust had also been met.

MOTION by company to compel receiver to pay amounts owed by debtor pursuant to loan assignment arrangement.

Morawetz R.S.J.:

Introduction

1 Maplebrook Capital Corp. ("Maplebrook") brought this motion to compel Grant Thornton Ltd. ("GTL"), in its capacity as the Court appointed Receiver and Manager (the "Receiver") of Redstone Investment Corporation ("RIC"), Redstone Capital Corporation ("RCC") and 1710814 Ontario Inc. o/a Redstone Management Services ("RMS") to pay the following amounts to Maplebrook:

- a) \$750,000 advanced by Maplebrook to fund the Pro-Hairlines transaction (as defined below), less 37.5% of the legal fees (\$13,189.12) incurred by RIC;
- b) \$150,000 that was received on April 7, 2014 in full satisfaction of the outstanding principal owed under the CFT Properties Loan (as defined below) and any interest payments collected under the CFT Properties Loan after March 28, 2014;
- c) \$311,400 that was received on March 31, 2014 in full satisfaction of the outstanding interest and principal owed under the Chiu Chow Loan (as defined below); and
- d) \$28,494 that was collected after March 28, 2014 in satisfaction of interest payments owed under the AG Loans (as defined below).

2 The Receiver opposed the relief requested by Maplebrook. The Receiver took the position that all funds in which Maplebrook claimed an ownership interest formed part of the property of RIC and ought not to be paid to Maplebrook in priority to RIC's other creditors.

3 On March 28, 2014, RIC and a related company RCC, made an application to commence proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA Proceedings"). An order (the "Initial Order") was granted which appointed GTL as Monitor in the CCAA.

4 On August 8, 2014, an order was made (the "Receivership Order") appointing GTL as the Receiver and Manager of all of the assets, undertakings and properties of RIC and RCC.

5 On September 17, 2014, the Receivership Order was amended to include RMS as a party subject to the Receivership Order.

6 At the outset, it is noted that Maplebrook accepted and agreed to GTL's recommendation to terminate the Agency Agreements in respect of the AG Loans and the Quality Contract Loan (as defined below). This relief was granted by order dated November 12, 2014. The AG Loans and the Quality Contract Loan were declared to be the property of Maplebrook and the stay of proceedings was lifted in order to allow Maplebrook to terminate its Agency Agreements with RIC effective as of November 12, 2014.

Facts

7 Maplebrook is an Ontario corporation established in May 2013. Its President and sole Officer and Director is Mr. John Pizzacalla. Maplebrook carries on business as a short-term lender to small and medium sized Canadian businesses.

8 In the fall of 2013, Maplebrook advanced five loans to borrowers through RIC (the "Assigned Loans"). The Assigned Loans are comprised of:

- a) A \$500,000 loan to CFT Properties Inc. ("CFT Properties");
- b) A \$650,000 to AG Yonge Street Investments Inc. ("AG Investments");
- c) A further \$350,000 loan to AG Investments;
- d) A \$300,000 loan to Chiu Chow Koon Chinese Restaurant Inc. ("Chiu Chow"); and
- e) A \$400,000 loan to Quality Contract Manufacturing Ltd. ("Quality Contract").

9 The general structure of the Assigned Loans was such that RIC would obtain an assignable promissory note from the borrower, which RIC would assign to Maplebrook. Maplebrook would irrevocably appoint RIC as its agent to collect and enforce the Assigned Loans and the related security. Maplebrook would advance the funds to RIC. The loan proceeds would be advanced to the borrowers. RIC would collect and remit payments of principal and interest in respect of the loan to Maplebrook.

10 RIC has not remitted any payments of interest and principal that it has received with respect to the Assigned Loans since February 22, 2014 (when RIC remitted payments to Maplebrook in respect of interest and principal collected in January 2014).

11 On March 31, 2014, RIC received \$311,000 from Chiu Chow in full satisfaction of the Chiu Chow Loan that had been assigned to Maplebrook.

12 On April 7, 2014, RIC received \$150,000 from CFT Properties in full satisfaction of the CFT Properties Loan that had been assigned to Maplebrook.

13 After the Initial Order, RIC also received \$28,494 in interest payments from AG Investments in respect of the AG Loans that had been assigned to Maplebrook.

14 RIC deposited these post-CCAA collections in its general account rather than remitting them to Maplebrook or keeping them segregated from RIC's other assets.

15 Since its appointment, the Receiver has not remitted any payments to Maplebrook in respect of the Assigned Loans.

16 With respect to the AG Loans and the Quality Contract Loan, the Receiver acknowledges that, pursuant to the assignments entered into between Maplebrook and RIC, these loans are Maplebrook property.

17 With respect to the Chiu Chow Loan and the CFT Properties Loan, the Receiver also appears to acknowledge that these loans were Maplebrook Property and that RIC acted as Maplebrook's agent to collect and enforce these loans. However, as noted above, the Receiver takes the position that the interest and principal that RIC collected on these loans does not belong to Maplebrook and should not be returned to Maplebrook, ahead of RIC's other creditors.

18 The Receiver's position is based on its assertion that the funds collected by RIC in respect of the assigned loans are not trust funds. The Assignment Agreements for the Assigned Loans do not explicitly state that the proceeds of the Assigned Loans are to be held in "trust" for Maplebrook. Further, the Receiver relies upon the fact that the proceeds of the Chiu Chow and CFT Properties Loans were deposited to RIC's general account.

19 Maplebrook takes the position that RIC has no beneficial entitlement to the funds, and neither the Receiver nor RIC's creditors can have any higher claim. Accordingly, a constructive trust in Maplebrook's favour is necessary to prevent this unjust result.

20 In addition to the Assigned Loans, Maplebrook also agreed to participate in a sixth loan through RIC in late February 2014. The loan to 2234241 Ontario Inc. c.b.a. Pro-Hairlines ("Pro-Hairlines"), was to be for \$2 million, with RIC advancing \$1.25 million of the total loan and Maplebrook advancing the remaining \$750,000 of the loan. The Maplebrook portion of the loan was to have been structured in the same manner as the Assigned Loans (the "Pro-Hairlines Transaction").

21 In anticipation of closing, Maplebrook transferred \$750,000 to RIC on March 4, 2014 (the "Pro-Hairlines Advance") to acquire its portion of the loan. The Pro-Hairlines Advance was subsequently transferred by RIC to its lawyers trust account in anticipation of closing.

22 The Pro-Hairlines Transaction did not close. On March 25, 2014 RIC informed Maplebrook that it would not participate in the Pro-Hairlines Transaction. Maplebrook decided not to participate and requested that RIC return the Pro-Hairlines funds.

23 On March 25, 2014, Mr. Karim Habib, the RIC consultant who was in charge of the Pro-Hairlines Transaction informed Mr. Eric Hansen, the sole director and officer of RIC, and Mr. Chris Shaule, a consultant of RIC, that the Pro-Hairlines Advance should "immediately" be returned to Maplebrook after RIC's lawyer transferred it back to RIC.

24 The funds were returned by RIC's lawyer to RIC on April 1, 2014, which post-dated the commencement of CCAA Proceedings.

25 The Receiver takes the position that Maplebrook did not transfer the Pro-Hairlines Advance to a trust account (instead, transferring the funds directly to RIC) and the funds were transferred in the absence of any executed agreement. Consequently, as no trust was created, there is no basis upon which to repay the Maplebrook Advance to Maplebrook.

26 Maplebrook takes the position that RIC received the Pro-Hairlines Advance in trust and that the Pro-Hairlines Advance remains subject to that trust obligation in the Receiver's hands.

27 The Receiver asserts that Mr. Pizzacalla acknowledged that Maplebrook had a close relationship with RIC and RMS. For example, RIC (presumably through RMS, since RIC had no employees) would carry out the bookkeeping and accounting functions for Maplebrook. RMS's and RIC's bookkeeper has signing authority on Maplebrook's accounts, but was required to seek Mr. Pizzacalla's instructions before dealing with Maplebrook's funds. The Receiver also suggested that RIC and/or RMS did not appear to have received any compensation for the performance of these management functions. The Receiver also suggests that Mr. Pizzacalla appeared to have acted as a representative of RIC, RCC and RMS for the purpose of soliciting investments in these entities from various individual third parties.

28 Additionally, the Receiver pointed out that there may be funds owing to RMS from Maplebrook.

29 During oral argument on October 31, 2014, I raised questions with respect to the apparent lack of formal documentation in respect of the Assigned Loans. I also raised questions as to whether there was any type of a relationship as between Maplebrook and RIC that was not fully explained in the materials.

30 Prior to the continuation of oral argument on November 12, 2014, a supplementary affidavit of Mr. Pizzacalla was filed.

31 In the supplementary affidavit, Mr. Pizzacalla provided additional information concerning:

1. A step-by-step explanation of the Loan Purchase Transactions;
2. Maplebrook's financial statements;
3. Maplebrook/Pizzacalla's relationship with RIC/RMS/RCC; and
4. Details with respect to other transactions.

32 Mr. Pizzacalla stated the following at paragraph 3 of the supplementary affidavit as follows:

1. A STEP BY STEP EXPLANATION OF THE LOAN PURCHASE TRANSACTIONS

3. As explained in paragraph 23 of the First Pizzacalla Affidavit, all of the Assigned Loans were structured in essentially the same way. In connection with RIC's loan to the ultimate borrower (the "Borrower"), RIC would obtain an assignable promissory note from the Borrower. RIC would, in turn, absolutely assign the promissory note and related security to Maplebrook in consideration for Maplebrook's investment (which was in the same amount as the assigned promissory note). Maplebrook would, in the assignment agreement, appoint RIC as its agent to collect and enforce the promissory note and security on its behalf. RIC would then collect the lender fees, interest and principal in respect of the Assigned Loans and deposit those amounts, in full, into Maplebrook's account. Thereafter, Maplebrook would remit RIC's share of the lender fees and interest spread.

33 On the issue of the interest split in the Lender Fees Split Arrangement, when Maplebrook was interested in a potential transaction, it would offer the transaction to its investors at a lower interest rate than would be paid by the Borrower. The difference between the interest rate paid by the Borrower and the interest rate paid to investors would be split equally between RIC and Maplebrook (the "Interest Split"). The Interest Split for the Assigned Loans varied between 4% and 8%.

34 The Borrowers of the Assigned Loans paid lender fees ("Lender Fees") in addition to interest. With the exception of the CFT Transaction, Lender Fees were split equally between Maplebrook and RIC.

35 Mr. Pizzacalla acknowledged there was no written formal agreement with regard to the Interest Split and Lender Fees. The oral agreement was the same for each transaction, which was reflected in the loan schedules for the Assigned

Loans. Mr. Pizzacalla did acknowledge that with respect to the CFT Transaction, which had been sourced by Mr. Habib, the parties agreed that Mr. Habib would receive a 1% "Finders Fee".

36 Mr. Pizzacalla also elaborated on the method by which RIC would collect the interest, principal and Lender Fees owing under the Loans and remit these amounts to Maplebrook.

37 Specifically, after Maplebrook purchased the Loan, RIC, as Maplebrook's agent, would collect all interest, Lender Fees and principal payments due from the Borrower and remit those amounts, in full, to Maplebrook.

38 Mr. Pizzacalla would meet Ms. D'Leon, usually on a monthly basis to confirm the interest, principal and Lender Fees due to Maplebrook on each of the Assigned Loans. Ms. D'Leon would cause these amounts to be transferred from RIC's bank account to Maplebrook.

39 On a monthly basis, Maplebrook would pay its investors the interest and principal owed to them on any transactions that the investors had participated in, including the Assigned Loans.

40 After RIC collected and remitted to Maplebrook all interest and Lender Fees due under the Assigned Loans, Ms. D'Leon would then calculate the Interest Split and Lender Fees Split that Maplebrook owed.

41 Ms. D'Leon also maintained a loan schedule for every loan that Maplebrook was involved in. The Loan Schedules included all the pertinent details for each transaction that Maplebrook was involved in.

42 During the October 31, 2014 hearing, I requested copies of Maplebrook's financial statements in order to review how the Assigned Loans were recorded. The financial statements were produced. The Assigned Loans were individually recorded and the Borrowers set out.

43 With respect to the relationship as between Maplebrook and RIC/RMS and RCC, Mr. Pizzacalla stated that neither he, nor Maplebrook, has ever had an interest in, or control of RIC/RCC or RMS.

44 With respect to other transactions, Mr. Pizzacalla acknowledged that, in light of RIC's refusal to pay certain amounts owing to Maplebrook, Maplebrook was retaining certain funds due to RMS on account of potential set-off claims.

45 The evidence of Mr. Pizzacalla was not challenged.

Issues

46 From the standpoint of Maplebrook, the following issues have to be addressed:

- a) Who owned the loans in issue?
- b) Is Maplebrook entitled to the post-CCAA collections?
- c) Is Maplebrook entitled to a return of the Pro-Hairlines Advance?

47 The Receiver submits that the issues to be resolved on the motion are:

- a) Are the proceeds of the RIC/Maplebrook loans subject to a constructive trust in favour of Maplebrook?
- b) Is the Maplebrook advance subject to a specific purpose or *Quistclose* Trust in favour of Maplebrook?
- c) Should Maplebrook be denied the equitable relief it seeks on the basis that it does not come to court with clean hands.

48 Maplebrook submits that, in each of the Assigned Loans, RIC obtained from the Borrower an assignable promissory note and, in each case, that promissory note and related security was absolutely assigned to Maplebrook. In each assignment document, Maplebrook also engaged RIC as its agent with authority to, on Maplebrook's behalf and for Maplebrook's benefit, collect any payment under the promissory note and enforce the security.

49 The Receiver submits that the facts give rise to a debtor-creditor relationship between RIC and Maplebrook and do not give Maplebrook any proprietary interest in the Assigned Loans proceeds.

50 The Receiver takes the position that the agency relationship pursuant to which RIC collected the Assigned Loan proceeds was created as part of the assignments executed in respect of each of the Assigned Loans. The Receiver points out that these assignments do not impose any obligations on RIC with respect to how the funds are to be collected, how they are to be held by RIC on Maplebrook's behalf, nor how they are to be paid to Maplebrook.

51 The Receiver submits that it is well established that, in the absence of an agreement to hold funds collected on a principal's behalf in a separate account, an agent and its principal are in a debtor/creditor relationship. In support of this proposition, the Receiver relies on *General Publishing Co., Re*, [2002] O.J. No. 2270 (Ont. C.A.) and *M.A. Hanna Co. v. Provincial Bank of Canada* (1934), [1935] S.C.R. 144 (S.C.C.).

Analysis

52 With respect to the AG Loans and the Quality Contract Loan, the Receiver acknowledged that these are the property of Maplebrook and that RIC was acting as Maplebrook's agent in administering the Loans and even recommended terminating the agency relationship in order to allow Maplebrook to enforce its security. In my view, there is no material difference between the structure, documentation, and administration of the AG Loans and the Quality Contract Loans and the CFT Property Loans and the Chiu Chow Loan. These loans were also the subject of absolute equitable assignments to Maplebrook.

53 The documentation establishes RIC's intention to convey the debts to Maplebrook, thereby transferring all credit risks to Maplebrook, retaining only the administrative role of Maplebrook's agent for collection purposes. The evidence also establishes that the parties conducted themselves in a manner consistent with the assignment documentation.

54 Counsel to Maplebrook submits that where there has been an assignment of a debt, and the assignor becomes bankrupt or otherwise seeks protection from its creditors, the debt will no longer form part of the bankrupt's estate. Insofar as the assignor receives repayments of interest or principal of such an assigned debt, these receipts are held in trust for the assignee and are not available for distribution among the assignors' creditors (see *Pythe Navis Adjusters Corp. v. Columbus Hotel Co. (1991) Ltd.*, 2014 BCCA 262 (B.C. C.A.)).

55 In this case, prior to RIC and RMS seeking protection in the CCAA Proceedings on March 28, 2014, agreed upon amounts were forwarded by RIC to Maplebrook in accordance with the terms of the Assigned Loans.

56 Upon the commencement of CCAA Proceedings, the Court issued a stay order. RIC remained a debtor-in-possession (under the supervision of the Court and GTL as Monitor, carrying on RIC's business). As a consequence of the stay order, Maplebrook was precluded from terminating its agency arrangements with RIC, revoking RIC's authority as agent and retaking its property (that is, the Assigned Loans).

57 The purpose of a CCAA stay order is to maintain the status quo amongst creditors and prevent their maneuvering for position. While the stay order prevents secured creditors and other parties from exercising and confirming their security for proprietary rights, it should not be used to prejudice those rights or to reorder the priorities as they existed on the date that the stay is granted (see: *Sharp-Rite Technologies Ltd., Re*, 2000 BCSC 414 (B.C. S.C. [In Chambers]) and *Windsor Machine & Stamping Ltd., Re* [2009 CarswellOnt 4471 (Ont. S.C.J. [Commercial List])], 2009 CanLII 39771).

58 The stay order effectively prevented Maplebrook from terminating RIC's agency agreement so as to take over the administration of the loans and ensure that it receive the post-CCAA collections directly from the debtors, CFT Properties, Chiu Chow and AG Properties. Counsel to Maplebrook submitted that RIC was not at liberty — during the status quo period — to negate these propriety rights by receiving the post-CCAA collections and depositing them in its general account. I agree

59 The Receiver relies on general statements as set out in *General Publishing* and *Hanna*, to the effect that the absence of an agreement to hold funds in a separate account results in a legal conclusion that the parties are in a debtor/creditor relationship. These statements have to be considered in the context of the facts in *General Publishing* and *Hanna* and also subsequent jurisprudence. *Hanna* involved a priority dispute as between a secured creditor bank and a supplier who sought to establish the foundations for a consignment agreement that, if demonstrated, would result in a proprietary right. *General Publishing* involved a priority dispute between the secured creditor (Bank of Nova Scotia) and publishers who claimed a proprietary right and resulting priority over the Bank with respect to accounts billed to and collected by the distributor, General Distribution Services. In both cases, *Hanna* and *General Publishing* collections were deposited into the general account of the debtor.

60 This case does not involve a priority dispute between a secured creditor and a third party. Rather, it involves a dispute between the Receiver and Maplebrook, with Maplebrook asserting a proprietary right to the loans, a right that the Receiver has acknowledged with respect to the AG Investments and Quality Contract loans.

61 The Chiu Chow and CFT Properties loans were structured in the same way as the AG Investors and Quality Contract loans. In my view, it is surprising that the Receiver maintains that the interest and principal that RIC collected on the Chiu Chow and CFT Properties loans does not belong to Maplebrook and should be available to RIC's other creditors. The explanation for and the flaw in the Receiver's position can be found in a review and analysis of the authorities relied upon by Maplebrook.

62 The Receiver submits that, in the absence of an agreement to hold funds collected on a principal's behalf in a separate account, an agent and its principal are in a debtor/creditor relationship which would defeat the property claim of Maplebrook. However, the cases relied upon by the Receiver to support its submissions, predate the controlling authority and do not consider cases relied upon by Maplebrook, which address whether the absence of a separate account determines the issue.

63 In *Shenzhen City Luohu Industrial Development Co. v. Yao*, 2000 BCSC 677 (B.C. S.C.), the Court enumerated a number of factors that should be considered in deciding whether a party receiving funds does so as a mere debtor, or as a trustee:

[T]he presence of comingling, while a factor to be weighted in favour of a debtor-creditor relationship is not necessarily determinative. The nature of the relationship depends on whether the certainties which constitute a trust are present. Factors to consider include: whether there was an obligation to keep the funds separate; whether the terms of the agreement clearly set out an obligation to keep the funds separate; whether it was intended that, should the funds be comingled, the trustee could do as he pleased with the money; whether the trustee was required to fulfil a specific purpose; whether the recipient could use the funds for any other purpose before making payment for the specific purpose; and whether the settlor had any direct supervision or control over the financial dealings of the recipient.

64 *Shenzhen City* followed the decision of the Alberta Court of Appeal in *R. v. Lowden*, 1981 ABCA 79 (Alta. C.A.), where the Court held that a travel agent receiving funds from a customer for the specific purpose of purchasing travel services or hotel accommodations assumed a trust obligation to apply the funds as directed or return them to the customers:

Undoubtedly a direction that monies are to be kept separate and apart is a strong indication of a trust relationship being created. It does not appear to me, however, that the converse is necessarily so (...). The fact that there is no specific discussion about monies being kept separate and apart from other monies does not detract from the fact that the money is paid first for a particular purpose, namely the obtaining of tickets for specific flights or reservations at named accommodation for a particular period. ... To my mind, the paying of money to a travel agency for a particular trip on a particular date with a carrier flying regularly, or the payment of money for a particular reservation with a particular hotel for a particular period, creates more than a simple debtor and creditor relationship. To my mind, it is implicit that the agent is either expected to get the ticket or to return the money.

65 These principles were confirmed by the Supreme Court of Canada in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.), where the Court cited *McEachren v. Royal Bank*, [1990] A.J. No. 1145 (Alta. Q.B.) and *Lowden*, the Court agreed that "while the presence or absence of a prohibition on the comingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative".

66 In my view, these cases stand for the proposition that the absence of an agreement to hold funds collected in a separate account is not necessarily determinative of whether a debtor-creditor relationship is established. In the circumstances of this case, further examination is necessary, including an examination as to whether a constructive trust may be imposed.

67 Counsel to the Receiver acknowledges that a constructive trust may be imposed in circumstances where:

a) the alleged constructive trustee has engaged in the type of wrongful conduct that is capable of giving rise to a constructive trust; or

b) the alleged constructive trustee has been unjustly enriched, and a constructive trust is the appropriate remedy (see: *Gorecki v. Canada (Attorney General)*, 2006 CarswellOnt 1745 (Ont. C.A.); and *Canada (Attorney General) v. Confederation Life Insurance Co.*, 1995 CarswellOnt 318 (Ont. Gen. Div.), affirmed 1997 CarswellOnt 62 (Ont. C.A.)).

68 The test for finding a constructive trust based on wrongful conduct was set out by the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.). The following criteria is to be considered in determining the availability of the remedial constructive trust:

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.

69 Counsel to Maplebrook submits that these criteria are satisfied in the present case.

a) Under the Assignment Agreements, RIC acted as Maplebrook's agent in enforcing the CFT Properties Loan, Chiu Chow Loan and AG Investments Loan. As such, and as the assignor under the Equitable Assignments, RIC owed equitable obligations to Maplebrook to remit all sums paid. This is how the parties operated prior to the CCAA Proceedings and it was by virtue of this agency relationship that the post-CCAA collections came to be in RIC's hands.

b) The post-CCAA collections came to be in RIC's possession by virtue of this agency relationship. While it may not have been a breach of RIC's fiduciary obligations to receive that money, it constitutes a breach of RIC's equitable obligations to retain that money and not to remit it to Maplebrook.

c) There is nothing "illegitimate" about Maplebrook's claim for a proprietary remedy. Failing to grant this remedy would result in an unjust enrichment of RIC's creditors. As in *Soulos*, "no less is required ... to return the parties to the position that they would have been in had the breach not occurred".

d) There is nothing that would render the imposition of a constructive trust unjust in these circumstances. On the contrary, it would be unjust if RIC's creditors received a windfall by virtue of the stay order, which effectively prevented Maplebrook from revoking the agency and retaking its property. The creditors that would benefit are not "intervening creditors"; rather, they are creditors who, before the stay order, had interests that were subordinate to Maplebrook's ownership interests. It would be unjust for the stay orders — and RIC's actions under that order to extinguish those proprietary rights and defeat that priority.

70 Counsel to Maplebrook also submits that there is an overriding principle of "good conscience". In this case, Maplebrook does not allege that RIC or its creditors having engaged in any actionable conduct; it is simply that it would be contrary to good conscience to permit them to retain the benefits derived from Maplebrook's properties. The Court, in *Soulos*, expressly recognized this broader principle, quoting with approval:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts into a trustee: *Soulos, supra* at paragraph 29, quoting *Beatty v. Guggenheim Exploration Co.*, 225 NY 380(1919) at 386-387.

71 This principle was the basis for imposing a constructive trust in *Cummings Estate v. Peopledge HR Services Inc.*, 2013 ONSC 2781 (Ont. S.C.J.), a case that arose out of the receivership of a payroll management company. When payroll went into receivership, employers sought to recover funds that had been conveyed to *Peopledge*, but that had not yet been distributed to employees. Some of the agreements with the employers imposed express trust obligations or segregated obligations but many did not. Further, *Peopledge* did not maintain segregated employer-by-employer accounts. In *Peopledge*, the Court held that the terms of the agreements, and the manner in which *Peopledge* actually handled the funds were not determinative; all such funds were received by *Peopledge* as agent for the employers and, therefore, they could not in good conscience be applied to discharge *Peopledge's* obligations to its own creditors:

In these circumstances, it would appear to be inequitable to permit the general creditors of *Peopledge* other than the customers who provided the funds to now be paid their claims from those funds. It was never intended that *Peopledge* or its creditors would have any beneficial interest in these funds. ... Under the umbrella of good conscience, constructive trusts are recognized to remedy the unjust and corresponding deprivation (see McLaughlin J. in *Soulos* at paras. 20 and 43). In this case, *Peopledge* and its general creditors would be enriched by having the ability to access the payroll funds advanced by customers to *Peopledge*. The customers and their employees, would be deprived by not having the funds paid to them and there would be no juristic reason for this to occur. It was never intended that *Peopledge* or its creditors, would have any beneficial interest in the payroll funds advanced by customers.

72 In this case, while the documents may not have expressly obligated RIC to segregate the loan payments received from borrowers, or to hold these funds in trust, it was nevertheless understood between the parties that these funds were the property of Maplebrook. In addition, as previously noted, the Receiver has acknowledged that the structure of the Assigned Loans results in Maplebrook being the owner and equitable assignee of the loans originated by RIC.

73 After March 28, 2014, the stay order effectively stayed any right of Maplebrook to terminate RIC's agency and retake its property. The monies at issue in this case were received after the granting of the Initial Order. In my view, if these post-CCAA collections were to form part of RIC's assets, RIC's creditors would receive a windfall; RIC had no beneficial

entitlement to these funds, and neither the Receiver nor RIC's creditors can have any higher claim. Accordingly, I am satisfied that the absence of RIC to maintain a separate trust account, although a factor to be taken into account, is not determinative of the issue as to whether the relationship between Maplebrook and RIC was one of debtor-creditor. In my opinion, the relationship was not one of debtor-creditor. RIC recognized the assignment in favour of Maplebrook and there is no basis to alter this recognition after the CCAA filing. To alter the relationship would be inconsistent with the long recognized principle that the purpose of the CCAA is to preserve the status quo. Accordingly, I am satisfied the *Soulos* test has been met and it is appropriate and necessary to impose a constructive trust in Maplebrook's favour to prevent an inequitable and unjust result.

74 On the issue of Maplebrook's entitlement to repayment of the Pro-Hairlines Advance, Maplebrook submits that there can be no question that RIC received the Pro-Hairlines Advance in trust and that the Pro-Hairlines Advance remains the subject of that trust obligation in the Receiver's hands.

75 The existence of a trust depends upon satisfying the three certainties of (1) an intention to create a trust; (2) the subject matter of the trust; and (3) the trust objects or purposes.

76 There is no issue respecting the latter two requirements as the subject matter or corpus of the trust was the Pro-Hairlines Advance, and the object was to fund the Pro-Hairlines Transaction. While Maplebrook did not impose any express obligation requiring RIC to hold the Pro-Hairlines Advance "in trust" or to segregate the Pro-Hairlines Advance from RIC's own funds, I am satisfied that there was no question that the Pro-Hairlines Advance was being advanced for, and could only be used for, one particular purpose: to fund the loan to Pro-Hairlines.

77 I accept the submission of Maplebrook that RIC received the Pro-Hairlines Advance in trust and that the Pro-Hairlines Advance remains the subject of that trust obligation in the Receiver's hands. The actions of both RIC and Maplebrook established that there was an intention to settle a trust and impose trust obligations.

78 Although the Pro-Hairlines Advance was transferred into RIC's general account, the analysis in *Shenzhen, Lowden, Air Canada* and *McEachren* referred to above is relevant to this issue as the absence of a specific trust account is not determinative of the issue.

79 In my view, the trust principles described above, result in a conclusion that the Pro-Hairlines Advance is being held on a trust obligation in favour of Maplebrook. Maplebrook never parted with beneficial title to the funds: they were conveyed to RIC subject to an equitable obligation to use those funds to make the loan to Pro-Hairline (that is, to "purchase a \$750,000 debt to be assigned to Maplebrook", or to return the funds to Maplebrook if the transaction did not close). I am in agreement with counsel to Maplebrook that nothing in the evidence supports the view that the Pro-Hairlines Advance was advanced to RIC to use in any way that it saw fit, with a mere obligation to make repayment to Maplebrook if and when RIC elected to do so. At the time that the funds were returned to RIC, with RIC operating under court supervision and under the supervision of a Monitor, the obligations in favour of Maplebrook are even more definite. The position of Maplebrook should not be prejudiced during the CCAA proceedings.

80 Counsel to Maplebrook also submitted that another line of cases that supports the existence of a trust in the present case is that applying the principle developed by the English House of Lords in *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1968] UKHL 4 (U.K. H.L.). The Alberta Court of Appeal summarized that principle in the following terms:

This type of trust, commonly called a *Quistclose* trust, arises when funds are advanced for a specific purpose, but cannot be or are not used for that purpose.

81 The Ontario Court of Appeal has commented that the *Quistclose* trust has not yet been adopted in Ontario, and has warned against the potential negative impact such trust may have on creditors who have no notice that a debtor's funds are not available to general creditors, as follows:

"As I have concluded that the requirements for a *Quistclose* trust have not been met in this case, I do not need to decide to what extent that expansion should be adopted in Ontario. However, when that decision does have to be made, the Court will have to consider a number of commercial consequences, one of the most significant of which is the potential effect on the creditors of the borrower (or grantee) of the subject funds. For example, as in this case, where funds are advanced to a business with no registration under the *Personal Property Security Act*, RSO 1990, cP-10, creditors will have no notice, and in many cases no knowledge, that they are dealing with a debtor whose money is subject to a trust and not available to general creditors." *Ontario (Minister of Training, Colleges and Universities) v. Two Feathers Forest Products LP*, 2013 ONCA 598 (Ont. C.A.) ("*Two Feathers*").

82 In the circumstances of this case, with the Pro-Hairlines Advance being provided to RIC and forwarded on to RIC's counsel expressly for the purpose of being held by counsel pending the completion of the transaction, and then being returned to RIC subsequent to the filing of the CCAA Proceedings, there does not appear to be any opportunity for any creditor of RIC to have been misled or in any way detrimentally affected by having the knowledge that the funds were subject to a trust and not available to general creditors.

83 The principle of *Quistclose* as summarized by the Alberta Court of Appeal in *Carevest Capital Inc. v. 1262459 Alberta Ltd.*, 2012 ABCA 161 (Alta. C.A.) is as follows:

This type of trust, commonly called a *Quistclose* trust, arises when funds are advanced for a specific purpose, but cannot be or are not used for that purpose.

84 I am mindful of the comments of the Ontario Court of Appeal in *Two Feathers* to the effect that *Quistclose* has not yet been adopted in Ontario. In my view, it is not necessary to determine this issue as I have determined that the Pro-Hairlines Advance is being held in a trust obligation in favor of Maplebrook. However, if I am in error in reaching that conclusion, I am also of the view that this is a situation where the requirements for a *Quistclose* trust have been met. In reaching this conclusion, I have taken into account that:

1. The funds were advanced by Maplebrook for a specific purpose;
2. The funds were returned to RIC at a time when RIC was operating under court supervised creditors' protection and under the supervision of the Monitor; and
3. If the funds are returned to Maplebrook, there is no effect on the other creditors of RIC. The funds were never the property of RIC and the creditors of RIC have no entitlement to the funds in question.

Disposition

85 In the result, Maplebrook's motion is granted. The Receiver is to pay the following amounts to Maplebrook's legal counsel, Fasken, in trust:

- i) The sum of \$750,000, less 37.5% of legal fees (\$13,189.12) incurred by RIC in respect of the Pro-Hairlines Transaction;
- ii) The sum of \$150,000 and any interest payments collected after March 28, 2014 in respect of the CFT Properties Loan;
- iii) The sum of \$311,400 representing the outstanding principal and interest collected after March 28, 2014 in respect of the Chiu Chow Loan; and
- iv) The sum of \$28,494 representing interest collected after March 28, 2014 in respect of the AG Loans.

86 However, prior to making payment to Maplebrook, the Receiver, in consultation with Maplebrook, is to establish the amount owing by Maplebrook to RMS. This amount is to be held back from the amount due to Maplebrook. The Receiver can apply for directions, if necessary, as to how the amount held back is to be allocated as between the Redstone estates. If the parties are unable to come to agreement on the amount to be held back, a 9:30 a.m. appointment can be scheduled.

87 Maplebrook has been the successful party and is entitled to its costs on a partial indemnity basis. I would ask counsel to confer in an effort to settle on an appropriate amount of costs, taking into account the submissions made on this subject at the conclusion of oral argument. If not agreement can be reached, brief submissions to a maximum of 3 pages can be submitted, within thirty days.

Motion granted.

Tab 8

2006 CarswellOnt 116
Ontario Superior Court of Justice

Ascent Ltd., Re

2006 CarswellOnt 116, [2006] O.J. No. 89, 144 A.C.W.S. (3d) 984, 18 C.B.R. (5th) 269, 9 P.P.S.A.C. (3d) 176

**In the Matter of the Bankruptcy of Ascent Ltd., of
the City of Mississauga, in the Province of Ontario**

Reg. Nettie

Heard: December 22, 2005
Judgment: January 13, 2006
Docket: 32-149265

Counsel: G.F. Camelino for Appellant
Vern DaRe for Respondent

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications

Bankruptcy and insolvency

[IX](#) Proving claim

[IX.4](#) Practice and procedure

[IX.4.g](#) Miscellaneous

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Miscellaneous issues

Creditor financed acquisition by company of insurance policy, for benefit of company — In exchange for financing, company assigned creditor right to any unearned premiums under policy as security for payment — Company filed notice of intention to make proposal for bankruptcy and defaulted on payments to creditor for policy — On application by creditor, court ordered that amount of unpaid premiums be set aside by company and held in trust pending further order of court — Trustee failed to set aside amount ordered by court — Creditor's proof of claim for amount of unearned premiums held by company at time of deemed assignment was denied by trustee — Creditor brought appeal from trustee's denial of property claim — Appeal allowed — Constructive trust was imposed over assets of company in favour of creditor in amount of unpaid premiums — No unearned premiums remained to be secured through usual remedies because insurance policy itself had expired, and therefore only way creditor could recover funds was through equitable remedy — Company was unjustly enriched through retention of insurance coverage despite not having made payments to creditor for financing — Company had failed to obey court order to set aside funds for creditor prior to its deemed assignment — Company could not benefit from its own failure to obey court order and then seek to retain such unjust enrichment before court.

APPEAL by creditor from trustee's denial of property claim.

Reg. Nettie:

1 This matter came before me as the appeal by Cafo Inc. ("Cafo") of the disallowance by Zeifman Partners Inc. (the "Trustee") of its secured proof of claim in the bankruptcy of Ascent Ltd. ("Ascent" or the "Bankrupt"), pursuant to s. 135 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). Although nothing substantive turns on this, I note for the record that all of the materials were styled as in the Proposal of Ascent, and not the Bankruptcy. The latter is correct, and, for that reason, this decision is styled in that manner.

2 On a more substantive note, however, is the fact that at the outset of the hearing, it became evident that Cafo agrees with the Trustee in its Notice of Disallowance, that Cafo is not a secured creditor in the bankruptcy of Ascent. This due to the fact that the passage of time has resulted in the asset over which it had security no longer existing. That asset was the right to receive unearned premiums on the cancellation of a certain policy of insurance, placed and financed by way of a Premium Installment Contract ("PIC") dated July 15, 2004. The insurance policy itself having expired, there remain no unearned premiums, and, thus, nothing over which Cafo may any longer claim security. Accordingly, the Disallowance by the Trustee of Cafo's secured Proof of Claim is proper, and the appeal is dismissed, in that regard.

3 Despite this, the parties agreed, at the hearing, that the dismissal would result in the advancement by Cafo of a property Proof of Claim, wherein Cafo would claim that the Bankrupt was holding \$24,374.00 of cash or other property at the time of its deemed assignment in trust for Cafo. The basis of this claim is the Order of the Honourable Madam Justice Hoy, made in the Proposal on February 17, 2005. The parties also agreed that the result of such a Claim by Cafo would be its denial by the Trustee, resulting in a fresh appeal of that, under s. 81 of the BIA. Accordingly, the parties agreed to proceed to argue this matter on the basis that such a property Claim had been advanced, disallowed, and appealed. Ordinarily, Courts should not hear matters on a conjectural or hypothetical basis, but, as the materials and argument were already before the Court, I saw no point in putting off to a later date that which could be determined now, and heard the matter.

Facts

4 As indicated above, Cafo financed the acquisition by Ascent of an insurance policy, for the benefit of Ascent. This financing was pursuant to the PIC. In the PIC, Ascent assigned to Cafo the right to any unearned premiums under the Policy, as security for payment by Ascent to Cafo under the PIC. Default in payment under the PIC occurred in December, 2004, with the failure by Ascent to make the December, 2004, payment to Cafo. Ultimately, no further payments were made under the PIC.

5 On January 14, 2005, Ascent filed a Notice of Intention to make a proposal. This stayed the efforts of Cafo to enforce payment of the amounts due under the PIC, whether Cafo was a secured or unsecured creditor. At that point in time, it was the position of Cafo that it was a secured creditor. It was the position of Ascent and the Trustee (which was then the Proposal Trustee), that Cafo was an unsecured creditor. The reason for this disagreement had its genesis in the decision of Mr. Justice Farley in *Stelco Inc., Re* (2004), 49 C.B.R. (4th) 283 (Ont. S.C.J. [Commercial List]) ("Stelco 1"), wherein, on nearly identical facts, Mr. Justice Farley had held that, absent registration of a Financing Statement under the *Personal Property Security Act* ("PPSA"), Cafo had no perfected security under a PIC. There, as in the case at bar, Cafo had not registered a Financing Statement, relying on certain exemptions in s. 4 of the PPSA and s. 138 of the *Insurance Act*. Cafo had obtained a contrary ruling from a Court of co-ordinate jurisdiction, namely the order of Cameron J. dated June 28, 2001, in the unreported matter of *Icon Laser Eye Centers Inc.*, Ct. File No. 01-CL-41759. Cafo had also appealed the decision of Farley, J. to the Court of Appeal.

6 Given the stay engendered by the NOI, and the refusal of both Ascent and its Proposal Trustee to either pay the amounts due to Cafo or allow Cafo to cancel the policy and realize on its secured position, despite the continued enjoyment by Ascent of the insurance coverage to its benefit and the benefit of the body of its creditors, Cafo moved before Madam Justice Hoy for either an Order lifting the stay, pursuant to s. 69.4 BIA, or requiring the Proposal Trustee to establish a fund to satisfy Cafo's claim. The latter was an effort to practically deal with the fact that mere effluxion of time would render the value of the unearned premiums as nil, and wipe out any security of Cafo long before *Stelco 1* could be appealed. At the time of the motion, the value of the unearned premium was \$24,374.00, and that is the amount Cafo sought to have set aside.

7 Both Ascent and the Proposal Trustee were served with notice of the motion. Only Ascent appeared in response. Her Honour ordered that "\$24,374.00 shall be set aside by Ascent, and held in trust, pending the Court of Appeal's decision in *Stelco* or further order of this court." That Order was appealed by Ascent, and ultimately dismissed for delay on April

27, 2005, two days after the Court of Appeal released its decision in the appeal of Stelco 1. Counsel for Cafo inquired of counsel for Ascent on April 27, 2005, as to how Ascent wished to proceed to resolve this matter, given that the Court of Appeal in Stelco 1 had found in Cafo's favour that Cafo was, in circumstances just such as in the case at bar, a secured creditor. The upshot of that inquiry is that Ascent takes the position that the Order of Madam Justice Hoy was stayed under s. 195 of the BIA, by Ascent's appeal thereof, and that that excuses Ascent from its failure to comply with her Order. This despite the fact that said stay dissolved on April 27, 2005, when Ascent's appeal was dismissed, and Ascent was not deemed to have made an assignment in bankruptcy until May 18, 2005, when its proposal was rejected. No explanation has been offered by Ascent or the Trustee for Ascent's failure to comply with Madam Justice Hoy's Order between April 27, 2005, and May 18, 2005. I find that Ascent had an obligation on April 27, 2005, to comply with Justice Hoy's order to set aside \$27,374.00 and to hold same in trust for Cafo, which it did not do.

8 Subsequent to the bankruptcy, the Trustee has now set aside the said sum, pending the outcome of this appeal. It has done so, it claims, as a courtesy. Much was made in the materials of both parties of the Trustee not having control over Ascent as proponent, and of behaviour of the Trustee. I find all of this to be irrelevant to the legal issues at hand, as will be seen below.

Law

9 Cafo argues that Ascent and the body of its creditors have been unjustly enriched by the circumstances in this matter, and that the proper remedy is the declaration of a constructive trust over sufficient of Ascent's assets at the time of bankruptcy as are necessary to provide Cafo with the sum of \$24,374.00 as had been ordered set aside by Madam Justice Hoy. Of course, if the Hoy Order had been complied with, the matter would be quite straight forward as there would have been the sum of \$24,374.00 set aside, and impressed with a clear legal trust pursuant to Court Order. This not being the case, Cafo must look to equitable constructs such as unjust enrichment and constructive trust to have its remedy.

10 What is unjust enrichment, and can it form the basis of the use of the constructive trust in a commercial insolvency to provide an appropriate remedy?

11 *Soulos v. Korkontzilas* (1997), 46 C.B.R. (3d) 1 (S.C.C.), at 9 provides clear authority, building on *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), for the proposition that a constructive trust may be imposed "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...". A constructive trust imposed in a case of unjust enrichment is a tool of a Court of equity to remedy a legal wrong. It is, as a result, often referred to as a remedial constructive trust.

12 Are the requisite three elements present in the case at bar? In my view they are. Clearly, Ascent was enriched by the ability to retain and consume the insurance coverage in question. Had Cafo had its way, the policy would have been cancelled by it for Ascent's default under the PIC, and the unearned premium would have been paid to Cafo, and applied against Ascent's PIC indebtedness. Ascent would have lost insurance coverage, no doubt something of value to it or it would not have resisted the cancellation of the policy by Cafo in the first instance. Not only did Ascent retain the insurance coverage, but it has not had to pay for the coverage, to the extent of at least the \$24,374.00 in dispute. As a result, there was at the time of Ascent's bankruptcy some \$24,374.00 more in the asset pool available for the creditors (or, if there had been no bankruptcy, available for Ascent).

13 With respect to the corresponding deprivation, I am inclined to agree with Mr. Justice Cory in *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.), at 631, where His Lordship stated:

Indeed, I would have thought that if there is an enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. there [sic] is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic.

Accordingly, I find that there is a corresponding deprivation of Cafo to the enrichment of Ascent.

14 Was there a juristic reason for the enrichment and deprivation? This requires a consideration of the relationship between Ascent and Cafo, and the effect of the intervening Order of Madam Justice Hoy. Absent the Hoy Order, the enrichment of Ascent by payment of its insurance premiums by Cafo without paying Cafo in full for those payments is an enrichment for which juristic reason may be found, as that is the very nature and intent of the PIC. In other words, most debtor-creditor relationships are going to involve, by the advancement of credit, an unjust enrichment if that credit is not repaid. However, as the enrichment, at least for the period of time until repayment, is the very nature of the credit agreement, such an agreement or contract constitutes a juristic reason, and the enrichment will not be viewed as unjust. This is as discussed in *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Ont. Gen. Div.), wherein Blair J., as he then was, sets out at pp. 772-773 certain elaborations on juristic reason in unjust enrichment.

15 However, in the case at bar, we have the intervention of the Hoy Order, which, in my view, changes the landscape dramatically, and cries out for equity to intervene. In this case, make no mistake: however much Ascent may rely upon s. 195 of the BIA, there remained a clear period of time prior to its deemed assignment wherein Ascent failed to obey Her Honour's Order and set aside funds in trust for Cafo. This failure is the source of the unjust enrichment, not the PIC. As stated above, the result is that the Estate of Ascent has been augmented by the said sum. While I recognize that the debtor pool is also increased by like amount, mathematically the creditors are better off by the augmentation of the asset pool even though the debtor pool increases. This is not, as was argued at the hearing, a wash. Consider if there were unsecured claims totaling \$100,000.00, and assets of \$50,000.00 available to satisfy them. Clearly the creditors would be better off if there were \$75,000.00 in assets to satisfy \$125,000.00 in claims, as each creditor of the previous class will receive a slightly larger dividend when the extra \$25,000.00 in assets is added to the Estate — obviously at the expense of the new \$25,000.00 claimant also added to the debtor class. This is the case herein. The creditors are being enriched by the additional availability to them of the \$24,374.00 that Ascent failed to set aside under the Hoy Order, and Cafo, which would otherwise receive all of those funds as trust funds, must now share with the other creditors — clearly to its detriment. The only reason for this situation is the failure of Ascent to obey a Court Order, notwithstanding its own resort to this Court first by way of a proposal and secondly by way of a deemed assignment. I can find no juristic reason in this to support the enrichment. It is surely not a juristic reason if the enrichment is the result of failure to obey the Court's own Order, and I so find.

16 Having found that unjust enrichment has occurred herein, should the Court use the tool of a remedial constructive trust to remedy this? In considering this, it is important to remember that unjust enrichment is a concept which may quite properly be used in commercial cases. Winkler J., as he then was, in *Brown & Collett Ltd., Re* (1996), 11 E.T.R. (2d) 164 (Ont. Gen. Div. [Commercial List]), at 179 found this to be the case, and that it is appropriate for promoting "honest dealing and sound commercial conscience."

17 It also important to consider that imposition of a remedial constructive trust will take out of the hands of the Estate and the creditors the sum in dispute, and turn it over, in its entirety, to Cafo. This will clearly be a disruption of the scheme laid out in the BIA. This was the position of the Trustee at the hearing. I have considered this, but I have also considered *Brown* and the cases cited therein. I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution. It is simply not right for Ascent and its creditors to benefit from Ascent's failure to obey the Hoy Order, and then come to this Court to seek to retain such an unjust enrichment.

18 Similarly, I am not moved by the Trustee's arguments that the funds which have been set aside are GST refunds. The right to receive those refunds must have existed at the time of the deemed assignment in order for them to have crystallized and fallen into the Estate. It must be remembered that the point here is that if the Court does not impose a remedial constructive trust on sufficient of Ascent's assets to return to Cafo the sum of \$24,374.00, then an injustice occurs. It matters not which assets are consumed to remedy this.

19 I have also considered the earlier decision of Registrars Holmsted, K.C. and Reilly in *Inrig Shoe Co., Re* (1924), 4 C.B.R. 516 (Ont. Bkcty.) and *Thompson, Re* (1930), 11 C.B.R. 263 (Ont. S.C.), both of this Court, respectively, and distinguish them both. These cases dealt with legal trusts, and the inability to use assets to satisfy those trusts where tracing could not take place. This is very different, in my view, from the use of an equitable tool to do justice.

20 Accordingly, I find it appropriate to impose over the assets of Ascent, in the hands of the Trustee, a remedial constructive trust, in favour of Cafo, in the amount of \$24,374.00. In the context of how this hearing was structured, Cafo may prove a claim for such an amount as a property claim pursuant to this declaration of remedial constructive trust, and the Trustee is to allow same. While this may be a slightly awkward way to go about things, in terms of the best use of Court time, it was certainly practical and expedient and the parties and their counsel are to be commended for being flexible enough to proceed in this manner.

21 At the conclusion of the hearing, it was agreed that counsel would like to speak to costs, dependent upon the outcome. Accordingly, counsel may arrange to bring the matter back on before me for that purpose.

Appeal allowed.

Tab 9

1996 CarswellOnt 619
Ontario Court of Justice (General Division, Commercial List)

Brown & Collett Ltd., Re

1996 CarswellOnt 619, [1996] O.J. No. 625, 11 E.T.R. (2d) 164, 61 A.C.W.S. (3d) 425

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Re BROWN & COLLETT, LIMITED

Winkler J.

Heard: January 29-31, February 1, 19-20, 1996

Judgment: February 26, 1996

Docket: Doc. B266/95

Counsel: *John T. Porter* and *Lynn O'Brien*, for applicant, Brown & Collett, Limited.
Raymond F. Leach and *B.F. Fischer*, for Hay Stationery Incorporated.

Subject: Estates and Trusts; Corporate and Commercial

Related Abridgment Classifications

Estates and trusts

III Trustees

III.1 Nature of trustee's office

III.1.h Miscellaneous

Headnote

Trusts and Trustees --- Nature of trustee's office

Constructive trust — Two companies supplying office supplies to customer pursuant to ongoing arrangement under which customer remitted payment to one company — Company receiving payment depositing money in general account and then sending other company its share of payment — Company receiving payment filing plan of compromise and arrangement under Companies' Creditors Arrangement Act — Moneys owing to other company being unpaid — No justification existing for proposition that doctrine of unjust enrichment should be applied sparingly in commercial context — Company receiving payment being enriched and other company suffering corresponding deprivation — No juristic reason for enrichment existing — Company receiving payment being agent of other company for purposes of collection and remittance of moneys owing by customer to that company — No express trust existing and parties being merely creditor and debtor — Debtor/creditor relationship and finding of unjust enrichment not being mutually exclusive — Company receiving payment being unjustly enriched — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. H Inc. and B & C Ltd. were stationary suppliers. One of their customers, FLtd., insisted on dealing with one stationary supplier only. Although H Inc. supplied two plants and B & C Ltd. supplied one plant, F Ltd. remitted its payments to B & C Ltd., who deposited them in its general account. Under B & C Ltd.'s arrangement with H Inc., the moneys owing to H Inc. were to be forwarded forthwith. Actually, B & CLtd. used the money owing to H Inc. as its own pending reconciliation of the cheques. A considerable time lapse developed between the receipt of the money by B & C Ltd. and the forwarding of the money to H Inc. While a considerable amount of money was still owing to H Inc., B & C Ltd. filed a plan of compromise and arrangement under the *Companies' Creditors Arrangement Act*. Pursuant to the plan, a claim in trust was one of the categories of claims against B & C Ltd., which was not compromised by the plan. H Inc. brought a motion for a declaration that its claim against B & C Ltd. was a valid trust claim. Trial of an issue was directed to determine whether any part of H Inc.'s claim was in fact a valid trust claim. The trial of the issue was to be bifurcated: the first part of the trial was to determine whether H Inc. had a valid trust claim, and if such a claim was established, the second part of the trial would deal with the appropriate remedy.

Held:

B & C Ltd. was unjustly enriched at the expense of H Inc.

The evidence was categorical that the parties did not intend to create an express trust. Similarly, there was no evidence to support the implication of such a trust.

As H Inc. was never paid for office supplies forwarded to F Ltd., although B & C Ltd. received and retained the payment by F Ltd., B & C Ltd. was enriched and there was a corresponding deprivation to H Inc. There was no justification for the proposition that the doctrine of unjust enrichment should be applied sparingly, if at all, in a commercial context. Principles of unjust enrichment may properly be considered in a commercial context, with the aim of promoting sound commercial conscience and honest dealings between parties. In order to determine whether or not there exists a valid juristic reason for the enrichment, it is incumbent upon the court to ascertain whether there is any legal obligation, contractual or otherwise, which will justify the enrichment. B & C Ltd. was the agent of H Inc. for purposes of collection, reconciliation and remittance of moneys owing by F Ltd. to H Inc. The parties were creditor and debtor. A debtor/creditor relationship and a finding of unjust enrichment are not necessarily mutually exclusive. The fact that the parties freely negotiated and entered into the agreement could not in this case constitute a juristic reason. If B & C Ltd. had incurred the enrichment within the framework of the contract with H Inc., the existence of the contract would indeed constitute a valid juristic reason for the enrichment. B & C Ltd. did not act within the agreement; however, it was not entitled under the agreement to use the moneys owing to H Inc. as its own.

The issue of whether H Inc. was entitled to the remedy of a constructive trust should be dealt with in the second part of the trial.

Trial of issue to determine whether moving party had valid trust claim.

Winkler J.:**Introduction**

1 This is an action brought by Hay Stationery Incorporated ("Hay") for recovery of monies allegedly held in trust for Hay by Brown & Collett, Limited ("Brown & Collett") pursuant to a business arrangement involving a common client.

2 On September 13, 1995, the Honourable Mr. Justice Farley made an Order (the "CCAA Order") staying all proceedings against Brown & Collett and authorizing the company to file a Plan of Compromise and Arrangement pursuant to provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Brown & Collett filed a Plan of Compromise and Arrangement on September 29, 1995 (the "Plan"), which was approved by Brown & Collett's creditors on December 11, 1995 and sanctioned by the Court on December 20, 1995 (the "Sanction Order"). Pursuant to the plan, a claim in trust is one of the categories of claims against Brown & Collett which is not compromised by the plan.

3 Hay Stationery now brings this motion for a declaration that part of its claim against Brown & Collett is a valid trust claim and as such, constitutes an Unaffected Obligation under the Plan which is not subject to compromise. Brown & Collett oppose the motion, on the grounds that the claim by Hay is no more than an unsecured debt.

4 On November 30, 1995, this Court directed that there be a trial of an issue to determine whether part of Hay's claim against Brown & Collett is in fact a valid trust claim.

5 It has been agreed by the parties that the trial of the issue is to be bifurcated. That is, the first part of the trial is to determine whether Hay has a valid trust claim. If such a trust claim is established, the second part of the trial will deal with remedy including any resultant asset tracing issues. The essential facts for the determination of this matter are not in dispute, which has been greatly assisted by the Agreed Statement of Facts reached between counsel, supplemented by viva voce evidence.

The Facts

General

6 Both Hay and Brown and Collett carry on business as suppliers of stationery and office products. Hay is based in London, Ontario, while Brown & Collett's main office is located in Mississauga, Ontario. From time to time, the two companies have entered into business ventures together, the nature of which will be explored in more detail below.

The Ford Account

7 As early as 1991, Brown & Collett began to court Ford Motor Company ("Ford") in the hope of becoming the chief office supplier to Ford's Oakville plant. In the course of this process, Brown & Collett became aware that Ford required their Oakville, Talbotville and Windsor plants to be supplied by the same company. In order to service the other Ford locations, Brown & Collett approached Hay to assist them in landing the contract. Consequently, in 1993 the two companies entered into an arrangement whereby Brown & Collett would exclusively supply and service the Oakville Ford plant and Hay would exclusively supply and service the Talbotville and Windsor Ford plants. Each company used only their own inventory to supply Ford.

8 Sometime prior to this arrangement, Ford commenced an internal policy known as Ford 2000, the aim of which was to increase efficiency by reducing the number of vendors to the company. Pursuant to this program, Ford required that it deal with only one vendor as supplier of office products for all of its Ontario locations. As far as Ford was concerned, this term was non-negotiable.

9 As a result of this policy, the Ford account was negotiated by representatives from Brown & Collett. Hay had no direct dealings with Ford during the negotiations, although Hay and Brown & Collett negotiated, as between themselves, those points which were of concern to them. The arrangement operated as follows.

10 The Ford account was unusual in that orders were placed electronically, through Ford's C-PARS system. C-PARS is the Ford computer software system which deals with the generation and placement of orders. Hay and Brown & Collett were obliged to use Ford's C-PARS system in order to secure the Ford account.

11 Whenever Ford ordered office supplies, the order was keyed into the computer, which would automatically assign a release number to that order. The order, after being approved internally at Ford, would then appear in a Brown & Collett electronic mailbox to which both Hay and Brown & Collett had access. Brown & Collett would take all orders from their electronic mailbox, re-direct any orders that related to the Talbotville and Windsor plants to Hay's mailbox. Brown & Collett would fill from its own inventory any orders which related to the Oakville plant. Hay would retrieve the forwarded orders from its mailbox, fill them from its inventory, and ship the product directly to Ford.

12 Neither Hay nor Brown & Collett formally invoiced Ford for the purchased product. When Ford received office supplies, the original order would be retrieved on the Ford computer. As long as the product received matched the order placed and everything else was satisfactory, the employee in receipt of the supplies would enter into the computer the sales order number from the packing slip. This number constituted both the receipt and invoice. At that stage authorization was given to Ford's Dearborn, Michigan U.S. headquarters to pay for the transaction.

13 All cheques were paid by Dearborn, made payable to and forwarded only to Brown & Collett. The cheques contained the sales ordernumber typed in by the Ford employee so that one could determine which orders were being paid by Ford. Once the cheques were received by Brown & Collett, they were cashed and deposited in its general account. They were then reconciled and any monies paid in respect of goods supplied by Hay to the Windsor and Talbotville plants were to be forwarded to Hay. Brown & Collett did not receive any fee or commission for their role in reconciling the cheques and forwarding that portion of the payment attributable to Hay. At no time did Hay invoice Brown & Collett for goods supplied by it to Ford.

14 Although Brown & Collett handled all the orders and payment from Ford, Hay dealt directly with Ford and Ford employees at the Windsor and Talbotville plants on a daily basis. Deliveries were made by Hay right to the desk of the Ford employee who had ordered supplies, and Hay hired a sales representative based in Windsor whose sole responsibility was to service Ford on a daily basis. In short, Ford was aware that the two plants were being serviced by Hay and not by Brown & Collett.

15 Mr. Donald Clark, on behalf of Hay, negotiated the Ford account with Mr. Donald Wortman of Brown & Collett. Mr. Clark testified he has no recollection of ever having talked about the establishment of a trust account in his negotiations with Mr. Wortman concerning the monies attributable to Hay in the operation of the Ford account. Mr. Clark also testified that he never stipulated that the Hay portion of the Ford payments received by Brown & Collett were to be held in a separate account by Brown & Collett pending payment to Hay. Further, he confirmed that he never referred to the Ford monies as being trust funds either internally at Hay, or in his conversations with Brown & Collett.

16 Mr. Clark testified that the two companies had dealt with each other for many years. He believed they had a "gentleman's agreement", that there was an understanding that funds were to be forwarded to Hay immediately upon reconciliation by Brown & Collett.

17 Hay and Brown & Collett began supplying Ford in July or early August of 1993. Hay received its first Ford account payment from Brown & Collett in November, 1993. Throughout the operation of the Ford account, Hay complained to Brown & Collett about the delay in reconciling cheques received from Ford and forwarding the monies attributable to Hay. The average time lapse between the receipt of cheques by Brown & Collett and the receipt of forwarded funds by Hay was several months. This delay lengthened over the life of the arrangement between the companies, notwithstanding the parties' understanding that monies were to be forwarded immediately. The last payment received by Hay from Brown & Collett was in May, 1995, although Brown & Collett allegedly continued to receive funds from Ford until December, 1995. Since May, 1995 Hay asserts that Brown & Collett has received some \$343,519.74 from Ford, in respect of product supplied by Hay. Hay has not received any of that money.

18 By its own admission, Brown & Collett deposited Hay's portion of the funds to its general account at the Toronto Dominion Bank and used the money in the daily operation of the company. This process continued after Brown & Collett had filed its Plan under the CCAA. Brown & Collett has paid other Unaffected Obligations since filing the Plan, however, including payments totalling \$284,522.39 to Canadian Treasury Management, the corporation appointed by the court to manage the operation of Brown & Collett; \$106,086.28 to BDO Dunwoody, the company appointed by the court to monitor the business affairs of Brown & Collett; \$872,436.19 to Meighen Demers, counsel for Brown & Collett; and \$1,680,000.00 to the Toronto Dominion Bank in respect of an outstanding loan.

Gold Leaf Office Products Limited

19 At all material times, both Hay and Brown & Collett were members of Gold Leaf Office Products Limited ("Gold Leaf"). Gold Leaf carried on business as a buying group for stationery products and was comprised of various stationery companies across Canada. Gold Leaf acquired a number of customers over the years which had offices across the country, and wished to have their stationery requirements dealt with centrally. These were referred to as Gold Leaf National Accounts.

20 When a particular member of Gold Leaf obtained a contract with a customer having branch offices across the country, one of the methods of accommodating the customer was for a the particular Gold Leaf dealer, or Gold Leaf itself, to be designated the Host Dealer. The Host Dealer would then contract with other Gold Leaf dealers to supply product to the branch offices of the customer. The customer would order its stationery requirements from a designated Gold Leaf dealer closest to the location of the customer's office. That local Gold Leaf dealer would then ship the product to the customer and invoice the Host Dealer, who held the master contract with the customer. The Host Dealer would then invoice the customer for all stationery supplies sold to the customer at all locations. When payment was received

by the Host Dealer, the proportionate amount would be forwarded to the local Gold Leaf supplier. This arrangement was one, amongst others, that was typically used by Gold Leaf members to accommodate National Accounts. From a customer's perspective their contract was with the Host Dealer who would then be regarded as a supplier having national branches.

21 National Accounts were accommodated by the use of specific computer software known as the Gold Leaf Office Supply System ("GLOSS") which assisted the members in accounting, billing and reporting activities. The reports prepared using GLOSS could be tailored to meet the specific requirements of each customer. Members of Gold Leaf were charged a fee for the use of GLOSS.

22 Counsel for Brown & Collett have conceded that there were many different variations of Gold Leaf accounts. Almost every account was unique in that it was structured to accommodate the specific needs of the individual customer. With all of the National Accounts however, the Host Dealer was responsible for paying the local dealer after it had received and reconciled the payment from the National Account customer.

The Relationship Between Hay and Brown & Collett

23 Brown & Collett and Hay had an ongoing business relationship prior to the establishment of the Ford account. Both had been involved in Gold Leaf since the early 1980's, and had worked together on a number of National Accounts. Brown & Collett was a Host Dealer for a number of Gold Leaf accounts for which Hay provided product.

24 In each of these cases, Hay supplied branch locations of a customer with whom Brown & Collett held the master account. Hay would invoice Brown & Collett for the goods supplied. Brown & Collett would subsequently invoice the customer and include in its invoice the value of stationery products supplied by Hay. As was the case with all Gold Leaf National Accounts, there was an understanding between Hay and Brown & Collett regarding the terms of payment for these accounts. Upon receipt of payment, Brown & Collett was to remit any funds due to Hay immediately after Brown & Collett had reconciled the account.

25 In June, 1993 Ford was a potential National Account, and it appeared on a listing of Gold Leaf National Accounts along with Carrier Canada, Otis Canada, Motorola Canada, Ecilab Ltd. and Leon's Furniture, which were also Gold Leaf National Accounts at the time. The supply of stationery products to these latter customers forms the basis of Hay's further unsecured claim against Brown & Collett (which claim is not part of this trial of an issue).

26 It was Mr. Clark's evidence that the Ford account was not a National Account. The main distinction between a National Account and the Ford account, he stated, was the fact that Hay did not invoice Brown & Collett at all with respect to the Ford account. Nor was the Ford account handled through Gold leaf. Ford, he said, was on the National Account list in error. All information required for the Ford account was processed and available through C-PARS. The GLOSS method of billing was not required. On cross-examination, he admitted that the understanding Hay had with Brown & Collett regarding the handling of Ford payments was the same as the understanding Hay had with Brown & Collett regarding the handling of National Account payments. In both cases, on receipt of payment, Brown & Collett was to remit any funds due to Hay immediately after Brown & Collett had reconciled the account. Hay's accounts receivable listing shows Ford as the account debtor. Brown & Collett does not appear as an account of Hay with respect to Ford. Similarly, in respect of National Accounts serviced through Brown & Collett, Hay shows the customer as being the account debtor on its account receivable listing, and not Brown & Collett.

27 There were distinct similarities between the Ford account and other National Accounts. However, I accept Mr. Clark's evidence, which was un rebutted as Brown & Collett called no witnesses, that the Ford account was not a National Account. As stated, it was not dealt with through Gold Leaf, there were no invoices as between Hay and Brown & Collett, and the area serviced did not go beyond provincial boundaries. It was a discrete and idiosyncratic transaction subject to the terms agreed upon between Ford and Brown & Collett and between Brown & Collett and Hay.

Value of Hay's Claim re: Ford

28 According to statements provided by Ford, which Brown & Collett concede they have no evidence to refute, Brown & Collett has been paid \$1,926,881.70 for goods supplied by both Brown & Collett and Hay. Of this sum, Hay has received \$628,313.68 from Brown & Collett directly. Hay remains unpaid for a substantial part of the goods supplied to Ford, notwithstanding that Brown & Collett now acknowledge they have received these funds from Ford.

29 Hay originally claimed the sum of \$329,000.00 in its Statement of Claim, being the value of goods shipped by Hay to Ford as at June 20, 1995. The amount claimed was the value of all goods shipped as of that date. Hay now claims the amount of \$343,519.74 which represents the value of stationery and supplies delivered by Hay to Ford, and for which Ford had made payment to Brown & Collett up to September 13, 1995. The original Proof of Claim delivered by Hay in relation to this matter was reduced to this figure once Hay had updated their reconciliation of the amounts Brown & Collett had received from Ford. This figure is not disputed by Brown & Collett in this proceeding.

Hay's Unsecured Claim

30 Brown & Collett owes Hay \$9,274.63 in respect of several of the Gold Leaf National Accounts referred to above. Hay has acknowledged in its Proof of Claim that its claim in this regard is that of an unsecured creditor.

31 Brown & Collett's obligation to Hay regarding these Gold Leaf accounts was to reconcile the accounts upon receipt of funds, and to immediately remit the appropriate portion to Hay. Counsel for Brown & Collett assert that this obligation was identical to Brown & Collett's obligation in respect of payments received from Ford. There is no distinction it is said, between the nature of the funds received by Brown & Collett for these Gold Leaf accounts and the funds received by Brown & Collett for the Ford account. Brown & Collett submit that if the Gold Leaf accounts are simple unsecured debts, so then are the amounts owing to Hay in respect of the Ford account. In light of my finding that the Ford account is not a National Gold Leaf Account, it is unnecessary to address this point further.

Summary

32 The facts may be summarised as follows. Brown & Collett and Hay entered into an oral agreement to jointly supply Ford; Brown & Collett to supply the Oakville location and Hay to supply Windsor and Talbotville. Neither supplier would invoice for goods shipped. Each would service its designated locations and ship from its own inventory. They agreed between themselves on pricing. They stipulated to Ford that payment would be remitted for goods supplied by both companies to Brown & Collett in cheques payable to Brown & Collett. Brown & Collett undertook to reconcile the accounts as between the two suppliers and remit funds owing to Hay forthwith. Meanwhile the cheque from Ford was deposited in the Brown & Collett general account.

33 It seems to me that the *raison d'être* for the agreement between Brown & Collett and Hay is apparent. Brown & Collett offered to include Hay in the Ford account because, without Hay's inclusion to service Windsor and Talbotville, the Ford account could not be obtained. Hay, on the other hand, was anxious to participate in a large account which it could not have obtained access to other than through Brown & Collett's involvement. There was an obvious mutuality of benefit to both companies. Given that Ford insisted on one supplier of record, and that Brown & Collett was the contact company of the two joint participants in the account, payment was directed to Brown & Collett and Brown & Collett acted as a "conduit" regarding funds attributable to Hay.

34 Brown & Collett's dilatoriness in transmitting Hay's funds was explained by Brown & Collett, in response to Hay's pressing for more prompt payment, as being due to the difficulty in reconciling the Brown & Collett and Hay portions of the Ford remittances. It was not until preparation for this litigation, when Hay received copies of the cheque stubs sent by Ford to Brown & Collett, that Hay learned Brown & Collett's explanation for the delay could not be accurate, in that Ford itself had reconciled the shipments of the companies, and had forwarded that information to Brown & Collett along with the payments.

35 Subsequently, Brown & Collett explained failure to pay Hay as being due to the fact that payment had not been received from Ford. It was not until delivery of the affidavit of Peter Perly, president of Canadian Treasury Management, in December, 1995, that Brown & Collett even conceded that it had received the monies now claimed. Accordingly, the evidence is clear that both of Brown & Collett's explanations for the delay in payments were untrue, and I so find.

36 Although the funds were deposited in the Brown & Collett account upon receipt, it was not a term of the agreement that Brown & Collett would be entitled to use the funds attributable to Hay for its own purposes, pending reconciliation. Brown & Collett had no right, title or interest in the monies.

37 In my opinion, for the purposes of collection, reconciliation and remission of funds between Brown & Collett and Hay, Brown & Collett acted as Hay's agent. The terms of the agreement were clear and not disputed. Brown & Collett was to reconcile and remit to Hay forthwith after receipt from Ford.

Issues

38 The parties to this proceeding are *ad item* that trust monies owed by Brown & Collett are Unaffected Obligations for the purposes of the Plan of Arrangement and are not, therefore, compromised by the Plan. Hence the issues in this proceeding are these:

1. Is there an implied trust with respect to the monies owed by Brown & Collett to Hay?
2. If not, has Hay made out a claim for unjust enrichment giving rise to the imposition of a constructive trust?

Law and Analysis

Implied Trust

39 Counsel for Hay asserts that the court ought to conclude that an implied trust exists with respect to the Ford monies owing to Hay. The elements of an implied trust are the same as those of an express trust.

40 According to D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 107, in order for an express trust to come into existence, it must have three essential characteristics: 1) the intention of the alleged settlor to create a trust must be certain; 2) the subject matter of the trust or trust property must be certain; and 3) the objects or beneficiaries of the trust must be certain. The principle of the "three certainties" is fundamental to the creation of a trust. Accordingly, Hay must demonstrate that there was a certain intention to create a trust in respect of the funds owing to Hay in the context of the agreement between Brown & Collett and Hay. Next, Hay must prove with certainty that it was the intended beneficiary of the trust.

41 Counsel for Hay submits that, in the absence of clear and certain language demonstrating the intention to form a trust, the court may interpret the language and behaviour of the alleged settlor as evidencing such certain intention, and may imply a trust; and that the evidence in the instant matter supports such a conclusion. I disagree.

42 The evidence is categorical that the parties did not intend to create an express trust. Similarly, there is no evidence to support the implication of a trust. It was the evidence of Mr. Clark that the creation of trust was never mentioned by either party, nor were the subject monies ever referred to as trust funds in discussions between Brown & Collett and Hay, or internally at Hay. The funds attributable to Hay were not intended to be, nor were they segregated. This submission is without merit.

Unjust Enrichment and Constructive Trust

43 The centrepiece of Hay's submission is that the circumstances of the instant case make out an equitable claim for unjust enrichment, the appropriate remedy for which would be the imposition of a constructive trust. Counsel for Hay

concedes that were it to be successful on the unjust enrichment argument, the only meaningful remedy is the imposition of a constructive trust. As stated, a trust claim is the only available avenue given the terms of the Plan of Compromise and Arrangement under the CCAA.

44 Unjust enrichment is an equitable doctrine which permits the court to order restitution in situations where one party has benefitted unfairly at the expense of another. In a series of cases commencing in 1954 with the decision of the Supreme Court of Canada in *Degelman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725, Canadian courts have adopted the equitable doctrine of unjust enrichment as the legal framework for the remedy of the injustice which occurs where one party makes a substantial contribution to the property of another party without compensation.

45 The notion of unjust enrichment was considered by Dickson J. (as he then was) in *Becker v. Pettikus*, [1980] 2 S.C.R. 834 at 847:

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* put the matter in these words" ... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money*". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. ... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. (emphasis in the original)

46 More recently, McLachlin J. conducted a detailed analysis of the principles of unjust enrichment in *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 (S.C.C.). The elements of the doctrine are set out at p. 643:

The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, the second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of *quantum meruit* or *quantum valebat*. Another equitable remedy, available traditionally where one person was possessed of equitable title to property in which another had an interest, was the constructive trust. ... the remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that found the action and the property in which the trust is claimed.

47 The doctrine of unjust enrichment has most frequently been invoked in the context of family law property division cases. However in *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Gen. Div.) (Notice of Appeal to the Court of Appeal filed), unjust enrichment was considered in the context of a commercial insolvency. In that case, the employees of an insolvent insurance company sought to impress the assets of the company with a constructive trust sufficient to fund the employee benefit plan. Although Blair J. ultimately held that there had not been any unjust enrichment in the circumstances of that case, he adopted the analysis of McLachlin J. in *Peter v. Beblow*, *supra*. In so doing, he stated at p. 769:

In carrying out the enrichment-detriment analysis the courts have generally taken an economic approach, recognizing these elements as the "morally neutral" components of the mix, and looking to the third element, that of the absence of juristic reason for the enrichment, as the source of the "unjustness".

48 Applying a straight economic analysis to the first point, I find that Brown & Collett received an enrichment. Brown & Collett acknowledges that it received the monies paid by Ford, and did not forward the amounts attributable to Hay.

49 With respect to the second stage of the test, Mr. Justice Cory, in *Peter v. Beblow*, *supra*, stated at p. 631:

Indeed, I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. there is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic.

50 Applying this logic to the present case, Hay forwarded office supplies to Ford, from its own inventory. It was never paid for these supplies, although Brown & Collett received and retained the payment by Ford. Accordingly, I find that there was an enrichment in the hands of Brown & Collet, with a corresponding deprivation to Hay.

51 This leads inexorably to the next step, which is to ascertain whether there is any juristic reason which would justify the enrichment. Determination of the presence or absence of a juristic reason for an enrichment is the stage of analysis where the court must consider whether the enrichment is "unjust". The nature of this third element of the test was considered by McLachlin J. in *Peter v. Beblow*, *supra* at p. 645:

This court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment... It is in connection with the third element - absence of juristic reason for the enrichment - that such considerations may more properly find their place. *It is at this third stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".... In every case, the fundamental concern is the legitimate expectation of the parties.* (emphasis added)

52 Similarly, in *Royal Bank v. Pioneer Trust Co. (Liquidator of)* (1988), 68 C.B.R. (N.S.) 124 (Sask. Q.B.), Gerein J. described the third stage of the unjust enrichment test at p. 131:

As I understand the law, if there is a juristic reason for maintaining an enrichment then such enrichment should not be characterised as unjust.

53 An elaboration of what will constitute a juristic reason for the enrichment is found in the reasons of Blair J. in *Confederation Life*, *supra*, where four general propositions to assist in making the determination are set out at pp. 772-3:

(i) An obligation to make the contribution which leads to the enrichment - whether that obligation arises in a debtor-creditor or other contractual context, or whether by reason of the principles of common law or of equity, or whether it arises by way of statutory provision - may constitute a juristic reason.

(ii) The reasonable expectations of the parties must be considered, in particular whether the party providing the contribution leading to the enrichment did so with a reasonable expectation of receiving an interest in property, and the other party knew or ought to have known of this reasonable expectation. The test in this case is an objective one.

(iii) It must be evident that the retention of the benefit would be unjust in the circumstances of the case.

(iv) Finally, the juristic reason for the enrichment need not always be tied irrevocably to the person who asserts the unjust enrichment but may arise out of a relationship between the person enriched and some other person. In short, a "juristic reason" simply means some underlying justification, grounded in a legal or equitable base, for the circumstances that have arisen, notwithstanding that the benefit/detriment equilibrium has since become unbalanced.

54 In the present case, counsel for Brown & Collet assert that the more common application of the doctrine of unjust enrichment is in the family law context and that the doctrine should be applied sparingly in a commercial context, if at all. I do not accept this proposition. In my opinion, the principles of unjust enrichment are equally applicable to a commercial context, and should be applied in the same fashion as in any other context. I am comforted in this approach by the words of McLachlin J. in *Peter v. Beblow*, *supra*, at p. 649-650:

I doubt the wisdom of dividing unjust enrichment cases into two categories commercial and family - for the purpose of determining whether a constructive trust lies. ... In short, the concern for clarity and doctrinal integrity with which this court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

55 Indeed, application of the principles of unjust enrichment in a commercial context have been recognised as promoting both commercial conscience and bargaining in good faith. In *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1989), 61 D.L.R. (4th) 14, the Supreme Court of Canada applied a remedial constructive trust in a commercial situation. In *LAC*, a company revealed confidential information about mineral deposits in a piece of property, during negotiations with a view to commencing a joint venture. The defendant then purchased the property independently, and developed a profitable mine on the site. The plaintiff was successful in an action for breach of confidence leading to a finding of unjust enrichment and the application of a constructive trust. In considering the applicability of an equitable remedy in a commercial context, Mr. Justice La Forest observed at p. 47:

The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties.

56 Finally, in *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161, the British Columbia Court of Appeal, in concluding that the elements of the unjust enrichment test were equally applicable in a commercial context, held at p. 171:

In the context of a domestic relationship those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing. ... in a business relationship, honest dealing not equal dealing should set the standard of fairness. ... To my mind the key to the correct interpretation and application of the decision of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of unjust enrichment.

And later at p. 172:

In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in *Pettkus v. Becker* when they are applied to a commercial context.

57 I agree with the approach taken in the authorities above. Principles of unjust enrichment may properly be considered in a commercial context, with the aim of promoting sound commercial conscience and honest dealing between parties. In order to determine whether or not there exists a valid juristic reason, it is incumbent upon the court to ascertain whether there is any legal obligation, contractual or otherwise, which will justify an enrichment, keeping in mind at all times the legitimate expectations of the parties. In a commercial setting, the court must remain mindful of goal of the promoting honest dealing and sound commercial conscience.

58 In the present case, it is asserted on behalf of Brown & Collett that the relationship between the parties was a simple contractual debtor-creditor relationship. It is stated that the enrichment of Brown & Collett was incurred within the framework of that relationship, and as such, constitutes a juristic reason for the enrichment.

59 In support of the argument that the relationship between the parties is simply one of debtor-creditor, Brown & Collett relies on the decision of Morden J.A. in *Ontario Hydro-Electric Power Commission v. Brown*, [1960] O.R. 91 (C.A.). In that case, an agent appointed to collect accounts had placed the collected monies in a safe which was later burgled. The court held that the agent was not in a position of trustee of the actual money which comes into his hands, but is simply a debtor of his principal, and consequently liable to repay the money on that basis. Mr. Justice Morden stated at p. 94:

An agent has been held to be a trustee of moneys he has received from or for his principal where he is specifically instructed to keep such moneys separate.... On the other hand and in contrast, where the sole duty of the agent with respect to the money is to pay it to his principal, the relationship between the parties is that of debtor and creditor.

60 In the case at bar, Brown & Collett was the agent of Hay for purposes of collection, reconciliation and remittance of monies owing by Ford to Hay. It was not required to maintain a separate account. I accept the contention that the parties are merely debtor and creditor, and not trustee and beneficiary in the sense of an express or implied trust. However, in my opinion, a debtor creditor relationship and a finding of unjust enrichment are not, of necessity, mutually exclusive.

61 Counsel for Brown & Collett submits that by reason of the debtor creditor relationship, this court should not make a finding of unjust enrichment. In support of this contention, I am directed to the reasons of Blair J. in *Confederation Life, supra*, at p. 771:

The case-law indicates that a contractual debtor-creditor relationship will be sufficient to establish the existence of a juristic reason for an enrichment *that can be accounted for on the basis of that contractual relationship*. (emphasis added)

62 Here it cannot be said, however, that the enrichment of Brown & Collett can be accounted for on the basis of the contractual relationship. On the contrary, the enrichment is in clear breach of the agreement.

63 Similarly, in *Royal Bank v. Pioneer Trust Co. (Liquidator of)*, *supra*, the bank provided cash in the amount of \$30,000 to a trust company, in exchange for a cheque in the same amount. Winding up proceedings were subsequently commenced, and the bank brought an action claiming the liquidator held the monies in trust as constructive trustee. In holding that the existence of a debtor-creditor relationship was sufficient justification for the enrichment, Gerein J. held at p. 131:

In short, a debtor and creditor relationship was created. As I see it, the transaction in its essence was like unto other commercial transactions. Like many of those, this transaction went bad; but that fact does not justify setting aside the transaction. To do so would have the result of seriously infringing upon the efficacy of contracts as a whole. The avoidance of this potential result is good juristic reason to permit the enrichment.

And later at p. 133:

I hold the view that the plaintiff and defendant are parties to a creditor-debtor relationship. It is not unjust in law to hold the plaintiff to that status with the attendant consequences. To do otherwise would have no basis in law and would cause wrongful harm to other creditors.

64 In *Royal Bank* the court was asked to set aside the transaction. That is not so in the instant case.

65 In response to the submissions of Brown & Collett, Hay asserts that the mere existence of a contractual debtor-creditor relationship is not necessarily a bar to a finding of unjust enrichment, and points to several recent cases which have reached such a conclusion within the context of a debtor-creditor relationship. In *Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* (1991), 3 O.R. (3d) 129 (Gen. Div.), the claimants were real estate salespersons who worked as independent contractors for a bankrupt brokerage firm. The salespersons brought a claim for unjust enrichment in respect of commissions they had earned but not been paid. In allowing the claim, Killeen J. held that it was in fact the very contract with the brokerage firm which elevated the plaintiffs' status from that of a mere employee, relied on the terms of the contract to demonstrate the absence of juristic reason for the enrichment. He stated at p. 142:

Finally, there is no legitimate juristic reason for the enrichment: the very contract under which the monies in question have been taken states that N.R.S. is only to have 35 per cent and not 100 per cent.

66 Similarly, in *Atlas, supra*, the British Columbia Court of Appeal the respondents were subcontractors on a construction project. The project was financed by the appellant trust company under a first mortgage, which permitted the company to make advances at its discretion. The owner incurred financial difficulties, however on the strength of assurances from the appellant's mortgage manager that monies would be retained in a holdback to ensure their payment, the subcontractors finished the project. The trust company foreclosed, taking title to the project, but the subcontractors were not paid. In allowing the claim for unjust enrichment, Lambert J.A. held that the only possible juristic reason which could exist to justify the enrichment in the hands of the trust company was the mortgage commitment letter, which contained a clause conferring discretion on the trust company to refuse further advances. However, the court held that by providing assurances that the subcontractors would be paid, the trust company had waived the right to rely on that discretion, and was estopped from doing so.

67 The facts of *Atlas* are on all fours with the matter presently before me. The logic is compelling, and I am persuaded by it. While it may be that in certain circumstances the fact that an enrichment and a corresponding deprivation have taken place in a contractual debtor creditor context will operate to provide a juristic reason for the enrichment, it does not automatically follow that such a relationship precludes the finding of an unjust enrichment. As McLachlin J. stated in *Peter v. Beblow, supra*, the primary consideration in assessing whether there is any juristic reason is the legitimate expectation of the parties. The debts incurred in the above-noted cases were all incurred in the normal course of business and within the parameters of the contracts negotiated between the parties. Here, quite the opposite occurred.

68 The terms of the agreement were as simple as they were clear. Brown & Collett was expected to receive, reconcile and remit that funds attributable to Hay. Although it was to deposit the funds in the general account, it was not to apply the funds to its own use. The agreement was that Brown & Collett was to reconcile and remit forthwith! Instead, under the guise of difficulties encountered in reconciliation, it applied the funds during this period of delay to its own use. This did not come within the stated purview of the contract. Rather, it was a blatant breach of the agreement, which cannot, with any force, be said to justify the enrichment.

69 Hay went along with delays in remittance to it. It was mislead as to the reason for these delays, and as a consequence suffered prejudice. I cannot accede to a submission that there was a juristic reason for this enrichment and perforce it is, in my view, unjust.

70 Brown & Collett asserts that Hay did adequately protect its own interests, that Hay negotiated payments terms with Brown & Collett, and had the opportunity to implement additional safeguards of the monies owing to it. Hay did not do so, and in the submission of Brown & Collett, simply made a bad bargain. Counsel for Brown & Collett argues that the court should not interfere with contractual relations to make a better bargain for the parties than they negotiated for themselves, and the fact that the parties freely negotiated and entered into the agreement is a juristic reason which will justify the enrichment. In support of this argument, Brown & Collett relies on *Pioneer Trust, supra*, and on the judgement of Harman L.J. in *Campbell Discount Co. Ltd. v. Bridge*, [1961] 1 Q.B. 445 (C.A.) at 459:

Similarly I rather deprecate the attempt to urge the court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be disadvantageous to one of the parties. It is pointed out in one of the cases cited to us yesterday... that:

"the Chancery "mends no man's bargain," and I do not therefore see my way to call in aid equity to mend what may be an unfortunate situation..."

71 This proposition cannot constitute a juristic reason in the circumstances of this case. It may be that Hay should have protected itself by requiring that their accounts be segregated, and as Brown & Collett asserts, if the parties made a bad bargain, the court cannot step in and create a better one. However, in my opinion, the court is not required to do that in order to reach a finding of unjust enrichment. Hay does not request that the court impose additional terms

in the agreement with Brown & Collett, but merely seeks to hold Brown & Collett to the very terms which Brown & Collett agreed to.

72 If Brown & Collett had incurred the enrichment within the framework of the contract with Hay, the existence of the contract would indeed constitute a valid juristic reason for the enrichment. Brown & Collett did not act within the agreement however, and it was through the breaches referred to above that the enrichment was incurred. Given that Brown & Collett violated the agreement, it is not open to it to now claim that the existence of the agreement constitutes a valid juristic reason for the enrichment. To accept such a defence would be to allow Brown & Collett to use the very contract which it breached as a justification for the enrichment flowing from that breach, and to profit from its wrongdoing.

73 In the alternative, Brown & Collett asserts that because the company has filed a Plan of Arrangement and Compromise, its creditors are all subject to the same statutory framework, and this framework should operate as a juristic reason for the enrichment. In support of this contention, Brown & Collett argues that the Plan of Arrangement under the CCAA is analogous to the ordering of priorities in the *Bankruptcy Act*, and rely on the decision of Wilson J., in *Abraham v. Canadian Admiral Corp. (Receiver of)* (1993), 20 C.B.R. (3d) 257 at 316:

However, in this case, the subject matter giving rise to the trust claim is within the queue of defined preferred creditors. I find that, when the subject matter of the trust is defined within the s. 107 queue, a trust claim cannot elevate the plaintiff's claim to that of a secured creditor without circumventing the intended legislative purpose of the *Bankruptcy Act*. The juristic reason why the plaintiffs' claim cannot succeed is that the legislature has enunciated a national code for the distribution of the bankrupt's estate. It would not, in my view, be appropriate for a court to re-order clear statutory priorities specified in the queue of preferred creditors in the *Bankruptcy Act* by a finding of constructive trust.

74 This case is distinguishable in its facts from the instant matter. In *Abraham*, Wilson J. was considering an constructive trust claim brought by a group of creditors of a bankrupt company. The creditors brought a number of statutory trust claims, and argued constructive trust in the alternative. Wilson J. permitted the action to proceed based on the statutory claims, but then gave what would have been her disposition on the alternative arguments. With respect to the constructive trust claim, Wilson J. noted that they fell within a list of preferred creditors as defined within the *Bankruptcy Act*, and held that to allow the claims would amount to elevating them above those of the secured creditors, and effectively rewriting the priorities under the Act.

75 In contrast, in the present case, the category of trust claims is one of a number of Unaffected Obligations defined as such in the Plan of Arrangement. To allow a trust claim to proceed in this context, would not amount to a re-ordering of a statutory order of priorities, but would be consistent with the priorities as defined in the Plan.

76 In any event, the argument is circular, since if Hay is successful on its trust claim, the status of Unaffected Obligation would remove it from the ambit of the CCAA and the Plan of Arrangement. Accordingly, this argument must fail.

77 In light of the above reasons, it is my conclusion that Brown & Collett has been unjustly enriched at the expense of Hay. The existence of the enrichment and deprivation have been conceded by counsel, and applying the guidelines as set out in *Confederation Life* and the other cases cited, I am unable to find any juristic reason which would operate to justify the enrichment.

Remedy

78 In light of my conclusion that Brown & Collett diverted the funds attributable to Hay to its own cash flow under the pretence of reconciling the two accounts, I now turn to the question of remedy.

79 Although a wide range of remedies are available to a court to redress an unjust enrichment, Hay seeks in this proceeding a singular remedy, namely a constructive trust. The reason for this is a practical one dictated by the fact that,

as all counsel agree, a trust is the only means by which the amounts owed by Brown & Collett to Hay can be said to constitute an Unaffected Obligation within the meaning of the court sanctioned compromise of debts under the CCAA. In other words it is the only way that Hay can recover the full amount owing to it. The question, therefore, is whether the court is prepared to impose a constructive trust in the instant circumstances.

80 Notwithstanding that counsel agreed at the beginning of this proceeding, with the court's concurrence, to separate the issue of unjust enrichment and remedy into two stages for hearing purposes, nonetheless both parties dealt with the issue of constructive trust in this initial phase. Counsel for Hay urged the court to impress with a constructive trust all of the assets of Brown & Collett. It is trite law that a constructive trust must attach to specific property and that there be a direct link between the contribution giving rise to the unjust enrichment and the property in which the trust is claimed.

81 Dickson J. (as he then was), considered the requirement in a family law context in *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289 (S.C.C.) at 306:

Where ... a spouse does contribute to family life, the Court has the difficult task of deciding whether there is any causal connection between the contribution and the disputed asset. It has to assess whether the contribution was such as enabled the spouse with title to acquire the asset in dispute. That will be a question of fact to be found in the circumstances of the particular case. If the answer is affirmative, then the spouse with title becomes accountable as a constructive trustee.

82 Madam Justice McLachlin expanded on the concept in *Peter v. Beblow*, *supra*, at p. 649:

The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker*, *supra*, and *Sorochan v. Sorochan*, *supra*, as I understand those cases.

83 In response to a request that a trust be imposed on a broad basis such as is sought here, Anderson J. stated in *Re Allan Realty of Guelph* (1979), 29 C.B.R. 229 (Ont. S.C.) at 245:

Nor would it be easy to find the certainty of subject matter which is fundamental. What was the subject matter? Was it the deposit, or the commission when paid by the vendor, or a combination of these, or was it the chose in action? The argument on behalf of the brokers opened up all these questions and, in my respectful view, concluded none. I would be very hesitant to declare a trust with respect to subject matter so amorphous.

84 I am not prepared to accede to Hay's request that a constructive trust be imposed on all of the assets of Brown & Collett. The subject matter is too "amorphous", to adopt the words of Anderson J., above. However, I will not finally dispose of Hay's claim on this ground at this stage of the proceeding. As stated, Counsel have agreed to bifurcate this hearing so that remedy, including tracing, be dealt with as a second phase, should Hay succeed on the issue of unjust enrichment. The question of the appropriateness of a constructive trust is clearly a matter of remedy. As such, even though the parties have addressed this area at the initial phase, all of the material facts necessary for an ultimate remedial disposition are not before the court at this time. Until that is the case, it seems to me to be premature to decide this point.

85 There is, however, a further and more compelling reason for leaving this issue to the second phase of the proceeding, over and above the fact that it is clearly a matter of remedy and properly at the second stage. During the hearing, counsel for Brown & Collett advised the court that because Hay has impugned the payment of numerous large unaffected obligations by Brown & Collett, including the accounts rendered by the law firm of which counsel is a member, he is of the view that he has a conflict of interest in respect of those issues to be dealt with at the second phase of the proceeding dealing with remedy. For this reason he would not be appearing to make submission with respect to remedy, and Brown & Collett would be represented by new counsel. Clearly the appropriateness of a constructive trust is a question of

remedy. The conflict of interest about which counsel is concerned, in my view, enures to all remedial questions whether dealt with at phase I or phase II of the hearing.

86 This issue will therefore be dealt with at the second stage of this proceeding to permit Brown & Collett an opportunity to appoint and instruct fresh counsel. This will also ensure that all of the material facts necessary for a final disposition on remedy are before the court.

87 Accordingly, I will instruct the registrar to schedule this matter for continuation of hearing, dates to be co-ordinated to accommodate counsel. The continuation of hearing shall deal with matters of remedy, including tracing, in accordance with the agreement between counsel.

Order accordingly.

Tab 10

1990 CarswellOnt 3055
Ontario Supreme Court [High Court of Justice]

Canadian Imperial Bank of Commerce v. Jack

1990 CarswellOnt 3055, [1990] C.L.D. 538, [1990] O.J. No. 670, 20 A.C.W.S. (3d) 416

**Canadian Imperial Bank of Commerce, Plaintiff and
Garnet Glen Jack, and Robert G. Jack, Defendants**

Killeen L.J.S.C.

Judgment: March 23, 1990

Docket: London 39399/89

Counsel: None given

Subject: Corporate and Commercial; Insolvency

Killeen L.J.S.C.:

1 The parties to this proceeding have already been before me seeking other relief. On an application brought by the Jacks last fall, I ordered that their request for an accounting under s.63(1) of the *Personal Property Security Act*, R.S.O. 1980, c.375 be stayed and that any claims that they wished to assert against the Canadian Imperial Bank of Commerce be asserted, by counterclaim, in the Bank's action on its security instruments. The Jacks, I am advised, have now done so.

2 The Bank now brings a motion in its action for the appointment of a receiver-manager and, in response, the Jacks seek an injunction which would effectively restrain the Bank from that course.

The Background Facts

3 The defendants, Garnet Glen Jack and Robert G. Jack, have had a long-standing business relationship with the plaintiff Bank, going back at least 25 years. The Jacks are farmers in Chatham, Ontario, and own about 825 acres of farmland.

4 Until 1986, when this lawsuit started to bubble, the Jacks financed their large farming business through the Bank using a variety of banking methods such as an overdraft or current account, an operating line of credit and special loans. It would seem that prior to the early 1980's the Bank's practice was to secure amounts advanced to the current account by promissory notes and so-called s.178 security under the *Bank Act*, R.S.C. 1985, c.B-1.

5 In the early 1980's, it is clear that the Bank became concerned about its loans to the Jacks and sought to improve its securities. For example, in 1986, the Jacks agreed to execute a land mortgage in the sum of \$700,000. on 325 of the total of 825 acres of farmlands owned by the Jacks. This mortgage did *not* represent new debt but was, rather, largely a consolidation or conversion of existing debt.

6 There is uncontradicted evidence that, in 1987, representatives of the Bank sought further and broader land security from the Jacks and this effort led the Jacks to demand a full accounting of what was truly owing from them to the Bank. By early 1988, the battlelines were drawn and the Bank, on April 27, 1988, made formal demand on the Jacks for payment of the sum of about 1.3 million dollars. Then, in late May, 1988, the Bank served a "Notice of Disposition" pursuant to the *Personal Property Security Act*, along with a Notice of Sale under the land mortgage.

7 In response to these steps by the Bank, the Jacks deposited \$150,000.00 into the current account on May 31, and, later, on June 8, deposited a further \$196,964.00. These funds, totalling \$346,964.00, came from the sale of farm crops planted in the spring of 1987 on the Jacks' farm. No further funds have been forthcoming from the Jacks since these mid-1988 payments and the Bank's position is that, as of February 23, 1990, the indebtedness stands at \$1,298,619.97. In the interim, the Jacks sold their 1988 crops in December, 1989, without accounting for them and the 1989 crops now rest in storage.

8 The nub of the Bank's argument is that the Jacks are guilty of breach of trust or conversion in respect of the sale proceeds for the 1988 crop and that their security interests are seriously jeopardized by the Jacks' conduct. The Bank relies heavily on two instruments in support of its sought-for order: first, a "General Assignment of Accounts" instrument, dated March 21, 1984, which, in material part, says:

...5. All moneys collected or received by the undersigned in respect of the assigned premises shall be received as trustee for the Bank and shall be forthwith paid over to the Bank.

and second, a s.178 instrument, described as an "Overdraft Lending Agreement", dated October 29, 1987, which contains, in part, the following language:

...For good and valuable consideration, the undersigned hereby assigns to Canadian Imperial Bank of Commerce...all property of the kinds hereinafter described of which the undersigned is now or may hereafter become the owner, to wit:

All the crops growing or produced upon the farm hereinafter mentioned...

All the horses and other equines, cattle... and the natural increase thereof....

9 On the other hand, the Jacks, in defence of the Bank's motion and in support of their own cross-motion, lay out a complex set of evidentially-supported propositions and positions which may be summarized in the following way.

10 First, the Jacks point to the mid-1988 payments totalling \$346,964.00 which would, on the then face of things, have reduced the Bank's claim to a *maximum* of about \$960,000.00. Second, they point to the serious issues they have raised evidentially about the correct balance of the Bank's overall loan claim under its prior advances. The Jacks' materials challenge (1) \$180,000.00 of alleged prior advances as being totally unsupported by promissory notes or otherwise; (2) another \$266,000.00 where promissory notes show only one signature; (3) another \$70,000.00 where the notes contain no specified interest rate. Also, and probably more importantly, the Jacks claim that they have been grossly overcharged on interest through the period from about 1976 down to the end of 1982 or so. In this period, they claim that the Bank illegally charged interest at floating rates rather than at fixed rates as allegedly provided for in the relevant promissory notes. There is affidavit evidence before me tending to show that the overcharge arising from the interest issue, as of June, 1988, could run from a low of about \$300,000.00 to a high of \$990,000.00. This range-estimate, when coupled with the admitted payments at that time, totalling \$346,964.00, means that there is even the possibility at trial of a judge finding that no money was owing to the Bank by the end of June, 1988.

11 The Jacks make one further point about their position: during earlier interim steps in this lawsuit the Jacks gave a special undertaking, as a condition of an adjournment, that they would not dispose of any of their assets other than in the ordinary course of farming nor further encumber any of their assets. I am advised that that undertaking was fully complied with to its end date, Oct.5-6, 1989, but counsel for the Jacks has indicated that his clients would agree to its extension to the trial date subject, of course, to the outcome of this motion and cross-motion. While the Jacks' lands covered by the Bank's mortgage are only worth about 1.2 million dollars against the alleged indebtedness of 1.3 millions, as of February 23, 1990, the parties agreed before me that the total farmlands, comprising 825 acres, were worth about 2.6 millions and that there was ample equity in the total farmlands to cover the Bank claim, if the Bank were successful at trial.

The Law

12 The plaintiff Bank's motion is grounded in s.144(1) of the *Courts of Justice Act*, 1984 S.O. 1984, c.11, reading as follows:

114.-(1) In the Supreme Court, the District Court or the Unified Family Court, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

It is but stating the obvious to say that the appointment of an interim receiver-manager is extraordinary relief which, as it were, prejudices the conduct of a litigant and, accordingly, should only be granted cautiously and sparingly where there is a showing of serious potential prejudice or jeopardy to the creditor's right to recover on its claim and security interests: see *Fisher Investments Ltd. v Nusbaum* (1988), 31 C.P.C. (2d) 158 (Ont.H.C.).

13 Here, my outline of but some of the major factual and legal issues between the parties shows that the defendant Jacks have raised strong triable issues as to the entitlement of the Bank to *any* of the moneys claimed. It is true that the Bank has put before me apparent answers to each of the defendants' positions but, nevertheless, this case bristles with serious issues which call for a trial.

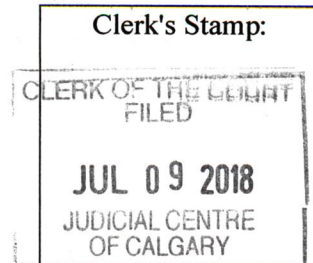
14 Because of the strong and broad frontal attack on all aspects of the Bank's claim, as demonstrated in the materials before me, and the fact that the Bank's land mortgage is but \$100,000.00 short in value of the Bank's gross claim, I remain thoroughly unconvinced that the Bank should obtain its order. I am reinforced in that view by reason of the defendant's compliance up to this date with their undertaking not to dispose of or encumber their complete farm holdings and their offer to extend that undertaking to trial.

15 As I have implied in what I have said already, the defendants have shown that there are strongly serious issues to be tried between the parties and, to me, the balance of convenience strongly points to the grant of an interlocutory injunction, as a corollary of my rejection of the Bank's motion, to restrain the Bank from attempting to realize upon the defendants' pledged assets pending trial: see *American Cyanamid Co. v Ethicon Ltd.*, [1975] A.C. 396 (H. of L.) and *Yule Inc. v Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505 (Ont.Div.Ct). This injunctive order is conditioned upon the extension of the undertaking of the defendants, as given by their counsel, to the completion of the trial.

16 In accordance with discussions with counsel at the end of the hearing, I order that the trial of this action be expedited and that the case be transferred to Chatham for trial at the September sittings. Because of the extensive cross-examinations already conducted in this case, counsel have indicated that the discoveries, as required, could be completed by the end of June and that affidavits of documents could be exchanged at an early date. I order, accordingly, that (1) affidavits of documents be delivered by not later than April 30 next; (2) the discoveries be completed by June 30 next; (3) the plaintiff Bank will, immediately after the completion of the discoveries, serve and file a trial record with notices of readiness dispensed with; (4) after delivery of the trial record, the case will immediately go on the trial list in Chatham for the September sittings.

17 I may be spoken to on the question of costs in the next two weeks. If counsel wish, the costs' question can be dealt with by teleconference at a time to be arranged with the trial coordinator.

COURT FILE NUMBER 1801-09188
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF THIRD EYE CAPITAL CORPORATION
DEFENDANTS OPSMOBIL INC., RANCH ENERGY CORPORATION, 1734163
ALBERTA INC., 1859821 ALBERTA INC., AIR DELLAIRE LTD.,
OPSMOBIL GROUP INC., OPSMOBIL CONSTRUCTION INC.,
OPSMOBIL ENERGY SERVICES INC. and K.L. CAPITAL CORP.
DOCUMENT BRIEF OF AIRBORNE ENERGY SOLUTIONS INC.
VOLUME 2 OF 2



ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

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**Application before the Honourable Madam Justice Romaine,
on the Commercial List, in Chambers, on
Tuesday, July 10, 2018, commencing at 10:00 a.m.**

Tab 11

2014 SKCA 6
Saskatchewan Court of Appeal

101090442 Saskatchewan Ltd. v. Harle

2014 CarswellSask 10, 2014 SKCA 6, [2014] 4 W.W.R. 783, [2014] S.J. No. 13,
236 A.C.W.S. (3d) 1048, 40 R.P.R. (5th) 43, 433 Sask. R. 62, 602 W.A.C. 62

**Douglas John Harle and Colleen Karen Harle, (Defendants)
Appellants and 101090442 Saskatchewan Ltd., Respondent**

Lane, Jackson, Klebuc J.J.A.

Heard: February 20, 2013
Judgment: January 23, 2014
Docket: CACV2258

Proceedings: reversing in part *101090442 Saskatchewan Ltd. v. Harle* (2012), 2012 SKQB 112, 2012 CarswellSask 184, 392 Sask. R. 178 (Sask. Q.B.)

Counsel: Jeffrey Grubb, Q.C., Graham Purse, for Appellants
Deron Kuski, Joshua Morrison, for Respondent

Subject: Contracts; Property

Related Abridgment Classifications

Real property

III Sale of land

III.1 Agreement of purchase and sale

III.1.a Formation of contract

III.1.a.iii Requirements for validity

III.1.a.iii.C Certainty

III.1.a.iii.C.3 Miscellaneous

Remedies

III Specific performance

III.3 Availability in particular contracts

III.3.j Sale of land

Headnote

Real property --- Sale of land — Agreement of purchase and sale — Formation of contract — Requirements for validity — Certainty — Miscellaneous

Parties entered into sale of land subject to leaseback being in place before closing, subject to being relinquished on any lands required for development — After amount paid in trust to vendor's lawyer, vendor returned purchase price and refused to transfer title on ground that leaseback was not in place and development not properly defined — Purchaser successfully brought action for specific performance of transfer of land — Vendor appealed — Appeal allowed in part — Matter was remitted to trial judge for damages to be assessed — Trial judge did not err in concluding that agreement did not fail for lack of certainty of terms — It was possible to enforce both agreement for sale and lease without any further documents — Trial judge did not err in concluding that parties intended to be bound by agreement before lease document was executed — However, trial judge erred in ordering specific performance — Trial judge did not give effect to nature of property and started with wrong question, whether property was unique, rather than whether damages were adequate remedy — Trial judge gave no effect to nature of transaction, uncertainty of plaintiff's plans for land and plaintiff's decision not to adduce any evidence as to how damages should be assessed other than on basis of comparable sales and

market activity — Damages could not be inadequate when plaintiff removed from table consideration of methods of calculating damages other than increase in value of land — Trial judge's decision regarding specific performance was set aside, but appellate court was not in position to assess damages.

Remedies --- Specific performance — Availability in particular contracts — Sale of land

Parties entered into sale of land subject to leaseback being in place before closing, subject to being relinquished on any lands required for development — After amount paid in trust to vendor's lawyer, vendor returned purchase price and refused to transfer title on ground that leaseback was not in place and development not properly defined — Purchaser successfully brought action for specific performance of transfer of land — Vendor appealed — Appeal allowed in part — Matter was remitted to trial judge for damages to be assessed — Trial judge did not err in concluding that agreement did not fail for lack of certainty of terms — It was possible to enforce both agreement for sale and lease without any further documents — Trial judge did not err in concluding that parties intended to be bound by agreement before lease document was executed — However, trial judge erred in ordering specific performance — Trial judge did not give effect to nature of property and started with wrong question, whether property was unique, rather than whether damages were adequate remedy — Trial judge gave no effect to nature of transaction, uncertainty of plaintiff's plans for land and plaintiff's decision not to adduce any evidence as to how damages should be assessed other than on basis of comparable sales and market activity — Damages could not be inadequate when plaintiff removed from table consideration of methods of calculating damages other than increase in value of land — Trial judge's decision regarding specific performance was set aside, but appellate court was not in position to assess damages.

The parties entered into a sale of land subject to leaseback being in place before closing, subject to being relinquished on any lands required for development. After the amount was paid in trust to the vendor's lawyer, the vendor returned the purchase price and refused to transfer title on ground that the leaseback was not in place and development not properly defined.

The purchaser successfully brought action for specific performance of transfer of land.

The vendor appealed.

Held: The appeal was allowed in part.

Per Jackson J.A. (Lane J.A. concurring): The matter was remitted to the trial judge for damages to be assessed. The trial judge did not err in concluding that the agreement did not fail for lack of certainty of terms. It was possible to enforce both agreement for sale and lease without any further documents. The trial judge did not err in concluding that the parties intended to be bound by the agreement before the lease document was executed.

However, the trial judge erred in ordering specific performance. The trial judge did not give effect to the nature of the property and started with the wrong question, whether the property was unique, rather than whether damages were adequate remedy. The trial judge gave no effect to the nature of the transaction, uncertainty of the plaintiff's plans for land and the plaintiff's decision not to adduce any evidence as to how damages should be assessed other than on the basis of comparable sales and market activity.

The damages could not be inadequate when the plaintiff removed from the table consideration of methods of calculating damages other than the increase in the value of the land. The trial judge's decision regarding specific performance was set aside but appellate court was not in a position to assess damages.

Per Klebuc J.A. (dissenting in part): The appeal was dismissed. The trial judge was entitled to find that the land was unique by virtue of its exceptional character, location and development potential, and the purchaser was in the business of residential and commercial development, and this was the long-term goal it had in mind in purchasing the property. The acquisition by the purchaser amounted to a once-in-a-lifetime opportunity according to the evidence and that the vast preponderance of evidence ascertained that alternative land was not available.

APPEAL by vendor from judgment reported at *101090442 Saskatchewan Ltd. v. Harle* (2012), 2012 SKQB 112, 2012 CarswellSask 184, 392 Sask. R. 178 (Sask. Q.B.), in which purchaser successfully brought action for specific performance of transfer of land.

Jackson J.A.:

Introduction

1 This is an appeal from a decision granting specific performance to 101090442 Saskatchewan Ltd., a development corporation, with respect to an agreement to sell and lease back farm land situated near the city of Regina ([2012 SKQB 112](#), [392 Sask. R. 178](#) (Sask. Q.B.)). Douglas and Colleen Harle, the owners of the land, appeal the decision on the basis that the Court of Queen's Bench should not have granted specific performance. According to them, the agreement to sell should not be enforced as it lacks certainty and depends for its efficacy on a condition that was not fulfilled by the closing date, *i.e.*, the execution of a lease of the land. In any event, they assert that specific performance should not have been ordered because damages are an adequate remedy as the property is not unique, having been acquired for investment purposes, and damages are capable of assessment.

2 For the following reasons, the trial judge made no error by concluding that the exchange of documents between the parties constituted an enforceable contract for the sale and lease of the land, which the parties breached, but I have found that he erred by ordering specific performance. The matter will be remitted to assess damages.

Background

3 The Harles own approximately 1660 acres of farmland located west of Regina, which they farm. While the Harles own other land, it is those 1660 acres that are the subject matter of the within appeal.

4 In September of 2006, Bob Young, a real estate agent in the City of Regina, offered to act as the Harles' real estate agent for the purpose of selling the land. On October 15, 2006, the Harles entered into an exclusive seller's brokerage contract with Mr. Young's real estate firm.

5 The evidence demonstrates that the Harles were interested in selling only if they received an exceptionally favourable offer.

6 Mr. Young was also acting at the time for a newly created Saskatchewan Corporation called 101090442 Saskatchewan Ltd., which is affiliated with a Calgary company, Hopewell Residential Communities Inc. (I will refer to 101090442 Saskatchewan Ltd. as SaskCo for the balance of these reasons.)

7 SaskCo was incorporated for the specific purpose of taking title to lands in Saskatchewan for future sale or development for its parent corporation, Hopewell. Hopewell is not interested in farming land, but rather focuses on the development of residential neighborhoods.

8 Paul Taylor testified as an officer of both Hopewell and SaskCo. Mr. Taylor was responsible for looking for and securing Saskatchewan lands for development purposes.

9 On October 16, 2006, while acting as an agent for both the Harles and SaskCo, Mr. Young presented the Harles with an offer to purchase the land for \$3,050,000. Mr. Young testified that SaskCo understood its offer was approximately twice the market rate for the land.

10 The offer was made on a standard form provided by the Saskatchewan Real Estate Association entitled "Contract of Purchase and Sale" with the following details included:

- the transaction of "purchase and sale" would close on or before 12 noon February 26, 2007, which is when the buyer would take possession;
- notwithstanding the closing date, the seller would have access to grain storage until July 31, 2007;
- the seller would have a right of first refusal to lease all of the land after completion according to terms to be agreed upon *after* completion;
- the seller granted a right of first refusal to purchase another quarter of land to the buyer; and

- the seller would be responsible for the 2006 taxes (emphasis added).

11 Mr. Young advised the Harles that the prospective buyer intended to hold the land for long-term development potential. In the early stages of the deal, the Harles informed Mr. Young they wanted to continue to farm the land as long as possible following any sale. For the Harles, this was an important aspect of the deal. Any agreement to sell their land would need to be subject to a long-term lease. Even though Mr. Taylor had no direct discussions with the Harles, he understood this.

12 On October 20, 2006, the Harles submitted a counter offer to SaskCo. The counter offer also took the form of a standard form provided by the Saskatchewan Real Estate Association with the following additional terms:

Condition of right of first refusal to be removed from agreement. Seller agrees to notify the buyers if and when the NE 6 18 20 W2 property comes for sale.

Following terms to be added to sale agreement:

That there be a farmland lease agreement be [sic] in place prior to closing date.

Terms of the lease will be for an initial period of 5 years at a rate of \$30/acre, with the option for another 5 years at \$30/acre. The tenant would relinquish lease agreement on any land required for development.

(emphasis added)

As will be noted, the counter offer specifically contemplated a farmland lease would be in place *prior* to closing. The counter offer was accepted.

13 Following acceptance of the counter offer, two amendments were made. First, on November 28, 2006, SaskCo asked to change the date for the payment of the balance of cash to September 1, 2007 with a possession date of September 7, 2007. In exchange for this change to the closing date, SaskCo increased its irrevocable deposit from \$148,000 to \$1 million, to be held in trust and invested by the Harles' counsel with interest earned to follow the deposit. The Harles also asked to remove any crop after closing and agreed to pay 2007 taxes. Second, on January 15, 2007, the parties further amended the agreement for sale to correct land description errors in the original offer.

14 On February 8, 2007, the Harles' lawyer sent a letter to SaskCo's lawyer emphasizing the need for the lease agreement to be in place in advance of closing. No reply was received. On March 6, 2007, the Harles' lawyer asked for a reply to his letter of February 8, 2007. Again, the Harles received no response.

15 Meanwhile, fuelled generally by economic growth and by rumours regarding the development of a new inter-modal transportation facility west of Regina, land prices in and around the city began to rise.

16 On August 17, 2007, two weeks before closing, the Harles received a fax from SaskCo attaching a copy of a draft lease in purported response to the Harles' earlier correspondence. The 13-page lease added terms and, according to the Harles, changed the deal. Specifically, the proposed lease contained these terms, which were objectionable to the Harles:

- the rent was \$30 per acre per year rather than \$30 for two five-year terms;
- the Harles were required to vacate the land upon 30 days' notice;
- the Harles were precluded from pledging their crops as security for inputs;
- the Harles were required to pay 24% per annum interest on any money owing to the landlord.

17 On August 30, 2007, SaskCo forwarded to the Harles' lawyer the full amount of the purchase price. The closing date of September 1st and the possession date of September 7th passed without any communication from the Harles.

18 On September 13, 2007, counsel for the Harles notified SaskCo's lawyer that the proposed draft lease was unacceptable and, since the lease was not in place prior to the closing date, the agreement was at an end. Specifically, the Harles' lawyer wrote:

... To the extent my client has reviewed the document, he has been able to identify several provisions that are unacceptable. Regardless, given the time of year, there was no possibility for this draft to be considered fully.

Since a farm lease agreement is not in place prior to closing, as required by the Counter Offer, a fundamental condition of the accepted Counter Offer has not been satisfied and therefore, the agreement to purchase the land in question is at an end. It would be in order for Mr. Braun to return the cash to close with interest.

If your client wishes to close this transaction, it would be in order for your client to present a second offer. I would suggest that the offer should be coupled with a draft proposed lease ... (Appeal Book, Vol. 1, p. A87.115) (emphasis added)

19 SaskCo, on the other hand, took the position it had an enforceable agreement and the right to sue for specific performance as of September 7, 2007 — the date of possession.

20 At some point during the fall of 2007, the Harles had a change of heart. By way of a letter dated December 3, 2007, they signalled they were prepared to resolve the matter on a without prejudice basis. SaskCo agreed to enter into discussions on the same basis.

21 Three major issues of disagreement persisted. First, the Harles believed "\$30/acre" for five years meant the total rent to be paid for the period in question, whereas SaskCo believed it was \$30 per acre per year for each of the years. Secondly, the Harles had in mind that the "requirement for development" clause in their counter offer meant "urban development and annexation by the City of Regina" and they wished the resulting agreements to reflect that definition. Thirdly, the Harles believed negotiations leading up to execution of a formal lease agreement would give them the right to insist on a 99-year lease on the six-acre yard site containing their home. This was a new term not previously referred to in any of the documentation but, according to the Harles, Mr. Young had led them to believe this would be an acceptable term when formalizing the lease document itself.

22 On December 28, 2007, the Harles' counsel forwarded a revised version of a draft lease agreement to SaskCo, incorporating these terms. Of particular importance to the Harles was the following definition of "development purposes":

3.18 For the purposes of Article 3.17, "development purposes" shall mean urban development and annexation by the City of Regina.

23 On March 17, 2008, counsel for SaskCo indicated the revised draft lease was not acceptable and set out a list of some 20 items which needed to be changed, including provision 3.18, regarding development. SaskCo wanted development to be defined as follows:

...an application submitted by the Landlord to the relevant planning authority in respect of the proposed development, rezoning, or application for building permit involving some or all of the Lands.

24 Ultimately, the Harles withdrew their demand for a 99-year lease by way of a letter dated April 14, 2008. Following this concession, SaskCo agreed on April 23, 2008 that the rental rate would be \$30 per acre for the initial five-year term rather than \$30 per acre per year.

25 On April 23, 2008, SaskCo also delivered an ultimatum indicating that, if an acceptable final response were not received by April 29, it intended to sue for an order for specific performance. The Harles, however, continued to insist on: (i) a definition of development; and (ii) some protection for the land where their home is located for a period of 10 years, rather than the 99 years previously proposed.

26 When no agreement was reached by April 29, 2008, SaskCo indicated that negotiations were at an end and commenced the within action.

Decision of the Court of Queen's Bench

27 The trial judge made certain findings of credibility against the Harles. He found as follows:

- Contrary to their testimony, the Harles did not raise the question of the 99-year lease of the yard site with Mr. Young until after the closing date (paras. 65 and 69).
- The Harles knew "they could be required to be off any land required for development either before expiration of the five year term and, if elected, before the end of the second five year term" (para. 65).
- "[E]verything did point to the defendants asking for more money — they thought they 'had us over a barrel', in Mr. Taylor's words — and they withheld transfer of title even though the entire purchase price had been placed with their lawyer" (para. 66).

28 The trial judge found the contract comprised these documents: the offer, the counter offer and the two amending documents dated November 28, 2006 and January 15, 2007 (at para. 63).

29 Relying on *Saskatoon Business College Ltd. v. 607113 Alberta Ltd.*, [1995] 7 W.W.R. 244 (Sask. Q.B.), the trial judge concluded that a valid lease should contain: (i) the identity of the parties as lessor and lessee; (ii) a description of the premises; (iii) the date of commencement of the term; and (iv) usually the rent (at para. 73). Applying this law to the case before him, he concluded that the offer and counter offer provided all of the essential terms of the lease.

30 With respect to the rental rate, the trial judge noted its ambiguity but he did not find it uncertain. The rental rate clause needed to be construed but, for the trial judge, this did not make it uncertain. The trial judge also appears to have held the lack of specificity and ambiguity in the clause against the Harles, on the footing it was their wording, proposed by them in their counter offer. He also noted SaskCo "concedes that the rent rate should be construed as relating to the five-year term rather than being calculated on an annual basis" (see paras. 74, 79, 80).

31 With respect to the definition of development, the trial judge assessed this issue separately. First, he did not find the term to be uncertain (para. 63).

32 Second, he noted the phrase "required for development" came from the Harles as part of their counter offer and neither they nor SaskCo attempted to define it in the offer, the counter offer or the subsequent amending documents. On this point, he wrote:

[64] The definition of "development" and the proposal for the yardsite lease for 99 years were not raised by the plaintiff in its offer, [Tab 4] nor by the defendants in their counter offer, [Tab 6] nor by either party in the amendment made by both of them. [Tab 7] However, the defendants did speak to their understanding of the occurrence of an event which would give rise to relinquishment of the leaseback in their working copy of the offer: "when development happens it is agreed that the seller relinquish use of the land". [D3] Then, in their counter offer, the defendants offered to "... relinquish lease agreement on any land required for development". [Tab 6] In the mind of Mrs. Harle, this meant when earth moving equipment commenced operations. The defendants did not further define their own term, "development", even though they had consulted with their lawyer who made suggestions, in writing, on their working copy of the offer which formed the basis for their counter offer. In the amendment, [Tab 7] no mention

whatsoever is made of development or its definition, even though the amendment was completed in part by the defendants' lawyer. It was not until December of 2007, more than one year after the amendment of November 28, 2006, that the defendants first put forth their own definition of "development", linking it with annexation and compensation for revenue of \$150.00 per acre (perhaps \$249,000.00 per year) for the duration of the lease.

(emphasis added)

33 Third, he found the need to define "development" was "[a] later aim...to void the deal which itself was more than favourable to them" (para. 65).

34 Fourth, he found that "there was no indefiniteness in the minds of the Harles regarding the meaning of development." He noted that Mr. Harle admitted that "he was not going to 'get in their way'" and "would move over for development." See generally para. 65.

35 On the question of whether the parties had agreed to leave the exact terms for further negotiation, the trial judge adopted this passage from *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at p. 104:

...when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances that "contract to make contract" is not a contract at all...

36 Stating he was applying *Bawitko*, the trial judge did not find the parties had "agreed to agree" in the future. He also found that the Harles had conducted themselves as if they already had a deal with SaskCo. On this point, he wrote:

[68] After formation of the contract (offer, counter offer and acceptance, and amendment) in November 2006, but well before the closing date, September 7, 2007, the defendants acted as if the deal was complete, referring to the plaintiff as purchaser, expressing their priority "to keep the sale of our property confidential" and seeking to include the plaintiff in discussions about a potential pipeline and about inquiries regarding a potential equestrian facility nearby.

(emphasis added)

See also paras. 72 and 79.

37 As to the enforceability of the contract generally, the trial judge found as follows:

- "All essential provisions governing the contractual relationship between the parties had been agreed upon, and a separate formal lease was not required in these circumstances" (para. 72).
- The parties did not intend "to defer their lease obligations until a formal lease was approved and executed" (para. 70).
- "[T]here was no true condition precedent in the sense expressed by Judson J. speaking for the court in *Turney v. Zhilka*, [1959] S.C.R. 578, at pp. 583-4, 18 D.L.R. (2d) 44 " (para. 78).

He left the proper construction of the words of the contract to the parties to work out in the future as need be (para. 86).

38 As to remedy, he found that the subject land is "unique, without substitute replacement" (para. 81) and that the "monetary equivalent of the subject land at the time of closing, September 7, 2007, would not begin to adequately compensate the plaintiff for its loss of this unique land" (para. 84).

39 As to interest payable to the Harles on the purchase price, the trial judge ordered that none be payable on the footing the Harles had "wrongfully withheld transfer of title" (para. 85).

Issues

40 Having considered the parties' submissions, I find the issues in the within appeal are best considered in the following order:

- A. Did the trial judge err by concluding that the parties' agreement did not fail for a lack of certainty of terms?
- B. Did the trial judge err by concluding that the parties intended to be bound by their agreement before the formal lease document was executed?
- C. Did the trial judge err by failing to find that the parties' actions after closing should be considered as an agreement to extend the closing date?
- D. Did the trial judge err by ordering specific performance?
- E. Did the trial judge err by refusing to award interest on the unpaid purchase price?

Analysis

A. Did the trial judge err by concluding that the parties' agreement did not fail for a lack of certainty of terms?

41 By way of background to this legal issue, counsel for the Harles directed the Court's attention to this passage from John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law Inc., 2012) at p. 92:

...Where the parties either fail to reach agreement on all essential terms of the agreement or express themselves in such a fashion that their intentions cannot be divined by the court, the agreement will fail for lack of certainty of terms. In such circumstances, the parties have not reached a sufficient *consensus ad idem* to enable the courts to enforce their agreement. (emphasis added)

The doctrine of uncertainty of contract may be considered according to these categories: (i) incompleteness — in the sense of an agreement that lacks an essential term; (ii) agreements to agree — in the sense that the parties have stipulated in an agreement that they intend to reach an agreement in the future; and (iii) vagueness associated with an important term — in the sense of incurable uncertainty. See *McCamus, supra* at p. 93 and on. The Harles assert that the parties' agreement to sell the land and lease it back fails for uncertainty on the basis of incompleteness and because it constitutes an unenforceable agreement to agree.

42 Since the trial judge's conclusions in this regard involve statements of the law and the application of the law to the facts, the Harles submit that the applicable standard of review is correctness. The arguments that the Harles assert to justify intervention are as follows:

- there was no agreement on all the terms to be embodied in the farmland lease agreement, which was to be in place prior to closing;
- SaskCo was steadfast in its position that the rent on any lease back of the land was to be on a per year basis and not per the entire five-year term specified in the counter offer — a concession on this point was made only in the spring of 2008;

- the definition of development was important to both parties and each side had a very different understanding of what development meant;
- SaskCo's draft lease reveals several inconsistencies with the provisions of the accepted October 20, 2006 counter offer, including that (i) rent for the second five-year term is to be "determined by the landlord having regard to the market rent payable for similar leases;" and (ii) the Harles must surrender all or part of the land for development purposes upon 30 days' notice from the landlord;
- a farmland lease is an important document, the terms of which cannot be assumed or filled in by completing blanks or checking boxes;
- a few lines of an alleged "lease", which is supposed to govern a lengthy and important relationship, is not sufficient particularly when the parties' understanding was that a further lease would govern;
- the terms of the farmland lease yet to be negotiated are more than mere formalities; and
- if SaskCo believed and understood the counter offer contained all the final terms of the lease, it would not have needed to provide a detailed draft lease in August.

43 According to the Harles, the trial judge should have found that the agreement for sale lacked certainty because critical terms associated with the lease, which is itself a critical part of the parties' deal, are missing. He should have found that the parties' agreement, as of September 2007, is so uncertain that it is no more than an unenforceable "agreement to agree." In support of their position, the Harles rely extensively on *Bawitko* where the Court declared an agreement uncertain and therefore unenforceable. They also rely upon *Canadian Pacific Railway v. Toronto (City)* (1903), 5 O.L.R. 717 (Ont. C.A.), at 719 where Moss C.J.O. considered whether a further agreement was required in the circumstances of that case. He stated that "one can hardly suppose that in dealing with such a large and valuable tract of land" that "the parties intended that all questions respecting their rights and obligations should rest solely upon the bald provisions of the [earlier] agreement."

44 Relying on *Domtar Inc. v. ABB Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461 (S.C.C.) at para. 34, SaskCo accepts that the standard of review with respect to both the law and the application of the law to the facts is correctness, but asserts that the trial judge made no error of law in finding that the terms of the parties' agreement are certain. Moreover, SaskCo states the factual matrix in this case determines the outcome.

45 I accept the submissions of SaskCo's counsel on this point. The trial judge made no error of law or fact, and the factual matrix dictates the outcome. In that regard, significant differences exist between the parties' relationships in this case and those in *Bawitko*.

46 In *Bawitko*, the Ontario Court of Appeal allowed an appeal from a judgment holding that the appellant franchisor was in breach of an oral contract to grant the respondent a franchise to operate a store. The Court found that: (i) the franchisee was seeking to enforce an "oral" contract; (ii) the oral agreement was intended to cover a lengthy franchisor-franchisee relationship; (iii) the "very nature of the franchisor-franchisee relationship mandates that there be express agreement on the detailed provisions set up to regulate the business relationship of the parties" (p. 106); (iv) the "precise" terms under which a business relationship of this nature is to be governed are "manifestly essential to the formation of a binding contract" (pp. 104-05); (v) the oral agreement was not complete — the terms of the franchise beyond those agreed to could not be regarded as mere formalities or routine language; (vi) "essential terms to be contained in the formal written agreement ... had not been agreed upon" (p. 107); and (vii) the "terms found to have been agreed upon could not by themselves constitute a full and binding contract" (p. 107).

47 In the instant case, however, the agreement to be enforced is a *written* agreement for sale and a lease back to the seller and, unlike a franchise agreement, significant aspects of an agreement to sell and to lease land are governed

by legislation and the common law. In this jurisdiction, as in other jurisdictions governed by the land titles principles associated with the Torrens system of landholding, no other formal document is required to give effect to the agreement for sale other than the transfer of the land itself. As to the lease, I agree with the trial judge that all essential terms are present: (i) the names of the parties as lessor and lessee; (ii) the granting of the lease; (iii) the land description; (iv) the rental rate and term; and (v) the description of how the lease will be brought to an end, *i.e.*, at the end of each five year term and when the land is "required for development." In short, it is possible to enforce both the agreement for sale and the lease without any further document. It may be necessary to imply certain terms to address future matters but that is not the same as saying the parties' agreement fails for lack of certainty.

48 The matters that the Harles consider contentious, *i.e.*, the rental rate and the definition of development, are capable of being resolved by construing the lease. It is true that, by September 2007, the Harles and SaskCo differed as to what those terms meant, but a contract is construed according to the parties' intention when a contract is executed (*Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.) at p. 901). Whether the agreement lacks certainty and the determination of what the parties intended must be assessed as of when they made their bargain in October of 2006 as amended by the first amending agreement in November of the same year.

49 It is also relevant to note precisely what the Harles initially submitted the deal lacked. The Harles wanted: (i) a 99-year lease over the yard site; (ii) a third five-year option at Crown lease rates; (iii) a definition of "development purposes" that would require urban development and annexation to the City of Regina before the lease would be brought to an end; and (iv) monetary compensation in the amount of \$150/acre/year remaining on the lease, if SaskCo required the land for any other type of development (see: draft lease provided by the Harles' counsel on December 28, 2007 at Appeal Book, Vol. 1, pp. A87.126-A87.139). The monetary value of the items that the Harles proposed is significant.

50 If the Harles had succeeded in receiving a lease according to the above terms, they would be entitled to damages of up to \$249,000/year for land developed without annexation to the City of Regina. If an immediate development opportunity presented itself and SaskCo proceeded to develop in the first year of the lease, as counsel for SaskCo demonstrates, it would have been required to pay \$2,241,000 in damages for "lost profit" over the remaining nine years. If the Harles had terms of this value in mind, one can legitimately ask why they were not part of the discussions in the fall of 2006. In essence, the nature of the terms said to be lacking supports the trial judge's implicit conclusion that the Harles were not so much concerned with the lack of certainty of terms than with wanting a new deal.

51 If we return again to the words of Prof. McCamus (at pp. 93-94):

Parties, especially those not advised by lawyers, may be unaware of the nature of all the essential terms to be stipulated in the particular context. Parties may assume that reasonable or "the usual" arrangements will apply to an undetermined matter. In all such cases, the parties may intend to enter into binding contractual arrangements and believe that they have successfully done so. Rigid application of the doctrine of certainty, therefore, could produce much mischief, especially in cases where the parties detrimentally rely on the assumption that a valid and enforceable agreement has been created. Accordingly, courts will attempt to fill gaps and find meaning in agreements in circumstances where it appears the binding agreement was intended by the parties.

The law of certainty of terms, then, reflects this tension between a requirement that the parties reach a complete and intelligible agreement and a reluctance to defeat the expectations of the parties that an enforceable agreement has been created.... As we shall see, the leading modern authorities tend to place particular emphasis on the need to give effect, where possible, to the expectations of the parties that they have entered into a valid and enforceable agreement.

(emphasis added)

Similarly in this case, the expectations of the parties were that they had a valid and enforceable agreement — subject to a consideration of what they meant by the requirement of a written lease.

52 The parties used standard form documents regularly used in the industry: a purchase and sale agreement and a counter offer form that stipulated the essential terms of a lease. They created what at law is recognized as a sale agreement of real property and a lease of real property. The Harles' counter offer specified the rental rate and how the lease would be brought to an end. If they had not fixed the rental rate, it is probable that the deal would have failed for lack of certainty of terms, but they did fix it. The fact that the parties are now not *ad idem* as to the interpretation of the clauses is not indicative of whether it is possible to determine what they intended when they entered into their contract based on the factual matrix existing at that time. Thus, I find the trial judge correctly concluded that the parties' bargain did not suffer for the lack of certainty of terms.

53 That brings us to the next issue, which is whether the parties intended to be bound by their agreement or whether they deferred their legal obligations until after the lease agreement was executed.

B. Did the trial judge err by concluding that the parties intended to be bound by their agreement before the formal lease document was executed?

54 Counsel for the Harles asserts that the trial judge misstated the law, misinterpreted his arguments and failed to appreciate that the requirement to have a farmland lease agreement in place prior to closing was a condition precedent to the enforceability of the parties' bargain. In order to assess this submission, it is necessary to consider the trial judge's reasons on this point more fully.

55 The trial judge wrote on the question of the need to execute a formal lease document as follows:

[70] In my view, all of the essential terms in the contract were agreed upon by the parties, and no term was affected by indefiniteness. Nothing in the evidence shows the need of a formal lease nor the intention of the parties to defer their lease obligations until a formal lease was approved and executed.

...

[72] The term in the defendants' counter offer "that there be a farmland lease agreement be [sic] in place prior to the closing date" [Tab 6] asserted by the defendants as the basis for voiding the contract [Tab 17] Mr. Linka's letter of September 13, 2007] is not an agreement to agree. Prior to the closing date, the defendants, who always expressed their contentment with the purchase price and acted as if they had a deal, did not seek to negotiate another term nor to renegotiate an existing one. All essential provisions governing the contractual relationship between the parties had been agreed upon, and a separate formal lease was not required in these circumstances.

...

[74] The latter demands of the defendants for a 99 year lease of the yardsite, compensation and rent by term do not show, at the time of the contract, uncertainty, lack of agreement, or absence of intention to defer legal obligations until a formal lease was put in place. It would be unreasonable, unfair and unjust to now imply such importance to the words used by the parties when the contract, including the leaseback, is certain and intended by the parties to govern their legal obligations.

[75] Justice Dawson of our Court put it very well, *apropos* here:

The defendants' arguments above that the contract is incomplete because essential provisions have not been settled or agreed upon or because the contract is uncertain must fail. The contract executed by the parties was not sophisticated, but no essential terms were missing. The contract is not too general or uncertain to be valid.

In this instance, it cannot be said that the parties here expressed their intention so unclearly that a court cannot discern what their intentions were.

[*Martel v. Mohr*, 2011 SKQB 161, 370 Sask. R. 104 at para. 51]

[76] In another case, Justice Dawson quoted with approval:

Victor Di Castri, *The Law of Vendor and Purchaser*, 3rd ed., looseleaf (Toronto: 2004, 1988 Thomson Canada Limited, updated 2005-Rel. 1, February 2005) at c. 5, s. 196, pp. 5-25 and 5-26 ...:

Where a material term of a contract is left to future agreement or to the decision of a third party, specific performance will not be granted until such future agreement or decision has been made.

...

However, to render a contract unenforceable the missing term must be so essential to the contract that, without it, the court cannot collect the real intentions of the parties from the language within the four corners of the instrument and so cannot give effect to such intentions by supplying anything necessarily to be inferred.

[*Stefan v. Lichter*, 2005 SKQB 383, 270 Sask. R. 124 at para. 64]

[77] She went on to refer to the reasoning of Justice Dickson in *Dynamic Transport Ltd. v. OK Detailing Ltd.*, [1978] 2 S.C.R. 1072 at p. 1078, 69 A.R. 308:

On the issue of certainty of description of the land, courts have gone a long way in finding a memorandum in writing sufficient to satisfy the Statute of Frauds. The judges have consistently attempted to ascertain and effectuate the wishes of the parties, undeterred by lacunas in the language in which those wishes have been expressed. ... [Emphasis added] [para. 65]

[78] Here, there was no true condition precedent in the sense expressed by Judson J. speaking for the court in *Turney v. Zhilka*, [1959] S.C.R. 578, at pp. 583-4, 18 D.L.R. (2d) 447, where he said:

The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party-the Village council. This is a true condition precedent-an external condition upon which the existence of the obligation depends.

...

There is in the present case no future uncertain event the happening of which depends on the will of a third party under the contract.

[per Laskin C.J. speaking for the court in *McCauley v. McVey*, [1980] 1 S.C.R. 165 at p. 5, 98 D.L.R. (3d) 577]

[79] This was not an agreement to agree. The contract made by the parties is not subject to a true condition precedent. The defendants cannot void the contract which is definite, valid and enforceable. (emphasis added)

56 I agree with counsel for the Harles that the trial judge's reasons do not clearly address the issue he raises again with this Court. The Harles' argument on this point is that, even if the agreement does not lack certainty, it is nonetheless unenforceable as its efficacy depends upon the formalization of their lease agreement in writing. In that regard, the trial judge's reference to *Zhilka v. Turney* [1959 CarswellOnt 81 (S.C.C.)], *supra*, at pp. 583-4 is misplaced. The other authorities to which he refers, and in particular the passages quoted from them, address the question of certainty of terms and not whether the parties' agreement is subject to formalization in a subsequent document.

57 Further, it is not an accurate statement of the law to phrase the issue on enforceability in terms of whether there is "an agreement to agree." A finding that the agreement is certain addresses that issue. In my view, however, the trial judge uses the phrase "agreement to agree" as a substitute for the notion that the agreement is subject to a further agreement and that enforceability depends on the execution of another agreement.

58 The correct legal question is whether the requirement to have a written lease in place prior to closing is a condition that had to be fulfilled in order for the contract to be enforceable. The leading authority on the resolution of this question is *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 (S.C.C.).

59 In *Calvan*, the parties' agreement contained this clause: "[t]he terms of the operating agreement will be mutually agreed upon; and if agreement cannot be reached on any particular clause, then the clause in question will be arbitrated by a single arbitrator, pursuant to *The Arbitration Act of Alberta*" (p. 256, emphasis added). After concluding that the contract was not uncertain, the Court had to decide whether the offer and acceptance constituted an immediately binding contract notwithstanding the provision for a formal agreement to follow.

60 In answering this question, Judson J. for the Court stated two questions must be considered: first, whether the reference to a subsequent formal agreement indicates an intention not to be bound until the formal agreement is executed, and, second, what terms may be incorporated in the formal agreement by the arbitrator. He went on to support the conclusion of the Court of Appeal, which had overturned the trial court, and found that the parties intended to be bound *before* execution of the formal document:

... My opinion is that the parties were bound immediately on the execution of the informal agreement, that the acceptance was unconditional and that all that was necessary to be done by the parties or possibly by the arbitrator was to embody the precise terms, and no more, of the informal agreement in a formal agreement. This is not a case of acceptance qualified by such expressed conditions as "subject to the preparation and approval of a formal contract", "subject to contract" or "subject to the preparation of a formal contract, its execution by the parties and approval by their solicitors". Here we have an unqualified acceptance with a formal contract to follow.

Whether the parties intend to hold themselves bound until the execution of a formal agreement is a question of construction and I have no doubt in this case.... (pp. 260-61, emphasis added)

Judson J. then referred to *Von Hatzfeldt-Wildenburg v. Alexander* (1911), [1912] 1 Ch. 284 (Eng. Ch. Div.), at 288-289: "[i]t appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through" (p. 261, emphasis added). All subsequent cases are examples of cases that fall on one side or the other of the line drawn by the Court in *Hatzfeldt-Wildenburg*.

61 For ease of reference, the clause the Court must construe in the within appeal is the underlined phrase contained in the Harles' counter offer:

The Seller accepts the attached Offer and all its terms and conditions subject to the following amendments, exceptions and/or additions and covenants to carry out the sale on the terms and conditions mentioned herein:

Seller agrees to the sale price.

Condition of right of first refusal to be removed from agreement. Seller agrees to notify the buyers if and when the NE 6 18 20 W2 property comes for sale.

Following terms to be added to sale agreement:

That there be a farmland lease agreement be [sic] in place prior to closing date.

Terms of the lease will be for an initial period of 5 years at a rate of \$30/acre, with the option for another 5 years at \$30/acre. The tenant would relinquish lease agreement on any land required for development. (Appeal Book Vol. 1, p. A87.26) (emphasis added)

62 The Harles' strongest argument is that SaskCo's original offer stated the terms of the lease must be fixed *after* closing and the Harles' counter offer specifically asked that the lease be in place *prior* to closing. On the other hand, one must resist the temptation to view the lease as one agreement separate from the agreement for sale.

63 The proper view is that the lease is part of a larger transaction: the Harles agreed to sell and, as part of the same transaction, SaskCo agreed to lease the land back to them for a maximum of 10 years. The issue, of course, is whether *the agreement to sell and lease* is subject to the embodiment of the parties' lease agreement in a formal document.

64 It is quite clear that the Harles in October of 2006 would not have sold their land if they could not have been assured they would receive a lease of the land for a specific period of time at a specific rental rate, but that condition was fulfilled when their counter offer was accepted. The only issue is whether the execution of the lease is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through — to cast the issue in the same terms Judson J. approved in *Calvan*, *supra*.

65 Admittedly, the lease agreement is an important part of the parties' bargain. From the perspective of the Harles, they wanted to stay on the land and they insisted the lease terms not be left to chance. Their lawyer's letters written in February and March of 2007 urging that the lease be drafted early are also evidence of the Harles' intention not to be bound until the lease is in place. In my view, however, this evidence is not conclusive of the issue.

66 In the initial offer, SaskCo offered the Harles a lease in these terms:

5. ... seller will have first right of refusal to lease the land after completion, terms to be agreed upon after completion. (Appeal Book, p. A87.21)

In the counter offer, the Harles offered as followed:

That there be a farmland lease agreement be [*sic*] in place prior to closing date. Terms of the lease will be for an initial period of 5 years at a rate of \$30/acre, with the option for another 5 years at \$30/acre. The tenant would relinquish lease agreement on any land required for development. (Appeal Book, Vol. 1, p. A87.26)

SaskCo accepted this counter offer. Thus, the Harles, by virtue of their counter offer, transformed the deal from one where they would have a right of first refusal to lease the land, with the lease being negotiated after closing, to one where they were granted a lease and all key terms were stipulated.

67 By virtue of the counter offer, the Harles demanded and received lease terms allowing them to lease the land for one five-year term at a rental rate very favourable to them with an option to rent the land for a further five-year term at what, with the passage of time, would become an even more favourable rental rate. Even the structure of two five-year terms with a rental rate for each of the terms is favourable. A rental rate in the amount of \$30/year for two five-year terms would save the Harles about \$800,000 if they did not have to pay \$30/year for each year of the 10-year term. They would be able to remain on the land for 10 years until the land was "required for development." Whatever definition a court ultimately gives to "development", the land would still have to be "required" for development before the Harles would be obliged to relinquish it. By stipulating these terms, all essential terms of the lease were present as of October 20, 2006.

68 SaskCo may have misjudged two matters associated with the execution of the lease. SaskCo did not respond to the Harles' overtures with respect to the preparation of the lease on two occasions and then, two weeks before closing, they forwarded a detailed draft lease that did not reflect the lease terms contained in the counter offer. Nonetheless, the parties otherwise comported themselves as if they had a deal, notwithstanding the provision for a written lease.

69 The original deal called for a deposit of \$150,000 and an early closing. To secure a later closing, SaskCo offered to provide an irrevocable deposit of one million dollars in order to delay the deal to the fall of 2007. Nothing was said then to lead one to conclude that the parties did not intend to be bound. Indeed, the Harles who were now represented by a lawyer asked for three concessions:

4. Seller will have access to remove crop after possession date.

5. Seller will pay 2007 property tax.

6. Deposit to be held in trust by sellers' lawyer and invested. Interest earned to follow the deposit. (Appeal Book, p. A87.27)

70 Two of the above concessions support a conclusion that the parties intended to be bound at least at the time of the above agreement. By virtue of the first concession, the Harles asked for access to remove their crop after the possession date. Clearly, this would be important since the possession date would now fall in the middle of harvesting season, but why would it be required if the Harles intended to stay on the land and believed they would be entitled to do so over the long term? Such a term would only be required if the parties contemplated the land would be "required for development" at an early date. This is what I take the trial judge to mean when he stated "Clause 4 contradicts the defendants' assertion of indefiniteness and, further, it renders nugatory any need for compensation for loss of future crop revenue" (para. 65).

71 The concession, indicating that interest follows the deposit, is also significant. While this may have been intended to offset 2007 taxes, the Harles held the land as owners in 2007 and not as lessors such that one might expect they would assume that obligation in any event. By permitting the Harles to receive the interest, it supports the conclusion that the Harles perceived that the deal was already in effect.

72 These modifications to the original agreement support a conclusion that the parties intended to be bound if not when SaskCo accepted the Harles' counter offer then surely by the date of the amending agreement later in 2006. In light of the increase in the deposit and the concessions made at that time, if the situation were reversed and the Harles were seeking specific performance of the agreement for sale and lease, I would not think it possible to conclude that the parties did not intend to be bound by the agreement.

73 And here, the trial judge's findings regarding the Harles' motivation are important. The trial judge commented upon the announcements of the Global Transportation Hub, and the rumours regarding the possible expansion of the City of Regina, and the impact of such changes to land values. Clearly, there is nothing wrong with wanting a better deal than the Harles had received. Having said that, a lost profit in the order of millions is a powerful interpretive aid to explain the Harles' actions in September of 2007 as opposed to what they did when presented with a request to extend the closing date in exchange for an irrevocable deposit of \$1 million.

74 Thus, while the trial judge's reasons are not fully complete on the issue, his conclusion that the parties intended to be bound by the deal they made with SaskCo in the fall of 2006 is correct.

75 Even if the requirement for a lease to be in place before closing prevented the deal from being enforceable, the Harles were required to do more on August 14, 2007 than ignore the draft lease. And it is on this point that I believe the trial judge intended to express himself when he said it would be "unreasonable, unfair and unjust to now imply such importance to the words used by the parties when the contract, including the leaseback, is certain and intended by the parties to govern their legal obligations" (para. 74).

76 Thus, the trial judge did not err by concluding that the parties intended to be bound by their agreement before the formal lease document was executed.

C. Did the trial judge err by failing to find that the parties' actions after closing should be considered as an agreement to extend the closing date?

77 The Harles submit that the trial judge erred by failing to hold that the conduct of the parties between September 2007 and May 2008 constituted an implied agreement to extend the closing date of the purchase and sale. This issue was before the trial judge, and arguments were made to him in that regard. He does not appear to have addressed it in his written reasons, but he must be taken to have concluded that the argument is without merit.

78 SaskCo clearly entered the negotiations on the basis that it would be able to preserve its position as of September 2007. On December 12, 2007, counsel for the Harles wrote to SaskCo's counsel, saying: "if our respective clients are not successful in achieving a [resolution] we will be no further ahead and the respective positions taken by our clients will be maintained" (Appeal Book, Vol. 1, p. A87.125). In light of this, the discussions that followed cannot be relied upon to show the parties intended to extend the closing date.

79 Even if the parties can be taken to have extended the time for closing, I would be drawn to conclude that the Harles' insistence on a definition of development, compensating them at the rate of \$150 per acre for each year of the lease, was not part of the original bargain. The parties agreed that they would be entitled to lease the land until it was "required for development," whatever the term may ultimately be found to mean, nothing more nor less.

D. Did the trial judge err by ordering specific performance?

80 It is critical to the analysis of this issue that the trial judge's reasons be considered in full:

[81] In my view of the evidence, the plaintiff's expectation cannot be protected by a money award sufficient to purchase substitute performance since the subject land is unique, without substitute replacement. [See Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book, 2010), at para. 7.220, quoted with approval by Caldwell J.A. in *Raymond v. Raymond Estate*, 2011 SKCA 58, 371 Sask. R. 260] The overwhelming preponderance of evidence, including that of Mr. Lawrek which I accept, clearly shows that the subject land is "specially suited to the purchaser and that a comparable substitute property is not readily available." [Per Caldwell J. A. in *Raymond Estate*, *supra* at para. 15]

[82] The land, 1664 acres, was purchased for residential commercial development by the plaintiff, acquiring it because of its proximity to Regina, size and single ownership. Although the goal was long term because of many factors, such as annexation by Regina, in the interim, the defendants would continue to farm the land until such time as the plaintiff required it, or part of it, for development when the defendants would then move over to accommodate it. The land was not acquired by the plaintiff for farming use. The defendants were to receive twice the value of the land and they have now farmed it for five years without any cost to them. They have paid the taxes, approximately \$800.00 per quarter section, but have not paid the rent rate of \$30.00 per acre, taking the position that taxes contra rent, the rent rate being for the entire five year term, not per annum, a position reluctantly conceded by the plaintiff.

[83] It is not a certainty that the plaintiff will hold the land for long term development. As the evidence shows, the plaintiff sold the Ganshorn land, acquired about the same time as the contract with the defendants, and will sell the subject land if the price is right and circumstances warrant a sale. However, the long term goal of the plaintiff for ultimate residential development will achieve the highest and best use of the land, realizing rare and exceptional returns, rendering probable the achievement of its goal.

[84] No other land near Regina is so unique, fitting the criteria of the subject land: proximity, size and single ownership. These criteria suit the long term goal of residential or commercial development, the business of the plaintiff. I accept Mr. Lawrek's opinion that, indeed, its acquisition is a once in a lifetime opportunity. If one were to speculate, other land might be available, but at what price, to use Mr. Young's question, but the vast preponderance of evidence satisfies me that alternative land is not available. Sale prices and values experienced unprecedented growth between November 2006 and September 7, 2007 and thereafter, and seller expectations remain extremely high. The evidence clearly shows that replacement land is unavailable. In my view, damages are not an adequate remedy. The plaintiff cannot be made whole by an award of damages which, in the circumstances, would only be

highly speculative. The monetary equivalent of the subject land at the time of closing, September 7, 2007, would not begin to adequately compensate the plaintiff for its loss of this unique land. Justice requires "an award of specific performance because damages would be inadequate." [Per Caldwell J.A. in *Raymond Estate*, *supra* at para. 15]

(emphasis added)

81 In my respectful opinion, several difficulties arise with these reasons. First, the trial judge viewed "uniqueness" and the "adequacy of damages" as distinct questions, each to be answered independently of the other. Indeed, he considered whether the property is unique *before* considering whether damages would be adequate remedy. As such, he has not given effect to the change of law brought about by *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.).

82 Second, the trial judge cites Sharpe, *Injunctions and Specific Performance*, saying this Court in *Raymond v. Raymond Estate*, 2011 SKCA 58, 371 Sask. R. 260 (Sask. C.A.) cited para. 7.220 of that text *with approval*. This is not quite accurate. The Court in *Raymond Estate* quotes para. 7.220 to explain the approach of the courts with respect to specific performance *before Semelhago*. Indeed in the footnote to para. 7.210 of Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 2013), which introduces the role of "uniqueness" as a factor weighed to assess the suitability of specific performance, the learned author of the text directs the reader to paras. 8.10 to 8.220, where "the automatic remedy of specific performance is criticized."

83 In *Raymond Estate*, Caldwell J.A. for the Court made plain the proposition that the modern approach of courts faced with a breach of contract claim is "to assess the adequacy of damages before resorting to the remedy of specific performance, but then only if compensatory damages prove inadequate" (at para. 10). In *Raymond Estate*, Caldwell J.A. summarized the present law:

14 *Semelhago* does not, however, stand for the proposition that the presumption of uniqueness has been supplanted by a presumption of replaceability. See: *904060 Ontario Ltd. v. 529566 Ontario Ltd.*, 1999 CarswellOnt 378 (Gen. Div.) at para. 14, [1999] O.J. No. 355 (QL) and *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.J.) ("Dodge"). The only change wrought by *Semelhago* is in the approach of the courts to determining the appropriate remedy; judges must no longer presume the inadequacy of damages as a remedy whenever real property is involved. But, this assessment is not a search for uniqueness. Rather, it is appropriate to characterize a judge's assessment in cases of this nature as an inquiry into whether, in the circumstances, damages would be an inadequate remedy. As Lax J. said in *Dodge*:

[55] ... The danger in framing the issue as one of uniqueness (a term that carries with it a pre-*Semelhago* antediluvian aroma) is that the real point of *Semelhago* will be lost. It is obviously important to identify the factors or characteristics that make a particular property unique to a particular plaintiff. The more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties. This will depend on whether money is an adequate substitute for the plaintiff's loss and this in turn will depend on whether the subject matter of the contract is generic or unique.

15 In practical terms, this means the prospective purchaser bears the burden of adducing evidence that the subject property is specially suited to the purchaser and that a comparable substitute property is not readily available. These evidentiary points are necessarily intertwined because, on the basis of the evidence, the prospective purchaser must discharge the overall burden of persuading the judge that the subject property is so different from others that damages is an inadequate remedy and that justice dictates the purchaser should have the subject property. The judge, in turn, must conduct a critical inquiry on the evidence as to the nature and function of the subject property in relation to the prospective purchaser. The evidence and analyses will necessarily overlap, but the overall question the judge must answer is whether the justice of the matter calls for an award of specific performance because damages would be inadequate.

84 Third, the trial judge has given no effect to the nature of the transaction, the uncertainty of SaskCo's plans for the land and SaskCo's decision not to adduce any evidence as to how damages should be assessed other than on the basis of comparable sales and market activity. As other courts in Canada have indicated, the assessment of these matters is a particularly critical exercise when land is purchased for investment purposes. See, for example, *1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABCA 372, 288 D.L.R. (4th) 360 (Alta. C.A.); and *365733 Alberta Ltd. v. Tiberio*, 2008 ABCA 341, 440 A.R. 177 (Alta. C.A.) at para. 10.

85 While the trial judge refers to Sharpe on *Injunctions and Specific Performance*, the author classifies as "dubious" the proposition that damages are inadequate where the purchaser's interest is investment or resale (at paras. 8.64 and 8.70):

8.64 Where the purchaser's interest is investment or resale, the proposition that a substitute could not be found and that therefore damages are inadequate is dubious and specific performance will be refused. Take first the case of the purchaser who intends to use the property as an income-producing asset. Plainly, such a purchaser has no subjective attachment to the particular parcel. It might be argued, however, that the purchaser's own judgment as to the income-producing qualities of this parcel makes it unique. An award of damages, in effect forcing the purchaser back into the market to acquire another parcel in another location, may not offer the same income-producing qualities as the land the purchaser first bargained for. In other words, because no two pieces of land are identical, it could be argued that the purchaser should not be forced to accept the objective judgment of the court as to value. Unless it can be fairly said that the income-producing potential of a given parcel of land is unusually difficult to assess, this argument should be rejected. There is almost inevitably some risk of error in damage assessment and, when that risk becomes significant, specific performance is called for. However, it is not clear that the risks of error inherent in establishing land values for investment purposes are severe.

8.70 Similar considerations arise where the purchaser is a speculator acquiring the property for profit on a resale. Land is a fungible good to such a purchaser and the arguments which have been considered elsewhere in this book as to the relative advantages and disadvantages of specific performance and damages apply. Again, It may be argued that since land is so especially difficult to value objectively, a purchaser should not be forced to accept the assessment of others. On the other hand, granting specific performance will often allow such a purchaser, at the expense of the vendor, a risk-free period of speculation between the date of the breach and the date of the trial. There seems to be no reason why a speculator in real estate should not be subject to the same principle of mitigation as the speculator in any other commodity. (footnotes omitted, emphasis added)

86 In assessing the trial judge's reasons, it is critical to understand that SaskCo *did not have a specific plan for the land*. SaskCo was prepared to take a wait and see approach. This is what Mr. Taylor said:

Q Okay. And what were the particular criteria you were looking for in terms of the raw land you were seeking?

A Well, the — we didn't have any immediate development intentions given that our operation is headquartered in — in Calgary, and we haven't done anything from the development perspective in Saskatchewan, so we were looking for land with — given the price of land in Saskatchewan, a large volume of land that we would hold for a period of time, and it would offer numerous potentials for all of our companies, in the group of companies. We're a fully integrated development company.

Q Okay. So what kind of potential opportunities does that have?

A Well, we build houses. We do massive plan communities. We build industrial developments to the scale of we have the largest one in all of Canada, and we also do local and regional, commercial. (Appeal Book, Vol. 1, pp. T122-T123, emphasis added)

87 During cross-examination, Mr. Taylor acknowledged that SaskCo may have considered selling the land:

Q Now, as I understand it as well, that when you decided to purchase the — or make an offer to purchase the Doug and Colleen Harle land, and as you were proceeding with the deal, that one of the options you were keeping open was the possibility of flipping the land? Do you understand what I mean when I say that?

A I don't know, how do you describe or how do you define flipping?

Q Not doing any improvements to it, really, just keeping it and then selling it at some point in the future. I think you described the term as raw land —

A Okay.

Q — selling raw land?

A Right.

Q That was one of the options that you had in mind as a possibility?

A Definitely, yes. (Appeal Book, Vol. 2, p. T180, emphasis added).

The evidence also showed that SaskCo had indeed bought 640 acres from the Ganshorns, other farmers in the district, for the purpose of developing residential land and resold it almost immediately (Appeal Book, Vol. 4, pp. T233-234). In commenting on this, Mr. Taylor said their "business is very fluid" (Appeal Book, Vol. 4, p. T235).

88 Other than Mr. Taylor's testimony quoted above, SaskCo did not adduce any evidence, regarding a business plan or proposed development, and declined to do so when pressed to respond to an undertaking that would have quantified damages based on such a plan. In his examination-in-chief, Mr. Taylor was asked this question and gave this answer:

Q Okay. Just tell me, Mr. Taylor, in terms of raw numbers as opposed to rates of return numbers, what kind of damages do you expect as — give me the range you would expect in terms of being able to secure these lands and develop them?

A Well, I guess to be clear, what we do is add value to the land, essentially, in a development scenario, so we're not in the business to buy raw land and trade raw land. It's the — it's the improvement that we make where the value of that 20 to 25 percent is earned. So on a project of this nature, or of this size compared to other projects that we've done, the order of net profit would be in the order of 1 (sic) to 200 million dollars, depending on the exact scenario. (Appeal Book, Vol. 4, pp. T154-T155, emphasis added)

89 In cross-examination, when counsel for the Harles sought to clarify this response, this was the exchange:

Q You indicated, if I heard you correctly, that your estimate of your damages is 100 million to \$200,000,000. Did I hear you correctly?

A Yes.

Q Now, you provided no documentation to support that calculation or did you?

A No. (Appeal Book, Vol. 4, pp. T237-T238)

...

Q Now, if you will look, Mr. Taylor — I'm going to refer you again, Mr. Taylor, to the transcript from your examination for discovery, and this is at 13 page 131, and there's an undertaking number 12 given there. And the undertaking was to provide details and break down the loss and damage that the plaintiff alleges it has

suffered in the statement of claim, advise how it arrived at the calculation, the basis for the calculation, the date of the calculation, the rationale for that particular date, and provide any documents that the plaintiff relies upon to support those calculations. Do you see that undertaking?

A Yes.

Q I want to show you now the information that was provided to us in response to that particular undertaking. (Appeal Book, Vol. 4, p. T238, emphasis added)

90 Both counsel then addressed the Court:

Mr. Kuski: If it helps to speed this up at all, My Lord, we aren't taking the position in this action that we're claiming 100 or \$200 million. We have made a decision consciously to get this — the damages case, the damages should be assessed based on the increase in the value of the land only. The question was asked in terms of supporting the fact that the damages are so speculative, which is exactly what Mr. Taylor started that conversation with.

Mr. Grubb: Okay. On the basis then, that really nothing arises as a result of his testimony that the damages are \$100-\$200 million, and I won't pursue the matter further, but that's my understanding.

Mr. Kuski: Right. It was a clarification question that arose out of his initial testimony that there were thousands of scenarios put together for development, and he referred to a rate of return of 25 percent, and it wasn't clear what we're talking about in terms of the broad dollars, so I put it back to him, what are we talking about in terms of dollars or (inaudible), and those are the numbers he threw out. And if my friend wants to get more detail on that, for that purpose, it's not something we're claiming because we've said it's too speculative. If it's a damages case, we're prepared to just go with the value of land to make it somewhat simple. Certainly our primary position is that it's not a damages case, but that was evidence, so the undertaking, in response to the undertaking, if you want to have a further detail on the damages in relation to the development.

Mr. Grubb: Okay. Then on the understanding that the testimony about there being damages of 100 to 200,000,000 is of no consequence in terms of this claim, I will not pursue any further questions in relation to that matter. Mr. Taylor, thank you very much for your time and patience this afternoon. (Appeal Book, Vol. 4, pp. T238-T239, emphasis added)

91 Given SaskCo's lack of a business plan, counsel's concession was entirely appropriate, but it does make relevant such authorities as *1110049 Ontario Ltd. v. Exclusive Diamonds Inc.* (1995), 25 O.R. (3d) 417 (Ont. C.A.), at 418 where the buyer admitted that damages are capable of being assessed. Such an admission or concession is clearly relevant to the assessment of the adequacy of damages. See also: *Chan v. Chadha Construction & Investments Ltd.*, 2000 BCCA 198 (B.C. C.A.) and *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13 (Nfld. C.A.).

92 Damages cannot be inadequate when SaskCo removed from the table the consideration of methods of calculating damages other than the increase in value of the land. SaskCo's expert, Mr. Lawrek, adduced three appraisal reports, valuing the land at \$2,281,000 as of February 2007, \$5,507,000 as of May 2008 and \$5,602,000 as of September 2010. Mr. Lawrek took into account comparable sales and market activity. The Harles' expert witness, Blaise Clements, valued the land at \$3,342,000 as of May 2008, using a "direct comparison approach." It is the evidence of these two experts, which addresses the question of the increase in value of land only, that must be considered in order to determine whether damages are too speculative or uncertain, and, given that damages in this case can only be assessed based on their evidence, damages are neither speculative nor uncertain.

93 SaskCo's express decision not to adduce evidence regarding its long term plans makes decisions like *Covlin v. Minhas*, 2009 ABCA 404, [2010] 3 W.W.R. 48 (Alta. C.A.) distinguishable. In *Covlin*, the Alberta Court of Appeal upheld the trial judge's finding that, while the value of the property could easily be ascertained, this value would not adequately compensate the plaintiffs, as they had a long term plan to develop all the subject property, along with the other adjacent

properties. For a decision where the evidence played out in a similar manner see *Cantini Developments Ltd. v. Hi-Rise Group (Toronto) Inc.*, 2013 ONSC 186, 28 R.P.R. (5th) 279 (Ont. S.C.J.).

94 The case at bar, however, more closely resembles *Walton* where the majority of the Court held that the plaintiff was not entitled to maintain a caveat in the face of evidence that "the purchaser had every intention to flip the property and/or to acquire it for the purchase price and then sub-divide to home builders" (at para. 13). In support of his analysis, Berger J.A., speaking for the majority, referred to Anger and Honsberger, *Law of Real Property*, 3rd ed. looseleaf, (Aurora: Canada Law Book, 2007) at pp. 23-22 where the authors of the text indicate that a court considering whether specific performance should be ordered must determine the true intentions of the plaintiff so as to avoid a speculative lawsuit for profit.

95 In fairness to the trial judge in the within appeal, the Supreme Court of Canada released *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675 (S.C.C.) since he rendered his decision. In *Southcott*, the Court makes it clear that a buyer deprived of investment property must show that money is not a complete remedy because the land has "a peculiar and special value":

[40] I agree with the courts below that this is not a case where the plaintiff could reasonably refuse to mitigate. The trial judge made clear findings that the land was nothing more unique to Southcott than a singularly good investment and that this was not a case in which damages were too speculative or uncertain to be a satisfactory remedy. The unique qualities related solely to the profitability of the development for which damages were an adequate remedy (paras. 126 and 128). The calculation of profits was not conjectural or speculative as the proposed development was not complex, and the only disagreement between the parties regarding the quantum of damages related to the timing and rate of sale of completed units (paras. 130 and 132).

[41] A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance (*Asamera*, [[1979] 1 S.C.R. 633] at pp. 668-69) unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him (*Semelhago*, at para. 21, citing *Adderley* [(1824), 57 E.R. 239], at p. 240). Southcott could not make such a claim. It was engaged in a commercial transaction for the purpose of making a profit. The property's particular qualities were only of value due to their ability to further profitability. Southcott cannot therefore justify its inaction.

(emphasis added)

In my view, these comments are not limited to the sole issue of what damages should be awarded to a purchaser whose seller is in breach of contract, but address the issue of whether specific performance is available in the circumstances of the within appeal.

96 On the trial judge's own findings, SaskCo, like Southcott, has not shown that money is not a complete remedy because the land has "a peculiar and special value" (*Southcott* at para. 41 citing *Semelhago*, *supra* at para. 21). Rather, the land's "particular qualities were only of value due to their ability to further profitability for which damages were an adequate remedy" (*Southcott* at para. 41). SaskCo's purpose is a commercial investment purpose and the factors, found by the trial judge to support a finding of uniqueness, like size, single ownership and proximity to Regina, merely optimize the land's use with a view to maximizing revenues and, in turn, profits.

97 The question has been raised as to whether the trial judge's determination of "uniqueness" constitutes a finding of fact. I note that appellate courts have taken different approaches to that question (contrast *Exclusive Diamonds*, *supra* and *Raymond Estate*, *supra* with *Covlin*, *supra*). I have treated the question as one of mixed fact and law, reviewable on a standard of review of correctness, but even if the finding were reviewed on the basis of palpable and overriding error, the result, in my respectful view, would be the same.

98 As to the underlying facts, I should make it clear that no issue is taken with the trial judge's findings of fact that the land is well suited to prospective residential or commercial development or that it has no counterpart near Regina in

terms of proximity, size and single ownership, but I do not read the trial judge's reasons as finding that SaskCo intended to hold the land for long term residential development. SaskCo's plan was uncertain, and that is what the trial judge found. To repeat:

83 It is not a certainty that the plaintiff will hold the land for long term development. As the evidence shows, the plaintiff sold the Ganshorn land, acquired about the same time as the contract with the defendants, and will sell the subject land if the price is right and circumstances warrant a sale. However, the long term goal of the plaintiff for ultimate residential development will achieve the highest and best use of the land, realizing rare and exceptional returns, rendering probable the achievement of its goal. (emphasis added)

99 If I have misconstrued the trial judge's reasons on this point and he did in fact find that SaskCo's long term goal is residential development, I would hold that the trial judge made a palpable and overriding error in so finding. I say this because of Mr. Taylor's evidence on cross-examination, which I have reviewed previously, where he indicated that a sale was possible, and nothing was certain, and on SaskCo's decision not to adduce evidence demonstrating how profits in the order of \$100 to \$200 million could be generated.

100 The lack of specificity in the terms of the agreement indicates that the agreement alone cannot be used as evidence that SaskCo intended to hold the land for long-term development. To reiterate, the Harles were entitled to lease the land for ten years until it was required for development — an event that may or may not happen during the life of the lease or at all. SaskCo may or may not have developed the land, depending on a variety of factors, including whether the City of Regina and adjacent municipalities would permit development. Surely, much more is required to ground a finding as to special value than a bald statement that one potential option is development without any details as to the nature of that development or whether it will even occur.

101 In summary, the trial judge misapprehended the extent to which *Semelhago* changed the law of specific performance. He did not give sufficient weight to the nature of this property, and he started with the wrong question, *i.e.*, whether the property is unique, rather than whether damages are an adequate remedy. He also did not appreciate that SaskCo led no evidence demonstrating that the damages were speculative or too uncertain and, indeed would not be able to lead such evidence, given its lack of a business plan. Indeed, SaskCo was prepared to quantify and fix damages based on the increase in the value of the land as of a date selected by the trial judge. In all of these circumstances, this Court is entitled, if not obligated, to intervene and set aside his order of specific performance.

102 Having decided that the trial judge's decision regarding specific performance should be set aside, I must consider whether this Court is in a position to assess damages. I am reluctant to do so for two reasons. First, the trial judge made no preliminary determination as to which expert he preferred and did not specify the date at which damages should be assessed. Second, the Harles did not consent to this Court fixing damages. For these reasons, the matter should be remitted to the trial judge for damages to be assessed.

E. Did the trial judge err by refusing to award interest on the unpaid purchase price?

103 The trial judge held: "[n]o interest is payable to the defendants who failed to perform their obligations under the contract and wrongfully withheld transfer of title even though their lawyer had the entire purchase price in hand, in breach of their contractual obligations" (para. 85). The Harles challenge this conclusion.

104 According to the initial offer, SaskCo agreed to pay interest to the Harles at the rate of 6% per annum on any portion of the purchase price not received by them by the possession date (Appeal Book, Vol. 1, p. A87.21). If this Court were to sustain the trial judge's conclusion with respect to a breach of contract, the Harles submit they should receive interest on the purchase price since SaskCo has had the benefit of the money. While they have been using the land, they have also been carrying the mortgage payments on the land, which they would not have been required to do if the transaction had closed in September of 2007.

105 As a general rule, the contract governs who is entitled to interest payments. However, as J. Victor Di Castri, *Law of Vendor and Purchaser*, looseleaf, vol. 2, 3rd ed. (Toronto: Thomson Reuters, 2008) at para. 476 indicates, a purchaser may be relieved from the payment of interest if the delay resulted from the wilful default of the vendor.

106 The Supreme Court of Canada considered what constitutes wilful default in *Hayes v. Elmsley* (1893), 23 S.C.R. 623 (S.C.C.). The Court explained that willful default connotes something more than a mere default:

As to what constitutes wilful default on the part of the vendor no exact definition can perhaps be found. It is certainly, however, extensive enough to include what may be called gross negligence to perform obligations which he has imposed upon himself by his contract. It must therefore *a fortiori* comprehend cases in which the vendor is not merely guilty of inaction and neglect, but in which he actually repudiates his agreement altogether, and also cases in which he makes grossly untenable claims and refuses to complete except on the terms that such claims are acceded to ... (pp. 625-6).

107 *Obiter* affirmations of this statement are found in 306793 *Ontario Ltd. v. Rimes* (1979), 100 D.L.R. (3d) 350 (Ont. C.A.), at 357 and *Semelhago* at para. 24.

108 Since the trial judge did not err when he concluded that the Harles breached their contract, they should not be granted any interest on the purchase price. They lost that right when they failed to close the agreement in September 2007. Their breach of contract created the delay and thus generated the interest earned by SaskCo on the funds. While SaskCo has had the benefit of the money, the Harles have had the benefit of the land. Therefore, the trial judge did not err when he concluded that the Harles are not entitled to the payment of any interest.

Conclusion

109 The appeal is allowed in part. The matter is remitted to the trial judge to assess damages, based on the evidence adduced at trial. It is left to the trial judge to determine whether he will receive further submissions.

110 Each party will bear their own costs of appeal.

Lane J.A.:

I concur.

Klebuc J.A. (dissenting in part):

111 I agree with my colleagues that the appellants, Douglas John Harle and Colleen Karen Harle, breached the sale agreement by not completing the sale of the subject land to the respondent, SaskCo, and also agree with their decision regarding interest claimed on the unpaid purchase price. However, I respectfully disagree with their assessment of the trial judge's reasons for judgment and their conclusion that the trial judge erred in granting specific performance of the sale agreement rather than awarding damages for its breach. In my respectful opinion, the trial judge understood the law regarding this issue, made no unreasonable findings of fact, and correctly applied the law to the facts. Consequently, there is no tenable basis for interfering with his decision in this respect. That said, I turn to the law applicable to the issues that were before the trial judge.

112 As his reasons for judgment disclose, the trial judge instructed himself on the controlling principles of law by reference to the decision of this Court in *Raymond v. Raymond Estate*, 2011 SKCA 58, [2011] 9 W.W.R. 247 (Sask. C.A.), and the decisions and jurisprudential writings cited therein. Justice Caldwell, on behalf of the Court in *Raymond*, summarized the state of the law on specific performance subsequent to the Supreme Court decision in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.). Justice Caldwell specifically noted that as a result of *Semelhago* courts are not to assume damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in

all cases and therefore specific performance should not be granted "absent evidence that the property is unique to the extent that its substitute would not be readily available". (*Semelhago*, para, 22).

113 He also indicated the process for determining whether damages would be an adequate remedy entails an inquiry into whether the property in issue is "specially suited to the purchaser" and "comparable substitute property is not readily available". At para. 15 he spoke of what this entails in practical terms:

15 In practical terms, this means the prospective purchaser bears the burden of adducing evidence that the subject property is specially suited to the purchaser and that a comparable substitute property is not readily available. These evidentiary points are necessarily intertwined because, on the basis of the evidence, the prospective purchaser must discharge the overall burden of persuading the judge that the subject property is so different from others that damages is an inadequate remedy and that justice dictates the purchaser should have the subject property. The judge, in turn, must conduct a critical inquiry on the evidence as to the nature and function of the subject property in relation to the prospective purchaser. The evidence and analyses will necessarily overlap, but the overall question the judge must answer is whether the justice of the matter calls for an award of specific performance because damages would be inadequate.

114 Based on the trial judge's reasons for judgment, I am satisfied he understood the basic principles of law articulated in *Raymond*, understood the evidentiary burden upon the purchaser seeking an order for specific performance, and understood the nature of the inquiry he was to conduct, including the ultimate question he was to answer. While his self-instruction in some respects could have been more sophisticated, I am satisfied on reading his judgment as a whole that he fully appreciated the applicable law. Consequently he cannot be seen as having misdirected himself in any material respect.

115 It is said that the trial judge failed to give effect to the change of law brought about in *Semelhago*. I find nothing in his reasons for judgment suggesting that he ignored the question of whether monetary damages would constitute adequate compensation in the circumstances of this case. To the contrary, before opening his discussion on the issue of specific performance, he confirmed he found "the plaintiff's expectation cannot be protected by a money award sufficient to purchase substitute performance since the subject land is unique, without substitute replacement". In doing so, he performed what the Supreme Court prescribed in *Semelhago* at para 22:

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

116 The issue of whether damages are an inadequate remedy is bound up with the issue of whether the land is unique to the extent it is not readily replaceable. Thus the adequacy of compensatory damages and the uniqueness of the land are often discussed together.

117 In my respectful view, the reference by the trial judge to s. 7.220 of *Injunctions and Specific Performance*, *supra*, goes no further than confirming the trial judge was alive to the factors the author considered important in determining whether land is unique in a given circumstance. In sum, I am satisfied the trial judge made no error in his interpretation or application of the law to the facts as he found them based on the evidence he was prepared to accept.

118 My colleagues say that the relevant facts are not in dispute and, consequently they are able to characterize the land as not unique without having to take into account and weigh the whole of the complex evidence regarding the strategic location of the land, the significant development opportunity it provided the purchaser which otherwise was not available to it, the significant size of the land, the planning and development consideration related to its location and other material factors outlined by Mr. Taylor and other witnesses during the trial.

119 I concede that had the trial judge erred in law and the land consisted of a few building lots, a few townhouses, or a commercial building, this Court might have been able to make the required determination. However, this is not the case before the Court. It therefore follows that, unless the trial judge's findings of fact are set aside, I see no basis

on which it can be said that the subject land is not specially suited to the purchaser, or that comparable substitute land is readily available.

120 As for the trial judge's findings of fact, it is not open to this Court to interfere with them in the absence of palpable and overriding error on his part in making his findings of fact: *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.). In other words, it is not open to this Court to substitute its own view for that of the trial judge about what the evidence proves, or to draw its own inferences of fact, unless the trial judge can be shown to have made material findings of fact that are clearly wrong, unreasonable or unsupported by the evidence. In my respectful opinion the trial judge made no such error.

121 The trial judge opened his consideration of the facts with the observations that, based upon the evidence, he was satisfied, first, that the purchaser's "expectation cannot be protected by a money award sufficient to purchase substitute performance, since the subject land is unique, without substitute replacement"; and, second, that the subject land is "specially suited to the purchaser" and "a comparable substitute property is not readily available" (at para. 8). He then elaborated upon this, finding that this parcel of land is comprised of 1664 contiguous acres, is located near the western boundary of the City of Regina, is owned by a single owner, is well suited to prospective residential or commercial development, and has no counterpart near the City in terms of proximity, size, and single ownership.

122 Accordingly, the trial judge was entitled to find that the land was unique by virtue of its exceptional character, location and development potential and the purchaser was in the business of residential and commercial development and this was the long term goal it had in mind in purchasing the property. The trial judge further said the acquisition by the purchaser amounted to "a once in a lifetime opportunity" according to the evidence and that "the vast preponderance of evidence satisfies me that alternative land is not available".

123 These findings of fact are supported by the testimony of a number of witnesses whose evidence he accepted. For example, Mr. Taylor, the president of SaskCo and a person experienced in developing raw land for residential and commercial purposes, testified SaskCo purchased the subject land because of its potential for large scale residential and commercial developments. Mr. Lawrek, a veteran land appraiser, testified the acquisition of the subject land "is a once in a lifetime opportunity" because of its location and development potential. Having regard for this, as well as the whole of the evidence, I am not convinced the trial judge's essential finding of fact that the land is unique is clearly wrong, unreasonable, or not supported by the evidence. In other words, I am not convinced that the trial judge's essential findings of fact that the land is specially suited to the purchaser and that a comparable substitute property is not readily available, are the product of demonstrable or overriding error on his part.

124 Nor am I convinced that the trial judge misapplied the law to the facts. I think it was open to him, on the basis of the facts as found and the legal principles as outlined in *Raymond* and *Semelhago*, to conclude that specific performance, rather than damages, was an appropriate remedy in the circumstances of this case. Based on his finding of fact, an award of damages would not have been an adequate substitute for specific performance of the contract. It also would constitute an inequitable remedy to the extent the appellants would stand to capture the benefit of any future gain in the commercial value of their investment by breaching their contractual obligations.

125 On the whole of the evidence before him, the trial judge was satisfied that no other land near Regina was as unique in terms of size, single ownership and proximity to the City of Regina as the subject land. He also was alive to SaskCo's submission that *if* he was not prepared to order specific performance of the sale agreement, then "damages should be assessed based on the increase in the value of the land alone" as there was no other practical or viable way to assess the damages. Mr. Taylor had indicated the resulting damages could exceed \$100,000,000.00 but would be difficult to calculate. The trial judge considered the option of an award of damages and found the option to be inadequate in the circumstances and therefore ordered the appellant to perform his contractual obligations. I can see no basis for interfering with his judgment in this regard.

126 It is said that his judgment does not accord with the decision of the Supreme Court of Canada in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675 (S.C.C.). With respect I do not agree. I think the decision in *Southcott* is not applicable by virtue of the trial court in that case having found on the facts that the land in question was not unique and that damages were an appropriate remedy. Thus, the sole issue before the Supreme Court was what damages, if any, should have been awarded the purchaser for losses suffered as a consequence of the vendor breaching its contractual obligations. As previously noted, the learned trial judge in this case found the land was unique and damages would be an inadequate remedy.

127 In his text *Injunctions and Specific Performance*, Robert J. Sharpe addressed the relative merits of specific performance and damage awards. Of particular relevance are sections 7.210 and 7.220 where he wrote:

7.210 Where the subject-matter of the contract is "unique", a strong case can be made for specific performance. The more unusual the subject-matter of the contract, the more difficult it becomes to assess the plaintiff's loss. The special treatment accorded land, rare artifacts and family heirlooms is familiar in this regard.

7. 220 An award of damages presumes that the plaintiff's expectation can be protected by a money award which will purchase substitute performance. If the item bargained for is unique, then there is no exact substitute. The lack of an available substitute produces two problems. First, it makes the purely monetary loss caused by the defendant's breach very difficult to measure. There are no comparable sales to which reference may be made in order to establish an objective estimate of the value of the promised item or performance. Secondly, even if an objective value of some sort can be found, the effect of denying specific performance and granting damages is to force the plaintiff to settle for some inexact substitute. The plaintiff may, however, have attached to the particular item bargained for a value, sometimes call the "consumer surplus", which is not reflected by objective measurement. In such a case, the value of the item to the plaintiff exceeds the market value (even if it can be established) and it is difficult to justify forcing the plaintiff to accept only the lesser objective value. It might be argued that money relief could also be awarded to compensate the plaintiff for this loss above the market value but, because of its subjective nature, that extra value is extremely difficult to assess. If no account is taken of this aspect of the plaintiff's interest in performance, the expectation will not be protected and one of the basic aims of contract remedies will not be fulfilled. By requiring performance of the defendant's obligation, *in specie*, the court can avoid the expensive and time-consuming task of translating the effect of the breach into money terms and, more importantly, avoid the risk of inaccurate assessment and thereby achieve a virtual guarantee of remedial adequacy in favour of the plaintiff. (footnotes omitted)

128 In my view the trial judge took into account the factors articulated by the author and correctly concluded that an order for specific performance is more advantageous and efficient than an award of damages. The matter before the Court is not a case where a vendor breached a contract to sell a house or parcel of subdivided land which is not unique in the sense the purchaser would be able to replace it by buying a similar property. In this respect the circumstances in this case are materially different from those in *1244034 Alberta Ltd. v. Walton International Group Inc.*, 2007 ABCA 372, 288 D.L.R. (4th) 360 (Alta. C.A.) (*Walton*). In *Walton*, the purchaser had every intention to flip the purchased property, or to subdivide it and sell building lots to home builders. It also was interested in other properties in the same area for the same purpose. While the majority in *Walton* upheld the chamber judge's decision that damages were an adequate remedy, it noted, "the chambers judge's reasoning does not equate with the proposition that the acquisition of property for commercial profit invariably precludes specific performance. Rather, the chambers judge considered whether an award of damages would suffice and concluded that it would" (para. 12). In *365733 Alberta Ltd. v. Tiberio*, 2008 ABCA 341, 440 A.R. 177 (Alta. C.A.), the land consisted of three acres which were fully serviced. Based on affidavit evidence the chamber judge concluded this parcel was not unique. In the instant case, the trial judge concluded damages would not be adequate based on the whole of the evidence before him.

129 In my respectful opinion, the mere fact that a purchaser acquires a large parcel of raw land for the primary purpose of developing it as a large scale residential and commercial project does not undermine the uniqueness of the land to the purchaser or eliminate the remedy of specific performance.

130 Neither *Semelhago*, *Raymond* nor *Walton* stands for the proposition that, if a significant property is purchased as a long term investment or for a substantial commercial development, the injured purchaser is not entitled to the remedy of specific performance. However, it follows they are factors to be taken into account by a trial judge along with all other factors relevant to the determination of whether compensatory damages would be an adequate remedy having regard to the uniqueness of the subject land to the purchaser. In this case, the trial judge was alive to these factors and concluded damages would not be an adequate remedy due to the unique character of the land and no other equivalent property being available.

131 I am of the further view that limiting SaskCo to damages will unavoidably lead to substantial delays and expenses associated with the assessment of damages; the probability of another appeal to this Court from a damages awarded by the trial judge and the risk of an inaccurate assessment, particularly in circumstances where the evidence indicates the value of the land substantially rose between the date of the sale agreement and the date of the trial, and its development potential may increase in the future. In these circumstances a damage award would implicitly provide the appellant with an opportunity to significantly benefit from his breach by selling the land to a third party at a price significantly higher than its appraised value at the time of the trial or the damages to be assessed by the trial judge. The facilitation of such an opportunity in my view tends to undermine the efficacy of the law of contracts. It would empower vendors to adopt a "heads I win tails you lose" approach regarding their contractual obligations.

132 Moreover, the difficulty and related costs involved in enforcing a large damage award also weighs in favour of specific performance, particularly when farm land is the asset involved.

133 In conclusion, I would dismiss the appeal with costs to the respondent in the usual manner.

Appeal allowed in part.

Tab 12

2012 SCC 51
Supreme Court of Canada

Southcott Estates Inc. v. Toronto Catholic District School Board

2012 CarswellOnt 12505, 2012 CarswellOnt 12506, 2012 SCC 51, [2012] 2
S.C.R. 675, [2012] S.C.J. No. 51, 220 A.C.W.S. (3d) 348, 24 R.P.R. (5th) 1, 296
O.A.C. 41, 351 D.L.R. (4th) 476, 3 B.L.R. (5th) 1, 435 N.R. 41, J.E. 2012-1952

**Southcott Estates Inc., Appellant / Respondent on cross-appeal and Toronto
Catholic District School Board, Respondent / Appellant on cross-appeal**

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

Heard: March 20, 2012
Judgment: October 17, 2012
Docket: 33778

Proceedings: affirming *Southcott Estates Inc. v. Toronto Catholic District School Board* (2010), 261 O.A.C. 108, 319 D.L.R. (4th) 349, 2010 ONCA 310, 2010 CarswellOnt 2602, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, 104 O.R. (3d) 784 (Ont. C.A.); varying *Southcott Estates Inc. v. Toronto Catholic District School Board* (2009), 78 R.P.R. (4th) 285, 2009 CarswellOnt 494 (Ont. S.C.J.)

Counsel: J. Thomas Curry, Milton A. Davis, Paul-Erik Veel, for Appellant / Respondent on cross-appeal
Andrew M. Robinson, Elizabeth K. Ackman, Andrea Farkouh, for Respondent / Appellant on cross-appeal

Subject: Civil Practice and Procedure; Contracts; Property

Related Abridgment Classifications

Contracts

[XIV Remedies for breach](#)

[XIV.4 Specific performance](#)

[XIV.4.c Availability in particular contracts](#)

[XIV.4.c.x Sale of land](#)

Remedies

[I Damages](#)

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[I.6.c Measure of damages](#)

[I.6.c.i Real property](#)

[I.6.c.i.E Miscellaneous](#)

Remedies

[I Damages](#)

[I.6 Valuation of damages](#)

[I.6.d Duty to mitigate](#)

[I.6.d.i General principles](#)

Remedies

[III Specific performance](#)

[III.3 Availability in particular contracts](#)

[III.3.j Sale of land](#)

Headnote

Contracts --- Remedies for breach — Specific performance — Availability in particular contracts — Sale of land

Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to \$1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Specific performance claim was similarly not factor that prevented developer from having to mitigate damages — Property was not unique but was similar to other possible investment properties.

Remedies --- Damages — Valuation of damages — Measure of damages — Real property — Miscellaneous

Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to \$1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Fact that corporation was incorporated for single purpose did not relieve developer of duty to mitigate — Developer still had ability to purchase other properties and to extent that this was limited, it was part of risk of incorporation — Specific performance claim was similarly not factor that prevented developer from having to mitigate damages — Property was not unique but was similar to other possible investment properties — Subsequent purchases by parent company of developer showed that mitigation was possible, and trial judge failed to take this into account — General availability of similar properties was put into evidence by board.

Remedies --- Damages — Valuation of damages — Duty to mitigate — General principles

Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to \$1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Fact that corporation was incorporated for single purpose did not relieve developer of duty to mitigate — Developer still had ability to purchase other properties and to extent that this was limited, it was part of risk of incorporation — Subsequent purchases by parent company of developer showed that mitigation was possible, and trial judge failed to take this into account — General availability of similar properties was put into evidence by board.

Remedies --- Specific performance — Availability in particular contracts — Sale of land

Plaintiff was developer and was incorporated without assets for sole purpose of developing land belonging to defendant school board — Board failed to satisfy condition of contract, after which developer brought action for specific performance of contract — Developer claimed it was not required to mitigate losses — At trial, it was found that board breached agreement and that developer was entitled to damages for loss of chance of profit — Specific performance was not given as there was not sufficient evidence of property's uniqueness — Board appealed findings of trial judge — Finding as to breach of contract was upheld, but appeals court found that there was duty to mitigate on part of developer and that developer had not done so — Damage award was reduced to \$1 as result — Developer appealed to Supreme Court of Canada from findings of appeals court on mitigation — Appeal dismissed — Specific performance claim was similarly not factor that prevented developer from having to mitigate damages — Property was not unique but was similar to other possible investment properties.

Contrats --- Réparation du défaut — Exécution intégrale — Possible dans certains contrats — Vente d'un terrain
Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à \$1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait de déposer une action en exécution intégrale d'un contrat ne constituait pas un élément empêchant le promoteur de mitiger ses pertes — Terrain n'était pas unique mais était comparable à d'autres investissements immobiliers potentiels.

Réparations --- Dommages-intérêts — Évaluation des dommages — Évaluation des dommages — Biens immeubles — Divers

Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à \$1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait que la société ait été constituée en vue d'un projet unique ne libérait pas le promoteur de son obligation de mitiger le préjudice — Promoteur avait toujours la possibilité d'acquérir d'autres terrains et le fait que cette possibilité était limitée faisait partie des inconvénients de la constitution en société — Fait de déposer une action en exécution intégrale d'un contrat ne constituait pas un élément empêchant le promoteur de mitiger ses pertes — Terrain n'était pas unique mais était comparable à d'autres investissements immobiliers potentiels — Acquisitions subséquentes de terrains par la compagnie mère du promoteur démontraient qu'il était possible de mitiger le préjudice, ce que le juge du procès n'avait pas considéré — Disponibilité générale de terrains similaires a été mise en preuve par la commission.

Réparations --- Dommages-intérêts — Évaluation des dommages — Devoir de mitiger — Principes généraux

Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à \$1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait que la société ait été constituée en vue d'un projet unique ne

libérait pas le promoteur de son obligation de mitiger le préjudice — Promoteur avait toujours la possibilité d'acquérir d'autres terrains et le fait que cette possibilité était limitée faisait partie des inconvénients de la constitution en société — Acquisitions subséquentes de terrains par la compagnie mère du promoteur démontraient qu'il était possible de mitiger le préjudice, ce que le juge du procès n'avait pas considéré — Disponibilité générale de terrains similaires a été mise en preuve par la commission.

Réparations --- Exécution intégrale — Possible dans certains contrats — Vente d'un terrain

Demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée sans actif dans l'unique but de mettre en valeur un terrain appartenant à la commission scolaire défenderesse — Commission n'a pas satisfait à une des conditions d'une entente conclue entre les parties et a ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat — Promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes — Lors du procès, le juge de première instance a conclu que la commission avait violé l'entente et que le promoteur avait droit à des dommages-intérêts pour compenser la perte d'une occasion de profits — Juge du procès a refusé d'ordonner l'exécution du contrat au motif qu'on n'avait pas démontré le caractère unique du terrain — Commission a interjeté appel à l'encontre des conclusions du juge du procès — Conclusions du juge du procès concernant la violation de l'entente ont été confirmées, mais la Cour d'appel a estimé que le promoteur avait l'obligation de mitiger ses pertes, ce qu'il n'avait pas fait — Conséquemment, les dommages-intérêts octroyés au terme du procès ont été réduits à \$1 — Promoteur a formé un pourvoi devant la Cour suprême du Canada à l'encontre des conclusions de la Cour d'appel concernant l'obligation qui lui revenait de mitiger ses pertes — Pourvoi rejeté — Fait de déposer une action en exécution intégrale d'un contrat ne constituait pas un élément empêchant le promoteur de mitiger ses pertes — Terrain n'était pas unique mais était comparable à d'autres investissements immobiliers potentiels.

The plaintiff developer was a corporation which was incorporated for the purpose of developing a specific piece of property. The defendant school board failed to satisfy a condition of the contract between the parties, leading the developer to bring an action for specific performance against the board.

The developer claimed it did not have to mitigate its damages by attempting to purchase another property, and as such made no efforts to do so. At trial, it was found that the developer was entitled to damages for loss of profit even though it was not entitled to damages for specific performance.

On appeal, it was found that the developer should have taken steps to mitigate its damages, and as such the damage award at trial was reduced to nominal damages of \$1. The developer appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Karakatsanis J. (LeBel, Deschamps, Abella, Rothstein, Cromwell JJ. concurring): The fact that the plaintiff was incorporated for a single purpose did not relieve the developer of the duty to mitigate. The developer had the ability to purchase other properties and any difficulty with doing so was a risk of incorporation. The property itself was not unique in a way that should have led to a specific performance claim. The subsequent purchases of property by the parent company of the developer and the general availability of similar properties argued for the duty to mitigate. The findings of the appeal court were upheld.

Per McLachlin C.J.C. (dissenting): The trial judge's conclusion that there was no opportunity to mitigate by the developer was grounded in the evidence and was not to be disturbed. Even if there had been an opportunity to mitigate, the developer acted reasonably in not doing so. The properties held out, as examples of similar properties were in fact different in size and features, and so were not comparable for mitigation purposes. It would have been inconsistent for the developer to mitigate its damages while seeking specific performance.

La demanderesse était une société qui agissait en tant que promoteur et qui avait été constituée dans le but d'acheter et de mettre en valeur un terrain en particulier. La défenderesse était une commission scolaire qui n'avait pas satisfait à une des conditions d'une entente conclue entre les parties et qui avait ensuite fait l'objet d'une action entamée par le promoteur visant à obtenir l'exécution intégrale du contrat.

Le promoteur a fait valoir qu'il n'était pas tenu de mitiger ses pertes en tentant d'acheter un autre terrain et n'a fait aucun effort en ce sens. Lors du procès, le juge de première instance a conclu que le promoteur avait droit à des dommages-intérêts pour compenser la perte de profits mais n'avait pas droit à des dommages-intérêts pour compenser l'inexécution du contrat.

En appel, la Cour d'appel a conclu que le promoteur aurait dû entreprendre les démarches appropriées pour mitiger ses pertes de sorte que le montant des dommages-intérêts octroyés au terme du procès a été réduit à un montant symbolique de \$1. Le promoteur a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, J. (LeBel, Deschamps, Abella, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Le fait que la demanderesse ait été constituée en vue d'un projet unique ne libérait pas le promoteur de son obligation de mitiger le préjudice. Le promoteur avait la possibilité d'acquérir d'autres terrains et toute difficulté découlant de ces démarches faisait partie des inconvénients de la constitution en société. Le terrain lui-même n'était pas unique au point de justifier une action en exécution intégrale d'un contrat. Les acquisitions subséquentes de terrains par la compagnie mère du promoteur ainsi que la disponibilité générale de terrains similaires plaidaient en faveur de l'obligation de mitiger le préjudice. Les conclusions de la Cour d'appel ont été confirmées.

McLachlin, J.C.C. (dissidente) : La conclusion du juge du procès selon laquelle le promoteur n'avait aucune possibilité lui permettant de mitiger ses pertes était fondée sur la preuve, et la Cour ne devrait pas intervenir sur cet aspect du jugement. Même si le promoteur avait eu la possibilité de mitiger ses pertes, il a agi de façon raisonnable en ne le faisant pas. Les terrains présentaient un véritable attrait, dans la mesure où les terrains similaires étaient en fait de superficie différente et possédaient d'autres caractéristiques et n'étaient ainsi pas comparables pour les fins de l'obligation qui revenait au promoteur de mitiger ses pertes. Du point de vue du promoteur, il aurait été contradictoire de mitiger ses pertes tout en demandant l'exécution intégrale du contrat.

APPEAL by plaintiff developer from judgment reported at *Southcott Estates Inc. v. Toronto Catholic District School Board* (2010), 261 O.A.C. 108, 319 D.L.R. (4th) 349, 2010 ONCA 310, 2010 CarswellOnt 2602, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, 104 O.R. (3d) 784 (Ont. C.A.), allowing appeal by defendant school board.

POURVOI formé par le promoteur demandeur à l'encontre d'un jugement publié à *Southcott Estates Inc. v. Toronto Catholic District School Board* (2010), 261 O.A.C. 108, 319 D.L.R. (4th) 349, 2010 ONCA 310, 2010 CarswellOnt 2602, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, 104 O.R. (3d) 784 (Ont. C.A.), ayant accueilli l'appel interjeté par la commission scolaire défenderesse.

Karakatsanis J.:

I. Introduction

1 Real estate developers frequently create single-purpose corporations for the sole purpose of purchasing and developing properties for profit. The corporation has limited liability and no assets other than those that arise from the particular real estate investment. The issue raised in this appeal is whether such a single-purpose corporation is excused from mitigating its losses when the vendor breaches the agreement of purchase and sale, and particularly when it has promptly brought an action for specific performance. The further issue is whether the trial judge erred in his finding that there were no other "comparable" properties available to mitigate the loss.

2 The appellant, Southcott Estates Inc., was part of the Ballantry Group of associated companies that acquired and developed land in the Greater Toronto Area ("GTA"). Southcott was a single-purpose corporation, without assets, created for the sole purpose of developing the property that is the subject of this action. When the vendor, the Toronto Catholic District School Board, failed to satisfy a condition and refused to extend the closing date, Southcott sought specific performance of the contract. It argues that it was not required to mitigate its losses.

3 The trial judge ((2009), 78 R.P.R. (4th) 285 (Ont. S.C.J.)) found that the Board had breached the agreement of purchase and sale and had failed to prove that Southcott could have mitigated its damages. He awarded damages for loss of chance of profit. He refused to order specific performance, finding that the property was not "unique" and damages were an adequate remedy.

4 The Ontario Court of Appeal (2010 ONCA 310, 104 O.R. (3d) 784 (Ont. C.A.)) concluded that while the trial judge correctly found that the Board had breached its contractual obligations, he had erred in his approach to mitigation. The court concluded that Southcott had unreasonably failed to take available steps to mitigate its loss and reduced the damage award granted at trial to a nominal sum.

5 Southcott did not appeal the trial judge's refusal to award specific performance. However, it maintains its losses were not avoidable. The questions raised in this appeal are:

1. Should a Single-Purpose Company Mitigate its Losses?
2. To what extent must a plaintiff mitigate where the plaintiff has made a claim for specific performance?
3. Did the trial judge err in concluding that there was no evidence of comparable profitable properties available for mitigation?

6 For the reasons that follow, I conclude that Southcott cannot recover losses that it could reasonably have avoided. I agree with the Court of Appeal that the trial judge erred in concluding that there was no evidence of other development properties that Southcott could have purchased in mitigation. I would dismiss the appeal.

II. Facts

7 Southcott is a wholly owned subsidiary of Ballantry Homes Inc. and part of a larger group of companies called Ballantry Group of Companies ("Ballantry" or "Ballantry Group"). The Board is a School Board created pursuant to the *Education Act*, R.S.O. 1990, c. E.2, whose affairs were run by a publicly elected Board of Trustees.

8 Having determined that certain land within a school property was surplus to its needs, the Board put it up for sale. Intending to use the land for residential development, Southcott agreed to purchase the 4.78 acres of land for \$3.44 million. It paid a 10 percent deposit and the parties agreed to a closing date of August 31, 2004. It was a condition of the agreement that the Board obtain a severance from the Committee of Adjustments on or before the closing date. On August 30, 2004, the parties agreed to extend the closing date to January 31, 2005.

9 The Board applied for a severance in November; it was advised that a development plan was necessary but chose to proceed without one. On December 16, 2004, at the municipality's request, the Committee of Adjustments deferred the severance application hearing as premature because it was not accompanied by a development plan. At that time, it became clear to Southcott and the Board that the transaction could not be completed by the closing date of January 31, 2005. The Board refused Southcott's request to extend the closing date, declared the transaction to be at an end, and returned Southcott's deposit.

10 Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and commenced an action for specific performance or, in the alternative, for damages.

11 Southcott admitted that it never had any intention to mitigate its loss and, indeed, never tried to mitigate (para. 137 of the trial judge's decision). Southcott was a single purpose company incorporated solely for the purposes of this development project and had no assets other than the money advanced by Ballantry for the deposit. It never intended to purchase other land. In fact, Southcott's principal testified at trial that there was no question of it purchasing other land, given that it was involved in this litigation (para. 18 of the Court of Appeal decision).

12 The Board led expert evidence that 81 parcels of vacant development land in the GTA were sold between the date of breach and the date of trial. The land was suitable for residential development and within the parameters, of size and price, of other lands purchased by the Ballantry Group.

13 Corporations within the Ballantry Group purchased seven parcels of land for development purposes during this same period. The principal of Ballantry testified that it was always in the market for new land, had the financial means to make the purchases, and it would have made these purchases even if Southcott had completed the land purchase from the Board (para. 138 of the trial judge's decision).

III. Decisions Below

14 At trial, Spiegel J. concluded that the Board had failed to take all reasonable steps to fulfill the severance condition. It breached its best efforts obligation by failing to contact relevant city staff; delaying in processing the severance application; failing to include the proposed plan of use with the severance application; submitting an improper survey; failing to seek appropriate advice; ignoring the advice of the Committee of Adjustments; proceeding with the application for severance even after being advised that it was incomplete and failing to keep Southcott informed (paras. 71-87).

15 The trial judge found that had the Board used its best efforts, the severance would likely have been granted, and the transaction would have been completed by the closing date. The trial judge was satisfied that the Board's breach caused Southcott's loss (paras. 93-116).

16 Turning to remedy, Spiegel J. found that specific performance was not an appropriate remedy as the land did not have the quality of uniqueness (paras. 128-33).

17 However, he concluded that Southcott was entitled to damages. He rejected the Board's argument that Southcott had in fact mitigated damages because the Ballantry Group made several purchases subsequent to the breach of the agreement:

I find that these subsequent purchases were collateral, independent transactions that did not arise out of the consequences of the breach. In all the circumstances, I do not consider these transactions as mitigatory. [para. 143]

18 The trial judge found that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate its loss. He held that there was no evidence that any of the available properties were actually offered for sale or could have been profitably developed and he was not satisfied that the properties were comparable (paras. 144-46). He therefore awarded Southcott damages in the amount of \$1,935,500 which represented the loss of a 60 percent chance to make profits in the amount of \$3,225,827.

19 On appeal, the Board did not dispute the findings that it had breached its obligation to use its best efforts to obtain the severance required to complete the sale. It challenged the findings of causation and mitigation.

20 Sharpe J.A., writing for the Court of Appeal, rejected the first ground of the Board's appeal, that the trial judge erred in finding that the Board's breach was the cause of the failure to obtain the severance by the closing date (paras. 11-14).

21 Regarding the issue of whether the losses could have been avoided, however, the Court of Appeal concluded that the trial judge had erred in law in finding that the Board had not shown that Southcott could have mitigated its losses. First, Southcott's admission that it had no intention of taking any steps to mitigate was sufficient to satisfy the onus resting upon the Board and to shift the evidentiary onus to Southcott to demonstrate that, even if it had attempted to mitigate, it could not have done so. Second, the trial judge erred in dealing with the Board's evidence regarding the land that was available: "By requiring the Board to prove ... the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level" (para. 25). Finally, the trial judge failed to consider that Ballantry's purchases of other lands clearly demonstrated that the directing mind of Southcott knew that investment quality lands, suitable for profitable development, were available on the market. The Court of Appeal stated that Southcott was a distinct legal entity that could not avoid mitigating its loss by arguing that it was a part of Ballantry: the obligation to mitigate rested with Southcott (paras. 24-27).

22 The Court of Appeal concluded that while Southcott had made out its case for breach of contract, it failed to make out a case for either specific performance or damages. The appropriate award was for nominal damages in the amount of \$1.

IV. Mitigation — General Principles

23 This Court in *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.) [hereinafter *Asamera Oil Corp.*], cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673 (U.K. H.L.), at p. 689:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

24 In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 (S.C.C.), at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." As a general rule, a plaintiff will not be able to recover for those losses which he could have been avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Michaels v. Red Deer College* (1975), [1976] 2 S.C.R. 324 (S.C.C.); *Asamera Oil Corp.*; *Evans v. Teamsters, Local 31*, 2008 SCC 20, [2008] 1 S.C.R. 661 (S.C.C.), at para. 30).

25 On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1991-92), 13 *Advocates Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. "Cisco" (The)* (1993), [1994] 2 F.C. 279 (Fed. C.A.), at p. 302: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case.

A. Should a Single-Purpose Company Mitigate its Losses?

26 Southcott argues that the Court of Appeal failed to recognize the unique circumstance of a single-purpose corporation in mitigating contractual loss; as a single-purpose company, it was impecunious and unable to mitigate without significant capital investment of the parent company or without the corporate mandate to do so. Further, it submits that it would be reasonably foreseeable to those contracting with a single-purpose corporation that such an entity would have finite resources and a confined corporate mandate. In this case, Southcott acted reasonably, within its ordinary course of business and promptly brought this lawsuit.

27 Southcott sought specific performance and was therefore ready to complete the purchase. In any event, its alternative claim for consequential damages was predicated upon its access to capital to complete the agreement of purchase and sale. As such, both claims were premised upon resources, resources that were not tied up as a result of the breach alleged. Indeed, the alleged breach in this case did not affect Southcott's ability to obtain capital. Southcott can hardly argue that the same money would not have been available for mitigation.

28 Further, the question is factual and it was not suggested at trial that Southcott had no access to capital or that borrowing money would have been unreasonably risky or costly. Southcott did not argue that it was impecunious at trial.

29 In the absence of actual evidence of impecuniosity, finding that losses cannot be reasonably avoided, simply because it is a single-purpose corporation within a larger group of companies, would give an unfair advantage to those conducting business through single-purpose corporations. In addition, not requiring single-purpose corporations to mitigate would expose defendants contracting with such corporations to higher damage awards than those reasonably claimed by other plaintiffs, based solely upon their limited assets.

30 The trial judge found that the purchases of development land by other corporations within the Ballantry Group did not in fact mitigate Southcott's loss; that finding is not challenged here. As noted above, he found that the other properties purchased by other members of the Ballantry group were "collateral" in the sense that the purchases would have occurred whether or not the defendant had breached its contract with Southcott (para. 143). However, because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. As a separate legal entity, Southcott was required to mitigate by making diligent efforts to find a substitute property. Those who choose the benefits of incorporation must bear the corresponding burdens: *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 (S.C.C.), at pp. 10-12. Southcott is entitled to the benefits of limited liability, but it is also saddled with the responsibilities that all legal entities have. The requirement to take steps to mitigate losses is one such responsibility. A plaintiff cannot recover losses that could reasonably have been avoided. The overriding issue here is whether Southcott's inaction was reasonable, and if not, whether it could have reasonably mitigated if it had tried to do so.

B. Southcott Was Required to Mitigate Losses Despite its Claim for Specific Performance

31 Specific performance is an equitable remedy that is difficult to reconcile with the principle of mitigation. Obviously, if Southcott had purchased a property in mitigation, it may not have been able to complete its agreement of purchase and sale of the Board's surplus land if ultimately successful in its claim for specific performance. When can a plaintiff seeking specific performance justify inaction and recover losses which may otherwise have been classified as avoidable?

32 The trial judge found that Southcott did not have a viable claim for specific performance. He found that while the business opportunity may have been unique, the property itself was not. The trial judge found that what was at issue here was a straightforward business plan, the failure of which could be measured in damages (para. 132). The Court of Appeal agreed. The trial judge's decision not to order specific performance is not challenged in this appeal.

33 However, Southcott submits that even though it was unsuccessful in its claim for specific performance, it proceeded expeditiously and the claim had real substance because the property was a unique opportunity, given its location and the rarity of such properties in the GTA. As a result, it says that it was not reasonable to attempt to mitigate; the remedy of specific performance would become illusory.

34 Southcott suggests that there are two separate questions that a court must ask in cases where a plaintiff seeks specific performance: (1) should specific performance be awarded? And if the answer is no, (2) is this plaintiff justified in its mitigatory inaction? Southcott says that the trial judge conflated these two questions and did not consider whether it was justified in failing to mitigate.

35 This Court dealt with this issue in *Asamera Oil Corp.*, at pp. 668-69:

Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real, and substantial justification for his claim to performance must be found....

Where ... circumstances reveal a substantial and legitimate interest in seeking [specific] performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then [be able to] recover losses which in other circumstances might be classified as avoidable and thus unrecoverable.

36 This Court thus recognized that there may be situations in which a plaintiff's inaction is justifiable notwithstanding its failure to obtain an order for specific performance where circumstances reveal "some fair, real, and substantial justification" for his claim or "a substantial and legitimate interest" in seeking specific performance. (*Asamera Oil Corp.*, at pp. 668-69 (emphasis added)) This does not mean that a plaintiff with such a claim should not attempt to mitigate; rather it recognizes that such a claim for specific performance informs what is reasonable behaviour for the plaintiff in mitigation. See N. Siebrasse, "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997), 76 *Can. Bar Rev.* 551.

37 *Asamera Oil Corp.* set out the general principles governing mitigation: was the plaintiff's inaction reasonable in the circumstances, and could the plaintiff have mitigated if it chose to do so. Those principles apply to a plaintiff seeking specific performance. If the plaintiff has a "substantial justification" or a "substantial and legitimate interest" in specific performance, its refusal to purchase other property may be reasonable, depending upon the circumstances of the case.

38 The statements in *Asamera Oil Corp.* dealing with specific performance and the determination of what is reasonable conduct must be read in light of *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.). In that case, the Court acknowledged that "[w]hile at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case" (para. 20). The Court thus found that it "cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases" (para. 21). Specific performance will be available only where money cannot compensate fully for the loss, because of some "peculiar and special value" of the land to the plaintiff" (para. 21, citing *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239 (Eng. V.-C.), at p. 240).

39 The overriding issue is therefore whether Southcott's inaction was reasonable. Southcott argued at trial that the fact that the property was uniquely well situated gives it the unique character required to constitute a fair justification for specific performance (para. 119 of the trial judge's decision).

40 I agree with the courts below that this is not a case where the plaintiff could reasonably refuse to mitigate. The trial judge made clear findings that the land was nothing more unique to Southcott than a singularly good investment and that this was not a case in which damages were too speculative or uncertain to be a satisfactory remedy. The unique qualities related solely to the profitability of the development for which damages were an adequate remedy (paras. 126 and 128). The calculation of profits was not conjectural or speculative as the proposed development was not complex, and the only disagreement between the parties regarding the quantum of damages related to the timing and rate of sale of completed units (paras. 130 and 132).

41 A plaintiff deprived of an investment property does not have a "fair, real, and substantial justification" or a "substantial and legitimate" interest in specific performance (*Asamera Oil Corp.*, at pp. 668-69) unless he can show that money is not a complete remedy because the land has "a peculiar and special value" to him (*Semelhago*, at para. 21, citing *Adderley*, at p. 240). Southcott could not make such a claim. It was engaged in a commercial transaction for the purpose of making a profit. The property's particular qualities were only of value due to their ability to further profitability. Southcott cannot therefore justify its inaction.

C. The Trial Judge Erred in Finding no Evidence of Comparable Profitable Properties Available for Mitigation

42 In this case, Southcott admitted that it made no efforts to mitigate — on the basis that it was not obliged to do so. Southcott submits that the Court of Appeal erred in shifting the onus to the plaintiff based on the admission by Southcott's principal that he had no intention to mitigate through Southcott. Southcott says that the Board did not provide the trial judge with evidence that there was a comparable profitable investment property available for sale. The trial judge found that there were no comparable or profitable properties. Southcott submits that the Court of Appeal erred in disregarding the trial judge's finding of fact and in substituting its own.

43 The entirety of the trial judge's analysis on this issue was as follows:

There was no evidence that the properties referred to [by the Board's expert] were actually available to the public for sale but only that they had been sold. Also there was no evidence that had these properties been purchased that they could have been profitably developed. In any event, I am not satisfied that the evidence established that these were comparable properties or that had they been purchased, that the plaintiff's loss would have been avoided or reduced. [para. 144]

44 Regarding the failure to mitigate, the Court of Appeal found that the trial judge had erred in law:

First, Southcott's admission that it had no intention of taking any steps to mitigate its loss was sufficient to satisfy the onus resting upon the Board to prove failure to mitigate and to shift the evidentiary onus to Southcott of demonstrating that, even if it had attempted to mitigate, it could not have done so. Southcott led no evidence to that effect. In my view, the trial judge erred by holding that the Board had failed to meet the onus imposed upon it to prove that Southcott had failed to mitigate its damages.

... By requiring the Board to prove the precise manner in which 81 parcels of investment land had been sold or to prove the profitability of individual parcels, the trial judge raised any bar the Board had to satisfy to an unrealistic level, particularly in the face of Southcott's admission that it had no intention to mitigate and of the evidence that Ballantry actually did find other suitable development properties to purchase.

Third, the trial judge erred in the manner in which he dealt with the evidence of purchases made by Ballantry. Those purchases clearly demonstrate that the directing mind of Southcott knew that investment-quality lands, suitable for profitable development, were available on the market. [paras. 24-26]

45 As noted above, where it is alleged that a plaintiff has failed to mitigate damages, the onus of proof on a balance of probabilities lies with the defendant, who must establish not only that the plaintiff failed to take reasonable efforts to find a substitute, but also that a reasonable profitable substitute could be found.

46 Thus, it would be an error to suggest that the defendant did not have the burden of showing that mitigation was possible even where the plaintiff made no attempt to do so. Further, while I agree that the trial judge erred in dealing with the Board's evidence regarding the availability of the 81 properties, the error is best approached as an evidentiary issue rather than as one engaging the burden of proof.

47 The finding about whether Southcott could have mitigated involves applying a legal standard; it is a question of mixed fact and law. Whether or not there were comparable properties and whether they were profitable is a finding of fact. Implicit in the Court of Appeal's decision is the conclusion that the trial judge's findings of fact were unreasonable.

48 For the reasons that follow, I agree with the Court of Appeal that the trial judge erred in principle by failing to consider relevant evidence. In particular, Ballantry's subsequent purchases were evidence that other development properties were reasonably available. These errors skewed his factual analysis on the issue of mitigation. I conclude that the trial judge made a palpable and overriding error in finding that there were no comparable profitable mitigation opportunities: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10.

(1) *The Expert Evidence of Comparable Properties*

49 At trial, the Board presented evidence that 81 parcels of raw land suitable for development and 49 properties subdivided into lots suitable for building were available for sale in the GTA and were in fact sold in the period between January 31, 2005 and the time of trial (para. 136 of the trial judge's decision). The parameters that the Board's expert used in selecting alternative available parcels were sales of land between \$1,000,000 and \$27,000,000, that had an estimated time to develop of one year or less, and that could be developed for low to medium density residential. These parameters were chosen to match the parameters of the actual purchases made by the Ballantry Group.

50 Nevertheless, the trial judge concluded that the Board had not discharged the onus of proving that Southcott failed to take advantage of a reasonable opportunity to mitigate. He found that: there was no evidence that the 81 properties were actually available to the public for sale; there was no evidence that, had these properties been purchased, they could have been profitably developed, and the plaintiff's loss could have been avoided or reduced; and in any event, these properties were not comparable properties.

51 The trial judge failed to consider the available and reasonable inferences of the Board's evidence that there were 81 parcels of rawland suitable for development and 49 properties subdivided into lots suitable for building sold during the time period in issue here. In cross-examination, the Board's expert witness admitted being unaware of the marketing strategies used to sell the 81 properties sold during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 232-33). However, notwithstanding that answer, it is an obvious inference that if 81 properties suitable for development were offered for sale, and were in fact sold, then investment properties were available to developers for sale, particularly in the absence of evidence to the contrary.

52 Further, the trial judge failed to consider whether the fact that all of the properties the Board's expert testified to were capable of being brought to development in a year could support an inference that their development was profitable. Reasonable inferences of profitability could be drawn based upon the size and price of property or the fact that land was purchased for development purposes by experienced developers. The trial judge did not turn his mind to this evidence.

53 Finally, the trial judge also failed to consider that an adverse inference against Southcott could be drawn from the fact that it led no evidence about the profitability of the alternative development opportunities.

(2) The Purchases by Ballantry

54 I agree with the Court of Appeal that the trial judge also erred in failing to consider whether the purchases by the Ballantry corporations provided evidence of other profitable properties available in mitigation. As noted above, the trial judge found (at para. 143) that the other properties purchased by other members of the Ballantry Group were "collateral" in the sense that the transactions would have occurred whether or not the defendant had breached its contract with Southcott and did not represent actual mitigation due to Southcott's distinct legal personality. This is not challenged.

55 The trial judge did not go on to consider, however, whether these transactions established that those same properties were evidence of "available" comparable mitigation opportunities in the market. Because Southcott is a separate legal entity, purchases by other Ballantry corporations of other comparable property did not make those properties "unavailable" for mitigation. In effect, the trial judge ignored the separate legal personalities of Southcott and the other corporations in the Ballantry group by failing to consider those purchases as evidence of the existence of mitigation opportunities.

56 The Ballantry Group companies purchased seven other development properties subsequent to the breach of the agreement, ranging in size from 2.3 acres to 110.8 acres and in price from \$3.3 million to \$27 million. In particular, two specific purchases were clearly comparable. Southcott had agreed to purchase 4.78 acres of land for \$3.44 million in August 2004. Ballantry corporations purchased 2.7 acres for \$3.3 million in August 2005 and 2.3 acres for \$6 million in December 2006.

57 The defence raised by Southcott, which was accepted by the trial judge, was that the purchases by Ballantry Group of development lands in the GTA were purchases which would have been made in any event, regardless of whether Southcott purchased the Board's property. However, it is no answer to say that other companies in the same corporate group would have purchased the other available lands in any event. It was clear from the testimony of the president of Southcott and co-owner of Ballantry that the Ballantry Group was always purchasing promising development land and that the different companies were simply used as different vehicles to invest.

58 It was a choice on the part of the principals of the Ballantry Group as to which corporate entity would be used for each purchase and they elected not to use Southcott. In addition, the trial judge found that "[t]he plaintiffs proposed development here was not complex, but rather a relatively straightforward plan for the development of 48 semi-detached residential units" (para. 132). In these circumstances, a straightforward development could have been carried out on a different property by Southcott, had it wanted to mitigate its loss. This corresponds to the modern reality recognized in *Semelhago* that "[r]esidential, business and industrial properties are all mass produced much in the same way as other consumer products" (para. 20).

59 As the Court of Appeal concluded (at paras. 25-26), the Ballantry Group's purchases of other properties was evidence that other suitable development lands *were* available and the decision not to purchase them in Southcott's name was based on other considerations. I agree with the Court of Appeal that the trial judge erred in failing to consider these purchases as evidence of other available and comparable development properties.

V. Conclusion

60 In conclusion, the trial judge erred in failing to consider relevant evidence and made a palpable and overriding error of fact in concluding that Southcott could not have reasonably avoided its loss.

61 He failed to take into account in his analysis of the mitigation issue that Southcott had simply refused to take any mitigatory action. He failed to consider the evidence of Ballantry's purchases as supporting the inference that alternative parcels were available and that their development was sufficiently profitable to meet Ballantry's requirements. He conflated a lack of evidence regarding the marketing of parcels with a lack of evidence that any of the parcels had been available for sale. He failed to consider whether the fact that all of the properties the Board's expert testified were development properties capable of being brought to development in a year could support an inference that their development was profitable. Finally, he failed to consider the fact that Southcott did not lead evidence to challenge the Board's evidence regarding alternative development opportunities.

62 In these circumstances, the Court of Appeal was entitled to look at the record and conclude that the trial judge's findings regarding mitigation were not available to him on the evidence. The evidence of the Ballantry purchases, in the context of Southcott's refusal to mitigate, established that there were opportunities to mitigate by purchasing other development land in the GTA. Failure to mitigate reduces damages. The Court of Appeal concluded that, based upon the investment properties purchased by Ballantry, and in the absence of evidence to the contrary, the Board discharged the burden of showing that other investment properties were available in the relevant time period to mitigate the losses and that the trial judge's finding that there were no comparable properties was not open to him on the evidence. I agree.

63 I would dismiss the appeal with costs. In light of the result on the main appeal, I need not consider the cross-appeal. The cross-appeal should be dismissed without costs.

McLachlin C.J.C. (dissenting):

64 Damages for breach of contract may be reduced if the plaintiff unreasonably fails to mitigate its loss. To show that a plaintiff unreasonably failed to mitigate its loss, the defendant who is in breach of the contract must establish: (1) that an opportunity to mitigate the loss existed; and (2) that the plaintiff acted unreasonably in failing to take that opportunity.

65 The trial judge found as a fact that the defendant had not proved that Southcott had an opportunity to mitigate. This finding, in my view, was grounded in the evidence. This is sufficient to dispose of the appeal. However, if such opportunity were found to exist, I see no basis on which to conclude that Southcott acted unreasonably in maintaining its suit for specific performance instead of mitigating its loss. It follows, in my view, that the judgment of the Court of Appeal should be set aside, and the trial judge's conclusion that the plaintiff established breach of contract and damages should be restored.

I. Background

66 The Toronto Catholic School Board contracted with Southcott Estates Inc. for the sale of 4.78 acres of surplus land for \$3.44 million. The closing date was August 31, 2004. Southcott was a wholly owned subsidiary of Ballantry Homes Inc., which was in the business of buying property and developing it for residential purposes. Southcott was a single-purpose company created expressly and only for the purpose of buying this parcel of land and developing it with single-family homes. Southcott had no assets except for the deposit it paid on the land.

67 The land was part of a larger parcel on which school buildings were located so the agreement was conditional upon the Board obtaining a severance from the Committee of Adjustments on or before the closing date. The agreement was signed on June 14, 2004, but only became firm on August 23, 2004. The Board, realizing it might not be able to get severance of the property by the closing date of August 31, 2004, asked Southcott to extend the closing date to a fixed date after severance. Southcott was willing to extend the August 31 closing date, but insisted on a firm final date of January 31, 2005.

68 The Board's application for severance was heard on December 16, 2004. It was deferred because the Board had failed to include a development plan in its application. This made it impossible for the Board to comply with the January 31, 2005 closing date. Southcott requested the Board to extend the closing date. The Board refused this request, declared the transaction to be at an end, and returned Southcott's deposit.

69 Southcott took the position that the Board had breached its obligation to use its best efforts to obtain the severance and brought an action for specific performance or, in the alternative, damages.

70 The trial judge held that the plaintiff was not entitled to an order for specific performance because the property was not sufficiently unique to satisfy the requirements of that remedy. However, he awarded damages in the amount of \$1,935,500, representing the loss of a 60 percent chance to make profits in the amount of \$3,225,827. He rejected the Board's argument that Southcott had failed to act reasonably to mitigate its loss, holding that the Board had not established as a matter of fact that mitigation opportunities were available.

71 The Court of Appeal reversed the trial judge and set aside the award for damages, essentially holding that the evidence, properly viewed, established an unreasonable failure to mitigate.

II. The Requirements of Mitigation

72 The doctrine of mitigation holds that a plaintiff cannot recover damages for loss that could have been reasonably avoided: *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.), at p. 660; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673 (U.K. H.L.), at p. 689; *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch. D. 20 (Eng. C.A.), at p. 25. A plaintiff is not contractually obliged to mitigate, and in this sense the term "duty to mitigate" is misleading. However, if the plaintiff unreasonably fails to mitigate, its damages for breach of contract may be reduced: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 (S.C.C.), at pp. 166-67; *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (Eng. C.A.), at p. 1075.

73 The defendant, having breached the contract, bears the onus of proving that the plaintiff unreasonably failed to mitigate its loss: *Michaels v. Red Deer College* (1975), [1976] 2 S.C.R. 324 (S.C.C.), at pp. 330-31; *Roper v. Johnson* (1873), L.R. 8 C.P. 167 (Eng. C.P.). This entails establishing, on a balance of probabilities: (1) that opportunities to mitigate the loss were available to the plaintiff; and (2) that the plaintiff unreasonably failed to pursue these opportunities.

74 Failure to mitigate may not be unreasonable for a variety of reasons. One such reason may be a "fair, real, and substantial justification" for claiming specific performance: *Asamera Oil Corp.*, at pp. 667 and 668. Another may be lack of financial resources: *McGregor on Damages* (18th ed. 2009), at para. 7-088. The rules for mitigation "do not require the injured party to do what he cannot afford to do when he is seeking to reduce the damages payable by the wrongdoer":

Lagden v. O'Connor, [2003] UKHL 64, [2004] 1 All E.R. 277 (Eng. H.L.), at para. 51 (*per* Lord Hope); see also *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670 (S.C.C.).

75 Unreasonable failure to mitigate loss reduces damages to the extent that mitigation would have avoided the loss: see "*Andros Springs*" (*The*) v. "*World Beauty*" (*The*) (1969), [1970] P. 144 (Eng. C.A.), at p.154 (*per* Lord Denning). If a mitigation opportunity would only partially avoid the plaintiff's loss, then only a partial reduction in damages can be justified.

III. Opportunity to Mitigate

76 The trial judge found that the Board had not discharged its onus of proving that Southcott unreasonably failed to mitigate its loss because it did not establish that the opportunity to mitigate existed. This finding must stand unless it constitutes palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10.

77 The Board sought to prove that mitigation opportunities existed in two ways — through the testimony of an expert witness and with evidence of purchases made by other Ballantry companies.

A. The Evidence of the Expert Witness

78 The trial judge found that the Board's expert witness's evidence did not establish opportunity to mitigate the loss.

79 The Board's expert presented evidence of 81 parcels of raw land and 49 subdivided properties that were purchased in the Greater Toronto Area ("GTA") between January 31, 2005 and the time of trial. The trial judge found a number of shortcomings in this evidence.

80 First, there was no evidence that the alleged properties the expert referred to were actually available to Southcott; the Board's expert witness admitted to being entirely unaware of whether substitute property was available to the public for sale during the period in which the Board suggested that Southcott could mitigate (A.R., at p. 233).

81 Second, the evidence did not establish that these properties were comparable to Southcott's target property ((2009), 78 R.P.R. (4th) 285 (Ont. S.C.J.), at para. 144). Little was known about the properties identified by the Board's expert witness beyond their size, cost, and nearest major intersection. Most were outside the City of Toronto. The properties vary widely in both size and price, including parcels as large as 123.988 acres, as small as 0.251 acres, and costing as much as \$23.77 million. The trial judge concluded that the comparability of these properties to Southcott's 4.78 acre target property had not been established.

82 Third, the trial judge found that the evidence did not establish that alternate properties could have been profitably developed (para. 144). Only a profitable development would mitigate Southcott's loss; an unprofitable one would aggravate it. A plaintiff is not required to take foolish steps that would not reduce its loss. The Board's expert presented no evidence on the potential profitability of the properties he referred to.

83 The Court of Appeal criticized the trial judge's finding that the evidence did not establish profitability, on the ground that he raised the burden of proof on the Board to an unrealistic level (2010 ONCA 310, 104 O.R. (3d) 784 (Ont. C.A.), at para. 25). With respect, the burden was clear — the Board had to establish that alternate properties could have been profitably developed on a balance of probabilities. There is no indication that the trial judge failed to appreciate this basic principle. See *World Beauty*, at p. 154.

84 The trial judge found that the Board's expert witness failed to establish that Southcott had opportunities to mitigate its loss. This finding finds support in the evidence and is not vitiated by legal error. It follows that it cannot be set aside: *Housen*.

B. The Evidence of Purchases by Other Ballantry Companies

85 The second way the Board sought to discharge its onus of showing opportunity to mitigate was by evidence that other Ballantry companies had made purchases of development land in the GTA at the relevant time. The Board argued that these other Ballantry purchases had in fact mitigated the loss caused by the Board's breach.

86 The trial judge accepted the Board's invitation to consider the matter from the perspective of the Ballantry Group as a whole, effectively piercing the corporate veil. He concluded that Ballantry's subsequent purchases were collateral, independent transactions that could not have avoided the loss arising from the Board's breach of contract (para. 143): see *Windmill Place v. Apeco of Canada Ltd.*, [1978] 2 S.C.R. 385 (S.C.C.), at p. 389. Leaving aside the question of whether piercing the corporate veil in these circumstances was appropriate, the trial judge's analysis was not in error. The trial judge's reasoning was that the Ballantry Group, with extensive access to credit, was limited only by the number of properties it could find. The more good properties it could find, the more money it stood to make. In this sense, other purchases by the Ballantry Group were collateral rather than substitutions for the Board's property.

87 The trial judge, having dealt with the purchases of other Ballantry companies in this way, did not make a finding on whether these properties offered mitigation opportunities for Southcott, as an independent legal entity. The evidence, however, does not support such a finding, in my view. First, there was no evidence that the properties purchased by other Ballantry companies were available to Southcott. At best, Southcott would have been competing with its sister companies for these properties. Whether it would have succeeded in acquiring a comparable property was a matter of speculation.

88 Second, the evidence did not establish that other Ballantry Group purchases were comparable to Southcott's target property. Under its contract with the Board, Southcott was purchasing a 4.78 acre parcel located in a desirable residential neighbourhood of the City of Toronto suited to the development of 48 semi-detached residential units (para. 132). There was no evidence that any of the other Ballantry purchases were comparable. It is not enough to show that some development land may have been available to companies which may have had different development strategies. Ballantry had wide ranging interests in residential real estate development throughout the GTA. Southcott had a narrower, specific development objective. To show opportunity to mitigate, the Board had to prove that a property comparable to the one that Southcott sought to purchase was available.

89 I respectfully cannot agree that two of the subsequent Ballantry purchases were clearly comparable to Southcott's target property (Karakatsanis J., at para. 56). The first (a parcel of 2.7 acres for \$3.3 million) was 43 percent smaller than Southcott's target property, cost 59 percent more per acre, and was purchased for the development of a retirement home. The second (a parcel of 2.3 acres for \$6 million) was 51 percent smaller than Southcott's target property, cost 200 percent more per acre, and was purchased for development of a high rise building. On the record, these properties were not comparable to the property that Southcott sought to acquire: a 4.78 acre parcel suited to the development of 48 semi-detached residential units. The remaining Ballantry purchases were even less comparable to Southcott's target property. The Board had the burden of establishing the comparability of these properties. It failed to do so.

90 I see no error in the trial judge's conclusion that the evidence as to other Ballantry properties did not establish opportunities to mitigate the loss suffered as a result of the Board's breach of contract.

1. Did Southcott Act Reasonably?

91 The trial judge's finding that the Board failed to establish that Southcott had opportunities to mitigate its loss is sufficient to dispose of the appeal. However, I offer the following comments on whether the Board established, as it was also required to do, that failure to take advantage of any proven opportunities for mitigation was unreasonable.

92 In my view, it is difficult to conclude that Southcott acted unreasonably. The first reason is that it had a "fair, real, and substantial justification" for claiming specific performance of the contract: *Asamera Oil Corp.*, at pp. 667 and 668. In such circumstances, a plaintiff is not required to mitigate. As explained in *Asamera Oil Corp.*, this is simply an application of the rule of mitigation requiring the plaintiff to act reasonably in the circumstances:

Where those circumstances reveal a substantial and legitimate interest in seeking performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then recover losses which in other circumstances might be classified as avoidable and thus unrecoverable [pp. 668-69]

93 The act of filing a claim for specific performance is inconsistent with the act of acquiring a substitute property. A plaintiff, acting reasonably, cannot pursue specific performance and mitigate its loss at the same time. It makes no sense for a reasonable plaintiff seeking specific performance to effectively concede defeat and buy a substitute property. The plaintiff could end up with two properties — one it wanted and one it did not. Furthermore, an action for specific performance is often motivated by the unavailability of substitutes in the marketplace. A plaintiff's reasonable claim that substitutes are unavailable is inconsistent with the ability to acquire a substitute in the marketplace (E. Yorio, "[A Defense of Equitable Defenses](#)" (1990), 51 *Ohio St. L.J.* 1201).

94 In the end, the trial judge dismissed the claim for specific performance. However, that does not mean that Southcott acted unreasonably in pursuing the claim. Whether a plaintiff had a "fair, real, and substantial justification" for maintaining a specific performance claim is a different question from whether specific performance should be granted at the conclusion of the trial when all the evidence is in and appraised by the trial judge. Plaintiffs can never be certain that an action for specific performance will succeed, particularly as this is an equitable, discretionary remedy. Demanding that losses be mitigated unless success in obtaining specific performance is assured would deter valid claims for specific performance and hold plaintiffs to an impossible standard.

95 The trial judge, while ultimately rejecting Southcott's claim for specific performance, did not find that Southcott acted unreasonably in pursuing that remedy. Nor does there appear to be a basis for such a finding. It can be fairly argued that Southcott did not act unreasonably in pursuing specific performance of the contract. The property was uniquely suited to Southcott's needs for single-family residential development within the City of Toronto. Though the common law presumption of the uniqueness of real property no longer holds, a claim for specific performance may still be reasonable if a property has unique characteristics such that a substitute property is not readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.), at para. 22. Southcott's contention that there was no comparable substitute property found support in the evidence.

96 Another reason for failing to acquire and develop a substitute property, assuming such a property had been available, is that Southcott lacked financial resources. Southcott did not have the financial capacity to go into the market and purchase a substitute property. It was a single-purpose company with no assets other than the \$344,000 advanced to it by Ballantry for the deposit on the target property (trial judgment, at para. 137). Whether it could have obtained financing to buy a different property is at the very least speculative.

97 In summary, I see no basis for concluding that Southcott acted unreasonably in failing to mitigate its loss, assuming that opportunities to do so were available.

V. Conclusion

98 I see no basis upon which to set aside the trial judge's conclusion that the defendant did not prove that the plaintiff unreasonably failed to mitigate its loss. His conclusions find support in the evidence and the law.

99 I would allow the appeal and restore the judgment of the trial judge.

Appeal dismissed.

Pourvoi rejeté.

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Tab 13

1996 CarswellOnt 2737
Supreme Court of Canada

Semelhago v. Paramadevan

1996 CarswellOnt 2737, 1996 CarswellOnt 2738, [1996] 2 S.C.R. 415, [1996]
S.C.J. No. 71, 136 D.L.R. (4th) 1, 197 N.R. 379, 28 O.R. (3d) 639 (note), 3 R.P.R.
(3d) 1, 63 A.C.W.S. (3d) 973, 91 O.A.C. 379, J.E. 96-1316, EYB 1996-67695

**Sinnadurai Paramadevan and Blossom Paramadevan
(Appellants) v. Bernard Semelhago (Respondent)**

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: January 31, 1996
Judgment: June 20, 1996
Docket: 24325

Proceedings: Affirming (1994), 39 R.P.R. (2d) 215, [19 O.R. \(3d\) 479](#), [73 O.A.C. 295](#) (C.A.), which reversed (December 5, 1990), Corbett J. (Ont. Gen. Div.) [unreported].

Counsel: *John Swan* and *Barbra H. Miller*, for appellants.
Martin Scisizzi and *Orlando Da Silva*, for respondent.

Subject: Property; Contracts

Related Abridgment Classifications

Real property

[III Sale of land](#)

[III.4 Remedies](#)

[III.4.h Damages](#)

[III.4.h.vii Measure of damages](#)

Remedies

[I Damages](#)

[I.6 Valuation of damages](#)

[I.6.b Time of assessment](#)

[I.6.b.iii In sale of land transactions](#)

Headnote

Sale of Land --- Remedies — Damages — Measure of damages.

Damages --- Valuation of damages — Time of assessment — General principles.

Sale of Land — Remedies — Damages — Measure of damages — Vendor breaching agreement of purchase and sale — Purchaser electing to take damages — Purchaser being awarded damages for difference in value of land at date of sale and date of trial, less deductions — Damages being correctly assessed as of date of trial.

Damages — Valuation of damages — Time of assessment — General principles — Vendor breaching agreement of purchase and sale — Purchaser electing to take damages — Purchaser being awarded damages for difference in value of land at date of sale and date of trial, less deductions — Damages being correctly assessed as of date of trial.

In 1986, the plaintiff agreed to purchase a house that was under construction from the defendant vendor for \$205,000. The plaintiff was to finance the purchase by paying \$75,000 in cash and obtaining \$130,000 by mortgaging his current residence. Prior to the closing date, the defendant reneged on the deal. Title in the house was taken by the other defendant. At the time, the real estate market was escalating. The plaintiff remained in his old house, which was valued at \$190,000

at the time, a value which increased to \$300,000 by the date of trial. At the date of trial, the house which was the subject of the transaction was valued at \$325,000.

The plaintiff sued the defendants for specific performance or damages. The plaintiff subsequently elected to take damages, and was awarded \$120,000 at trial, this being the difference in the value of the property. The defendant successfully appealed, arguing that the damages awarded at trial constituted a windfall to the plaintiff. The Ontario Court of Appeal determined that the object of an award of damages for breach of contract was to put the injured party in the same position he or she would have been in had the contract been performed. At issue was whether the trial award had doubly benefited the plaintiff by giving him damages amounting to the increase in the value of the new house, while allowing him to retain the increase in value of his old house. The Court of Appeal allowed the plaintiff to retain the difference in value in the property, less carrying costs, nominal interest, and legal costs. The defendants appealed.

Held:

The appeal was dismissed.

Per Sopinka J. (Gonthier, Cory, McLachlin, Iacobucci and Major JJ. concurring): A party who is entitled to specific performance is entitled to elect damages in lieu thereof. Damages are normally assessed as of the date of the breach of contract for the sale of goods, the rationale being that if the innocent party is compensated for the value of the goods as of the date of the breach, he can then purchase identical or equivalent goods. Accordingly, the purchaser would ideally be placed in the same financial position as if the contract had been kept.

Different considerations apply where the item being purchased is of a unique nature. Given the flexibility of the rule at common law as to the date for the assessment of damages, it would not be appropriate to insist on applying the date of breach as the assessment date when the purchaser of a unique asset has a legitimate claim to specific performance and elects to take damages instead. Furthermore, the claim for specific performance revives a contract to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment he or she tenders performance. It was not inconsistent with the rules of common law to assess damages at the date of trial. Damages that are awarded must be a true substitute for specific performance. Therefore, the appropriate date for the assessment of damages is the date of trial. If the plaintiff had received a decree of specific performance, he would have had both the property he had contracted to purchase and the rise in value in the property he had retained. There was no basis for deductions that were not related to the value of the property, which was the subject of the contract.

Per La Forest J. (concurring): Given that the case was argued on the assumption that specific performance was an appropriate remedy, the circumstances giving rise to entitlement to specific performance, or, generally, the interpretation that should be given to legislation authorizing the award of damages in lieu of specific performance should not be dealt with.

Annotation

"To boldly go where no man has gone before." To hear the legal press talk about the impact of the *Semelhago* case on real estate litigation, one would think that the Supreme Court of Canada has done in one decision what the U.S.S. Enterprise is still trying to do after years of reruns. For instance, in the July 5, 1996, Volume 16, No. 9 issue of *The Lawyers Weekly*, the author of an article on *Semelhago* concludes that "[t]he 7-0 decision sharply restricts the availability of the remedy of specific performance or equitable damages in lieu thereof..." [emphasis added]. It is submitted that, while Mr. Justice Sopinka's reasons in *Semelhago* have in fact brought fairly definitive closure to the simmering debate over a priori specific performance for contracts involving land, the conclusion is not at all as dramatic as may have been suggested and the hoopla surrounding this case is undeserved.

True, Mr. Justice Sopinka does conclude that specific performance will not be granted as a matter of course simply because the subject-matter is real estate, but this has always been the law. While the notion has developed over time that purchasers under contracts for the purchases of real estate are always entitled to specific performance, real estate practitioners would readily acknowledge that, at least on a theoretical level, there is no policy justification to elevate such a notion to the status of a legal axiom. The test for specific performance has always been the inadequacy of common law damages in the circumstances, and the test of the inadequacy of common law damages involves, inter alia, the uniqueness of the property in contest. It just so happens that real property, throughout the history of modern law, has almost always seemed unique ("Blackacre had no readily available equivalent"), at least in contrast to the apparent fungibility of stocks,

bonds, commodities, precious metals, and other types of often-litigated personal property. The ease and consistency with which real estate was time and time again found to be unique gave rise to the impression of an irrebuttable presumption that specific performance will, as of right, be an available remedy for any and all disputed real estate deals. Granted, perhaps like racial stereotypes, when a generalization is repeated again and again over the course of more than a century, it takes on somewhat of a life of its own and becomes a truth unto itself. Indeed, textbook authorities had, prior to *Semelhago*, taken the proposition of a priori specific performance for real estate a long way down the road to being ensconced in our common law (see, e.g., *Snell's Principles of Equity* (27th ed.) (1973) at p. 574, wherein the authors conclude that "the court will therefore almost invariably decree specific performance of a contract regarding land..." [emphasis added]).

All Mr. Justice Sopinka does in *Semelhago* is to remind practitioners to go back to first principles when determining whether or not specific performance ought to be available, but this is not a radical or extraordinary comment for the top court. Other courts have also resisted the temptation to elevate the convention regarding a priori specific performance for real estate to that of an irrebuttable presumption. Mr. Justice Sopinka himself notes the decision of Sir John Leach, V.C., in *Adderley v. Dixon* (1824), 57 E.R. 239 which, over 170 years ago, held that there is nothing inherently special about realty which entitles it to specific performance, but that realty just usually happens to have peculiar or special value, making common law damages inadequate. Geographically and temporally closer to home, readers are directed to the decisions of the Newfoundland Court of Appeal in *Chaulk v. Fairview Construction Ltd.* (1977), 3 R.P.R. 116 (which was cited and quoted from by Mr. Justice Sopinka with approval in *Semelhago*), the British Columbia Courts in *McNabb v. Smith* (1981), 124 D.L.R. (3d) 547 (B.C. S.C.), affirmed (1982), 132 D.L.R. (3d) 523 (B.C. C.A.), and the "epic" litigation currently brewing in the Ontario Courts in *Domowicz v. Orsa Investments Ltd.* (1993), 36 R.P.R. (2d) 174 (Ont. Gen. Div.), additional reasons at (1993), 15 O.R. (3d) 661 (Gen. Div.), and (1994), 43 R.P.R. (2d) 300 (Ont. Gen. Div.) (the "epic" superlative coming from Paul Perrell, in "The Fate of Specific Performance", *Gravel to Gavel: Recent Developments in Real Estate Litigation*, Law Society of Upper Canada, January 12, 1996; although, curiously enough, the *Domowicz* litigation was not even raised by Mr. Justice Sopinka in *Semelhago*). Even the Supreme Court of Canada has (sort of) concluded that specific performance is not automatic just because the case involves real estate. Almost 45 years ago, in *Roy v. Kloepper Wholesale Hardware & Automotive Co.*, [1952] 2 S.C.R. 465 at p. 472, the leading Canadian case in support of specific performance for real estate, Mr. Justice Kerwin concluded "...generally speaking, specific performance applies to agreements for the sale of lands as a matter of course" [emphasis added - the inference being that were contemplated exceptions to the rule]. Although the presumption was obvious, even then, the Supreme Court of Canada refused to make specific performance absolutely automatic just because the subject-matter of the contract was real property.

What is different in *Semelhago* is the directness with which the high court makes its point. No longer does it require an annotator to emphasize some limiting words from a pull quote in order to extrapolate the required construction. Instead, Mr. Justice Sopinka comes to his conclusion aggressively, concluding, in no uncertain terms, that "[i]n future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy".

It is submitted that *Semelhago* will ultimately have little practical effect on the law of real estate remedies. So, while trial judges will no longer be (not that they ever were) constrained to find that specific performance is the only remedy, it is submitted that specific performance will still apply to most agreements for the sale of land as a matter of course because real estate will still remain unique in all but a few isolated cases. Even in an age of prefabricated housing and concrete square box industrial development, so long as the test of uniqueness retains a subjective element, most real estate purchasers will continue to have available to them specific performance (the same might not be true, however, in the case of real estate vendors, even where the real estate is demonstrably unique - readers are directed to Paul Perrell's analysis in "The Fate of Specific Performance" (supra, at p. F-18) of the "sterility" of the mutuality argument giving rise to a vendor's corollary right to specific performance). In other words, reminding the bench that the uniqueness of any given piece of real property is a justiciable issue does not necessarily make it any easier to disprove such uniqueness (see, e.g., *Tanu v. Ray* (1981), 20 R.P.R. 22 (B.C. S.C.), *Joseph Chiavatti Construction Ltd. v. Palleschi* (1994), 40 R.P.R. (2d) 130 (Ont. Gen. Div.), and *A.N. Koskolos Realty Ltd. v. Palleschi* (1994), 40 R.P.R. (2d) 262 (N.S. S.C.)), wherein

the subjective nature of the test for uniqueness makes for an uphill struggle for those arguing against such uniqueness). Readers are directed to Mr. Perell's article (*supra*) and to what is probably the seminal modern Canadian article on the topic, J.J. Chapman, "A Stacked Deck: Specific Performance and the Real Estate Transaction" (1994) 16 Adv. Q. [Part I] at p. 240, for excellent, albeit pre-*Semelhago*, discussions of the role of specific performance in real estate litigation.

Although this annotator is not exactly certain as to the benefits of pointing this out, one cannot help but note that, while Mr. Justice Sopinka's analysis of the availability of specific performance for real estate is characteristically well written (indeed, a virtual tour de force), it is, nonetheless, *entirely obiter dicta*! *Semelhago* went to the Supreme Court of Canada on the agreed assumption that specific performance *was* available in the circumstances! By his own words:

While I would be inclined to agree with the trial judge as to the inappropriateness of an order for specific performance, both parties were content to present the case on the basis that the respondent was entitled to specific performance. The case was dealt with on this basis by the Court of Appeal. In the circumstances, this Court should abide by the manner in which the case has been presented by the parties and decided in the courts below.

That is, counsel had *not* appealed the availability of specific performance and, presumably, there was no comprehensive argument of the point before the court. Furthermore, the court obviously had no intention of repleading the case for the vendor. So why the walk on the wild side? (see, by contrast, Mr. Justice LaForest's brief decision, which clearly recognizes the obiter dicta and distances him from same). That being said, however, the unequivocal nature of Mr. Justice Sopinka's reasoning on the matter, the comprehensiveness of his treatment of the subject, and his express direction to trial judges not to be constrained to the contra- view, militates against marginalization, even though those parts of his reasons were blatantly obiter dicta. Indeed, given the foregoing, and notwithstanding any assistance that could be derived from Mr. Justice LaForest's disclaimer, it would take some considerable amount of *chutzpah* to suggest that the reasoning of Mr. Justice Sopinka in *Semelhago* ought not be followed because it is merely obiter dicta. The issue of whether or not specific performance is automatically available where the subject-matter of the contract is real property is now settled law in Canada thanks to Mr. Justice Sopinka.

Jeffrey W. Lem

APPEAL from judgment reported at (1994), 39 R.P.R. (2d) 215, [19 O.R. \(3d\) 479](#), [73 O.A.C. 295](#) (C.A.), allowing appeal and cross-appeal from decision of Corbett J. (December 5, 1990), (Ont. Gen. Div.) [unreported], awarding damages in lieu of specific performance of agreement of purchase and sale.

La Forest J. (concurring):

1 I have had the advantage of reading the reasons of my colleague, Justice Sopinka, and I agree with his proposed disposition in the circumstances of this case. However, given the assumption under which the case was argued, I prefer not to deal with the circumstances giving rise to entitlement to specific performance or generally the interpretation that should be given to the legislation authorizing the award of damages in lieu of specific performance. In considering modification to existing law, both these interdependent factors may well require examination, and the arguments in this case were not made in those terms.

Sopinka J. (Gonthier, Cory, McLachlin, Iacobucci and Major JJ. concurring):

2 This appeal concerns the principles that apply in awarding damages in lieu of specific performance. The appellant vendor refused to close a transaction for the sale of residential property to the respondent purchaser. The latter sued for specific performance and, in the alternative, damages in lieu thereof. At the commencement of the trial, the respondent elected the latter. Subsequent to the date fixed for closing, property values rose. If the closing date is the date on which damages are assessed, the respondent would not recover the increase in the value of the property he agreed to purchase. If, however, damages are assessed as of the date of trial, the question is whether the respondent is entitled to recover not only this increase but also to retain the increase in value of the residence which the respondent owned at the time of the agreement of purchase and sale and which was not sold as a result of the aborted transaction.

I. Facts

3 In August 1986, the respondent purchaser agreed to buy a house under construction in the Toronto area from the appellant vendor Sinnadurai Paramadevan for \$205,000, with a closing date of October 31, 1986. To finance the purchase, the respondent was going to pay \$75,000 cash, plus \$130,000 which he was going to raise by mortgaging his current house. The respondent negotiated a six-month open mortgage, so that he could close the deal on the new house and then sell his old one at an appropriate time in the six months following closing. Before the closing date, the appellant vendor reneged and in December 1986, title to the house was taken by the appellant Blossom Paramadevan. The respondent stayed in his old house which was worth \$190,000 in the fall of 1986, and \$300,000 at the time of the trial.

4 The respondent sued the appellants for specific performance or damages in lieu thereof and put a caution on the title. At the time of trial, the market value of the property was \$325,000. The respondent elected to take damages rather than specific performance and on December 5, 1990, Corbett J. of the Ontario Court of Justice (General Division) awarded him \$120,000, that being the difference between the purchase price he had agreed to pay and the value of the property at the time of trial. The appellants appealed to the Court of Appeal for Ontario on the ground that the assessment was a "windfall" because the respondent was benefiting not only from the increase in the value of the new house, but also from the gain in the value of the old house. The respondent cross-appealed against the disallowance of legal and appraisal fees. On June 17, 1994, the Court of Appeal allowed the appeal and the cross-appeal: (1994), 19 O.R. (3d) 479, 39 R.P.R. (2d) 215, 73 O.A.C. 295.

II. Judgments Below

A. Ontario Court of Justice (General Division)

5 Corbett J. concluded that she was bound by the decision of the Ontario Court of Appeal in 306793 *Ontario Ltd. v. Rimes* (1979), 25 O.R. (2d) 79 (leave to appeal refused, [1979] 2 S.C.R. xi):

In this case, we have evidence of various reference points with respect to the measure of damages, the first being the difference between the contract price and the value which is \$120,000. This measure of damages was expressly adopted in 306793 *Ontario Limited in trust v. Rimes*.

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The Court held that adopting the learned trial judge's approach would not be giving a true alternative to specific performance and that the true loss was the difference between the original purchase price and the reasonable estimate of the value at the date of trial.

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This approach, although it was criticized

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, is still the law in Ontario today at this time.

6 Corbett J. examined the respondent's proposed assessment of damages which consisted of "a calculation of the increase in value of property between the date fixed for closing and the date of trial less the cost to gain the benefit of the increased value. He took the market value of the subject property, deducted the purchase price, deducted the carrying costs of the \$130,000 mortgage for six months being \$6,716.04". Corbett J. found that the respondent "would have sold his own property in order to finance the acquisition of the subject property and, therefore, had obtained the \$130,000 mortgage open for six months". Corbett J. then found that the respondent "further deducted notional interest earned by [him] on the \$75,000 which he was going to pay as part of the purchase price from his own money, being \$30,000 less and he deducted legal costs on closing of \$2,473.75 for a net amount of damages of \$80,810.21". Corbett J. pointed out that this approach was specifically rejected by the Court of Appeal's decision in *Rimes* "which is binding upon me".

7 Corbett J. stated that:

There is no question that to award damages on the basis of the *Rimes* case does result in a windfall to the plaintiff. I considered other methods of calculating the damages. For example, if the contract had been carried out, the purchaser would today be the owner of a house worth \$325,000 rather than having a property worth \$300,000. It would not in my view be unreasonable to calculate the loss on this basis at \$25,000.

I also considered a method which has less appeal than the above method, namely that the difference in the increase in value of the defendant's property when compared with the plaintiff's property might be considered. The rise in the plaintiff's property was from \$190,000 to \$300,000, namely \$110,000 and the defendant's increased by \$115,000. The defendant therefore experienced a greater increase in value which put the damages at \$5,000.

Corbett J. added that she:

might have been inclined on the facts of this case to consider that specific performance was not an appropriate remedy and to assess damages as I have indicated on some other basis. However, there is not sufficient jurisprudence for me to adopt that approach, but I will set out reasons why the question presented itself on the facts of this case.

First of all, the subject property was not unique. It was a building lot under construction which would be interchangeable in all likelihood with any number of others. Second, there is no evidence in this case that the plaintiff did look for other residences or other dwellings. Third, the plaintiff in this case was going to finance the purchase with the sale of his own dwelling so that he continued to have his own dwelling in order to assist in the purchase of the property. Fourth, the plaintiff has retained his own property and received the benefit of the increase in value of that house. Fifth, both of the parties to this transaction were sophisticated dealers in real estate.

Corbett J. concluded that:

There is no question that to award damages on the basis of the *Rimes* case does result in a windfall to the plaintiff.

.....

I am constrained to follow the *Rimes* case so long as specific performance is a lawful remedy when Agreements of Purchase and Sale are not concluded or are, in the circumstances of this case, wrongfully not concluded.

[ellipsis]

I therefore find that I must award damages in the amount of the difference between the contract price and the value given close to trial; namely \$120,000.

B. Ontario Court of Appeal (1994), 19 O.R. (3d) 479

8 Austin J.A., for the court, reviewed the decision in *Rimes* and concluded that "[t]hose are not the facts of the case now before the court" (p. 481). Austin J.A. stated that the object of an award of damages for breach of contract was to "put the injured party into the position in which he would have been had the contract been performed, in so far as that is possible by the payment of money". Austin J.A. concluded that the appellants' proposal that the respondent be awarded \$10,000, that being the difference between the increase in the value of the new house and the increase in value of the old house, "would achieve little, if any, of this objective". Austin J.A. then considered the respondent's alternative assessment (explained above in the review of the trial decision) and concluded (at p. 482) that:

The trial judge rejected this approach because of *Rimes*. This case, however, like most damage claims, turned on its own peculiar facts. This alternative approach attempts to track the events as the trial judge found they would have unfolded, and attempts to put the purchaser, to the extent that money can do it, in the position he would have been had the sale closed. In light of the trial judge's findings of fact, the alternative approach comes closer to the compensatory goal than does the approach followed by the trial judge.

In addition to the foregoing sum [\$80,810.21], the purchaser is entitled to out-of-pocket expenses of \$673.75 for legal fees and \$250 for appraisal fees. These items were dealt with by the trial judge, but seem to have been omitted from the formal judgment.

In the result I would allow both the appeal and the cross-appeal. I would amend para. 1 of the judgment by striking out the figure \$120,000 and substituting therefor the figure of \$81,733.96.

III. Issue

9 What principles apply to the assessment of damages in lieu of specific performance and, further, how do those principles apply to the facts of this case?

IV. Analysis

10 The trial judge expressed reservations about the propriety of an award of specific performance in this case. While I share those reservations and will return to the question as to the circumstances under which specific performance is an appropriate remedy, this appeal should be disposed of on the basis that specific performance was appropriate. The case was dealt with by the parties in both courts below and in this Court on the assumption that specific performance was an appropriate remedy.

11 A party who is entitled to specific performance is entitled to elect damages in lieu thereof. The jurisdiction to award damages in lieu of specific performance was conferred on the Court of Chancery by *The Chancery Amendment Act, 1858* (U.K.), 21 & 22 Vict., c. 27 (known as *Lord Cairns' Act*). Although the Act was repealed, in *Leeds Industrial Cooperative Society Ltd. v. Slack*, [1924] A.C. 851, the House of Lords established that the jurisdiction to award damages in lieu of specific performance was maintained. This jurisdiction exists as part of the law of Ontario by virtue of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 99, which provides:

99. A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.

12 *Lord Cairns' Act* permits damages to be awarded in some circumstances in which no claim for damages could be entertained at common law. See *Leeds, supra*, and *Wroth v. Tyler*, [1974] Ch. 30, at p. 57. In cases in which damages could also be claimed at common law, the principles generally applicable are those of the common law. In *Johnson v. Agnew*, [1980] A.C. 367, at pp. 400-1, Lord Wilberforce stated that:

(2) The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach — a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

13 The rationale for assessing the damages at the date of breach in the case of breach of contract for the sale of goods is that if the innocent purchaser is compensated on the basis of the value of the goods as of the date of breach, the purchaser can turn around and purchase identical or equivalent goods. The purchaser is therefore placed in the same financial situation as if the contract had been kept.

14 Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance. Given the flexibility of the rule at common law as to the date for the assessment of damages, it would not be appropriate to insist on applying the date of breach as the

assessment date when the purchaser of a unique asset has a legitimate claim to specific performance and elects to take damages instead (see *Wroth v. Tyler*; *Johnson v. Agnew*; and *Mavretic v. Bowman*, [1993] 4 W.W.R. 329 (B.C. C.A.)). The rationale that the innocent purchaser is fully compensated, if provided with the amount of money that would purchase an asset of the same value on the date of the breach, no longer applies. This disposition would not be a substitute for an order of specific performance. The order for specific performance may issue many months or even years after the breach. The value of the asset may have changed.

15 Moreover, the claim for specific performance revives the contract to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment, performance is tendered. In cases such as the one at bar, where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. In that event, both parties are relieved from performing any outstanding obligations and the injured party may commence an action for damages. Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance. In that case, the contract continues in force and neither party is relieved of their obligations under the agreement. As is elaborated in *McGregor on Damages* (13th ed. 1972), at p. 149:

Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages.

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Thus, the claim for specific performance can be seen as reviving the contract to the extent that the defendant who has failed to perform can avoid a breach if, at any time up to the date of judgment, performance is tendered. In this way, a claim for specific performance has the effect of postponing the date of breach.

16 For all of these reasons, it is not inconsistent with the rules of the common law to assess damages as of the date of trial. It must be remembered that the rules of the common law did not contemplate awarding damages as a substitute for specific performance. The rules of the common law must be applied in light of the statutory imperative contained in s. 99 of the *Courts of Justice Act*. The damages that are awarded must be a true substitute for specific performance. This point is forcefully made by Megarry J. in *Wroth v. Tyler*. In that case, the purchaser had contracted for the purchase of a house for £6,000. The vendor defaulted. On the closing date, the property was worth £7,500. As of the date of trial the property was worth £11,500. In assessing damages as of the date of trial, Megarry J. stated, at p. 58:

On the wording of the section, the power "to award damages to the party injured,

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in substitution for such

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specific performance," at least envisages that the damages awarded will in fact constitute a true substitute for specific performance. Furthermore, the section is speaking of the time when the court is making its decision to award damages in substitution for specific performance, so that it is at that moment that the damages must be a substitute. The fact that a different amount of damages would have been a substitute if the order had been made at the time of the breach must surely be irrelevant. In the case before me, I cannot see how £1,500 damages would constitute any true substitute for a decree of specific performance of the contract to convey land which at the time of the decree is worth £5,500 more than the contract price.

At p. 59 Megarry J. added:

Yet on principle I would say simply that damages "in substitution" for specific performance must be a substitute, giving as nearly as may be what specific performance would have given. [Emphasis added.]

17 This was also the basis upon which *Rimes* was decided by the Ontario Court of Appeal. The reasons for judgment of MacKinnon A.C.J.O. cite *Wroth v. Tyler* with approval, pointing out that that case was not overruled by *Johnson v. Agnew*, *supra*. I agree with that observation. In *Johnson v. Agnew*, Lord Wilberforce, speaking for the House of Lords, concluded that in view of the flexibility of the common law rule with respect to the date for the assessment of damages to which I have referred, the view taken by Megarry J. in *Wroth v. Tyler* was consistent with the common law.

18 I therefore conclude that, in the circumstances of this case, the appropriate date for the assessment of damages is the date of trial as found by the trial judge. Technically speaking, the date of assessment should be the date of judgment. That is the date upon which specific performance is ordered. For practical purposes, however, the evidence that is adduced which is relevant to enable damages to be assessed will be as of the date of trial. It is not usually possible to predict the date of judgment when the evidence is given.

19 The difference between the contract price and the value "given close to trial" as found by the trial judge is \$120,000. I would not deduct from this amount the increase in value of the respondent's residence which he retained when the deal did not close. If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property. Damages are to be substituted for the decree of specific performance. I see no basis for deductions that are not related to the value of the property which was the subject of the contract. To make such deductions would depart from the principle that damages are to be a true equivalent of specific performance.

20 This approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique. While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Both residential, business and industrial properties are mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

21 It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land had no peculiar or special value. In *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, Sir John Leach, V.C., stated (at p. 240):

Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value.

22 Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief. See *Roberto v. Bumb*, [1943] O.R. 299 (C.A.), at p. 311; *Roy v. Kloefer Wholesale Hardware and Automotive Co.*, [1952] 2 S.C.R. 465; *Nepean Carleton Developments Ltd. v. Hope* (1976), [1978] 1 S.C.R. 427, at p. 438. Some courts, however, have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land. In *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13, the Newfoundland Court of Appeal (*per* Gushue J.A.), after quoting the above passage from *Adderley v. Dixon*, stated, at p. 21:

The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which

the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Baud Corp., N.V. v. Brook*, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp*) [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:

Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

A similar position has been taken by the British Columbia Supreme Court in *McNabb v. Smith* (1981), 124 D.L.R. (3d) 547, at p. 551.

23 The trial judge was of the view in this case that the property was not unique. She stated that, "It was a building lot under construction which would be interchangeable in all likelihood with any number of others". Notwithstanding this observation, she felt constrained by authority to find that specific performance was an appropriate remedy. While I would be inclined to agree with the trial judge as to the inappropriateness of an order for specific performance, both parties were content to present the case on the basis that the respondent was entitled to specific performance. The case was dealt with on this basis by the Court of Appeal. In the circumstances, this Court should abide by the manner in which the case has been presented by the parties and decided in the courts below. In future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy.

24 This takes me to the deductions made by the Court of Appeal. While I have some reservations about the propriety of these deductions, there was no cross-appeal by the respondent with respect to the award of damages. No argument was presented with respect to these deductions. My reservations relate to the basis upon which the Court of Appeal distinguished *Rimes*. In this regard, the Court stated (at p. 481):

Those are not the facts of the case now before the court. In this case, the purchaser is not a shell and the trial judge found that the evidence established what probably would have happened had the transaction closed.

25 On my reading of the reasons of MacKinnon A.C.J.O. in *Rimes*, the principal reason for deciding not to deduct the carrying charges was that to do so would be inconsistent with adopting the date of trial as the assessment date. I am not convinced that there is an inconsistency but would prefer not to express any further opinion on the question inasmuch as there is no cross-appeal and these matters are not in issue here.

26 The Court of Appeal added out-of-pocket expenses of \$673.75 for legal fees and \$250 for appraisal fees, amounts which were apparently inadvertently omitted from the judgment at trial. There was no dispute about these items.

Disposition

27 In the result, the appeal is dismissed with costs.

Appeal dismissed.

Tab 14

2011 SCC 10
Supreme Court of Canada

Kerr v. Baranow

2011 CarswellBC 240, 2011 CarswellBC 241, 2011 SCC 10, [2011] 1 S.C.R. 269, [2011] 3 W.W.R. 575, [2011] B.C.W.L.D. 2245, [2011] B.C.W.L.D. 2316, [2011] B.C.W.L.D. 2321, [2011] B.C.W.L.D. 2322, [2011] B.C.W.L.D. 2346, [2011] B.C.W.L.D. 2347, [2011] B.C.W.L.D. 2440, [2011] B.C.W.L.D. 2441, [2011] W.D.F.L. 1631, [2011] W.D.F.L. 1646, [2011] W.D.F.L. 1647, [2011] W.D.F.L. 1648, [2011] W.D.F.L. 1649, [2011] W.D.F.L. 1651, [2011] W.D.F.L. 1657, [2011] W.D.F.L. 1660, [2011] W.D.F.L. 1668, [2011] W.D.F.L. 1680, [2011] W.D.F.L. 1685, [2011] W.D.F.L. 1690, [2011] W.D.F.L. 1700, [2011] W.D.F.L. 1701, [2011] W.D.F.L. 1702, [2011] W.D.F.L. 1706, [2011] W.D.F.L. 1714, [2011] W.D.F.L. 1715, [2011] A.C.S. No. 10, [2011] S.C.J. No. 10, 108 O.R. (3d) 399, 14 B.C.L.R. (5th) 203, 199 A.C.W.S. (3d) 1214, 274 O.A.C. 1, 300 B.C.A.C. 1, 328 D.L.R. (4th) 577, 411 N.R. 200, 509 W.A.C. 1, 64 E.T.R. (3d) 1, 93 R.F.L. (6th) 1, J.E. 2011-333

Margaret Patricia Kerr (Appellant) and Nelson Dennis Baranow (Respondent)

Michele Vanasse (Appellant) and David Seguin (Respondent)

McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein, Cromwell JJ.

Heard: April 21, 2010
Judgment: February 18, 2011
Docket: 33157, 33358

Proceedings: reversing in part *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.); additional reasons at *Kerr v. Baranow* (2010), [2010] 4 W.W.R. 465, 2 B.C.L.R. (5th) 197, 2010 CarswellBC 108, 2010 BCCA 32, 78 R.F.L. (6th) 305 (B.C. C.A.); reversing in part *Kerr v. Baranow* (2007), 2007 CarswellBC 3047, 2007 BCSC 1863, 47 R.F.L. (6th) 103 (B.C. S.C.); and reversing *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.); reversing *Vanasse v. Seguin* (2008), 2008 CarswellOnt 4265 (Ont. S.C.J.); additional reasons at *Vanasse v. Seguin* (2009), 2009 CarswellOnt 606, 77 R.F.L. (6th) 109 (Ont. S.C.J.)

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Subject: Restitution; Family; Property; Estates and Trusts

Related Abridgment Classifications

Family law

III Division of family property

III.4 Determination of ownership of property

III.4.a Application of trust principles

III.4.a.i Resulting and constructive trusts

III.4.a.i.A Resulting trusts generally

Family law

IV Support

IV.1 Spousal support under Divorce Act and provincial statutes

IV.1.g Retroactivity of order

Family law

IV Support

IV.1 Spousal support under Divorce Act and provincial statutes

IV.1.r Miscellaneous

Restitution and unjust enrichment

V Benefits conferred in anticipation of reward

V.5 Family

V.5.d Common law spouses

Restitution and unjust enrichment

V Benefits conferred in anticipation of reward

V.5 Family

V.5.e Miscellaneous

Headnote

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — Common law spouses
V and S lived together in common law relationship from 1993 until March 2005 — In 2000, S sold company for approximately \$11 million — Parties separated almost 5 years later — V brought proceedings claiming unjust enrichment — Trial judge concluded that relationship of parties could be divided into three distinct periods and that S had been unjustly enriched by V in second period — Trial judge determined that V was entitled to one-half interest in prorated increase of S's net worth during period of unjust enrichment — S appealed, conceding unjust enrichment during period — Court of Appeal directed that proper approach to valuation was to place monetary value on services provided by V to family taking due account of S's own contributions — V appealed — Appeal allowed — Monetary award for unjust enrichment need not, as matter of principle, always be calculated on fee-for-service basis — Trial judge had concluded that V was at least equal contributor to family enterprise throughout relationship and that during period of unjust enrichment her contributions had significantly benefitted S — There were several factors which suggested that throughout relationship S and V were working collaboratively toward common goals — There were number of findings of fact that indicated that V and S considered their relationship to be joint family venture — There was strong inference from factual findings that, to S's knowledge, V relied on relationship to her detriment — Not only were V and S engaged in joint family venture but there was clear link between V's contribution to it and accumulation of wealth — Trial judge's approach to calculation was reasonable in circumstances.

Family law --- Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Resulting trusts generally

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim — B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — Court of Appeal was correct to intervene and conclude that transfer was not gratuitous — Common intention resulting trust has no further role to play in resolution of disputes such as this one — Resulting trust should not have been imposed on property on basis of finding of common intention between parties.

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — Miscellaneous

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — B brought counterclaim for unjust enrichment — Trial judge allowed K's claim both by way of resulting trust and by way of remedial constructive trust as remedy for her successful claim in unjust enrichment and rejected B's counterclaim

— B successfully appealed — Court of Appeal concluded that K's claims for resulting trust and in unjust enrichment should be dismissed and that B's claim for unjust enrichment should be remitted to trial court for determination — K appealed — Appeal allowed in part — Court of Appeal was right to set aside trial judge's findings of resulting trust and unjust enrichment and did not err in directing that B's counterclaim be returned to court for hearing — K's unjust enrichment claims should not have been dismissed but rather new trial ordered — Court of Appeal erred in assessing B's contributions as part of juristic reason analysis — Trying counterclaim separated from K's claim would be artificial and potentially unfair way of proceeding — K's claim was not presented, defended or considered by courts pursuant to joint family venture analysis — Even assuming K made out her claim in unjust enrichment, it was not possible to fairly apply joint family venture approach using record available.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Retroactivity of order

K and B began living together in common law relationship in 1981 — In 1991, K suffered massive stroke and cardiac arrest — In 2002, B took early retirement — In 2006, K was transferred to extended care facility — K brought claim for unjust enrichment, resulting trust and spousal support — K was awarded \$1,739 per month in spousal support effective date she commenced proceedings — B successfully appealed — Court of Appeal concluded that order for support should be effective as of first day of trial — K appealed — Appeal allowed in part — Court of Appeal's order with respect to commencement date of spousal support order was set aside and order of trial judge restored — There was little concern about certainty of B's obligations and there was little need to provide further incentives for K or others in her position to proceed with more diligence — It was unreasonable for Court of Appeal to attach such serious consequences to fact that interim application was not pursued — There was virtually no delay in applying for support nor was there any inordinate delay between date of application and date of trial — K was in need throughout relevant period, suffered from serious physical disability and her standard of living was markedly lower than it was while she lived with B — B had means to provide her support, had prompt notice of her claim and there was no indication in Court of Appeal's reasons that it considered judge's award imposed on him hardship so as to make award inappropriate.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Miscellaneous

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Restitution et enrichissement injustifié --- Avantages conférés dans l'attente d'un retour — Famille — Conjoints de fait V et S ont fait vie commune entre 1993 et mars 2005 — En 2000, S a vendu son entreprise pour la somme d'environ 11 millions \$ — Parties se sont séparées pratiquement 5 années plus tard — V a entamé des procédures, invoquant l'enrichissement injustifié — Juge de première instance a conclu que la relation des parties pouvait se diviser en trois périodes distinctes et que S s'était injustement enrichi grâce à V au cours de la deuxième période — Juge de première instance a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié — S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période — Cour d'appel a statué que la meilleure façon de procéder à l'évaluation était de calculer la valeur monétaire des services fournis par V à la famille en considérant de façon adéquate la contribution de S — V a formé un pourvoi — Pourvoi accueilli — Il n'est pas toujours nécessaire, en principe, de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la rémunération des services rendus — Juge de première instance a conclu que V avait contribué au moins autant pendant la relation à la coentreprise familiale et que, pendant la période de l'enrichissement injustifié,

ses contributions avaient grandement avantage S — Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, V et S collaboraient en vue d'atteindre des buts communs — Certain nombre de conclusions de fait indiquaient que V et S considéraient leur relation comme une coentreprise familiale — Il y avait de fortes raisons d'inférer des conclusions de fait que, à la connaissance de S, V se fiait sur la relation à son détriment — Non seulement V et S étaient engagés dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V à celle-ci et l'accumulation de la richesse — Approche adoptée par la juge de première instance au sujet du calcul était raisonnable dans les circonstances.

Droit de la famille --- Partage du patrimoine familial — Détermination de la propriété des biens — Application des principes de fiducie — Fiducie résultoire et fiducie constructive — Fiducies résultoires en général

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructive de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Cour d'appel a eu raison d'intervenir et de conclure que le transfert n'a pas été fait à titre gratuit — Fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci — Fiducie résultoire n'aurait pas dû être imposée à l'égard de la propriété sur la base de l'intention commune des parties.

Restitution et enrichissement injustifié --- Avantages conférés dans l'attente d'un retour — Famille — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont laissée paralysée du côté gauche et qui l'ont rendue inapte au travail — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — B a présenté une demande reconventionnelle fondée sur l'enrichissement injustifié — Juge de première instance a accueilli la réclamation de K sur le fondement de la fiducie résultoire et de la fiducie constructive de nature réparatoire comme réparation pour enrichissement injustifié et a rejeté la demande reconventionnelle de B — B a interjeté appel avec succès — Cour d'appel a conclu que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée et que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen — K a formé un pourvoi — Pourvoi accueilli en partie — Cour d'appel a eu raison d'écarter les conclusions du juge de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié et n'a pas commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B au tribunal — Réclamations de K fondées sur l'enrichissement injustifié n'auraient pas dû être rejetées mais une nouvelle audition de ces demandes aurait dû être ordonnée — Cour d'appel a commis une erreur en évaluant les contributions de B dans le cadre de l'analyse du motif juridique — Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K — Demande de K n'a pas été présentée, défendue ni examinée par les tribunaux suivant la méthode d'analyse de la coentreprise familiale — Même à supposer que K avait réussi à établir ses prétentions au sujet de l'enrichissement injustifié, il n'était pas possible d'appliquer équitablement la méthode d'analyse de la coentreprise familiale sur la base du dossier.

Droit de la famille --- Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Application rétroactive de l'ordonnance

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à

une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 \$ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

Droit de la famille --- Aliments — Pensions alimentaires pour époux en vertu de la Loi sur le divorce ou des lois provinciales — Divers

K et B ont commencé à faire vie commune en 1981 — En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque — B a pris une retraite anticipée en 2002 — En 2006, K a été transférée dans un établissement de soins prolongés — K a présenté une réclamation fondée sur la fiducie résultoire, l'enrichissement injustifié et le droit à une pension alimentaire — K a obtenu une pension alimentaire mensuelle de 1 739 \$ payable à la date où elle a entamé les procédures — B a interjeté appel avec succès — Cour d'appel a conclu que l'ordonnance de pension alimentaire devrait être applicable à compter du premier jour de l'audition — K a formé un pourvoi — Pourvoi accueilli en partie — Conclusion de la Cour d'appel au sujet de la date d'exécution de l'ordonnance alimentaire devrait être annulée et l'ordonnance de première instance rétablie — Il n'y avait pas vraiment lieu de s'interroger sur la certitude des obligations de B et il n'était pas vraiment nécessaire de mettre en place d'autres mesures propres à inciter K, ou d'autres personnes dans sa situation, à procéder de façon plus diligente — Il était déraisonnable pour la Cour d'appel d'attribuer des conséquences aussi graves au fait qu'une demande provisoire n'avait pas été présentée — K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition — K avait besoin de soutien pendant toute la période pertinente; elle souffrait d'une grave invalidité physique et son niveau de vie était nettement inférieur à celui qu'elle avait lorsqu'elle habitait avec B — B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge lui créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

B and K separated after a common law relationship of more than 25 years. In 1991, K suffered a massive stroke and cardiac arrest leaving her unable to return to work. B took early retirement in 2002. After surgery in 2005, K was transferred to an extended care facility. K claimed support and a one-third share of the property held in her partner's name based on resulting trust and unjust enrichment principles. B brought a counterclaim that K had been unjustly enriched at his expense. The trial judge awarded K one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims. The trial judge did not address B's counterclaim. The trial judge also awarded substantial monthly support for K effective as of the date she applied to the court for relief. B appealed. The Court of Appeal allowed the appeal, concluding that K's claim for resulting trust and in unjust enrichment should be dismissed, that B's claim for unjust enrichment should be remitted to the trial court for determination and that the order for spousal support should be effective as of the first day of trial, not as of the date proceedings were commenced.

V and S lived together in a common law relationship for approximately 12 years. During the first four years the couple diligently pursued their respective careers. In 1997, V took a leave of absence. During the next three and one-half years, the couple had two children and V took care of the domestic labour while S devoted himself to developing his business. In 2000, S's business was sold after which V continued to assume most of the domestic responsibilities. V and S separated in 2005. At the time of separation, V's net worth was about \$332,000 and S's net worth was about \$8,450,000. V brought an action for spousal support and child custody, and claimed unjust enrichment. The trial judge concluded that the

relationship could be divided into three distinct periods and that S had been unjustly enriched by V during the second period. The trial judge concluded that throughout the relationship V had been at least an equal contributor to the family enterprise and that V's efforts during this second period were directly linked to S's business success. The trial judge concluded that a monetary award was appropriate and determined that V was entitled to a one-half interest in the prorated increase in S's net worth during the period of unjust enrichment. The trial judge awarded just under \$1 million. S appealed, conceding unjust enrichment during the second period. The Court of Appeal set aside the trial judge's finding and held that V should be treated as an unpaid employee, not a co-venturer. Both K and V appealed.

Held: The appeal by V was allowed and the appeal by K was allowed in part.

Per Cromwell J. (McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein JJ. concurring): The time had come to acknowledge that there was no continuing role for the "common intention" resulting trust. First, the "common intention" resulting trust was doctrinally unsound. It was inconsistent with the underlying principles of resulting trust law. Second, the notion of common intention may be highly artificial, particularly in domestic cases. Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. Finally, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provided a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships.

The law of unjust enrichment had been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. A critical early question — whether the provision of domestic services could support a claim for unjust enrichment — was conclusively resolved in a 1993 decision. Remedies for unjust enrichment were restitutionary in nature. The first remedy was always a monetary award. Restricting the money remedy to a fee-for-services calculation was inappropriate for four reasons. First, it failed to reflect the reality of the lives of many domestic partners. Second, it was inconsistent with the inherent flexibility of unjust enrichment. Third, it ignored the historical basis of quantum meruit claims. Finally, it was not mandated by the Court's judgment in the 1993 case. Where the unjust enrichment was best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture" to which both partners had contributed, the monetary remedy should reflect that fact. When the parties had been engaged in a joint family venture, and the claimant's contributions to it were linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. To be entitled to a monetary remedy of that nature, the claimant must show both that there was in fact a joint family venture and that there was a link between his or her contributions to it and the accumulation of assets and/or wealth. Whether there was a joint family venture was a question of fact and may be assessed by having regard to all the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family.

Unjust enrichment analysis in domestic situations was often complicated by the fact that there had been a mutual conferral of benefits. Mutual enrichments should mainly be considered at the defence and remedy stages but they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constituted relevant evidence of the existence of juristic reason for the enrichment. The parties' reasonable or legitimate expectations had little role to play in deciding whether the services were provided for a juristic reason within the existing categories. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons was present. The parties' reasonable or legitimate expectations had a role to play at the second step of the juristic reason analysis.

In the V appeal, the trial judge's order should be restored. The money compensation for unjust enrichment need not always be calculated on a quantum meruit basis. The trial judge's findings of fact and analysis indicated that the unjust enrichment of S at the expense of V ought to be characterized as retention by S of a disproportionate share of the wealth generated from a joint family venture. There were several factors which suggested that throughout their relationship the parties were working collaboratively towards common goals. There was a pooling of resources. There were a number of findings of fact that indicated that the parties considered their relationship to be joint family venture. Not only were the parties engaged in a joint family venture but that there was a clear link between V's contribution to it and the accumulation of wealth. The trial judge's approach was reasonable in the circumstances. The trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to S's contribution.

In the K appeal, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that B's counterclaim be returned to the Supreme Court of British Columbia for hearing. The Court of Appeal was correct to conclude that the transfer was not gratuitous. The trial judge apparently based his conclusions about the resulting trust on his finding of a common intention on the part of K and B to share in the property. The common intention resulting trust had no further role to play in the resolution of such disputes. K's claim for unjust enrichment should be returned for a new trial. The first consideration in support of a new trial was that the Court of Appeal directed a hearing of B's counterclaim. Trying the counterclaim separated from K's claim would be an artificial and potentially unfair way of proceeding. More fundamentally, K's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that had been set out. Attempting to resolve K's unjust enrichment claim on its merits, using the record before this Court, involved too much uncertainty and risked injustice. With respect to the date of the spousal support order, the order of the trial judge should be restored. The Court of Appeal made two main errors. First, it erred in finding that the circumstances of K were such that there was no need prior to the trial. Second, the Court of Appeal was wrong to fault K for not bringing an interim application. There was virtually no delay in applying for maintenance nor was there any inordinate delay between the date of application and the date of trial. B had the means to provide support, had prompt notice of K's claim and there was no indication in the Court of Appeal's reasons that indicated that it had considered the trial judge's award a hardship so as to make that award inappropriate.

K et B se sont séparés après plus de 25 ans de vie commune. En 1991, K a été victime d'un grave accident vasculaire cérébral et d'un arrêt cardiaque qui l'ont rendue inapte au travail. B a pris une retraite anticipée en 2002. À la suite d'une intervention chirurgicale, en 2005, K a été transférée dans un établissement de soins prolongés. Sur le fondement de la fiducie résultoire et de l'enrichissement injustifié, K a réclamé une pension alimentaire et un tiers des biens détenus au nom de son conjoint. Par demande reconventionnelle, B a cherché à faire reconnaître que K s'était injustement enrichie à ses dépens. Le juge de première instance a accordé à K un tiers de la valeur de la maison du couple, sur le fondement de la fiducie résultoire et de l'enrichissement injustifié. Le juge de première instance ne s'est pas prononcé au sujet de la demande reconventionnelle de B. Le juge de première instance a également accordé à K une pension alimentaire mensuelle importante, rétroactive à la date d'introduction de l'instance. B a interjeté appel. La Cour d'appel a accueilli l'appel, concluant que la réclamation de K, fondée sur la fiducie résultoire et l'enrichissement injustifié, devrait être rejetée, que la réclamation de B, fondée sur l'enrichissement injustifié, devrait être renvoyée au tribunal de première instance pour réexamen et que l'ordonnance concernant la pension alimentaire devrait être rétroactive à la date du début de l'audition et non à la date d'introduction de l'instance.

V et S ont fait vie commune pendant environ 12 ans. Au cours des quatre premières années, les parties ont diligemment continué leur carrière respective. En 1997, V a pris un congé. Au cours des trois années et demie qui ont suivi, les parties ont eu deux enfants et V s'est occupée des travaux domestiques pendant que S se consacrait à la croissance de son entreprise. En 2000, l'entreprise de S a été vendue et V a continué de s'acquitter de la plupart des obligations familiales. V et S se sont séparés en 2005. Au moment de la séparation, l'avoir net de V était d'environ 332 000 \$ tandis que l'avoir net de S était d'environ 8 450 000 \$. V a déposé une action visant à obtenir une pension alimentaire et la garde des enfants et a invoqué l'enrichissement injustifié. La juge de première instance a conclu que la relation pouvait se diviser en trois périodes distinctes et que S s'était injustement enrichi grâce à V au cours de la deuxième période. La juge de première instance a conclu que tout le long de la relation, V avait contribué au moins autant à la coentreprise familiale et que les efforts déployés par V pendant cette deuxième période étaient directement liés au succès professionnel de S. La juge de première instance a conclu qu'une indemnité pécuniaire était appropriée et a déterminé que V avait droit à la moitié de l'augmentation proportionnelle de l'avoir net de S pendant la période de l'enrichissement injustifié. La juge de première instance a accordé un montant d'un peu moins d'un million de dollars. S a interjeté appel, admettant l'enrichissement injustifié au cours de la deuxième période. La Cour d'appel a annulé la conclusion de la juge de première instance et a conclu que V devait être considérée comme une employée non rémunérée, et non comme une co-entrepreneure. K et V ont toutes les deux formé un pourvoi.

Arrêt: Le pourvoi formé par V a été accueilli et le pourvoi formé par K a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., Binnie, LeBel, Abella, Charron, Rothstein, JJ., souscrivant à son opinion) : Il était temps de reconnaître que la fiducie résultoire fondée sur l'« intention commune » avait perdu sa raison d'être.

Premièrement, la fiducie résultoire basée sur l'« intention commune » était mal fondée sur le plan théorique. Elle était incompatible avec les principes sous-jacents du droit des fiducies résultoires. Deuxièmement, la notion d'intention commune peut être extrêmement artificielle, surtout en matière familiale. Troisièmement, la fiducie résultoire fondée sur « l'intention commune » au Canada tirait son origine d'une interprétation erronée de quelques formulations imprécises dans l'ancienne jurisprudence de la Chambre des lords. Finalement, les principes de l'enrichissement injustifié, conjugués au recours possible à la fiducie constructive, fournissaient un fondement beaucoup moins artificiel, plus complet et plus rationnel pour traiter de la grande variété des circonstances donnant lieu à des réclamations découlant d'unions conjugales.

Les règles relatives à l'enrichissement injustifié ont été le principal moyen utilisé pour régler les réclamations pour partage inéquitable des biens après la rupture d'une relation conjugale. Une question cruciale qui consistait au début à savoir si la prestation de services domestiques pouvait appuyer une action pour enrichissement injustifié a été définitivement réglée dans un arrêt de 1993. Les moyens utilisés pour corriger l'enrichissement injustifié étaient de nature réparatoire. La réparation pécuniaire était toujours considérée en premier. Il était inapproprié de calculer la réparation pécuniaire en fonction de la rémunération des services rendus, et ce, pour quatre raisons. Premièrement, ce type de calcul ne reflétait pas la réalité de nombreux conjoints vivant en union libre. Deuxièmement, il était incompatible avec la souplesse inhérente à l'enrichissement injustifié. Troisièmement, il ne tenait pas compte de l'historique des réclamations fondées sur le quantum meruit. Enfin, l'arrêt de la Cour de 1993 ne l'imposait pas. Dans les cas où la meilleure façon de qualifier l'enrichissement injustifié était de le considérer comme une rétention injuste d'une part disproportionnée des biens accumulés dans le cadre d'une « coentreprise familiale » à laquelle les deux conjoints avaient contribué, la réparation pécuniaire devrait refléter ce fait. Quand les parties ont été engagées dans une coentreprise familiale, et que les contributions du demandeur sont liées à l'accumulation de la richesse, il convenait de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction de la part proportionnelle de la contribution du demandeur à cette accumulation de la richesse. Pour avoir droit à une réparation pécuniaire de cette nature, le demandeur doit prouver qu'une coentreprise familiale existait effectivement et qu'il existait un lien entre ses contributions à la coentreprise et l'accumulation de l'avoir ou de la richesse. La question de savoir s'il existait une coentreprise familiale était une question de fait et on pouvait l'apprécier en prenant en considération toutes les circonstances pertinentes, y compris les facteurs relatifs à l'effort commun, à l'intégration économique, à l'intention réelle et à la priorité accordée à la famille.

L'analyse de l'enrichissement injustifié en matière familiale se compliquait souvent du fait qu'il y avait eu des avantages réciproques. Les enrichissements mutuels devaient être examinés principalement au stade de la défense ou à celui de la réparation, mais il était aussi possible de le faire au stade de l'analyse du motif juridique dans la mesure où l'octroi d'avantages réciproques constituait une preuve pertinente de l'existence d'un motif juridique justifiant l'enrichissement. Les attentes raisonnables ou légitimes des parties jouaient un rôle négligeable au moment de décider si les services ont été fournis pour un motif juridique appartenant à une catégorie établie. Dans certains cas, le fait que des avantages réciproques aient été conférés ou le fait que les avantages aient été fournis conformément aux attentes raisonnables des parties pouvait constituer une preuve pertinente pour déterminer si l'une des catégories établies de motifs juridiques s'appliquait. Les attentes raisonnables ou légitimes des parties jouaient un rôle à la deuxième étape de l'analyse du motif juridique.

Dans le pourvoi de V, l'ordonnance de la juge de première instance devrait être rétablie. Il n'est pas toujours nécessaire de calculer une indemnité pécuniaire pour enrichissement injustifié en fonction du quantum meruit. Selon les conclusions de fait et l'analyse de la juge de première instance, l'enrichissement injustifié de S au détriment de V tenait à la conservation, par S, d'une part disproportionnée de la richesse générée par la coentreprise familiale. Plusieurs facteurs donnaient à penser que, pendant toute la durée de leur relation, les parties collaboraient en vue d'atteindre des buts communs. Il y avait une mise en commun des ressources. Un certain nombre de conclusions de fait indiquaient que les parties considéraient leur relation comme une coentreprise familiale. Non seulement les parties étaient engagées dans une coentreprise familiale, mais il y avait aussi un lien clair entre la contribution de V et l'accumulation de la richesse. L'approche adoptée par la juge de première instance était raisonnable dans les circonstances. La juge de première instance s'est prononcée de manière réaliste et pratique quant à la preuve dont elle disposait et a suffisamment tenu compte des contributions de S.

Dans le pourvoi de K, la Cour d'appel a eu raison d'écarter les conclusions de première instance en ce qui concernait la fiducie résultoire et l'enrichissement injustifié. Elle n'a pas non plus commis d'erreur en ordonnant le renvoi de la demande reconventionnelle de B à la Cour suprême de la Colombie-Britannique. La Cour d'appel a eu raison de conclure que le transfert n'avait pas été fait à titre gratuit. Le juge de première instance semblait avoir fondé ses conclusions relatives à la fiducie résultoire sur l'existence d'une intention commune, de la part de K et de B, de partager la propriété. La fiducie résultoire fondée sur l'intention commune n'avait plus aucun rôle à jouer dans le règlement d'un litige tel que celui-ci. Il convenait de renvoyer la demande de K fondée sur l'enrichissement injustifié pour qu'elle fasse l'objet d'une nouvelle audition. La première considération à l'appui d'une nouvelle audition était que la Cour d'appel avait ordonné l'audition de la demande reconventionnelle de B. Il serait artificiel et potentiellement injuste d'entendre la demande reconventionnelle séparément de celle de K. Fondamentalement, la demande de K n'a pas été présentée, défendue ni examinée par les tribunaux d'instance inférieure suivant la méthode d'analyse de la coentreprise familiale qui a été exposée. Tenter de trancher sur le fond la demande de K fondée sur l'enrichissement injustifié, sur la base du dossier soumis à la Cour, présentait trop d'aléas et des risques d'injustice. En ce qui concernait la date d'exécution de l'ordonnance alimentaire, l'ordonnance de première instance devrait être rétablie. La Cour d'appel a commis deux erreurs principales. Premièrement, elle a commis une erreur en concluant que la situation de K était telle qu'elle n'avait pas besoin de soutien avant l'audition. Deuxièmement, la Cour d'appel a eu tort de reprocher à K de ne pas avoir présenté une demande provisoire. K n'a pas tardé à déposer sa demande de pension alimentaire et il n'y a pas eu de retard excessif entre la date de la demande et le début de l'audition. B avait les moyens de lui verser une pension, il avait reçu sans délai un avis de sa réclamation, et rien dans les motifs de la Cour d'appel n'indiquait qu'elle considérait que la pension alimentaire imposée par le juge créait une situation financière difficile, au point de rendre l'ordonnance inappropriée.

APPEALS from judgments reported at *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.) and *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.).

POURVOIS à l'encontre des jugements publiés à *Kerr v. Baranow* (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.) et à *Vanasse v. Seguin* (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 77 R.F.L. (6th) 118, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.).

Cromwell J.:

I. Introduction

1 In a series of cases spanning 30 years, the Court has wrestled with the financial and property rights of parties on the breakdown of a marriage or domestic relationship. Now, for married spouses, comprehensive matrimonial property statutes enacted in the late 1970s and 1980s provide the applicable legal framework. But for unmarried persons in domestic relationships in most common law provinces, judge-made law was and remains the only option. The main legal mechanisms available to parties and courts have been the resulting trust and the action in unjust enrichment.

2 In the early cases of the 1970s, the parties and the courts turned to the resulting trust. The underlying legal principle was that contributions to the acquisition of a property, which were not reflected in the legal title, could nonetheless give rise to a property interest. Added to this underlying notion was the idea that a resulting trust could arise based on the "common intention" of the parties that the non-owner partner was intended to have an interest. The resulting trust soon proved to be an unsatisfactory legal solution for many domestic property disputes, but claims continue to be advanced and decided on that basis.

3 As the doctrinal problems and practical limitations of the resulting trust became clearer, parties and courts turned increasingly to the emerging law of unjust enrichment. As the law developed, unjust enrichment carried with it the possibility of a remedial constructive trust. In order to successfully prove a claim for unjust enrichment, the claimant must show that the defendant has been enriched, the claimant suffered a corresponding detriment, and there is no "juristic

reason" for the enrichment. This claim has become the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships. However, various issues continue to create controversy, and these two appeals, argued consecutively, provide the Court with the opportunity to address them.

4 In the *Kerr* appeal, a couple in their late-sixties separated after a common law relationship of more than 25 years. Both had worked through much of that time and each had contributed in various ways to their mutual welfare. Ms. Kerr claimed support and a share of property held in her partner's name based on resulting trust and unjust enrichment principles. The trial judge awarded her one-third of the value of the couple's residence, grounded in both resulting trust and unjust enrichment claims (2007 BCSC 1863, 47 R.F.L. (6th) 103 (B.C. S.C.)). He did not address, other than in passing, Mr. Baranow's counterclaim that Ms. Kerr had been unjustly enriched at his expense. The judge also ordered substantial monthly support for Ms. Kerr pursuant to statute, effective as of the date she applied to the court for relief. However, the resulting trust and unjust enrichment conclusions of the trial judge were set aside by the British Columbia Court of Appeal (2009 BCCA 111, 93 B.C.L.R. (4th) 201 (B.C. C.A.)). Both lower courts addressed the role of the parties' common intention and reasonable expectations. The appeal to this Court raises the questions of the role of resulting trust law in these types of disputes, as well as how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations play in that analysis. This Court is also called upon to decide whether the award of spousal support should be effective as of the date of application, as found by the trial judge, the date the trial began, as ordered by the Court of Appeal, or some other date.

5 In the *Vanasse* appeal, the central problem is how to quantify a monetary award for unjust enrichment. It is agreed that Mr. Seguin was unjustly enriched by the contributions of his partner, Ms. Vanasse; the two lived in a common law relationship for about 12 years and had two children together during this time. The trial judge valued the extent of the enrichment by determining what proportion of Mr. Seguin's increased wealth was due to Ms. Vanasse's efforts as an equal contributor to the family venture (2008 CanLII 35922). The Court of Appeal set aside this finding and, while ordering a new trial, directed that the proper approach to valuation was to place a monetary value on the services provided by Ms. Vanasse to the family, taking due account of Mr. Seguin's own contributions by way of set-off (2009 ONCA 595, 252 O.A.C. 218 (Ont. C.A.)). In short, the Court of Appeal held that Ms. Vanasse should be treated as an unpaid employee, not a co-venturer. The appeal to this Court challenges this conclusion.

6 These appeals require us to resolve five main issues. The first concerns the role of the "common intention" resulting trust in claims by domestic partners. In my view, it is time to recognize that the "common intention" approach to resulting trust has no further role to play in the resolution of property claims by domestic partners on the breakdown of their relationship.

7 The second issue concerns the nature of the money remedy for a successful unjust enrichment claim. Some courts take the view that if the claimant's contribution cannot be linked to specific property, a money remedy must always be assessed on a fee-for-services basis. Other courts have taken a more flexible approach. In my view, where both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result, have accumulated assets, the money remedy for unjust enrichment should reflect that reality. The money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.

8 The third area requiring clarification relates to mutual benefit conferral. Many domestic relationships involve the mutual conferral of benefits, in the sense that each contributes in various ways to the welfare of the other. The question is how and at what point in the unjust enrichment analysis should this mutual conferral of benefits be taken into account? For reasons I will develop below, this issue should, with a small exception, be addressed at the defence and remedy stage.

9 Fourth, there is the question of what role the parties' reasonable or legitimate expectations play in the unjust enrichment analysis. My view is that they have a limited role, and must be considered in relation to whether there is a juristic reason for the enrichment.

10 Finally, there is the issue of the appropriate date for the commencement of spousal support. In my respectful view, the Court of Appeal erred in setting aside the trial judge's selection of the date of application in the circumstances of the *Kerr* appeal.

11 I will first address the law of resulting trusts as it applies to the breakdown of a marriage-like relationship. Next, I will turn to the law of unjust enrichment in this context. Finally, I will address the specific issues raised in the two appeals.

II. Resulting Trusts

12 The resulting trust played an important role in the early years of the Court's jurisprudence relating to property rights following the breakdown of intimate personal relationships. This is not surprising; it had been settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, "results" to the person who advances the purchase money: *Dyer v. Dyer* (1788), 2 Cox Eq. Cas. 92, at p. 93, 30 E.R. 42 (Eng. Ch. Div.). The resulting trust, therefore, seemed a promising vehicle to address claims that one party's contribution to the acquisition of property was not reflected in the legal title.

13 The resulting trust jurisprudence in domestic property cases developed into what has been called "a purely Canadian invention", the "common intention" resulting trust: A H. Oosterhoff, et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009) at p. 642. While this vehicle has largely been eclipsed by the law of unjust enrichment since the decision of the Court in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), claims based on the "common intention" resulting trust continue to be advanced. In the *Kerr* appeal, for example, the trial judge justified the imposition of a resulting trust, in part, on the basis that the parties had a common intention that Mr. Baranow would hold title to the property by way of a resulting trust for Ms. Kerr. The Court of Appeal, while reversing the trial judge's finding of fact on this point, implicitly accepted the ongoing vitality of the common intention resulting trust.

14 However promising this common intention resulting trust approach looked at the beginning, doctrinal and practical problems soon became apparent and have been the subject of comment by the Court and scholars: see, e.g., *Pettkus*, at pp. 842-43; Oosterhoff, at pp. 641-47; D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005) ("*Waters*") at pp. 430-35; J. Mee, *The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions* (1999), at pp. 39-43; T. G. Youdan, "Resulting and Constructive Trusts" in *Special Lectures of the Law Society of Upper Canada 1993 - Family Law: Roles, Fairness and Equality* (1994), 169 at pp. 172-74.

15 In this Court, since *Pettkus*, the common intention resulting trust remains intact but unused. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, the time has come to acknowledge that there is no continuing role for the common intention resulting trust. To explain why, I must first put the question in the context of some basic principles about resulting trusts.

16 That task is not as easy as it should be; there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points: see, for example, *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at pp. 449-50; *Waters*', at pp. 19-22; P. H. Pettit, *Equity and the Law of Trusts* (11th ed. 2009), at p. 67. However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters*', at p. 21.

17 Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.

18 The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the *transferor's actual intention*" (emphasis added).

19 As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds that property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).

20 The presumption of resulting trust, however, is neither universal nor irrebuttable. So, for example, in the case of transfers between persons in certain relationships (such as from a parent to a minor child), a presumption of advancement — that is, a presumption that the grantor intended to make a gift — rather than a presumption of resulting trust applies: see *Pecore*, at paras. 27-41. The presumption of advancement traditionally applied to grants from husband to wife, but the presumption of resulting trust traditionally applied to grants from wife to husband. Whether the application of the presumption of advancement applies to unmarried couples may be more controversial: Oosterhoff, at pp. 681-82. Although the trial judge in *Kerr* touched on this issue, neither party relies on the presumption of advancement and I need say nothing further about it.

21 That brings me to the "common intention" resulting trust. It figured prominently in the majority judgment in *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423 (S.C.C.). Quoting from Lord Diplock's speech in *Gissing v. Gissing*, [1970] 2 All E.R. 780 (U.K. H.L.), at pp. 789 and 793, Martland J. held for the majority that, absent a financial contribution to the acquisition of the contested property, a resulting trust could only arise "where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other": *Murdoch*, at p. 438.

22 This approach was repeated and followed by a majority of the Court three years later in *Rathwell*, at pp. 451-53, although the Court also unanimously found there had been a direct financial contribution by the claimant. In *Rathwell*, there is, as well, some blurring of the notions of contribution and common intention; there are references to the fact that a presumption of resulting trust is sometimes explained by saying that the fact of contribution evidences the common intention to share ownership: see p. 452, *per* Dickson J. (as he then was); p. 474, *per* Ritchie J. This blurring is also evident in the reasons of the Court of Appeal in *Kerr*, where the court said, at para. 42, that "a resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another *and where there is evidence of a common intention that the property was to be shared by both parties*" (emphasis added).

23 The Court's development of the common intention resulting trust ended with *Pettikus*, in which Dickson J. (as he then was) noted the "many difficulties, chronicled in the cases and in the legal literature" as well as the "artificiality of the common intention approach" to resulting trusts: at pp. 842-3. He also clearly rejected the notion that the requisite common intention could be attributed to the parties where such an intention was negated by the evidence: p. 847. The import of *Pettikus* was that the law of unjust enrichment, coupled with the remedial constructive trust, became the more flexible and appropriate lens through which to view property and financial disputes in domestic situations. As Ms. Kerr stated in her factum, the "approach enunciated in *Becker v. Pettikus* has become the dominant legal paradigm for the resolution of property disputes between common law spouses" (para. 100).

24 This, in my view, is as it should be, and the time has come to say that the common intention resulting trust has no further role to play in the resolution of domestic cases. I say this for four reasons.

25 First, as the abundant scholarly criticism demonstrates, the common intention resulting trust is doctrinally unsound. It is inconsistent with the underlying principles of resulting trust law. Where the issue of intention is relevant to the finding of resulting trust, it is the intention of the grantor or contributor alone that counts. As Professor Waters puts it, "In imposing a resulting trust upon the recipient, Equity is never concerned with [common] intention (*Waters*', at p. 431)." The underlying principles of resulting trust law also make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition. The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property. This thinking extends artificially to claims that are based on contributions that are not clearly associated with the acquisition of an interest in property; in such cases there is not, in any meaningful sense, a "resulting" back of the transferred property: *Waters*', at p. 432. It follows that a resulting trust based solely on intention without a transfer of property is, as Oosterhoff puts it, a doctrinal impossibility: "... a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property": p. 642. The final doctrinal problem is that the relevant time for ascertaining intention is the time of acquisition of the property. As a result, it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance. As Oosterhoff succinctly puts it at p. 652, a resulting trust is inappropriate in these circumstances because its imposition, in effect, forces one party to give up beneficial ownership which he or she enjoyed before the improvement or maintenance occurred.

26 There are problems beyond these doctrinal issues. A second difficulty with the common intention resulting trust is that the notion of common intention may be highly artificial, particularly in domestic cases. The search for common intention may easily become "a mere vehicle or formula" for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties. Dickson J. in *Pettikus* noted the artificiality and undue malleability of the common intention approach: at pp. 843-44.

27 Third, the "common intention" resulting trust in Canada evolved from a misreading of some imprecise language in early authorities from the House of Lords. While much has been written on this topic, it is sufficient for my purposes to note, as did Dickson J. in *Pettikus*, at p. 842, that the principles upon which the common intention resulting trust jurisprudence developed are found in the House of Lords decisions in *Pettitt v. Pettitt* (1969), [1970] A.C. 777 (U.K. H.L.), and *Gissing*. However, no clear majority opinion emerged in those cases and four of the five Law Lords in *Gissing* spoke of "resulting, implied or constructive trusts" without distinction. The passages that have been most influential in Canada on this point, those authored by Lord Diplock, in fact relate to constructive rather than resulting trusts: see, e.g., *Waters*', at pp. 430-35; Oosterhoff, at pp. 642-43. I find persuasive Professor Waters' comments, specifically approved by Dickson J. in *Pettikus*, that where the search for common intention becomes simply a vehicle for reaching what the court perceives to be a just result, "[i]t is in fact a constructive trust approach masquerading as a resulting trust approach": D. Waters, Comment (1975), 53 *Can. Bar Rev.* 366, at p. 368.

28 Finally, as the development of the law since *Pettikus* has shown, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial attempts to find common intent to support what the court thinks for unstated reasons is a just result.

29 I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in *Murdoch* and *Rathwell*, no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing

other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

III. Unjust Enrichment

A. Introduction

30 The law of unjust enrichment has been the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship. In a series of decisions, the Court has developed a sturdy framework within which to address these claims. However, a number of doctrinal and practical issues require further attention. I will first briefly set out the existing framework, then articulate the issues that in my view require further attention, and finally propose the ways in which they should be addressed.

B. The Legal Framework for Unjust Enrichment Claims

31 At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed., 2007), c. 4-11, 17 and 19-26).

32 Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettikus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.

33 The application of unjust enrichment principles to claims by domestic partners was resisted until the Court's 1980 decision in *Pettikus*. In applying unjust enrichment principles to domestic claims, however, the Court has been clear that there is and should be no separate line of authority for "family" cases developed within the law of unjust enrichment. Rather, concern for clarity and doctrinal integrity mandate that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases" (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 997).

34 Although the legal principles remain constant across subject areas, they must be applied in the particular factual and social context out of which the claim arises. The Court in *Peter* was unanimously of the view that the courts "should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases" (p. 997, *per* McLachlin J. (as she then was); see also p. 1023, *per* Cory J.). Thus, while the underlying legal principles of the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.

35 It will be helpful to review, briefly, the current state of the law with respect to each of the elements of an unjust enrichment claim and note the particular issues in relation to each that arise in claims by domestic partners.

C. The Elements of an Unjust Enrichment Claim

(1) Enrichment and Corresponding Deprivation

36 The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

37 The Court has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 31.

38 For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

39 Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

40 The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp. 990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.); *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

42 A critical early question in domestic claims was whether the provision of domestic services could support a claim for unjust enrichment. After some doubts, the matter was conclusively resolved in *Peter*, where the Court held that they could. A spouse or domestic partner generally has no duty, at common law, equity, or by statute, to perform work or services for the other. It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan*, at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection". (*Peter*, at pp. 989-95, *per* McLachlin J., and pp. 1012-16, *per* Cory J.).

43 In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established

categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

First, the plaintiff must show that no juristic reason from an established category exists to deny recovery [...] The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

44 Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

45 Policy arguments concerning individual autonomy may arise under the second branch of the juristic reason analysis. In the context of claims for unjust enrichment, this has led to questions regarding how (and when) factors relating to the manner in which the parties organized their relationship should be taken into account. It has been argued, for example, that the legislative decision to exclude unmarried couples from property division legislation indicates the court should not use the equitable doctrine of unjust enrichment to address their property and asset disputes. However, the court in *Peter* rejected this argument, noting that it misapprehended the role of equity. As McLachlin J. put it at p. 994, "It is precisely where an injustice arises without a legal remedy that equity finds a role." (See also *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.), at para. 61.)

(3) Remedy

46 Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 669, *per* La Forest J.).

(a) Monetary Award

47 The first remedy to consider is always a monetary award (*Peter*, at pp. 987 and 999). In most cases, it will be sufficient to remedy the unjust enrichment. However, calculation of such an award is far from straightforward. Two issues have given rise to disagreement and difficulty in domestic unjust enrichment claims.

48 First, the fact that many domestic claims of unjust enrichment arise out of relationships in which there has been a mutual conferral of benefits gives rise to difficulties in determining what will constitute adequate compensation. While the value of domestic services is not questioned (*Peter*; *Sorochan*), it is unjust to pay attention only to the contributions

of one party in assessing an appropriate remedy. This is not only an important issue of principle; in practice, it is enormously difficult for the parties and the court to "create, retroactively, a notional ledger to record and value every service rendered by each party to the other" (R. E. Scane, "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 *Can. Bar Rev.* 260, at p. 281). This gives rise to the practical problem that one scholar has aptly referred to as "duelling *quantum meruit*" (J. D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?", in J.W. Neyers, M. McInnes and S.G.A. Pitel, eds., *Understanding Unjust Enrichment* (2004), 359, at p. 376). McLachlin J. also alluded to this practical problem in *Peter*, at p. 999.

49 A second difficulty arises from the fact that some courts and commentators have read *Peter* as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the *quantum meruit*, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly — in effect, on a value survived basis — by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26 (B.C. C.A.), at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C. C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (B.C. C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108 (N.B. C.A.), at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40 (B.C. C.A.), at para. 37. With respect to inconsistencies in how *in personam* relief for unjust enrichment may be quantified, see also: *Matrimonial Property Law in Canada*, vol 1, by J.G. McLeod and A.A. Mamo, eds.(loose-leaf), at pp. 40.78-40.79.

(b) Proprietary Award

50 The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

51 As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154 (Alta. Q.B.), at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

52 The plaintiff must also establish that a monetary award would be insufficient in the circumstances (*Peter*, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (*Lac Minerals*, at p. 678, *per* La Forest J.).

53 The extent of the constructive trust interest should be proportionate to the claimant's contributions. Where the contributions are unequal, the shares will be unequal (*Pettkus*, at pp. 852-53; *Rathwell*, at p. 448; *Peter*, at pp. 998-99).

As Dickson J. put it in [Rathwell](#), "The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions" (p. 454).

D. Areas Needing Clarification

54 While the law of unjust enrichment sets out a sturdy legal framework within which to address claims by domestic partners, three areas continue to generate controversy and require clarification. As mentioned earlier, these are as follows: the approach to the assessment of a monetary award for a successful unjust enrichment claim, how and where to address the mutual benefit problem, and the role of the parties' reasonable or legitimate expectations. I will address these in turn.

E. Is a Monetary Award Restricted to Quantum Meruit?

(1) Introduction

55 As noted earlier, remedies for unjust enrichment may either be proprietary (normally a remedial constructive trust) or personal (normally a money remedy). Once the choice has been made to award a monetary rather than a proprietary remedy, the question of how to quantify that monetary remedy arises. Some courts have held that monetary relief must always be calculated based on a value received or *quantum meruit* basis ([Bell](#)), while others have held that monetary relief may also be based on a value survived (i.e. by reference to the value of property) approach ([Wilson](#); [Pickelein](#); [Harrison](#); [MacFarlane](#); [Shannon](#)). If, as some courts have held, a monetary remedy must invariably be quantified on a *quantum meruit* basis, the remedial choice in unjust enrichment cases becomes whether to impose a constructive trust or order a monetary remedy calculated on a *quantum meruit* basis. One scholar has referred to this approach as the false dichotomy between constructive trust and *quantum meruit* (McCamus, at pp. 375-76). Scholars have also noted this area of uncertainty in the case law, and have suggested that an *in personam* remedy using the value survived measure is a plausible alternative to the constructive trust (McCamus, at p. 377; P. Birks, *An Introduction to the Law of Restitution* (1985), at pp. 394-95). As I will explain below, [Peter](#) is said to have established this dichotomy of remedial choice. However, in my view, the focus in [Peter](#) was on the availability of the constructive trust remedy, and that case should not be taken as limiting the calculation of monetary relief for unjust enrichment to a *quantum meruit* basis. In appropriate circumstances, monetary relief may be assessed on a value survived basis.

56 I will first briefly describe the genesis of the purported limitation on the monetary remedy. Then I will explain why, in my view, it should be rejected. Finally, I will set out my views on how money remedies for unjust enrichment claims in domestic situations should be approached.

(2) The Remedial Dichotomy

57 As noted, there is a widespread, although not unanimous, view that there are only two choices of remedy for an unjust enrichment: a monetary award, assessed on a fee-for-services basis; or a proprietary one (generally taking the form of a remedial constructive trust), where the claimant can show that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property. Some brief comments in [Peter](#) seem to have spawned this idea, which is reflected in a number of appellate authorities. For instance, in the [Vanasse](#) appeal, the Ontario Court of Appeal reasoned that since Ms. Vanasse could not show that her contributions were linked to specific property, her claim had to be quantified on a fee-for-services basis. I respectfully do not agree that monetary awards for unjust enrichment must always be calculated in this way.

(3) Why the Remedial Dichotomy Should Be Rejected

58 In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of *quantum meruit* claims. Finally, it is not mandated by the Court's judgment in [Peter](#). For those reasons, this remedial dichotomy should be rejected. The discussion which

follows is concerned only with the quantification of a monetary remedy for unjust enrichment; the law relating to when a proprietary remedy should be granted is well established and remains unchanged.

(a) Life Experience

59 The remedial dichotomy would be appropriate if, in fact, the bases of all domestic unjust enrichment claims fit into only two categories — those where the enrichment consists of the provision of unpaid services, and those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property. To be sure, those two bases for unjust enrichment claims exist. However, all unjust enrichment cases cannot be neatly divided into these two categories.

60 At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

61 There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 (S.C.C.), at p. 807 (in relation to Nova Scotia's *Matrimonial Property Act*), "... the Act supports the equality of both parties to a marriage and *recognized the joint contribution of the spouses, be it financial or otherwise, to that enterprise*. ... The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized" (emphasis added).

62 Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

63 This reality has also been recognized many times and in many contexts by the Court. For instance, in *Murdoch*, Laskin J. (as he then was), in dissent, would have imposed constructive trust relief, on the basis that the facts were "consistent with a pooling of effort by the spouses" to establish themselves in a ranch operation (p. 457), and that the spouses had worked together for fifteen years to improve "their lot in life through progressively larger acquisitions of ranch property" (p. 446). Similarly, in *Rathwell*, a majority of the judges agreed that Mr. and Mrs. Rathwell had pooled their efforts to accumulate wealth as a team. Dickson J. emphasized that the parties had together "decided to make farming their way of life" (p. 444), and that the acquisition of property in Mr. Rathwell's name was only made possible through their "joint effort" and "team work" (p. 461).

64 A similar recognition is evident in *Pettkus* and *Peter*.

65 In *Pettkus*, the parties developed a successful beekeeping business, the profits from which they used to acquire real property. Dickson J., writing for the majority of the Court, emphasized facts suggestive of a domestic and financial partnership. He observed that "each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort" (p. 853); that each contributed to the "good fortune of the common enterprise" (p. 838); that Wilson J.A. (as she then was) at the Court of Appeal had found the wealth they accumulated was through "joint effort" and "teamwork" (p. 849); and finally, that "[t]heir lives and their economic well-being were fully integrated" (p. 850).

66 I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

67 The significance of the fact that wealth had been acquired through joint effort was again at the forefront of the analysis in *Peter* where the parties lived together for 12 years in a common law relationship. While Mr. Beblow generated most of the family income and also contributed to the maintenance of the property, Ms. Peter did all of the domestic work (including raising the six children of their blended family), helped with property maintenance, and was solely responsible for the property when Mr. Beblow was away. The reality of their joint venture was acknowledged when McLachlin J. wrote that the "joint family venture, in effect, was no different from the farm which was the subject of the trust in *Becker v. Pettkus*" (p. 1001).

68 The Court's recognition of the joint family venture is evident in three other places in *Peter*. First, in reference to the appropriateness of the "value survived" measure of relief, McLachlin J. observed, "[I]t is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship" (p. 999). Second, and also related to valuing the extent of the unjust enrichment, McLachlin J. noted that, in a case where both parties had contributed to the "family venture", it was appropriate to look to all of the family assets, rather than simply one of them, to approximate the value of the claimant's contributions to that family venture (p. 1001). Third, the Court's justification for affirming the value of domestic services was, in part, based on reasoning that such services are often proffered in the context of a common venture (p. 993).

69 Relationships of this nature are common in our life experience. For many domestic relationships, the couple's venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis. Of course, this is a relationship-specific issue; there can be no presumption one way or the other. However, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives. It should not impose on them the need to engage in an artificial balance sheet approach which does not reflect the true nature of their relationship.

(b) Flexibility

70 Maintaining a strict remedial dichotomy is inconsistent with the Court's approach to equitable remedies in general, and to its development of remedies for unjust enrichment in particular.

71 The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: "... the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *Lloyds' Mar. & Com. L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 34.

72 Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has

recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, at p. 47.

73 Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. This means that a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or other of the two remedial options into which some have tried to force them.

(c) History

74 Imposing a strict remedial dichotomy is also inconsistent with the historical development of the unjust enrichment principle. Unjust enrichment developed through several particular categories of cases. *Quantum meruit*, the origin of the fee-for-services award, was only one of them. *Quantum meruit* originated as a common law claim for compensation for benefits conferred under an agreement which, while apparently binding, was rendered ineffective for a reason recognized at common law. The scope of the claim was expanded over time, and the measure of a *quantum meruit* award was flexible. It might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), vol. 1 at § 4:200.30. The important point, however, is that *quantum meruit* is simply one of the established categories of unjust enrichment claims. There is no reason in principle why one of the traditional categories of unjust enrichment should be used to force the monetary remedy for all present domestic unjust enrichment cases into a remedial straitjacket.

(d) *Peter v. Beblow*

75 *Peter* does not mandate strict adherence to a *quantum meruit* approach to money remedies for unjust enrichment. One must remember that the focus of *Peter* was on whether the plaintiff's contributions entitled her to a constructive trust over the former family home. While it was assumed by both McLachlin J. and Cory J., who wrote concurring reasons in the case, that a money award would be fashioned on the basis of *quantum meruit*, that was not an issue, let alone a holding, in the case.

76 There are, in fact, only two sentences in the judgments that could be taken as supporting the view that this rule should always apply. At p. 995, McLachlin J. said, "Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e. *quantum meruit*; and the one the trial judge awarded, title to the house based on a constructive trust"; at p. 999, she wrote that "[f]or a monetary award, the 'value received' approach is appropriate". Given that the focus of the case was deciding whether a proprietary remedy was appropriate, I would not read these two brief passages as laying down the sweeping rule that a monetary award must always be calculated on a fee-for-services basis.

77 Moreover, McLachlin J. noted that the doctrine of unjust enrichment applies to a variety of situations, and that successful claims have been addressed through a number of remedies, depending on the circumstances. Only one of these remedies is a payment for services rendered on the basis of *quantum meruit*: p. 987. There is nothing in this observation to suggest that the Court decided to opt for a one-size-fits-all monetary remedy, especially when such an approach would be contrary to the very flexibility that the Court has repeatedly affirmed with regards to the law of unjust enrichment and corresponding remedies.

78 This restrictive reading of *Peter* is not consistent with the underlying nature of the claim founded on the principles set out in *Pettkus*. As Professor McCamus has suggested, cases like *Pettkus* rest on a claimant's right to share surplus wealth created by joint effort and teamwork. It follows that a remedy based on notional fees for services is not responsive to the underlying nature of that claim: McCamus, at pp. 376-77. In my view, this reasoning is persuasive whether the joint effort has led to the accumulation of specific property, in which case a remedial constructive trust may be appropriate

according to the well-settled principles in that area of trust law, or where the joint effort has led to an accumulation of assets generally. In the latter instance, when appropriate, there is no reason in principle why a monetary remedy cannot be fashioned to reflect this basis of the enrichment and corresponding deprivation. What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in *Peter*, between the "value received" and the "value surviving". Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

79 Professor McCamus has suggested that the equitable remedy of an accounting of profits could be an appropriate remedial tool: p. 377. While I would not discount that as a possibility, I doubt that the complexity and technicality of that remedy would be well-suited to domestic situations, which are more often than not rather straightforward. The unjust enrichment principle is inherently flexible and, in my view, the calculation of a monetary award for a successful unjust enrichment claim should be equally flexible. This is necessary to respond, to the extent money can, to the particular enrichment being addressed. To my way of thinking, Professor Fridman was right to say that "where a claim for unjust enrichment has been made out by the plaintiff, the court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled, regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398).

(4) *The Approach to the Monetary Remedy*

80 The next step in the legal development of this area should be to move away from the false remedial dichotomy between *quantum meruit* and constructive trust, and to return to the underlying principles governing the law of unjust enrichment. These underlying principles focus on properly characterizing the nature of the unjust enrichment giving rise to the claim. As I have mentioned above, not all unjust enrichments arising between domestic partners fit comfortably into either a "fee-for-services" or "a share of specific property" mold. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of what McLachlin J. referred to in *Peter* (at p. 1001) as a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

81 In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure. Since the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". In such cases, the unjust enrichment is understood to arise because the party who leaves the relationship with a disproportionate share of the wealth is denying to the claimant a reasonable share of the wealth accumulated in the course of the relationship through their joint efforts. The monetary award for unjust enrichment should be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth.

82 This flexible approach to the money remedy in unjust enrichment cases is fully consistent with *Walsh*. While that case was focused on constitutional issues that are not before us in this case, the majority judgment was clearly not intended to freeze the law of unjust enrichment in domestic cases; the judgment indicates that the law of unjust enrichment, including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances" (para. 61). In short, while emphasizing respect for autonomy as an important value, the Court at the same time approved of the continued development of the law of unjust enrichment in order to respond to the plethora of forms and functions of common law relationships.

83 A similar approach was taken in *Peter*. Mr. Beblow argued that the law of unjust enrichment should not provide a share of property to unmarried partners because the legislature had chosen to exclude them from the rights accorded to married spouses under matrimonial property legislation. This argument was succinctly — and flatly — rejected with the remark that it is "precisely where an injustice arises without a legal remedy that equity finds a role": p. 994.

84 It is not the purpose of the law of unjust enrichment to replicate for unmarried partners the legislative presumption that married partners are engaged in a joint family venture. However, there is no reason in principle why remedies for unjust enrichment should fail to reflect that reality in the lives and relationships of unmarried partners.

85 I conclude, therefore, that the common law of unjust enrichment should recognize and respond to the reality that there are unmarried domestic arrangements that are partnerships; the remedy in such cases should address the disproportionate retention of assets acquired through joint efforts with another person. This sort of sharing, of course, should not be presumed, nor will it be presumed that wealth acquired by mutual effort will be shared equally. Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality.

86 Thus the rejection of the remedial dichotomy leads us to consider in what circumstances an unjust enrichment may be appropriately characterized as a failure to share equitably assets acquired through the parties' joint efforts. While this approach will need further refinement in future cases, I offer the following as a broad outline of when this characterization of an unjust enrichment will be appropriate.

(5) Identifying Unjust Enrichment Arising From a Joint Family Venture

87 My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture. In the preceding section, I reviewed the many occasions on which the existence of a joint family venture has been recognized. From this rich set of factual circumstances, what emerge as the hallmarks of such a relationship?

88 It is critical to note that cohabiting couples are not a homogeneous group. It follows that the analysis must take into account the particular circumstances of each particular relationship. Furthermore, as previously stated, there can be no presumption of a joint family venture. The goal is for the law of unjust enrichment to attach just consequences to the way the parties have lived their lives, not to treat them as if they ought to have lived some other way or conducted their relationship on some different basis. A joint family venture can only be identified by the court when its existence, in fact, is well-grounded in the evidence. The emphasis should be on how the parties actually lived their lives, not on their *ex post facto* assertions or the court's view of how they ought to have done so.

89 In undertaking this analysis, it may be helpful to consider the evidence under four main headings: mutual effort, economic integration, actual intent and priority of the family. There is, of course, overlap among factors that may be relevant under these headings and there is no closed list of relevant factors. What follows is not a checklist of conditions for finding (or not finding) that the parties were engaged in a joint family venture. These headings, and the factors grouped under them, simply provide a useful way to approach a global analysis of the evidence and some examples of the relevant factors that may be taken into account in deciding whether or not the parties were engaged in a joint family venture. The absence of the factors I have set out, and many other relevant considerations, may well negate that conclusion.

(a) Mutual Effort

90 One set of factors concerns whether the parties worked collaboratively towards common goals. Indicators such as the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent, if any, to which the parties have formed a true partnership and jointly worked towards important mutual goals.

91 Joint contributions, or contributions to a common pool, may provide evidence of joint effort. For instance, in *Murdoch*, central to Laskin J.'s constructive trust analysis was that the parties had pooled their efforts to establish themselves in a ranch operation. Joint contributions were also an important aspect of the Court's analyses in *Peter*, *Sorochan*, and *Pettkus*. Pooling of efforts and resources, whether capital or income, has also been noted in the appellate case law (see, for example, *Birmingham v. Ferguson* [2004 CarswellOnt 3119 (Ont. C.A.)], 2004 CanLII 4764; *McDougall v. Gesell Estate*, 2001 MBCA 3, 153 Man. R. (2d) 54 (Man. C.A.), at para. 14). The use of parties' funds entirely for family purposes may be indicative of the pooling of resources: *McDougall*. The parties may also be said to be pooling their resources where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce (see *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.) and *Panara v. Di Ascenzo*, 2005 ABCA 47, 361 A.R. 382 (Alta. C.A.), at para. 27).

(b) Economic Integration

92 Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettkus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in *Rathwell*. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations (see *Wilson*; *Panara*).

93 The parties' conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of the family unit over the individual interests of the individual members (McCamus, at p. 366). These and other factors may indicate that the economic well-being and lives of the parties are largely integrated (see, for example, *Pettkus*, at p. 850).

(c) Actual Intent

94 Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships. While domestic partners might not marry for a host of reasons, one of them may be the deliberate choice not to have their lives economically intertwined. Thus, in considering whether there is a joint family venture, the actual intentions of the parties must be given considerable weight. Those intentions may have been expressed by the parties or may be inferred from their conduct. The important point, however, is that the quest is for their actual intent as expressed or inferred, not for what in the court's view "reasonable" parties *ought* to have intended in the same circumstances. Courts must be vigilant not to impose their own views, under the guise of inferred intent, in order to reach a certain result.

95 Courts may infer from the parties' conduct that they intended to share in the wealth they jointly created (P. Parkinson, "Beyond *Becker v. Pettkus*: Quantifying Relief for Unjust Enrichment" (1993), 43 U.T.L.J. 217, at p. 245). The conduct of the parties may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture (*Pettkus*; *Peter*; *Sorochan*). In some cases, courts have explicitly labelled the relationship as a "partnership" in the social and economic sense (*Panara*, at para. 71; *McDougall*, at para. 14). Similarly, the intention to engage in a joint family venture may be inferred where the parties accepted that their relationship was "equivalent to marriage" (*Birmingham*, at para. 1), or where the parties held themselves out to the public as married (*Sorochan*). The stability of the relationship may be a relevant factor as may the length of cohabitation (*Nasser*; *Sorochan*; *Birmingham*).

When parties have lived together in a stable relationship for a lengthy period, it may be nearly impossible to engage in a precise weighing of the benefits conferred within the relationship (*McDougall*; *Nasser*).

96 The title to property may also reflect an intent to share wealth, or some portion of it, equitably. This may be the case where the parties are joint tenants of property. Even where title is registered to one of the parties, acceptance of the view that wealth will be shared may be evident from other aspects of the parties' conduct. For example, there may have been little concern with the details of title and accounting of monies spent for household expenses, renovations, taxes, insurance, and so on. Plans for property distribution on death, whether in a will or a verbal discussion, may also indicate that the parties saw one another as domestic and economic partners.

97 The parties' actual intent may also negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Once again, it is the parties' actual intent, express or inferred from the evidence, that is the relevant consideration.

(d) Priority of the Family

98 A final category of factors to consider in determining whether the parties were in fact engaged in a joint family venture is whether and to what extent they have given priority to the family in their decision making. A relevant question is whether there has been in some sense detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. As Professor McCamus puts it, the question is whether the parties have been "[p]roceeding on the basis of understandings or assumptions about a shared future which may or may not be articulated" (p. 365). The focus is on contributions to the domestic and financial partnership, and particularly financial sacrifices made by the parties for the welfare of the collective or family unit. Whether the roles of the parties fall into the traditional wage earner/homemaker division, or whether both parties are employed and share domestic responsibilities, it is frequently the case that one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment (Parkinson, at p. 243). This may occur in a number of ways including: leaving the workforce for a period of time to raise children; relocating for the benefit of the other party's career (and giving up employment and employment-related networks as a result); foregoing career or educational advancement for the benefit of the family or relationship; and accepting underemployment in order to balance the financial and domestic needs of the family unit.

99 As I see it, giving priority to the family is not associated exclusively with the actions of the more financially dependent spouse. The spouse with the higher income may also make financial sacrifices (for example, foregoing a promotion for the benefit of family life), which may be indicative that the parties saw the relationship as a domestic and financial partnership. As Professor Parkinson puts it, the joint family venture may be identified where

[o]ne party has encouraged the other to rely to her detriment by leaving the workforce or forgoing other career opportunities for the sake of the relationship, and the breakdown of the relationship leaves her in a worse position than she would otherwise have been had she not acted in this way to her economic detriment. [p. 256].

(6) *Summary of Quantum Meruit Versus Constructive Trust*

100 I conclude:

1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services approach.
2. Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, and a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions.
3. To be entitled to a monetary remedy of this nature, the claimant must show both (a) that there was, in fact, a joint family venture, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.

4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family.

F. Mutual Benefit Conferral

(1) Introduction

101 As discussed earlier, the unjust enrichment analysis in domestic situations is often complicated by the fact that there has been a mutual conferral of benefits; each party in almost all cases confers benefits on the other: Parkinson, at p. 222. Of course, a claimant cannot expect both to get back something given to the defendant and retain something received from him or her: Birks, at p. 415. The unjust enrichment analysis must take account of this common sense proposition. How and where in the analysis should this be done?

102 The answer is fairly straightforward when the essence of the unjust enrichment claim is that one party has emerged from the relationship with a disproportionate share of assets accumulated through their joint efforts. These are the cases of a joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth. The remedy is a share of that wealth proportionate to the claimant's contributions. Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

103 Mutual benefit conferral, however, gives rise to more practical problems in an unjust enrichment claim where the appropriate remedy is a money award based on a fee-for-services-provided approach. The fact that the defendant has also provided services to the claimant may be seen as a factor relevant at all stages of the unjust enrichment analysis. Some courts have considered benefits received by the claimant as part of the benefit/detriment analysis (for example, at the Court of Appeal in *Peter v. Beblow* (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.)). Others have looked at mutual benefits as an aspect of the juristic reason inquiry (for example, *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (B.C. C.A.), and the Court of Appeal judgment in *Kerr*). Still others have looked at mutual benefits in relation to both juristic reason and at the remedy stage (for example, as proposed in *Wilson*). It is apparent that some clarity and consistency is necessary with respect to this issue.

104 In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.

105 At the outset, however, I should say that this Court's decision in *Peter* does not mandate consideration of mutual benefits at the juristic reason stage of the analysis: see, e.g., *Ford*, at para. 14; *Thomas v. Fenton*, 2006 BCCA 299, 269 D.L.R. (4th) 376 (B.C. C.A.), at para. 18. Rather, *Peter* made clear that mutual benefit conferral should generally not be considered at the benefit and detriment stages; the Court also approved the trial judge's decision to take mutual benefits into account at the remedy stage of the unjust enrichment analysis.

106 In *Peter*, the trial judge found that all three elements of unjust enrichment had been established. Before Ms. Peter and Mr. Beblow started living together, he had a housekeeper whom he paid \$350 per month. When Ms. Peter moved in with her children and assumed the housekeeping and child-care responsibilities, the housekeeper was no longer required.

The trial judge valued Ms. Peter's contribution by starting with the amount Mr. Beblow had paid his housekeeper, but then discounting this figure by one half to reflect the benefits Ms. Peter received in return. The trial judge then used that discounted figure to value Ms. Peter's services over the 12 years of the relationship: (B.C. S.C.).

107 The Court of Appeal, at (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.), set aside the judge's finding on the basis that Ms. Peter had failed to establish that she had suffered a deprivation corresponding to the benefits she had conferred on Mr. Beblow. The court reasoned that, although she had performed the services of a housekeeper and homemaker, she had received compensation because she and her children lived in Mr. Beblow's home rent free and he contributed more for groceries than she had.

108 This Court reversed the Court of Appeal and restored the trial judge's award. The Court was unanimous that Ms. Peter had established all of the elements of unjust enrichment, including deprivation. Cory J. (with whom McLachlin J. agreed on this point) made short work of Mr. Beblow's submission that Ms. Peter had not shown deprivation. He observed, "As a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course be deprivation suffered by the plaintiff": at p. 1013. The Court also unanimously upheld the trial judge's approach of taking account of the benefits Ms. Peter had received at the remedy stage of his decision. As noted, the trial judge had reduced the monthly amount used to calculate Ms. Peter's award by 50 percent to reflect benefits she had received from Mr. Beblow. McLachlin J. did not disagree with this approach, holding at p. 1003 that the figure arrived at by the judge fairly reflected the value of Ms. Peter's contribution to the family assets. Cory J., at p. 1025, referred to the trial judge's approach as "a fair means of calculating the amount due to the appellant". Thus, the Court approved the approach of taking the mutual benefit issue into account at the remedy stage of the analysis. *Peter* therefore does not support the view that mutual benefits should be considered at the benefit/detriment or juristic reason stages of the analysis.

(2) The Correct Approach

109 As I noted earlier, my view is that mutual benefit conferral can be taken into account at the juristic reason stage of the analysis, but only to the extent that it provides relevant evidence of the existence of a juristic reason for the enrichment. Otherwise, the mutual exchange of benefits should be taken into account at the defence and/or remedy stage. It is important to note that this can, and should, take place whether or not the defendant has made a formal counterclaim or pleaded set-off.

110 I turn first to why mutual benefits should not be addressed at the benefit/detriment stage of the analysis. In my view, refusing to address mutual benefits at that point is consistent with the *quantum meruit* origins of the fee-for-services approach and, as well, with the straightforward economic approach to the benefit/detriment analysis which has been consistently followed by this Court.

111 An unjust enrichment claim based on a fee-for-services approach is analogous to the traditional claim for *quantum meruit*. In *quantum meruit* claims, the fact that some benefit had flowed from the defendant to the claimant is taken into account by reducing the claimant's recovery by the amount of the countervailing benefit provided. For example, in a *quantum meruit* claim where the plaintiff is seeking to recover money paid pursuant to an unenforceable contract, but received some benefit from the defendant already, the claim will succeed but the award will be reduced by an amount corresponding to the value of that benefit: Maddaugh and McCamus (loose-leaf), vol. 2, at § 13:200. The authors offer as an example *Giles v. McEwan* (1896), 11 Man. R. 150 (Man. C.A.). In that case, two employees recovered in *quantum meruit* for services provided to the defendant under an unenforceable agreement, but the amount of the award was reduced to reflect the value of benefits the defendant had provided to them. Thus, taking the benefits conferred by the defendant into account at the remedy stage is consistent with general principles of *quantum meruit* claims. Of course, if the defendant has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that defence or claim.

112 Refusing to take mutual benefits into account at the benefit/detriment stage is also supported by a straightforward economic approach to the benefit/detriment analysis which the Court has consistently followed. *Garland* is a good example. The class action plaintiffs claimed in unjust enrichment to seek restitution for late payment penalties that had been imposed but that this Court (in an earlier decision) found had been charged at a criminal rate of interest: see *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.). The company argued that it had not been enriched because its rates were set by a regulatory mechanism out of its control, and that the rates charged would have been even higher had the company not received the late payment penalties as part of its revenues. That argument was accepted by the Court of Appeal, but rejected on the further appeal to this Court. Iacobucci J., for the Court, held that the payment of money, under the "straightforward economic approach" adopted in *Peter*, was a benefit: para. 32. He stated at para. 36: "There simply is no doubt that Consumers' Gas received the monies represented by the [late payment penalties] and had that money available for use in the carrying on of its business. ...We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme." The Court held that the company was in fact asserting the "change of position" defence (that is, the defence that is available when "an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned": para. 63). This defence is considered only after the three elements of an unjust enrichment claim have been established: para. 37. Thus the Court declined to get into a detailed consideration at the benefit/detriment stage of the defendant's submissions that it had not benefitted because of the regulatory scheme.

113 While *Garland* dealt with the payment of money, my view is that the same approach should be applied where the alleged enrichment consists of services. Provided that they confer a tangible benefit on the defendant, the services will generally constitute an enrichment and a corresponding deprivation. Whether the deprivation was counterbalanced by benefits flowing to the claimant from the defendant should not be addressed at the first two steps of the analysis. I turn now to the limited role that mutual benefit conferral may have at the juristic reason stage of the analysis.

114 As previously set out, juristic reason is the third of three parts to the unjust enrichment analysis. As McLachlin J. put it in *Peter*, at p. 990, "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'." The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations.

115 The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose.

(3) Summary

116 I conclude that mutual benefits may be considered at the juristic reason stage, but only to the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.

G. Reasonable or Legitimate Expectations

117 The final point that requires some clarification relates to the role of the parties' reasonable expectations in the domestic context. My conclusion is that, while in the early domestic unjust enrichment cases the parties' reasonable

expectations played an important role in the juristic reason analysis, the development of the law, and particularly the Court's judgment in [Garland](#), has led to a more limited and clearly circumscribed role for those expectations.

118 In the early cases of domestic unjust enrichment claims, the reasonable expectations of the claimant and the defendant's knowledge of those expectations were central to the juristic reason analysis. For example, in [Pettkus](#), when Dickson J. came to the juristic reason step in the analysis, he said that "where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it" (p. 849). Similarly, in [Soroohan](#), at p. 46, precisely the same reasoning was invoked to show that there was no juristic reason for the enrichment.

119 In these cases, central to the Court's concern was whether it was just to require the defendant to pay — in fact to surrender an interest in property — for services not expressly requested. The Court's answer was that it would indeed be unjust for the defendant to retain the benefits, given that he had continued to accept the services when he knew or ought to have known that the claimant was providing them with the reasonable expectation of reward.

120 The Court's resort to reasonable expectations and the defendant's knowledge of them in these cases is analogous to the "free acceptance" principle. The notion of free acceptance has been invoked to extend restitutionary recovery beyond the traditional sorts of *quantum meruit* claims in which services had either been requested or provided under an unenforceable agreement. The law's traditional reluctance to provide a remedy for claims where no request was made was based on the tenet that a person should generally not be required, in effect, to pay for services that he or she did not request, and perhaps did not want. However, this concern carries much less weight when the person receiving the services knew that they were being provided, had no reasonable belief that they were a gift, and yet continued to freely accept them: see P. Birks, *Unjust Enrichment* (2nd ed. 2005), at pp. 56-57.

121 The need to engage in this analysis of the claimant's reasonable expectations and the defendant's knowledge thereof with respect to domestic services has, in my view, now been overtaken by developments in the law. [Garland](#), as noted, mandated a two-step approach to the juristic reason analysis. The first step requires the claimant to show that the benefit was not conferred for any existing category of juristic reasons. Significantly, the fact that the defendant also provided services to the claimant is not one of the existing categories. Nor is the fact that the services were provided pursuant to the parties' reasonable expectations. However, the fact that the parties reasonably expected the services to be provided might afford relevant evidence in relation to whether the case falls within one of the traditional categories, for example a contract or gift. Other than in that way, mutual benefit conferral and the parties' reasonable expectations have a very limited role to play at the first step in the juristic reason analysis set out in [Garland](#).

122 However, different considerations arise at the second step. Following [Peter](#) and [Garland](#), the parties' reasonable or legitimate expectations have a critical role to play when the defendant seeks to establish a new juristic reason, whether case-specific or categorical. As Iacobucci J. put it in [Garland](#), this introduces a category of residual situations in which "courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery" (para. 45). Specifically, it is here that the court should consider the parties' reasonable expectations and questions of policy.

123 It will be helpful in understanding how [Peter](#) and [Garland](#) fit together to apply the [Garland](#) approach to an issue touched on, but not resolved, in [Peter](#). In [Peter](#), an issue was whether a claim based on the provision of domestic services could be defeated on the basis that the services had been provided as part of the bargain between the parties in deciding to live together. While the Court concluded that the claim failed on the facts, it did not hold that such a claim would inevitably fail in all circumstances: p. 991. It seems to me that, in light of [Garland](#), where a "bargain" which does not constitute a binding contract is alleged, the issue will be considered at the stage when the defendant seeks to show that there is a juristic reason for the enrichment that does not fall within any of the existing categories; the claim is that the "bargain" represents the parties' reasonable expectations, and evidence about their reasonable expectations would be relevant evidence of the existence (or not) of such a bargain.

124 To summarize:

1. The parties' reasonable or legitimate expectations have little role to play in deciding whether the services were provided for a juristic reason within the existing categories.
2. In some cases, the facts that mutual benefits were conferred or that the benefits were provided pursuant to the parties' reasonable expectations may be relevant evidence of whether one of the existing categories of juristic reasons is present. An example might be whether there was a contract for the provision of the benefits. However, generally the existence of mutual benefits flowing from the defendant to the claimant will not be considered at the juristic reason stage of the analysis.
3. The parties' reasonable or legitimate expectations have a role to play at the second step of the juristic reason analysis, that is, where the defendant bears the burden of establishing that there is a juristic reason for retaining the benefit which does not fall within the existing categories. It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

125 I will now turn to the two cases at bar.

IV. The *Vanasse* Appeal

A. Introduction

126 In the *Vanasse* appeal, the main issue is how to quantify a monetary award for unjust enrichment. The trial judge awarded a share of the net increase in the family's wealth during the period of unjust enrichment. The Court of Appeal held that this was the wrong approach, finding that the trial judge ought to have performed a *quantum meruit* calculation in which the value that each party received from the other was assessed and set off. This required an evaluation of the defendant Mr. Seguin's non-financial contributions to the relationship which, in the view of the Court of Appeal, the trial judge failed to perform. As the record did not permit the court to apply the correct legal principles to the facts, it ordered a new hearing with respect to compensation and consequential changes to spousal support.

127 In this Court, the appellant Ms. Vanasse raises two issues:

1. Did the Court of Appeal err by insisting on a strict *quantum meruit* (i.e. "value received") approach to quantify the monetary award for unjust enrichment?
2. Did the Court of Appeal err in finding that the trial judge had failed to consider relevant evidence of Mr. Seguin's contributions?

128 In my view, the appeal should be allowed and the trial judge's order restored. For the reasons I have developed above, my view is that money compensation for unjust enrichment need not always, as a matter of principle, be calculated on a *quantum meruit* basis. The trial judge here, although not labelling it as such, found that there was a joint family venture and that there was a link between Ms. Vanasse's contribution to it and the substantial accumulation of wealth which the family achieved. In my view, the trial judge made a reasonable assessment of the monetary award appropriate to reverse this unjust enrichment, taking due account of Mr. Seguin's undoubted and substantial contributions.

B. Brief Overview of the Facts and Proceedings

129 The background facts of this case are largely undisputed. The parties lived together in a common law relationship for approximately 12 years, from 1993 until March 2005. Together, they had two children who were aged 8 and 10 at the time of trial.

130 During approximately the first four years of their relationship (1993 to 1997), the parties diligently pursued their respective careers, Ms. Vanasse with the Canadian Security Intelligence Service ("CSIS") and Mr. Seguin with Fastlane Technologies Inc., marketing a network operating system he had developed.

131 In March of 1997, Ms. Vanasse took a leave of absence to move with Mr. Seguin to Halifax, where Fastlane had relocated for important business reasons. During the next three and one-half years, the parties had two children; Ms. Vanasse took care of the domestic labour, while Mr. Seguin devoted himself to developing Fastlane. The family moved back to Ottawa in 1998, where Mr. Seguin purchased a home and registered it in the names of both parties as joint tenants. In September 2000, Fastlane was sold and Mr. Seguin netted approximately \$11 million. He placed the funds in a holding company, with which he continued to develop business and investment opportunities.

132 After the sale of Fastlane, Ms. Vanasse continued to assume most of the domestic responsibilities, although Mr. Seguin was more available to assist. He continued to manage the finances.

133 The parties separated on March 27, 2005. At that time, they were in starkly contrasting financial positions: Ms. Vanasse's net worth had gone from about \$40,000 at the time she and Mr. Seguin started living together, to about \$332,000 at the time of separation; Mr. Seguin had come into the relationship with about \$94,000, and his net worth at the time of separation was about \$8,450,000.

134 Ms. Vanasse brought proceedings in the Superior Court of Justice. In addition to seeking orders with respect to spousal support and child custody, Ms. Vanasse claimed unjust enrichment. She argued that Mr. Seguin had been unjustly enriched because he retained virtually all of the funds from the sale of Fastlane, even though she had contributed to their acquisition through benefits she conferred in the form of domestic and childcare services. She alleged her contributions allowed Mr. Seguin to dedicate most of his time and energy to Fastlane. She sought relief by way of constructive trust in Mr. Seguin's remaining one half interest in the family home, and a one-half interest in the investment assets held by Mr. Seguin's holding company.

135 Mr. Seguin contested the unjust enrichment claim. While conceding he had been enriched during the roughly three-year period where he was working outside the home full time and Ms. Vanasse was working at home full time (May 1997 to September 2000), he argued there was no corresponding deprivation because he had given her a one-half interest in the family home and approximately \$44,000 in Registered Retirement Saving Plans ("RRSPs"). In the alternative, Mr. Seguin submitted that a constructive trust remedy was inappropriate because there was no link between Ms. Vanasse's contributions and the property of Fastlane.

136 The trial judge, Blishen J., concluded that the relationship of the parties could be divided into three distinct periods: (1) From the commencement of cohabitation in 1993 until March 1997 when Ms. Vanasse left her job at CSIS; (2) From March 1997 to September 2000, during which both children were born and Fastlane was sold; and (3) From September 2000 to the separation of the parties in March 2005. She concluded that neither party had been unjustly enriched in the first or third periods; she held that their contributions to the relationship during these periods had been proportionate. In the first period, there were no children of the relationship and both parties were focused on their careers; in the third period, both parents were home and their contributions had been proportional.

137 In the second period, however, the trial judge concluded that Mr. Seguin had been unjustly enriched by Ms. Vanasse. Ms. Vanasse had been in charge of the domestic side of the household, including caring for their two children. She had not been a "nanny/housekeeper" and, as the trial judge held, throughout the relationship she had been at least "an equal contributor to the family enterprise". The trial judge concluded that Ms. Vanasse's contributions during this second period "significantly benefited Mr. Seguin and were not proportional" (para. 139).

138 The trial judge found as fact that Ms. Vanasse's efforts during this second period were directly linked to Mr. Seguin's business success. She stated, at para. 91, that

Mr. Seguin was enriched by Ms. Vanasse's running of the household, providing child care for two young children and looking after all the necessary appointments and needs of the children. Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.

[Emphasis added.]

Again at para. 137, the trial judge found that

Mr. Seguin was unjustly enriched and Ms. Vanasse deprived for three and one-half years of their relationship, during which time Mr. Seguin often worked day and night and traveled frequently while in Halifax. Mr. Seguin could not have succeeded, as he did, and built up the company, as he did, without Ms. Vanasse assuming the vast majority of childcare and household responsibilities. Mr. Seguin could not have devoted his time to Fastlane but for Ms. Vanasse's assumption of those responsibilities. ... Mr. Seguin reaped the benefit of Ms. Vanasse's efforts by being able to focus all of his considerable energies and talents on making Fastlane a success.

[Emphasis added.]

139 The trial judge concluded that a monetary award in this case was appropriate, given Mr. Seguin's ability to pay, and lack of a sufficiently direct and substantial link between Ms. Vanasse's contributions and Fastlane or Mr. Seguin's holding company, as required to impose a remedial constructive trust.

140 With respect to quantification, Blishen J. noted that Ms. Vanasse had received a one-half interest in the family home, but concluded that this was not adequate compensation for her contributions. The trial judge compared the net worths of the parties and determined that Ms. Vanasse was entitled to a one-half interest in the prorated increase in Mr. Seguin's net worth during the period of the unjust enrichment. She reasoned that his net worth had increased by about \$8.4 million dollars over the 12 years of the relationship. Although she noted that the most significant increase took place when Fastlane was sold towards the end of the period of unjust enrichment, she nonetheless prorated the increase over the full 12 years of the relationship, yielding a figure of about \$700,000 per year. Starting with the \$2.45 million increase attributable to the three and one-half years of unjust enrichment, the trial judge awarded Ms. Vanasse 50 percent of that amount, less the value of her interest in the family home and her RRSPs. This produced an award of just under \$1 million.

141 Mr. Seguin did not appeal Blishen J.'s unjust enrichment finding, and conceded unjust enrichment between 1997 and 2000 on appeal. Therefore, the trial judge's findings that there had been an unjust enrichment during that period and that there was no unjust enrichment during the other periods are not in issue. The sole issue for determination in this Court is the propriety of the trial judge's monetary award for the unjust enrichment which she found to have occurred.

C. Analysis

(1) Was the Trial Judge Required to Use a Quantum Meruit Approach to Calculate the Monetary Award?

142 I agree with the appellant that a monetary award for unjust enrichment need not, as a matter of principle, always be calculated on a fee-for-services basis. As I have set out earlier, an unjust enrichment is best characterized as one party leaving the relationship with a disproportionate share of wealth that accumulated as a result of the parties' joint efforts. This will be so when the parties were engaged in a joint family venture and where there is a link between the contributions of the claimant and the accumulation of wealth. When this is the case, the amount of the enrichment should be assessed by determining the claimant's proportionate contribution to that accumulated wealth. As the trial judge saw it, this was exactly the situation of Ms. Vanasse and Mr. Seguin.

(2) Existence of a Joint Family Venture

143 The trial judge, after a six-day trial, concluded that "Ms. Vanasse was not a nanny/housekeeper". She found that Ms. Vanasse had been at least "an equal contributor to the family enterprise" throughout the relationship and that, during the period of unjust enrichment, her contributions "significantly benefited Mr. Seguin" (para. 139).

144 The trial judge, of course, did not review the evidence under the headings that I have suggested will be helpful in identifying a joint family venture, namely "mutual effort", "economic integration", "actual intent" and "priority of the family". However, her findings of fact and analysis indicate that the unjust enrichment of Mr. Seguin at the expense of Ms. Vanasse ought to be characterized as the retention by Mr. Seguin of a disproportionate share of the wealth generated from a joint family venture. The judge's findings fit conveniently under the headings I have suggested.

(a) Mutual Effort

145 There are several factors in this case which suggest that, throughout their relationship, the parties were working collaboratively towards common goals. First, as previously mentioned, the trial judge found that Ms. Vanasse's role was not as a "nanny/housekeeper" but rather as at least an equal contributor throughout the relationship. The parties made important decisions keeping the overall welfare of the family at the forefront: the decision to move to Halifax, the decision to move back to Ottawa, and the decision that Ms. Vanasse would not return to work after the sale of Fastlane are all clear examples. The parties pooled their efforts for the benefit of their family unit. As the trial judge found, during the second stage of their relationship from March 1997 to September 2000, the division of labour was such that Ms. Vanasse was almost entirely responsible for running the home and caring for the children, while Mr. Seguin worked long hours and managed the family finances. The trial judge found that it was through their joint efforts that they were able to raise a young family and acquire wealth. As she put it, "Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities" (para. 91). While Mr. Seguin's long hours and extensive travel reduced somewhat in September 1998 when the parties returned to Ottawa, the basic division of labour remained the same.

146 Notably, the period of unjust enrichment corresponds to the time during which the parties had two children together (in 1997 and 1999), a further indicator that they were working together to achieve common goals. The length of the relationship is also relevant, and their 12-year cohabitation is a significant period of time. Finally, the trial judge described the arrangement between the parties as a "family enterprise", to which Ms. Vanasse was "at least, an equal contributor" (paras. 138-39).

(b) Economic Integration

147 The trial judge found that "[t]his was not a situation of economic interdependence" (para. 105). That said, there was a pooling of resources. Ms. Vanasse was not employed and did not contribute financially to the family after the children were born, and thus was financially dependent on Mr. Seguin. The family home was registered jointly, and the parties had a joint chequing account. As the trial judge put it, "She was 'the C.E.O. of the kids' and he was 'the C.E.O. of the finances'" (para. 105).

(c) Actual Intent

148 The actual intent of the parties in a domestic relationship, as expressed by the parties or inferred from their conduct, must be given considerable weight in determining whether there was a joint family venture. There are a number of findings of fact that indicate these parties considered their relationship to be a joint family venture.

149 While a promise to marry or the discussion of legal marriage is by no means a prerequisite for the identification of a joint family venture, in this case the parties' intentions with respect to marriage strongly suggest that they viewed themselves as the equivalent of a married couple. Mr. Seguin proposed to Ms. Vanasse in July 1996 and they exchanged rings. While they were "devoted to one another and still in love", a wedding date was never set (para. 14). Mr. Seguin raised the topic of marriage again when Ms. Vanasse found out she was pregnant with their first child. Although they

never married, the trial judge found that there had been "mutual expectations [of marriage] during the first few years of their 12 year relationship" (para. 64). Mr. Seguin continued to address Ms. Vanasse as "my future wife", and she was viewed by the outside world as such (para. 33).

150 The trial judge also referred to statements made by Mr. Seguin that were strongly indicative of his view that there was a joint family venture. As the trial judge put it, at para. 28, upon the sale of Fastlane

Mr. Seguin became a wealthy man. He told Ms. Vanasse that they would never have to worry about finances as their parents did; their children could go to the best schools and they could live a good life without financial concerns.

Again, at para. 98:

After the sale of the company, Mr. Seguin indicated they could retire, the children could go to the best schools and the family would be well cared for. The family took travel vacations, enjoyed luxury cars, bought a large cabin cruiser which they used for summer vacations and purchased condominiums at Mont-Tremblant.

151 While the trial judge viewed Mr. Seguin's promises and reassurances as contributing to a reasonable expectation on the part of Ms. Vanasse that she was to share in the increase of his net worth during the period of unjust enrichment, in my view these comments are more appropriately characterized as a reflection of the reality that there was a joint family venture, to which the couple jointly contributed for their mutual benefit and the benefit of their children.

(d) Priority of the Family

152 There is a strong inference from the factual findings that, to Mr. Seguin's knowledge, Ms. Vanasse relied on the relationship to her detriment. As the trial judge found, in 1997 Ms. Vanasse gave up a lucrative and exciting career with CSIS, where she was training to be an intelligence officer, to move to Halifax with Mr. Seguin. In many ways this was a sacrifice on her part; she left her career, gave up her own income, and moved away from her family and friends. Mr. Seguin had moved to Halifax in order to relocate Fastlane for business reasons. Ms. Vanasse then stayed home and cared for their two small children. As I have already explained, during the period of the unjust enrichment, Ms. Vanasse was responsible for a disproportionate share of the domestic labour. It was these domestic contributions that, in part, permitted Mr. Seguin to focus on his work with Fastlane. Later, in 2003, the "family's decision" was for Ms. Vanasse to remain home after her leave from CSIS had expired (para. 198). Ms. Vanasse's financial position at the breakdown of the relationship indicates she relied on the relationship to her economic detriment. This is all evidence supporting the conclusion that the parties were, in fact, operating as a joint family venture.

153 As a final point, I would refer to the arguments made by Mr. Seguin, which were accepted by the Court of Appeal, that the trial judge failed to give adequate weight to sacrifices Mr. Seguin made for the benefit of the relationship. Later in my reasons, I will address the question of whether the trial judge actually failed in this regard. However, the points raised by Mr. Seguin to support this argument actually serve to reinforce the conclusion that there was a joint family venture. Mr. Seguin specifically notes a number of factors, including: agreeing to step down as CEO of Fastlane in September 1997 to make himself more available to Ms. Vanasse, causing friction with his co-workers and partners, and reducing his remuneration; agreeing to relocate to Ottawa at Ms. Vanasse's request in 1998; and making increased efforts to work at home more and travel less after moving back to Ottawa. These facts are indicative of the sense of mutuality in the parties' social and financial relationship. In short, they support the identification of a joint family venture.

(e) Conclusion on Identification of the Joint Family Venture

154 In my view, the trial judge's findings of fact clearly show that Ms. Vanasse and Mr. Seguin engaged in a joint family venture. The remaining question is whether there was a link between Ms. Vanasse's contributions to it and the accumulation of wealth.

(3) Link to Accumulation of Wealth

155 The trial judge made a clear finding that there was a link between Ms. Vanasse's contributions and the family's accumulation of wealth.

156 I have referred earlier, in some detail, to the trial judge's findings in this regard. However, to repeat, her conclusion is expressed particularly clearly at para. 91 of her reasons:

Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these [household and child-rearing] responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane.

157 Given that and similar findings, I conclude that not only were these parties engaged in a joint family venture, but that there was a clear link between Ms. Vanasse's contribution to it and the accumulation of wealth. The unjust enrichment is thus best viewed as Mr. Seguin leaving the relationship with a disproportionate share of the wealth accumulated as a result of their joint efforts.

(4) Calculation of the Award

158 The main focus of the appeal was on whether the award ought to have been calculated on a *quantum meruit* basis. Very little was argued before this Court regarding the way the trial judge approached her calculation of a proportionate share of the parties' accumulated wealth. I conclude that the trial judge's approach was reasonable in the circumstances, but I stress that I do not hold out her approach as necessarily being a template for future cases. Within the legal principles I have outlined, there may be many ways in which an award may be quantified reasonably. I prefer not to make any more general statements about the quantification process in the context of this appeal, except this. Provided that the correct legal principles are applied, and the findings of fact are not tainted by clear and determinative error, a trial judge's assessment of damages is treated with considerable deference on appeal: see, e.g., *Nance v. British Columbia Electric Railway*, [1951] A.C. 601 (British Columbia P.C.). A reasoned and careful exercise of judgment by the trial judge as to the appropriate monetary award to remedy an unjust enrichment should be treated with the same deference. There are two final specific points that I must address.

159 Mr. Seguin submits, very briefly, that a proper application of the "value survived" approach in this case would require a careful determination of the contributions by third parties to the growth of Fastlane during the period his own contributions were diminished, as a result of what counsel characterizes as Ms. Vanasse's "demands" that he reduce his hours and move back to Ottawa. This argument is premised on the notion that the money he received from the sale was not justly his to share with Ms. Vanasse. I cannot accept this premise. Unexplained is why he received more than his share when the company was sold or why, having received more than he was due, Ms. Vanasse is still not entitled to an equitable share of what he actually received.

160 Second, there is the finding of the Court of Appeal that the trial judge failed to take into account evidence of Mr. Seguin's numerous and significant non-financial contributions to the family. I respectfully cannot accept this view. The trial judge specifically alluded to these contributions in her reasons. Moreover, by confining the period of unjust enrichment to the three and one-half year period, the trial judge took into account the periods during which Ms. Vanasse's contributions were not disproportionate to Mr. Seguin's. In my view, the trial judge took a realistic and practical view of the evidence before her and gave sufficient consideration to Mr. Seguin's contributions.

D. Disposition

161 I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. The appellant should have her costs throughout.

V. The Kerr Appeal

A. Introduction

162 When their common law relationship of more than 25 years ended, Ms. Kerr sued her former partner, Mr. Baranow, advancing claims for unjust enrichment, resulting trust, and spousal support. Mr. Baranow counterclaimed that Ms. Kerr had been unjustly enriched by his housekeeping services provided between 1991 and 2006, and by his early retirement in order to provide her personal assistance. The trial judge awarded Ms. Kerr \$315,000, holding that she was entitled to this amount both by way of resulting trust (to reflect her contribution to the acquisition of property) and by way of remedial constructive trust (as a remedy for her successful claim in unjust enrichment). He also awarded Ms. Kerr \$1,739 per month in spousal support effective the date she commenced proceedings. Although the trial judge rejected Mr. Baranow's assertion that Ms. Kerr had been unjustly enriched at his expense, the reasons for judgment and the order after trial do not otherwise address Mr. Baranow's counterclaim.

163 Mr. Baranow appealed. The Court of Appeal allowed the appeal, concluding that Ms. Kerr's claims for a resulting trust and in unjust enrichment should be dismissed, that Mr. Baranow's claim for unjust enrichment should be remitted to the trial court for determination, and that the order for spousal support should be effective as of the first day of the trial, not as of the date proceedings were commenced.

164 Ms. Kerr appeals, submitting that the Court of Appeal erred by setting aside the trial judge's findings that:

- (1) a resulting trust arose in her favour;
- (2) she had unjustly enriched Mr. Baranow; and
- (3) spousal support should begin as of the date she instituted proceedings.

165 In my view, the Court of Appeal was right to set aside the trial judge's findings of resulting trust and unjust enrichment. It also did not err in directing that Mr. Baranow's counterclaim be returned to the Supreme Court of British Columbia for hearing. However, my view is that Ms. Kerr's unjust enrichment claim should not have been dismissed, but rather a new trial ordered. While the trial judge's errors certainly were not harmless, it is not possible to say on this record, which includes findings of fact tainted by clear error, that her unjust enrichment claim would inevitably fail if analyzed using the clarified legal framework set out above. With respect to the commencement date of the spousal support order, I would set aside the order of the Court of Appeal and restore the trial judge's order.

B. Overview of the Facts

166 The trial judge's disposition of both the resulting trust and unjust enrichment claims turned on his conclusion that Ms. Kerr had provided \$60,000 worth of equity and assets at the beginning of the relationship. This fact, in the trial judge's view, supported awarding her one-third of the value of the home she shared with Mr. Baranow at the time of separation. According to the trial judge, this \$60,000 of equity and assets consisted of three elements: her \$37,000 of equity in the Coleman Street home she had shared with her former husband; the value of an automobile; and the value of furniture which she brought into her relationship with Mr. Baranow. The trial judge did not make specific findings of fact about the value of either Ms. Kerr's or Mr. Baranow's non-monetary contributions to the relationship. As previously noted, while the judge rejected in a single sentence Mr. Baranow's contention that Ms. Kerr had been unjustly enriched at his expense, the judge did not explain the basis of that conclusion. Mr. Baranow's counterclaim was not otherwise addressed.

167 The trial judge's findings of fact, of course, must be accepted unless tainted with clear and determinative error. In this case, however, the Court of Appeal's intervention on some of the judge's key findings was justified, because those findings simply were not supported by the record. I will have to delve into the facts, more than might otherwise be required, to explain why.

168 The parties began to live together in Mr. Baranow's home on Wall Street in Vancouver in May 1981. Shortly afterward, they moved into Ms. Kerr's former matrimonial home on Coleman Street. They had met at their mutual place

of work, the Port of Vancouver, where she worked as a secretary and he as a longshoreman. Ms. Kerr was in midst of a divorce. Through her separation agreement, Ms. Kerr received her husband's interest in their former matrimonial home on Coleman Street in North Vancouver, all of the furniture in the house, and a 1979 Cadillac Eldorado. However, Ms. Kerr's ex-husband owed more than \$400,000 and Ms. Kerr was guarantor of some of that debt.

169 In the summer of 1981, the Coleman Street property was the subject of foreclosure proceedings and, according to the evidence, was about to be foreclosed on July 29, 1981. Ms. Kerr testified at trial that, at the time, she had two teenage children, was earning under \$30,000 a year, and had no money to save the house.

170 Ms. Kerr instructed her lawyer to place the titles to the Coleman Street property and the vehicle into Mr. Baranow's name. Mr. Baranow paid \$33,000 in cash to secure the property against outstanding debts, and guaranteed a \$100,000 mortgage at a rate of 22 percent. He then began to make the mortgage payments and eventually refinanced the mortgage, together with that on his Wall Street property, and assumed that new mortgage himself.

171 The couple lived together for the next 25 years, first in the Wall Street property, then at Coleman Street, then in a temporary apartment, and finally in their "dream home" which they constructed on Mr. Baranow's Wall Street property.

172 While the parties lived together in the Coleman Street property (from September 1981 to December 1985), Mr. Baranow retained the \$450 per month he received by renting out his Wall Street property. The trial judge found that, although the parties kept their financial affairs separate, there was an arrangement by which Mr. Baranow would pay the property taxes and mortgage payments on both the Coleman Street and the Wall Street properties. The mortgage on both properties was paid off before July 1985. However, Mr. Baranow took out a \$32,000 mortgage on the Wall Street property in July 1985, which was paid in full by August 1988.

173 The Coleman Street property was sold in August 1985 for \$138,000. This sale was at a considerable loss, taking into account the real estate commission, the \$33,000 in cash Mr. Baranow had contributed at the time of the transfer to him, and the mortgage payments he alone had made between the transfer in the summer of 1981 and the sale in the summer of 1985.

174 The parties moved into an apartment (from August 1985 until October 1986) while they constructed their "dream home" at the Wall Street location. The existing dwelling was torn down and replaced. Mr. Baranow spent somewhere between \$97,000 and \$105,000 on its construction, with additional amounts spent for materials, labour and permits. Ms. Kerr, the trial judge found, was involved with the planning, interior decorating and cleaning. She also planted sod, tended the flower garden, and paid for some wood paneling in the downstairs bedroom. In addition, she made contributions towards the purchase of furniture, appliances, and other chattels for the Wall Street property. Her son paid \$350 per month in rent, which Mr. Baranow retained. At one point in his reasons, the trial judge stated that Ms. Kerr paid "all of the household expenses and the insurance on the new house ... even after the \$32,000.00 mortgage was paid off by [Mr. Baranow] in August 1988" (para. 24). However, at another point, the judge noted that Ms. Kerr paid the utilities and insurance and bought "some groceries" (para. 36). Mr. Baranow, he found, paid the property-related expenses, consisting of property taxes (less the disability benefit attributable to Ms. Kerr) and upkeep (which was minimal in the new house). The trial judge found that the current value of the Wall Street property was \$942,500, compared with \$205,000 in October of 1986. He then concluded that, given there were no mortgage payments after 1988, Ms. Kerr's share of the expenses "was probably higher" than Mr. Baranow's for approximately 18 years before they stopped living together.

175 In 1991, Ms. Kerr suffered a massive stroke and cardiac arrest, leaving her paralyzed on her left side and unable to return to work. Her health steadily deteriorated, and relations between the couple became increasingly strained. Mr. Baranow took an early retirement in 2002. The trial judge acknowledged that Mr. Baranow claimed to have done this to care for Ms. Kerr, but noted that early retirement was also favourable to him. The trial judge found that Mr. Baranow started to experience "caregiver fatigue" and began exploring institutional care alternatives in June 2005. The next summer, in August 2006, Ms. Kerr had to undergo surgery on her knee. After the surgery, Mr. Baranow made it clear to the hospital staff that he was not prepared to have her return home. Ms. Kerr was transferred to an extended

care facility where she remained at the time of trial. The trial judge found that, in the last 18 months Ms. Kerr resided at the Wall Street property, Mr. Baranow did most of the housework and helped her with her bodily functions.

C. Analysis

(1) The Resulting Trust Issue

176 The trial judge found that Mr. Baranow held a one-third interest in the Wall Street property by way of resulting trust for Ms. Kerr, on three bases. The Court of Appeal found that each of these holdings was erroneous. I respectfully agree.

(a) Gratuitous Transfer

177 The trial judge found that the transfer of the Coleman Street property to Mr. Baranow was gratuitous, therefore raising the presumption of a resulting trust in Ms. Kerr's favour. At the time of transfer to Mr. Baranow, roughly \$133,000 was required to save the property (it was subject to a first mortgage of just under \$80,000, a second mortgage of just under \$35,000, a judgment in favour of the Bank of Montreal of just under \$12,000, and other miscellaneous debts and charges, adding up to roughly \$133,000). There was also a \$26,500 judgment in favour of CIBC, which was of concern to Ms. Kerr, although it is not listed in the payouts required to close the transfer. We know that Ms. Kerr had guaranteed some of her former husband's debts, and that she declared bankruptcy in 1983 in relation to \$15,000 of debt for which she had co-signed with her former husband.

178 The Court of Appeal reversed the trial judge's resulting trust finding, holding that the transfer was not gratuitous. The court pointed to the contributions and liabilities undertaken by Mr. Baranow to make the transfer possible, and concluded that the trial judge's finding in this regard constituted a palpable and overriding error.

179 On this point, I respectfully agree with the Court of Appeal. There is no dispute that Mr. Baranow injected roughly \$33,000 in cash, and guaranteed a \$100,000 mortgage, so that the property would not be lost to the bank in the foreclosure proceedings. This constituted consideration, and the transfer therefore cannot reasonably be labelled gratuitous. The respondent would have us hold otherwise on the basis of technical arguments about the lack of a precise coincidence between the time of the transfer and payments, and the lack of payment directly to Ms. Kerr because Mr. Baranow's payments were made to her creditors. These arguments have no merit. An important element of the trial judge's finding of a resulting trust was his conclusion that there was "no evidence" that Mr. Baranow's payment of \$33,000 in cash and his guarantee of the \$100,000 mortgage "were in connection with the transfer or part of an agreement between the parties so as to constitute consideration for the transfer" (para. 76). Putting to one side for the moment whether this finding reflects a correct understanding of a gratuitous transfer, the judge clearly erred in making this statement; there was in fact much evidence to that precise effect. Mr. Baranow testified that Ms. Kerr had "tearfully asked" Mr. Baranow for help to save the property from the creditors. Ms. Kerr's solicitor recorded in his reporting letter that Ms. Kerr felt she had little choice but to convey the property to Mr. Baranow "faced with the large outstanding debts of [her] husband which include[d] a Judgment taken by C.I.B.C. for a debt outstanding in the amount of \$26,500.00". At trial, Ms. Kerr was asked whether she had requested Mr. Baranow to save the house; she responded, "I guess so". Thus, contrary to the judge's finding, there was in fact considerable evidence that Mr. Baranow's paying off of the debts and guaranteeing the mortgage were in connection with the transfer of the property to him. This evidence shows that he accepted the transfer and assumed the financial obligations at Ms. Kerr's request, and in order to further her purpose of preventing the creditors from foreclosing on the property.

180 The Court of Appeal was correct to intervene on this point and conclude that the transfer was not gratuitous. The trial judge's imposition of a resulting trust on one-third of the Wall Street property on this basis accordingly cannot be sustained.

(b) Ms. Kerr's Contributions

181 The trial judge also based his finding of resulting trust on Ms. Kerr's financial and other contributions to the acquisition of the new home on the Wall Street property. He found Ms. Kerr had contributed a total of \$60,000: \$37,000 in equity from the transfer of the Coleman Street property to Mr. Baranow; \$20,000 for the value of the Cadillac also transferred to Mr. Baranow; and \$3,000 for the furniture in the Coleman Street property. In addition, the trial judge noted that, in obtaining the legal title of Coleman, Mr. Baranow was able to "re-mortgage both properties for \$116,000.00 and apply the \$16,000.00 toward the acquisition of the Wall Street Property" (para. 82). Furthermore, Mr. Baranow would not have been able to pay off the mortgages with the same efficiency but for Ms. Kerr's contributions to household expenses. However, the trial judge did not attach any value to these last two matters in his determination of the extent of the resulting trust which he imposed on the Wall Street property.

182 The Court of Appeal reversed this finding as not being supported by the record. The court noted that Ms. Kerr did not have \$37,000 in equity in the Coleman Street property when Mr. Baranow took title, Mr. Baranow did not receive any beneficial interest in the vehicle, and there was no evidence of the value of the furnishings.

183 I agree with the Court of Appeal's disposition of this issue. As it pointed out, the evidence showed that, in addition to Mr. Baranow paying cash and guaranteeing a mortgage, he paid the monthly mortgage payments, taxes and upkeep expenses on the Coleman property until it was sold in 1985 for \$138,000 (less real estate commission). Mr. Baranow received no beneficial interest in the vehicle and the judge made no finding about the value of the furnishings. There was not, in any meaningful sense of the word, any equity in the Coleman property for Ms. Kerr to contribute to the acquisition or improvement of the Wall Street property. I would affirm the conclusion of the Court of Appeal on this point.

(c) Common Intention Resulting Trust

184 The trial judge also appears to have based his conclusions about the resulting trust on his finding of a common intention on the part of Ms. Kerr and Mr. Baranow to share in the Wall Street property. For the reasons I have given earlier, the "common intention" resulting trust has no further role to play in the resolution of disputes such as this one. I would hold that a resulting trust should not have been imposed on the Wall Street property on the basis of a finding of common intention between these parties.

(d) Conclusion With Respect to Resulting Trust

185 In my view the Court of Appeal was correct to set aside the trial judge's conclusions with respect to the resulting trust issues.

(2) Unjust Enrichment

186 The trial judge also found that Mr. Baranow had been unjustly enriched by Ms. Kerr to the extent of \$315,000, the value of the one-third interest in the Wall Street property determined during the resulting trust analysis. The judge found that Ms. Kerr had provided the following benefits to Mr. Baranow:

- a. \$37,000 equity in the Coleman Street property
- b. the automobile
- c. the furnishings
- d. \$16,000 in refinancing permitted by the Coleman transfer and applied to the Wall Street property
- e. \$22,000 gained on the resale of the Coleman Street property
- f. household expenses and insurance paid on both properties

- g. spousal services such as housework, entertaining guests and preparing meals until Ms. Kerr's disability made it impossible to continue
- h. assistance with planning and decoration of the Wall Street house
- i. financial contributions towards the purchase of chattels for the new home
- j. a disability tax exemption
- k. approximately five years' worth of rental income from Ms. Kerr's son

187 Turning to the element of corresponding deprivation, the trial judge noted that it was "unlikely" that Ms. Kerr had given up any career or educational opportunities over the course of the relationship. Furthermore, her income remained unchanged, even following her stroke, due to her receipt of disability pensions and other benefits. The judge found that she had lived rent-free for the entire relationship. He concluded, however, that she had suffered a deprivation because, had she not contributed her equity in the Coleman Street property, it was "reasonable to infer that she would have used it to purchase an asset in her own name, invest for her own benefit, use it for some personal interest, or otherwise avail herself of beneficial financial opportunity": para. 92. He also concluded, without elaboration, that the benefits that she received from the relationship did not overtake her contributions.

188 The Court of Appeal set aside the trial judge's finding of unjust enrichment. It found that Mr. Baranow's direct and indirect contributions, by which Ms. Kerr was enriched and for which he was not compensated, constituted a juristic reason for any enrichment which he experienced at her expense. The court found that, for reasons mentioned earlier, there was no \$60,000 contribution by Ms. Kerr and therefore her claim rested on her indirect contributions. The court also concluded that the trial judge's analysis failed to assess the extent of Mr. Baranow's direct and indirect contributions to Ms. Kerr, including: his payment of accommodation expenses for the duration of the relationship; his contribution to the purchase price of the van which Ms. Kerr still possesses; her receipt of almost half of his lifetime amount of union medical benefits, used to pay for her health care expenses; his taking early retirement with a reduced monthly pension to care for Ms. Kerr; and his provision of extensive personal caregiver and domestic services without compensation. Moreover, in the Court of Appeal's view, the trial judge had failed to note that Mr. Baranow's payment of her living expenses permitted her to save about \$272,000 over the course of the relationship.

189 The appellant challenges the Court of Appeal's decision on two bases. First, she argues that the court improperly interfered with the trial judge's finding of fact with respect to Ms. Kerr's \$60,000 contribution to the relationship. Second, she submits that the court improperly considered the question of mutual benefits through the lens of juristic reason, and that this resulted in the court failing to consider globally who had been enriched and who deprived. Ms. Kerr's submission on this latter point is that consideration of mutual benefit conferral should occur during the first two steps of the unjust enrichment analysis: enrichment and corresponding deprivation. Once that has been established, she argues that the legitimate expectations of the parties may be considered as part of the analysis of whether there was a juristic reason for the enrichment. The main point is that, in the appellant's submission, it was open to the trial judge to conclude that the parties' legitimate expectation was that they would accumulate wealth in proportion to their respective incomes; without a share of the value of the real property acquired during the relationship, that reasonable expectation cannot be realized.

190 More fundamentally, the appellant urges the Court to adopt what she calls the "family property approach" to unjust enrichment. In essence, the appellant submits that her contributions gave rise to a reasonable expectation that she would have an equitable share of the assets acquired during the relationship.

191 I will deal with these submissions in turn.

(a) Findings of Fact Regarding the \$60,000 Contribution

192 As noted earlier, the Court of Appeal was right to set aside the trial judge's conclusion that the appellant had contributed \$60,000 to the couple's assets. There was, in no realistic sense of the word, any "equity" to contribute from the Coleman Street property to acquisition of the new Wall Street "dream home". Furthermore, the appellant retained the beneficial use of the motor vehicle, and there was no satisfactory evidence of the value of the furniture. The judge's findings on this point were the product of clear and determinative error.

(b) Analysis of Offsetting Enrichments

193 On this issue, I cannot accept the conclusions of either the trial judge or the Court of Appeal. As noted, in his determination of the extent of Ms. Kerr's unjust enrichment, the trial judge largely ignored Mr. Baranow's contributions. However, for the reasons I have developed earlier, the Court of Appeal erred in assessing Mr. Baranow's contributions as part of the juristic reason analysis; this analysis prematurely truncated Ms. Kerr's *prima facie* case of unjust enrichment. I have set out the correct approach to this issue earlier in my reasons. As, in my view, there must be a new trial of both Ms. Kerr's unjust enrichment claim and Mr. Baranow's counterclaim, it is not necessary to say anything further. The principles set out above must accordingly be applied at the new trial of these issues.

(c) The "Family Property Approach"

194 I turn finally to Ms. Kerr's more general point that her claim should be assessed using a "family property approach". As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

(d) Disposition of the Unjust Enrichment Appeal

195 I conclude that the findings of the trial judge in relation to unjust enrichment cannot stand. The next question is whether, as the Court of Appeal decided, Ms. Kerr's claim for unjust enrichment should be dismissed or whether it ought to be returned for a new trial. With reluctance, I have concluded the latter course is the more just one in all of the circumstances.

196 The first consideration in support of a new trial is that the Court of Appeal directed a hearing of Mr. Baranow's counterclaim. Given that the trial judge unfortunately did not address that claim in any meaningful way, the Court of Appeal's order that it be heard and decided is unimpeachable. There was evidence that Mr. Baranow made very significant contributions to Ms. Kerr's welfare such that his counterclaim cannot simply be dismissed. As I noted earlier, the trial judge also referred to various other monetary and non-monetary contributions which Ms. Kerr made to the couple's welfare and comfort, but he did not evaluate them, let alone compare them with the contributions made by Mr. Baranow. In these circumstances, trying the counterclaim separated from Ms. Kerr's claim would be an artificial and potentially unfair way of proceeding.

197 More fundamentally, Ms. Kerr's claim was not presented, defended or considered by the courts below pursuant to the joint family venture analysis that I have set out. Even assuming that Ms. Kerr made out her claim in unjust enrichment, it is not possible to fairly apply the joint family venture approach to this case on appeal, using the record available to this Court. There are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture. Moreover, even if one were persuaded that the evidence permitted resolution of the joint family venture issue, the record is unsatisfactory for deciding whether Ms. Kerr's contributions to a joint family venture were linked to the accumulation of wealth and, if so, in what proportion. The trial judge found that her payment of household expenses and insurance payments, along with the "proceeds" from the Coleman Street property, allowed

Mr. Baranow to pay off the \$116,000 mortgage on both properties before July 1985. There is, thus, a finding that her contributions were linked to the accumulation of wealth, given that the Wall Street property was valued at \$942,500 at the time of trial. However, as the judge's findings with respect to Ms. Kerr's equity in the Coleman Street property cannot stand, this conclusion is considerably undermined. For much the same reason, there is no possibility on this record of evaluating the proportionate contributions to a joint family venture. In short, to attempt to resolve Ms. Kerr's unjust enrichment claim on its merits, using the record before this Court, involves too much uncertainty and risks injustice.

198 In this respect, the *Kerr* appeal is in marked contrast to the *Vanasse* appeal. There, an unjust enrichment was conceded and the trial judge's findings of fact closely correspond to the analytical approach I have proposed. In the present appeal, while the findings made do not appear to demonstrate a joint family venture or a concomitant link to accumulated wealth, it would be unfair to reach that conclusion without giving an opportunity to the parties to present their evidence and arguments in light of the approach set out in these reasons.

199 Reluctantly, therefore, I would order a new trial of Ms. Kerr's unjust enrichment claim, as well as affirm the Court of Appeal's order for a hearing of Mr. Baranow's counterclaim.

(3) *Effective Date of Spousal Support*

200 The final issue is whether, as the Court of Appeal held, the trial judge erred in making his order for spousal support in favour of Ms. Kerr effective on the date she had commenced proceedings rather than on the first day of trial. In my respectful view, the Court of Appeal erred in its application of the relevant factors and ought not to have set aside the trial judge's order.

201 The trial judge found that the appellant's income in 2006 was \$28,787 and the respondent's income was \$70,520, on the basis of their respective income tax returns. He then applied the Spousal Support Advisory Guidelines ("SSAG") to arrive at a range of \$1,304 to \$1,739 per month. He settled on an amount at the higher end of that range in order to assist Ms. Kerr in pursuing a private bed while waiting for a subsidized bed in a suitable facility closer to her family.

202 The Court of Appeal agreed with the trial judge that Ms. Kerr was entitled to an award of spousal support given the length of the parties' relationship, her age, her fixed and limited income and her significant disability; she was entitled to a spousal support award that would permit her to live at a lifestyle that is closer to that which the parties enjoyed when they were together; and that the judge had properly determined the quantum of support. The Court of Appeal concluded, however, that the trial judge had erred in ordering support effective the date Ms. Kerr had commenced proceedings. It faulted the judge in several respects: for apparently having made the order as a matter of course rather than applying the relevant legal principles; for failing to consider that, during the interim period, Ms. Kerr had no financial needs beyond her means because she had been residing in a government-subsidized care facility and had not had to encroach on her capital; for failing to take account of the fact she had made no demand of Mr. Baranow to contribute to her interim support and had provided no explanation for not having done so; and for ordering retroactive support where, in light of the absence of an interim application, there was no blameworthy conduct on Mr. Baranow's part.

203 The appellant submits that the decision to equate the principles pertaining to retroactive spousal support with those of retroactive child support has been done without any discussion or legal analysis. Furthermore, she argues that the Court of Appeal's reasoning places an untoward and inappropriate burden on applicants, essentially mandating that they apply for interim spousal support or lose their entitlement. Lastly, she argues that there is a legal distinction between retroactive support before and after the application is filed, and that in the latter circumstance there is less need for judicial restraint. I agree with the second and third of these submissions.

204 There is no doubt that the trial judge had the discretion to award support effective the date proceedings had been commenced. This is clear from the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*"), s. 93(5)(d):

(5) An order under this section may also provide for one or more of the following:

.....

(d) payment of support in respect of any period before the order is made;

205 The appellant requested support effective the date her writ of summons and statement of claim were issued and served. She was and is not seeking support for the period before she commenced her proceedings, or for any period during which another court order for support was in effect. I note that she was obliged by statute to seek support within a year of the end of cohabitation: s. 1(1), definition of "spouse" para. (b), of the *FRA*. Ms. Kerr made her application just over a month after the parties ceased living together.

206 I will not venture into the semantics of the word "retroactive": see *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 (S.C.C.), at paras. 2 and 69-70; *S. (L.) v. P. (E.)* (1999), 67 B.C.L.R. (3d) 254 (B.C. C.A.), at paras. 55-57. Rather, I prefer to follow the example of Bastarache J. in *S. (D.B.)* and consider the relevant factors that come into play where support is sought in relation to a period predating the order.

207 While *S. (D.B.)* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

208 Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *S. (D.B.)*, at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, for example, M.L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.

209 Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *S. (D.B.)*, at paras. 100-103).

210 Neither of these concerns carries much weight in this case. The order was made effective the date on which the proceedings seeking relief had been commenced, and there was no interim order for some different amount. Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with more diligence.

211 In *S. (D.B.)*, Bastarache, J. referred to the date of effective notice as the "general rule" and "default option" for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support has been described by the Ontario Court of Appeal as the "usual commencement date", absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (Ont. C.A.), at para. 24. While in my view, the decision to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *S. (D.B.)*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

212 Other relevant considerations noted in *S. (D.B.)* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award. The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example concealing assets or failing to make appropriate disclosure: *S. (D.B.)*, at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the *S. (D.B.)* analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of *S. (D.B.)* may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in *S. (D.B.)* emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

213 In light of these principles, my view is that the Court of Appeal made two main errors.

214 First, it erred by finding that the circumstances of the appellant were such that there was no need prior to the trial. The trial judge found, and the Court of Appeal did not dispute, that the appellant was entitled to non-compensatory spousal support, at the high end of the range suggested by the SSAG, for an indefinite duration. Entitlement, quantum, and the indefinite duration of the order were not appealed before this Court. It is clear that Ms. Kerr was in need of support from the respondent at the date she started her proceedings and remained so at the time of trial. The Court of Appeal rightly noted the relevant factors, such as her age, disability, and fixed income. However, the Court of Appeal did not describe how Ms. Kerr's circumstances had changed between the commencement of proceedings and the date of trial, nor is any such change apparent in the trial judge's findings of fact. As I understand the record, one of the objectives of the support order was to permit Ms. Kerr to have access to a private pay bed while waiting for her name to come up for a subsidized bed in a suitable facility closer to her son's residence. From the date she commenced her proceedings until the date of trial, she resided in the Brock Fahrni Pavilion in a government-funded extended care bed in a room with three other people. In my respectful view, her need was constant throughout the period. If the Court of Appeal's rationale was that Ms. Kerr's need would only arise once she actually had secured the private pay bed, its decision to make the order effective the first day of trial seems inconsistent with that approach. The Court of Appeal did not suggest that her need was any different on that day than on the day she had commenced her proceedings. Nor did the court point to any financial hardship that the trial judge's award would have on Mr. Baranow.

215 Respectfully, the Court of Appeal erred in principle in setting aside the judge's order effective as of the date of commencement of proceedings on the ground that Ms. Kerr had no need during that period, while upholding the judge's findings of need in circumstances that were no different from those existing at the time proceedings were commenced.

216 Second, the Court of Appeal in my respectful view was wrong to fault Ms. Kerr for not bringing an interim application, in effect attributing to her unreasonable delay in seeking support for the period in question. Ms. Kerr commenced her proceedings promptly after separation and, in light of the fact that the trial occurred only about thirteen

months afterward, she apparently pursued those proceedings to trial with diligence. There was thus clear notice to Mr. Baranow that support was being sought and he could readily take advice on the likely extent of his liability. Given the high financial, physical, and emotional costs of interlocutory applications, especially for a party with limited means and a significant disability such as Ms. Kerr, it was in my respectful view unreasonable for the Court of Appeal to attach such serious consequences to the fact that an interim application was not pursued. The position taken by the Court of Appeal to my way of thinking undermines the incentives which should exist on parties to seek financial disclosure, pursue their claims with due diligence, and keep interlocutory proceedings to a minimum. Requiring interim applications risks prolonging rather than expediting proceedings. The respondent's argument based on the fact that a different legal test would have applied at the interim support stage is unconvincing. After a full trial on the merits, the trial judge made clear and now unchallenged findings of need on the basis of circumstances that had not changed between commencement of proceedings and trial.

217 In short, there was virtually no delay in applying for maintenance, nor was there any inordinate delay between the date of application and the date of trial. Ms. Kerr was in need throughout the relevant period, she suffered from a serious physical disability, and her standard of living was markedly lower than it was while she lived with the respondent. Mr. Baranow had the means to provide support, had prompt notice of her claim, and there was no indication in the Court of Appeal's reasons that it considered the judge's award imposed on him a hardship so as to make that award inappropriate.

218 While it is regrettable that the judge did not elaborate on his reasons for making the order effective as of the date proceedings had been commenced, the relevant legal principles applied to the facts as he found them support the making of that order and the Court of Appeal erred in holding otherwise.

219 In summary, I conclude that the Court of Appeal erred in setting aside the portion of the judge's order for support between the commencement of proceedings and the beginning of trial. I would restore the order of the trial judge making spousal support effective September 14, 2006.

D. Disposition

220 I would allow the appeal in part. Specifically, I would:

- a. allow the appeal on the spousal support issue and restore the order of the trial judge with respect to support;
- b. allow the appeal with respect to the Court of Appeal's decision to dismiss Ms. Kerr's unjust enrichment claim and order a new trial of that claim;
- c. dismiss the appeal in relation to Ms. Kerr's claim of resulting trust and the ordering of a new hearing of Mr. Baranow's counterclaim and affirm the order of the Court of Appeal in relation to those issues.

221 As Ms. Kerr has been substantially successful, I would award her costs throughout.

Appeal by V allowed; appeal by K allowed in part.

Pourvoi de V accueilli; pourvoi de K accueilli en partie.

Tab 15

1993 CarswellBC 44
Supreme Court of Canada

Peter v. Beblow

1993 CarswellBC 1258, 1993 CarswellBC 44, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, [1993] R.D.F. 369, [1993] B.C.W.L.D. 1264, [1993] W.D.F.L. 721, [1993] S.C.J. No. 36, 101 D.L.R. (4th) 621, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 39 A.C.W.S. (3d) 646, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, J.E. 93-660, EYB 1993-67100

CATHERINE PETER v. WILLIAM BEBLOW

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: November 12, 1992

Judgment: March 25, 1993

Docket: Doc. 22258

Proceedings: reversed *Peter v. Beblow* ((1990)), 1990 CarswellBC 237, 50 B.C.L.R. (2d) 266, 29 R.F.L. (3d) 268, 39 E.T.R. 113, [1991] 1 W.W.R. 419 ((B.C. C.A.))

Counsel: *G. William Wagner* and *R.C. Bernhardt*, for appellant.
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Subject: Family; Insolvency; Estates and Trusts; Property

Related Abridgment Classifications

Family law

III Division of family property

III.4 Determination of ownership of property

III.4.a Application of trust principles

III.4.a.i Resulting and constructive trusts

III.4.a.i.B Constructive trusts generally

Headnote

Family Law --- Family property on marriage breakdown — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Constructive trusts generally

Family law — Unmarried couples — Property — Constructive and resulting trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

Trusts — Constructive trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

Restitution — Unjust enrichment — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

The man and woman lived together in a common law relationship in the man's house for over 12 years. The woman cared for both sets of children while they remained at home. She cooked, cleaned, washed clothes, looked after the garden and worked on the property. The man did not pay the woman for her work. Both contributed to the purchase of groceries and supplies, the man contributing a greater share. The woman worked outside the home part-time during the summers,

and purchased a property elsewhere. The man paid off his mortgage on the house and bought a houseboat and a van. After the parties separated, the house remained vacant. The woman brought an action claiming that the man had been unjustly enriched by her work. She sought to have a constructive trust imposed respecting the house or, alternatively, damages. The trial judge found that the man had been unjustly enriched since he had obtained the woman's services without compensation. He also found that the woman was under no obligation to perform the work without reasonable expectation of compensation, and that the man ought to have known that. He concluded that she had conferred a proprietary benefit upon the house in an amount just over its assessed value. As the man was living elsewhere and a monetary judgment would be impracticable since he was living on his pension, the fairest apportionment would be to transfer the house to the woman. The British Columbia Court of Appeal allowed the man's appeal on the grounds that the woman was not deprived, that she had no reasonable expectation of compensation, and that there was insufficient nexus between her contribution and the property. The woman appealed.

Held:

Appeal allowed.

Per MCLACHLIN J. (LA FOREST, SOPINKA and IACOBucci JJ. concurring): Unjust enrichment has three elements: 1) an enrichment; 2) a corresponding deprivation; and 3) the absence of a juristic reason for the enrichment. One remedy for unjust enrichment is a monetary award. The remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed. Here the three elements necessary to establish a claim for unjust enrichment were established. The woman's housekeeping and child-care services constituted a benefit to the man. Those services constituted a corresponding detriment to the woman. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment, there was no juristic reason for the enrichment.

In determining whether there is an absence of juristic reason for the enrichment, the test is flexible. The fundamental concern is the legitimate expectation of the parties. In family cases, this concern may raise certain subsidiary matters: whether the plaintiff conferred the benefit as a valid gift, or obligation owed the defendant; whether the plaintiff submitted to, or compromised, the defendant's honest claim; whether public policy supports the enrichment. Here the first and third factors could be argued. The law presumes no duty on a common law spouse to perform work and services for her partner. As the trial judge found on the facts that the woman was under no obligation to perform the work without reasonable expectation of compensation, the woman's services were neither performed pursuant to obligation nor were they a gift. Concerning public policy, there is no logical reason to distinguish domestic services from other contributions. Refusing to put a price on these services systematically devalues women's contributions to the family economy and contributes to the feminization of poverty. Today courts regularly recognize the value of domestic services. Although the legislature has excluded unmarried couples from matrimonial property legislation, it is precisely where an injustice arises without a legal remedy that equity finds a role. Accordingly, there were no juristic arguments that would justify the unjust enrichment.

In determining the proper remedy for unjust enrichment the same general principles apply in both commercial and in family cases. The first step is to determine whether a monetary award is insufficient and whether sufficient nexus between the contribution and the property has been made out. In considering whether a monetary award is insufficient the court may consider the probability of the award being paid as well as the special interest in the property acquired by the contributions. The extent of the interest is to be determined on the basis of the actual value of the matrimonial property — the "value-survived" approach. The "value-received" approach applies only to a monetary award. Where the claim is for an interest in the property one must necessarily determine what portion of the property's value is attributable to the plaintiff's services. A "value-received" approach to property would present practical problems with calculation. Moreover, a "value-survived" approach would accord best with the expectations of most parties, who expect to share in the wealth generated by their partnership. The trial judge's approach accorded with these principles. He assessed the value received by the woman, held that a monetary judgment would be inadequate, and concluded that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust. Considering the woman's proper share of all the family assets, the evidence supported the trial judge's conclusion that the woman had established a constructive trust entitling her to title to the family home. Her services helped preserve the property and saved the man large sums of money which he used to pay off his mortgage and to purchase a houseboat and a van.

Per CORY J. (concurring) (L'HEUREUX-DUBÉ and GONTHIER JJ. concurring):

A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he or she would be unjustly enriched if he or she were permitted to retain it. The constructive trust may be applied where the spouse has contributed either to the acquisition of property or to its preservation, maintenance or improvement. This remedy may be applied to common law relationships. Here the trial judge specifically found that the woman's services had enriched the man.

Particularly in a matrimonial or long-term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other. The constructive trust is used to redress gains made through a breach of trust in a commercial or business relationship. Parties involved in long-term common law relationships will also base their actions on mutual trust. They too are entitled, in appropriate circumstances, to the remedy of constructive trust. In today's society it is unreasonable to assume that the presence of love automatically implies the gift of one party's services to another. Nor is it unreasonable for the party providing the domestic labour to share in the parties' property when the relationship is ended. The balancing of benefits in a matrimonial or common law relationship cannot be accomplished with the precision possible in a commercial relationship. The trial judge must consider the nature of the relationship, its duration and the contributions of the parties. Here there was ample evidence to justify the trial judge's finding that the woman had suffered deprivation. As a result of the relationship, including the efforts of the woman, the house was looked after and maintained. A 12-year relationship was long enough to provide a strong presumption that the services provided by the woman would not be used solely to enrich the man. The woman worked to create a home for the man, which involved many hours of work per week.

The test regarding juristic reasons for the enrichment is an objective one. In a common law relationship, it is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides "spousal services" to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary. Here the trial judge appropriately drew the inference that the woman would reasonably have had an expectation of sharing the wealth she helped to create. All the conditions for unjust enrichment were made out.

While there is a need to limit the use of the constructive trust remedy in a commercial context, the same proposition should not be rigorously applied in a family relationship. Unlike a commercial relationship, in a family relationship the work, services and contributions provided by one of the parties need not be directly linked to a specific property. As long as there was no compensation provided for one party's services then it can be inferred that the provision of those services permitted the other party to acquire lands or to improve them. It follows that in a quasi-marital relationship where third party rights are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. Where the relationship is short or there are no assets surviving its dissolution, a monetary award should be made. A monetary payment might also be more appropriate than a constructive trust if the plaintiff's entitlement is small or could be satisfied apart from the property, if the defendant has any special attachment to the property, or if an award to the plaintiff of an interest in the property might cause hardship to the defendant. Here the woman contributed to the maintenance and preservation of the house. The trial judge was correct in finding that a monetary award would be impracticable. The property was vacant and the woman might have formed an emotional attachment to it. It was both reasonable and appropriate to choose the house for a constructive trust.

The two methods of evaluating the contribution of a party in a matrimonial relationship are the "value received" approach and the "value surviving" approach. While the former has traditionally been used in constructive trust cases, there is no reason why the latter approach could not be used. The remedy should be flexible. Nevertheless, the value surviving approach will often be preferable. This method will usually be more equitable and will more closely accord with the parties' expectations. Further, this method will avoid the difficult task of putting a dollar value on domestic services. Here the trial judge used a value received approach. Awarding the house to the woman reflected a fair assessment of her contribution to the relationship.

Appeal from judgment of British Columbia Court of Appeal, [1991] 1 W.W.R. 419, 50 B.C.L.R. (2d) 266, 39 E.T.R. 113, 29 R.F.L. (3d) 268, reversing judgment of Arkell L.J.S.C. awarding common law wife matrimonial home under constructive trust.

McLachlin J. (La Forest, Sopinka and Iacobucci JJ. concurring):

1 I have had the advantage of reading the reasons of Justice Cory. While I agree with his conclusion and with much of his analysis, my reasons differ in some respects on two matters critical to this appeal: the issues raised by the requirement of the absence of juristic reason for an enrichment and the nature and application of the remedy of constructive trust.

2 In recent decades, Canadian courts have adopted the equitable concept of unjust enrichment inter alia as the basis for remedying the injustice that occurs where one person makes a substantial contribution to the property of another person without compensation. The doctrine has been applied to a variety of situations, from claims for payments made under mistake to claims arising from conjugal relationships. While courts have not been adverse to applying the concept of unjust enrichment in new circumstances, they have insisted on adhering to the fundamental principles which have long underlain the equitable doctrine of unjust enrichment. As stated by La Forest J.A. (as he then was) in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236, at p. 246, "... the well recognized categories of unjust enrichment must be regarded as clear examples of the more general principle that transcends them."

3 The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebat. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote Justice La Forest in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property." Or to quote Dickson J., as he then was, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

4 Notwithstanding these rather straightforward doctrinal underpinnings, their application has sometimes given rise to difficulty. There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a "benefit" to the defendant or a "detriment" to the plaintiff. On the remedies side, the requirements of the special proprietary remedy of constructive trust are sometimes minimized. As Professor Palmer has said: "The constructive trust idea stirs the judicial imagination in ways that assumpsit, quantum meruit and other terms as sociated with quasi-contract have never quite succeeded in duplicating" (G.E. Palmer, *The Law of Restitution*, vol. 1, at p. 16). Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.

5 Such difficulties have to some degree complicated the case at bar. At the doctrinal level, the simple question of "benefit" and "detriment" became infused with moral and policy questions of when the provision of domestic services in a quasi-matrimonial situation can give rise to a legal obligation. At the stage of remedy, the trial judge proceeded as if he were making a monetary award, and then, without fully explaining how, awarded the appellant the entire interest in the matrimonial home on the basis of a constructive trust. It is only by a return to the fundamental principles laid out in cases like *Pettkus v. Becker* and *Lac Minerals*, that one can cut through the conflicting findings and submissions on these issues and evaluate whether in fact the appellant has made out a claim for unjust enrichment, and if so what her remedy should be.

1. Is the Appellant's Claim for Unjust Enrichment Made Out?

6 I share the view of Cory J. that the three elements necessary to establish a claim for unjust enrichment — an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment — are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1st element), in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2nd element), in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment (3rd element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.

7 The main arguments on this appeal centred on whether the law should recognize the services which the appellant provided as being capable of founding an action for unjust enrichment. It was argued, for example, that the services cannot give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother. It was also said that the law of unjust enrichment should not recognize such services because they arise from natural love and affection. These arguments raise moral and policy questions and require the Court to make value judgments.

8 The first question is: where do these arguments belong? Are they part of the benefit — detriment analysis, or should they be considered under the third head — the absence of juristic reason for the unjust enrichment? The Court of Appeal, for example, held that there was no "detriment" on these grounds. I hold the view that these factors may most conveniently be considered under the third head of absence of juristic reason. This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289]; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (hereinafter "*Peel*"). It is in connection with the third element — absence of juristic reason for the enrichment — that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

9 What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. For example, different factors may be more relevant in a case like *Peel*, supra, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.

10 In every case, the fundamental concern is the legitimate expectation of the parties: *Pettkus v. Becker*, supra. In family cases, this concern may raise the following subsidiary questions:

11 (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?

12 (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?

13 (iii) Does public policy support the enrichment?

14 In the case at bar, the first and third of these factors were argued. It was argued first that the appellant's services were rendered pursuant to a common law or equitable obligation which she had assumed. Her services were part of the bargain she made when she came to live with the respondent, it was said. He would give her and her children a home and other husbandly services, and in turn she would look after the home and family.

15 This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner. As Dickson C.J., speaking for the Court put it in *Sorochan v. Sorochan*, supra, at p. 46, the common law wife "was under no obligation, contractual or otherwise, to perform the work and services in

the home or on the land." So there is no general duty presumed by the law on a common law spouse to perform work and services for her partner.

16 Nor, in the case at bar was there any obligation arising from the circumstances of the parties. The trial judge held that the appellant was "under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the respondent." This puts an end to the argument that the services in question were performed pursuant to obligation. It also puts an end to the argument that the appellant's services to her partner were a "gift" from her to him. The central element of a gift at law — intentional giving to another without expectation of remuneration — is simply not present.

17 The third factor mentioned above raises directly the issue of public policy. While it may be stated in different ways, the argument at base is simply that some types of services in some types of relationships should not be recognized as supporting legal claims for policy reasons. More particularly, homemaking and childcare services should not, in a marital or quasi-marital relationship, be viewed as giving rise to equitable claims against the other spouse.

18 I concede at the outset that there is some judicial precedent for this argument. Professor Marcia Neave has observed generally that "analysis of the principles applied in English, Australian and Canadian courts sometimes fails to confront this question directly ... Courts which deny or grant remedies usually conceal their value judgments within statements relating to doctrinal requirements." (Marcia Neave, "Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts*, at p. 251). More pointedly, Professor Farquhar has observed that many courts have strayed from the framework of *Sorochan* for public policy reasons: "the courts ... have, after *Sorochan*, put up warning signs that there are aspects of relationships that are not to be analyzed in the light of unjust enrichment and constructive trust." (Keith B. Farquhar, "Causal Connection in Constructive Trust After *Sorochan v. Sorochan*" (1989), 7 Can. J. of Family Law 337, at p. 343). The public policy issue has been summed up as follows by Professor Neave at p. 251: "whether a remedy, either personal or proprietary, should be provided to a person who has made contributions to family resources." On the judicial side, the view of the respondent is pointedly stated in *Grant v. Edwards*, [1986] 2 All E.R. 426, at p. 439, per Browne-Wilkinson V.C.:

Setting up house together, having a baby and making payments to general housekeeping expenses ... may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house.

Proponents of this view, Professor Neave, at p. 253 argues, "regard it as distasteful to put a price upon services provided out of a sense of love and commitment to the relationship. They suggest it is unfair for a recipient of indirect or non-financial contributions to be forced to provide recompense for those contributions." To support this position, the respondent cites several cases. *Kshywieski v. Kunka Estate* (1986), 50 R.F.L. (2d) 421 [[1986] 3 W.W.R. 472] (Man. C.A.); *Houghen v. Monnington* (1991), 37 R.F.L. (3d) 279 (B.C.C.A.); *Prentice v. Lang* (1987), 10 R.F.L. (3d) 364 (B.C.S.C.); *Hytte v. Pfenniger*, B.C.S.C., Dec. 19, 1991 [now reported (1991), 39 R.F.L. (3d) 30, additional reasons at 39 R.F.L. (3d) at 44].

19 It is my view that this argument is no longer tenable in Canada, either from the point of view of logic or authority. From the point of view of logic, I share the view of Professors Hovius and Youdan [*The Law of Family Property*] that "there is no logical reason to distinguish domestic services from other contributions" (at p. 146). The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse. As Lord Simon observed nearly thirty years ago: "The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it" ("With All My Worldly Goods," *Holdsworth Lecture* (University of Birmingham, 20th March 1964), at p. 32). The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty which this Court identified in *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481], per L'Heureux-Dubé J., at pp. 853-54.

20 Moreover, the argument cannot stand with the jurisprudence which this and other courts have laid down. Today courts regularly recognize the value of domestic services. This became clear with the Court's holding in *Sorochan*, leading one author to comment that "the Canadian Supreme court has finally recognized that domestic contribution is of equal value as financial contribution in trusts of property in the familial context" (Mary Welstead, "Domestic Contribution and Constructive Trusts: The Canadian Perspective," [1987] Denning L.J. 151, at p. 161). If there could be any doubt about the need for the law to honestly recognize the value of domestic services, it must be considered to have been banished by *Moge v. Moge*, supra. While that case arose under the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.), the value of the services does not change with the legal remedy invoked.

21 I cannot give credence to the argument that legal recognition of the value of domestic services will do violence to the law and the social structure of our society. It has been recognized for some time that such services are entitled to recognition and compensation under the *Divorce Act* and the provincial Acts governing the distribution of matrimonial property. Yet society has not been visibly harmed. I do not think that similar recognition in the equitable doctrine of unjust enrichment will have any different effect.

22 Finally, I come to the argument that, because the legislature has chosen to exclude unmarried couples from the right to claim an interest in the matrimonial assets on the basis of contribution to the relationship, the court should not use the equitable doctrine of unjust enrichment to remedy the situation. Again, the argument seems flawed. It is precisely where an injustice arises without a legal remedy that equity finds a role. This case is much stronger than *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, where I dissented on the ground that the statute expressly pronounced on the very matter with respect to which equity was invoked.

23 Accordingly, I would agree with Cory J. that there are no juristic arguments which would justify the unjust enrichment, and the third element is made out. Like him, I conclude that the plaintiff was enriched, to the benefit of the defendant, and that no justification existed to vitiate the unjust enrichment claim. The claim for unjust enrichment is accordingly made out and it remains only to determine the appropriate remedy.

2. Remedy — Monetary Judgment or Constructive Trust?

24 The other difficult aspect of this case is the question of whether the remedy which the trial judge awarded — title to the matrimonial home — is justified on the principles governing the action for unjust enrichment. Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e., quantum meruit; and the one the trial judge awarded, title to the house based on a constructive trust.

25 In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, supra, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker*, supra, and *Sorochan v. Sorochan*, supra, as I understand those cases. It was also affirmed by La Forest J. in *Lac Minerals*, supra.

26 My colleague Cory J. suggests that, while a link between the contribution and the property is essential in commercial cases for a constructive trust to arise, it may not be required in family cases. He writes [pp. 31-32]:

... La Forest J. concluded [in *Lac Minerals*, supra] that the constructive trust should only be awarded when the personal monetary award is insufficient; that is, when there is reason to grant to the plaintiff the additional rights that flow from recognition of a right to property.

I agree with my colleague that there is a need to limit the use of the constructive trust remedy in a commercial context. Yet I do not think the same proposition should be rigorously applied in a family relationship.

27 I doubt the wisdom of dividing unjust enrichment cases into two categories — commercial and family — for the purpose of determining whether a constructive trust lies. A special rule for family cases finds no support in the jurisprudence. Neither *Pettkus*, nor *Rathwell* [*Rathwell v. Rathwell*, [1978] 2 W.W.R. 101], nor *Sorochan* suggest such a departure. Moreover, the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust. Finally, the creation of special rules for special situations might have an adverse effect on the development of this emerging area of equity. The same general principles should apply for all contexts, subject only the demonstrated need for alteration. Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 [35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385], at p. 519 (adopted by La Forest J. in *Lac Minerals*, supra, at p. 675), warns against confining constructive trust remedies to family law cases stating that: "to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles." The same result, I fear, may flow from developing special rules for finding constructive trusts in family cases. In short, the concern for clarity and doctrinal integrity with which this Court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

28 Nor does the distinction between commercial cases and family cases on the remedy of constructive trust appear to be necessary. Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given her a special link to the property, in which case a constructive trust arises.

29 For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 28 [p. 32] that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.

30 The next question is the extent of the contribution required to give rise to a constructive trust. A minor or indirect contribution is insufficient. The question, to quote Dickson C.J. in *Pettkus v. Becker*, supra, at p. 852, is whether "[the plaintiff's] contribution [was] sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the ... property." Once this threshold is met, the amount of the contribution governs the extent of the constructive trust. As Dickson C.J. wrote in *Pettkus v. Becker*, supra, at pp. 852-53:

Although equity is said to favour equality, as stated in *Rathwell*, it is not every contribution which will entitle a spouse to a one-half interest in the property. *The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.* [Emphasis added.]

Cory J. advocates a flexible approach to determining whether a constructive trust is appropriate; an approach "based on common sense and a desire to achieve a fair result for both parties" (at p. 28 [p. 32]). While agreeing that courts should avoid becoming overly technical on matters which may not be susceptible of precise monetary valuation, the principle remains that the extent of the trust must reflect the extent of the contribution.

31 Before leaving the principles governing the remedy of constructive trust, I turn to the manner in which the extent of the trust is determined. The debate centres on whether it is sufficient to look at the value of the services which the claimant has rendered (the "value received" approach), or whether regard should be had to the amount by which the property has been improved (the "value survived" approach). Cory J. expresses a preference for a "value survived" approach. However, he also suggests, at p. 31 [pp. 33-34], that "there is no reason why quantum meruit or the value received approach could not be utilized to quantify the value of the constructive trust." With respect, I cannot agree. It seems to me that there are very good reasons, both doctrinal and practical, for referring to the "value survived" when assessing the value of a constructive trust.

32 From the point of view of doctrine, "the extent of the interest must be proportionate to the contribution" to the property: *Pettkus v. Becker*, supra, at p. 852. How is the contribution to the property to be determined? One starts, of necessity, by defining the property. One goes on to determine what portion of that property is attributable to the claimant's efforts. This is the "value survived" approach. For a monetary award, the "value received" approach is appropriate; the value conferred on the property is irrelevant. But where the claim is for an interest in the property one must of necessity, it seems to me, determine what portion of the value of the property claimed is attributable to the claimant's services.

33 I note, as does my colleague, that there may also be practical reasons for favouring a "value survived" approach. Cory J., alludes to the practical problems with balancing benefits and detriments as required by the "value received" approach, leading some to question whether it is the least attractive approach in most family property cases (see *Davidson v. Worthing* (1986), 6 R.F.L. (3d) 113 [9 B.C.L.R. (2d) 202] (S.C.), McEachern C.J.S.C.; Hovius and Youdan at pp. 136ff). Moreover, a "value survived" approach arguably accords best with the expectations of most parties; it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship.

34 To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Pettkus v. Becker* has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions: per La Forest J. in *Lac Minerals*. The value of that trust is to be determined on the basis of the actual value of the matrimonial property — the "value survived" approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

35 I turn now to the application of these principles to the case at bar. The trial judge began by assessing the value received by the respondent (the quantum meruit). He went on to conclude that a monetary judgment would be inadequate. The respondent had few assets other than his houseboat and van, and no income save for a War Veteran's Allowance. The judge concluded, as I understand his reasons, that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust, stating that "[the appellant] has shown that there was a positive proprietary benefit conferred by her upon the Sicamous property." Accordingly, he held that the remedy of constructive trust was made out. This approach accords with principles discussed above. In effect, the trial judge found the monetary award to be inadequate on the grounds that it would not be paid and on the ground of a special contribution to the property. These findings support the remedy of constructive trust in the property.

36 The remaining question is the quantification of the trust. The trial judge calculated the quantum meruit for her housekeeping for 12 years at \$350 per month and reduced that figure by 50% "for the benefits she received." The final amount was \$25,200. He then reasoned that, since the services rendered amounted to \$25,200 after appropriate deductions, it follows that the appellant should receive title to the respondent's property, valued at \$23,200. The missing step in this analysis is the failure to link the value received with the value surviving. As discussed above, a constructive trust cannot be quantified by simply adding up the services rendered; the court must determine the extent of the contribution which the services have made to the parties' property.

37 Notwithstanding the trial judge's failure to make this link, his conclusion that the appellant had established a constructive trust entitling her to title to the family home can be maintained if a trust of this magnitude is supported on the evidence. This brings me to a departure from the methods used below. The parties and the Court of Appeal appear to have treated the house as a single asset rather than as part of a family enterprise. This led to the argument that the appellant could not be entitled to full ownership in the house because the respondent had contributed to its value as well. The approach I would take — and the approach I believe the trial judge implicitly to have taken — is to consider the

appellant's proper share of all the family assets. This joint family venture, in effect, was no different from the farm which was the subject of the trust in *Pettkus v. Becker*.

38 With this in mind, I turn to the evidence on the extent of the contribution. The appellant provided extensive household services, over a period of 12 years, including care for the children while they were living at the house and maintenance of the property. The testimony of the plaintiff's son provides a general idea of her contribution to the family enterprise:

Q. What sort of things did she do?

A. She did all the motherly duties for all of us ...

A. When [the defendant's] two sons and my brother and I were there still, even when my sisters were there, that was quite a long time ago, I was quite young, so there was nothing really bad then, but after the sisters left, she took care of all the duties, cooking and stuff like that, cleaning, laundry. She had her ringer washer, she would do the laundry, she'd worked in the garden, things like that. She took care of all things around the house, when he was gone especially ...

Q. Do you remember what work your mother did in the yard outside?

A. M'hm, they both got together doing the garden, he would do the roto-tilling, they would both take care of the planting and stuff; when he was gone, she would do all the weeding and keeping up. They would share the watering of the garden. She put together three or four flower gardens all herself, except for the hard heavy work, like lifting rocks, when she first started, that was shared by all of us, including the kids.

Of all the chores performed around the property, the son states that the various siblings had minor chores, such as chopping wood and making beds. "Everything else, the major stuff, she would take care of." Other evidence, including testimony from Catherine Peter and William Beblow, supports this picture of the appellant's contribution. The trial judge held that while the respondent worked in the construction business:

... he would be away from home during the week and would return on the weekend whenever possible. While he was absent, the plaintiff would care for the property in the home and care for the children while he was away ...

In effect, the plaintiff by moving into the respondent's home became his housekeeper on a full-time basis without remuneration except for the food and shelter that she and the children received until the children left home.

39 The respondent also contributed to the value of the family enterprise surviving at the time of breakup; he generated most of the family income and helped with the maintenance of the property.

40 Clearly, the appellant's contribution — the "value received" by the respondent — was considerable. But what then of the "value surviving"? It seems clear that the maintenance of the family enterprise through work in cooking, cleaning, and landscaping helped preserve the property and saved the respondent large sums of money which he was able to use to pay off his mortgage and to purchase a houseboat and a van. The appellant, for her part, had purchased a lot with her outside earnings. All these assets may be viewed as assets of the family enterprise to which the appellant contributed substantially.

41 The question is whether, taking the parties' respective contributions to the family assets and the value of the assets into account, the trial judge erred in awarding the appellant a full interest in the house. In my view, the evidence is capable of supporting the conclusion that the house reflects a fair approximation of the value of the appellant's efforts as reflected in the family assets. Accordingly, I would not disturb the award.

42 I would allow the appeal with costs.

Cory J. (concurring) (*L'Heureux-Dubé* and *Gonthier JJ.* concurring):

43 The issue in this appeal is whether the provision of domestic services during 12 years of cohabitation in a common law relationship is sufficient to establish the proprietary link which is required before the remedy of constructive trust can be applied to redress the unjust enrichment of one of the partners in the relationship. Further, consideration must be given to the extent to which the remedy of constructive trust should be applied in terms of amount or proportion.

Factual Background

44 In April 1973, the respondent asked the appellant to come and live with him. That same month, the appellant together with her 4 children moved into the respondent's home in Sicamous, B.C. At the time, 2 children of the respondent were living in the home. The parties continued to live together in a common law relationship for over 12 years, separating in June 1985. During this entire time the appellant acted as the wife of the respondent. She was a stepmother to his children until 1977 while they remained in the home. As well, she cared for her own children, the last one leaving in 1980.

45 During the 12 years, the appellant cooked, cleaned, washed clothes and looked after the garden. As well, she worked on the Sicamous property, undertaking such projects as painting the fence, planting a cedar hedge, buying flowers and shrubs for the property and building a rock garden. She built a pig pen. She kept chickens for a few years, butchering and cooking them for the family. During the winters, the appellant shovelled snow, chopped wood and made kindling. The respondent did not pay the appellant for any of her work. Both the appellant and the respondent contributed to the purchase of groceries and household supplies, although the respondent contributed a greater share.

46 In the first year of the relationship the appellant did not undertake outside work and spent 8 hours a day doing housework and work on the Sicamous property. In subsequent years, she took part-time work as a cook from June to October. During these months she worked some six hours a day at a rate of \$4.50 per hour. Except for one winter when she worked at a bakery, the appellant received unemployment insurance benefits in the winter months.

47 Throughout the relationship, the respondent worked on a more or less full-time basis as a grader operator. His work frequently took him out of town to various locations in British Columbia.

48 Before he met the appellant, the respondent had lived in a common law relationship with another woman for 5 years. When she left his home he hired housekeepers. The last housekeeper he had before the appellant came to his home was paid at a rate of \$350 per month.

49 The trial judge accepted the appellant's testimony that the respondent had asked her to live with him because he needed someone to care for his 2 children. This need arose when the welfare authorities expressed some concern that the respondent left the children alone when he was working away from home.

50 When the parties met, the appellant had savings of \$100. In 1976, she purchased a property in Saskatchewan for \$2,500. She sold this property in 1980 for \$8,000 and purchased a property at 100 Mile House for \$6,500. She used the remainder of the sale proceeds for a trip to Reno. At the time of trial, the appellant still owned the 100 Mile House property.

51 The respondent had purchased the Sicamous property in 1971 for \$8,500. Some \$900 was paid in cash and the balance of \$7,600 was secured by a mortgage. The respondent was able to pay off the mortgage in 1975. The estimated market value of the Sicamous property as of 1987 was \$17,800. The property's assessed value in that year was \$23,200. In that same year, the respondent rented the property. The tenants were given an option to purchase it for \$28,000. The option was not exercised.

52 With the passage of time, the respondent began to drink heavily and became verbally and physically abusive to the appellant. As a result, the appellant moved out of the Sicamous home on June 7, 1985. At the time of the trial, she

was on welfare and lived in a trailer court in Sicamous. The respondent by that time had retired and was living on a houseboat in Enderby, B.C. The Sicamous house and property were vacant.

53 The appellant brought an action claiming that the respondent had been unjustly enriched over the years of the relationship as a result of the work which she performed in his home without payment of any kind. She sought to have a constructive trust imposed on her behalf in respect of the Sicamous property or in the alternative, monetary damages as compensation for the labour and services she provided to the respondent.

Courts Below

Trial Judgment

54 On the basis of *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289], the trial judge determined that in order to establish an unjust enrichment, the plaintiff must prove:

- (1) enrichment;
- (2) a corresponding deprivation; and
- (3) the absence of any juristic reason for the enrichment.

55 He decided there must also be a clear causal connection between the spousal contribution founding the unjust enrichment and the property which is alleged to be the subject of the constructive trust.

56 The trial judge found that there had been an enrichment since the respondent had obtained the services of a housekeeper, homemaker and stepmother to his children without compensation. He further found that the plaintiff was deprived of any compensation from her labour since she devoted the majority of her time and energy and some of the monies which she earned for the benefit of the respondent, his children and his Sicamous property. Lastly, he found that there was no juristic reason for the enrichment, that is to say the appellant was under no obligation to perform the work and assist in the home without some reasonable expectation of compensation. He found that she was entitled to receive something other than the drunken physical abuse to which she had been subjected by the respondent. He concluded that the respondent ought to have known that the appellant would have a reasonable expectation that she would be compensated. He also concluded that she had shown that there was a proprietary benefit conferred by her upon the Sicamous property.

57 The trial judge then considered what would be a fair and equitable compensation. He took into account the realities of the relationship and the assets and income of the parties in order to fashion the appropriate relief. He observed that if the appellant had been employed as a housekeeper for 12 years at \$350 per month, the amount the respondent had paid his last housekeeper before the appellant moved in, she would have earned \$50,400. He allowed a 50 percent reduction for the benefits the appellant had received in the relationship and settled on the amount which should be paid to her as \$25,200.

58 He then concluded that the fairest disposition of the case would be to award the Sicamous property to the appellant. He noted that the respondent was living in Enderby, on a houseboat. He noted that the respondent also had a van. The respondent was living on a War Veteran's Allowance and was retired. It was obvious to the trial judge that a monetary judgment would be impracticable, probably unrealistic and would not be reasonable under the circumstances. He therefore concluded that the fairest apportionment would be to have the house and land in Sicamous transferred to the appellant free and clear of encumbrances.

Court of Appeal

59 The respondent on the appeal [(1990), 50 B.C.L.R. (2d) 266, [1991] 1 W.W.R. 419] contended that, the trial judge had erred first in finding that there had been an unjust enrichment of the respondent, and secondly, that even if there had been an unjust enrichment, that he had erred in ordering the transfer of the Sicamous property to the appellant.

60 Macdonald J.A., writing on behalf of the court, observed that it had been conceded that the respondent had indeed been enriched by receiving the benefit of the appellant's labour and services. Thus, the first condition of *Sorochan* had been met. However, he found that the remaining conditions had not been fulfilled. The Court of Appeal disagreed with the trial judge's finding that there had been any deprivation suffered by the appellant. It found that the appellant had not been deprived as she and her children had lived in the respondent's home rent-free with the respondent's contributing more for the family's groceries than she had. He noted that the appellant had been able to acquire property and he took this as evidence that the appellant had not suffered any deprivation.

61 Macdonald J.A. further concluded that even if there was an imbalance sufficient to support a finding of deprivation, the unjust enrichment claim did not meet the third condition, namely the absence of any juristic reason for the enrichment. In his view, the appellant had failed to establish, as required by *Sorochan*, that she had prejudiced herself on the reasonable expectation of receiving something in return for her work and services. He stressed that there was not, as in other cases, the holding out of a promise to marry. Even though the respondent would, when he was drinking, ask the appellant to marry him, she never took those requests seriously.

62 Finally, even if all the conditions of unjust enrichment had been met, Macdonald J.A. disagreed with the trial judge's disposition. In his view, there was not a sufficient nexus between the appellant's contribution and the Sicamous property to entitle the appellant to receive, by way of relief, the property itself rather than a monetary judgment. He decided at p. 272 that the "relatively minor gardening activities and household tasks and expenditures over the 12 years of cohabitation" fell short of establishing a positive contribution to the acquisition, preservation, maintenance or improvement of the property. As a result, it was held that there was no legal ground upon which an order could be made transferring the property to the appellant. The appeal was allowed and the appellant's action was dismissed.

Position of the Respondent

63 The respondent conceded that there was an unjust enrichment but contended that there was no corresponding deprivation suffered by the appellant. It was said that she was adequately compensated for her services by the respondent's provision of free shelter and a large portion of the groceries.

64 Second, it was argued that the domestic services provided by the appellant did not establish any causal link to or proprietary interest in the Sicamous property.

65 The Court of Appeal clearly agreed with the respondent on these issues. With respect, I believe they erred in reaching these conclusions.

Should the Doctrines of Unjust Enrichment and Constructive Trust be Applied to "Common Law" Relationships?

66 It may be helpful to review once again the application and extension of the doctrine of constructive trust. In Scott, *The Law of Trusts*, vol. 5 (4th ed. 1989) at p. 304 the following definition appears:

A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. [Footnote omitted.]

67 This definition, which appeared in the same form in earlier editions, was cited with approval in the dissenting reasons of Laskin J. (as he then was) in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 [[1974] 1 W.W.R. 361]. In later decisions of this Court the definition has provided a basis for the application of the constructive trust remedy in matrimonial situations.

68 In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, Dickson J. (as he then was) writing for the majority, applied the doctrine of constructive trust to a common law relationship. He noted that a court must first determine whether a claim for unjust enrichment has been established. If it has, then a court must determine whether, in the circumstances presented, a constructive trust is the appropriate remedy to apply to redress the unjust enrichment. In order to determine that there has been an unjust enrichment, the following three conditions must be fulfilled:

69 (1) there has been an enrichment;

70 (2) a corresponding deprivation has been suffered by the person who supplied the enrichment; and

71 (3) there is an absence of any juristic reason for the enrichment itself.

72 The importance of *Pettkus v. Becker*, was emphasized in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 [35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385]. There at p. 471 Dickson C.J. wrote:

The constructive trust has existed for over two hundred years as an equitable remedy for certain forms of unjust enrichment ... Until the decision of this Court in *Pettkus v. Becker*, the constructive trust was viewed largely in terms of the law of trusts, hence the need for the existence of a fiduciary relationship. In *Pettkus v. Becker*, the Court moved to an approach more in line with restitutionary principles by explicitly recognizing constructive trust as one of the remedies for unjust enrichment.

73 Subsequently, this Court made it clear that the constructive trust remedy may also be applied in circumstances where the spouse has contributed not to the acquisition of property but rather to its preservation, maintenance or improvement. In *Sorochan v. Sorochan*, supra, Dickson C.J. gave the reasons for a unanimous Court. There the parties had never married but had cohabited on a farm in Alberta from 1940 to 1982. It is significant that before the parties began living together the defendant was, together with his brother, the owner of the farmland. Thus the lands were not acquired during the period of cohabitation. During the time they lived together the parties had 6 children. The plaintiff did all the domestic work associated with running the household and caring for the children. Both parties worked on the farm. It was conceded that the plaintiff did substantial and arduous work. For many years the defendant worked as a travelling sales representative and during those periods the plaintiff frequently assumed sole responsibility for the work on the farm.

74 It was held that the defendant had been unjustly enriched. That enrichment resulted from his receiving the benefit of the plaintiff's years of labour in the home and on the farm. This obviously resulted in valuable savings. It was pointed out that through the plaintiff's years of labour, the farm was maintained and preserved and did not deteriorate through neglect or disuse. It was found that the plaintiff's maintenance and preservation of the land coffered a significant benefit to the defendant.

75 Thus, it can be seen that the remedy provided by the constructive trust may, in appropriate cases, be applied to common law relationships where the plaintiff's contribution to the land was directed only to its maintenance and preservation. Those contributions which have been considered sufficient to justify the application of a constructive trust have been indirect financial contributions as in *Pettkus v. Becker*, supra, and work on the property which contributed to its maintenance as in *Sorochan*.

Should the Remedy of Constructive Trust be Applied to the Case at Bar?

1. Enrichment

76 It should not be forgotten that the trial judge specifically found that there had been an enrichment to the respondent "since he obtained the services of the plaintiff as a housekeeper, homemaker and in fact stepmother without compensation." Indeed, it was conceded before us that the respondent was enriched by the work and contributions of the appellant.

2. A Corresponding Deprivation

77 It is again important to first consider the finding of the trial judge on this issue. He stated:

... the plaintiff was deprived of any compensation for her labour since she devoted the majority of her time and energy and some of the monies she earned towards the benefit of the respondent, his children and his property.

78 That finding would seem sufficient in itself to warrant the conclusion that the appellant suffered a deprivation which corresponds to the enrichment of the respondent.

79 Indeed, I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. There is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic. In *Sorochan*, supra, Dickson C.J. suggested that benefit and deprivation are essentially two sides of the same coin. He wrote at pp. 45-46:

Moreover, the case law indicates that the full-time devotion of one's labour and earnings without compensation can readily be viewed as a deprivation. In *Murray v. Roty* (1983), 41 O.R. (2d) 705 (Ont. C.A.), for example, a case involving a joint business and farm operation, Cory J.A., commented (at p. 710): "For eight years of her life she devoted all of her time and energy and almost all of her wages for the benefit of Roty. The deprivation is obvious".

In *Everson v. Rich* (1988), 16 R.F.L. (3d) 337, the Saskatchewan Court of Appeal, applying *Sorochan*, stated at p. 342:

The spousal services provided by the appellant were valuable services and did constitute a benefit conferred upon the respondent. The provision of those services was a detriment to the claimant by virtue of the use of her time and energy.

80 I agree with his reasoning. As a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course, be deprivation suffered by the plaintiff. As Professor James McLeod pointed out ((1988), 16 R.F.L. (3d) 338) in his annotation of *Everson v. Rich*, supra, "the deprivation requirement is satisfied by showing the plaintiff expended effort or does not have what he/she had or might have had." Particularly in a matrimonial or long term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other.

81 Business relationships concerned with commercial affairs may, as a result of the conduct of one of the corporations involved, result in a court's granting a constructive trust remedy. The constructive trust has been appropriately used to redress a gain made through a breach of trust in a commercial or business relationship (See for example: *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592). Yet how much closer and trusting must be a long term common law relationship. In marriages or marriage-like relationships commercial matters and a great deal more will be involved. Clearly, parties to a family relationship will, in a commercial sense, share funds and financial goals. More importantly, couples such as the parties to this case will strive to make a home. By that I mean a place that provides safety, security and love and which is as well frequently the place where children may be cared for and nurtured. In a relationship that involves living and sleeping together, couples will share their worst fears and frustrations and their fondest dreams and aspirations. They will plan and work together to achieve their goals. Just as much as parties to a formal marriage, the partners in a long term common law relationship will base their actions on mutual love and trust. They too are entitled, in appropriate circumstances, to the relief provided by the remedy of constructive trust.

82 This remedy should be granted despite the fact that family will seldom keep the same careful financial records as business associates. Nonetheless, fairness requires that the constructive trust remedy be available to them and applied on an equitable basis without a minute scrutiny of their respective financial contributions. Indeed, in a situation such as

the one presented in this case, it may be very difficult to assess the value of making a house a home and of sharing the struggle to raise children to become responsible adults.

83 In the present case, although there was no formal marriage, the couple lived and worked together in the most intimate of relationships. They shared work and the monies which they earned. The amount of the contributions may have been varied and unequal. Yet the very fact that in addition to her household work the appellant contributed something of the income from her outside employment indicates that there was a real sharing of income. As a result of the relationship, the Sicamous property was looked after and maintained. None of this could have been achieved without the efforts of the appellant.

84 Certainly, it cannot be said that the relationship was so short-lived that it should not give rise to mutual rights and obligations. Twelve years is not an insignificant period of time to live in a relationship based on mutual trust and confidence. In those circumstances, there is a strong presumption that the services provided by one party will not be used solely to enrich the other. Both the reasonable expectations of the parties and equity will require that upon the termination of the relationship, the parties will receive an appropriate compensation based on the contribution each has made to the relationship.

85 The respondent asserts that because the appellant loved him she could not have expected to receive compensation or an interest in the property in return for the contributions she made to the home and family. However, in today's society it is unreasonable to assume that the presence of love automatically implies a gift of one party's services to another. Nor is it unreasonable for the party providing the domestic labour required to create a home to expect to share in the property of the parties when the relationship is terminated. Women no longer are expected to work exclusively in the home. It must be recognized that when they do so, women forgo outside employment to provide domestic services and child care. The granting of relief in the form of a personal judgment or property interest to the provider of domestic services should adequately reflect the fact that the income earning capacity and the ability to acquire assets by one party has been enhanced by the unpaid domestic services of the other. Marcia Neave in "Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability", in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), lucidly sets out the position in this way at p. 254:

The characterization of domestic services as gifts reflects a view of family relationships which is now out-dated and has a differential impact on women, since they are the main providers of such services. Women no longer work exclusively in the home. Those who do so sacrifice income that could otherwise be earned in paid work. Couples who decide that one partner, usually the woman, will forgo paid employment to provide domestic services and provide child care, presumably believe that this arrangement will maximize their economic resources. Grant of relief, whether personal or proprietary, to the provider of domestic services would recognize that the income-earning capacity of one partner and his ability to acquire assets have been enhanced by the unpaid services of the other and that those services were only provided free because it was believed that the relationship would continue.

86 This same reasoning has been recently applied in the context of divorce in *Moge v. Moge*, [1992] 3 S.C.R. 813 [1993] 1 W.W.R. 481]. It is appropriate to recognize that the same principle should be applied to long term common law relationships.

87 In the present case it cannot be said, as the respondent suggests, that the contributions of the appellant were minor or that they were compensated by the provision of free accommodation. It is true that the appellant did not devote all of her energy to the home or family business as did Mary Sorochoan or Charlotte Murray. However, the mere fact that the appellant was able to engage in part-time employment does not detract from the fact that she provided extensive and valuable services to the respondent for which she was not compensated.

88 It cannot be forgotten that the trial judge recognized that the appellant worked to create a "home" for the respondent. The nature and extent of her efforts were clear from the evidence, but one rather touching indication of her dedication is that she helped the children to make Christmas gifts. The value of the commitment of a homemaker such as the appellant

should not be underestimated. The partner who provides domestic services often works far in excess of 40 hours per week in order to provide a "home". Women who work in the home may have given up a career or a type of work which would enable them to improve their earning capacity. These are matters which should be taken into account when considering both the benefits conferred and the deprivation suffered by a claimant who has been a partner in a long term common law relationship.

89 The balancing of benefits conferred and received in a matrimonial or common law relationship cannot be accomplished with precision. Although it may well be essential in a commercial relationship to closely scrutinize the contributions made by each of the business partners to the acquisition of property, such an approach would be unrealistic and unfair in the context of a family relationship. Ordinarily, the trial judge will be in the best position to assess all the evidence presented and to estimate the contribution made by each of the parties. The nature of the relationship, its duration and the contributions of the parties must be considered. Equity and fairness should form the basis for the assessment. There was ample evidence presented in this case to justify the finding of the trial judge that there had been a deprivation suffered by the appellant.

Absence of Juristic Reason for the Enrichment

90 In *Pettikus v. Becker*, supra, Dickson J. had this to say at p. 849 with regard to juristic reasons for the enrichment:

... I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

91 The test put forward is an objective one. The parties entering a marriage or a common law relationship will rarely have considered the question of compensation for benefits. If asked, they might say that because they loved their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves. It is just and reasonable that the situation be viewed objectively and that an inference be made that, in the absence of evidence establishing a contrary intention, the parties expected to share in the assets created in a matrimonial or quasi-matrimonial relationship, should it end.

92 *Kshywieski v. Kunka Estate* (1986), 50 R.F.L. (2d) 421, [[1986] 3 W.W.R. 472], is a decision of the Manitoba Court of Appeal. It determined that, in the absence of evidence of a promise of marriage, a promise of compensation or an expectation on the part of the plaintiff that she would be remunerated for her services, it was not unjust for the defendant or his estate to retain the benefit of the spousal service conferred upon him by the plaintiff. Professor McLeod in his annotation ((1986), 50 R.F.L. (2d) 421) summarized the conclusion in this case in these words at p. 422:

Without some prejudicial conduct such as request, inducement, acquiescence or the holding out of future benefit, no restitutionary relief could be awarded.

93 In the case at bar the British Columbia Court of Appeal relied on the *Kshywieski* decision. It concluded that because the respondent's promises to marry the appellant were made when he was drunk, she could not have taken them seriously. As a result, it was found that there was no prejudice occasioned by the appellant. In my view, the Court of Appeal was in error in this conclusion.

94 It is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides "spousal services" to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary. This was the approach properly taken by the Saskatchewan Court of Appeal in *Everson v. Rich*, supra.

95 In the case at bar, the trial judge appropriately drew the inference that, in light of the duration of the relationship and the appellant's contribution to the home and property, she would reasonably have had an expectation of sharing the wealth she helped to create. He concluded that:

... there is no juristic reason for the enrichment. She was under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the respondent.

96 When a claimant is under no obligation contractual, statutory or otherwise to provide the work and services to the recipient, there will be an absence of juristic reasons for the enrichment. See *Murray v. Roty* (1983), 41 O.R. (2d) 705; *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, supra.

97 In summary then, there was unjust enrichment of the respondent by the work of the appellant. The appellant suffered a corresponding deprivation. There was no juristic reason for the enrichment, that is to say there was no obligation of any kind upon the appellant to provide the services to the respondent. It follows that the trial judge was correct in his finding that there had been an unjust enrichment, a corresponding deprivation and no juristic reason for providing the enriching services. It remains to be considered what remedy should have been provided in the circumstances. Would a monetary judgment have been appropriate or should the remedy of constructive trust have been granted?

The Appropriate Remedy

98 In *Sorochan v. Sorochan*, it was noted that although the constructive trust provides an important judicial means of remedying unjust enrichment, there are other remedies available, such as monetary damages. The first question to be resolved is which remedy is appropriate in the circumstances of this case? In *Sorochan* it was said that: the court must consider whether there is a causal connection between the deprivation suffered by the plaintiff and the property in question, because in order to justify the imposition of a constructive trust a court must be satisfied that there is a "clear proprietary relationship" between the services rendered and the disputed assets. The same case confirmed that a flexible approach should be taken in applying the constructive trust remedy and specifically approved of the position adopted by other courts in *Murray v. Roty*, supra; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286; *Lawrence v. Lindsey* (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.). At p. 50, Dickson C.J. wrote:

In my view, the constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice.

99 In addition to the causal connection requirement Dickson C.J. stated that the claimant must have reasonably expected to receive an interest in the property and that the respondent ought to have been aware of that expectation. He also observed that in considering whether a constructive trust is the appropriate remedy the duration of the relationship should be taken into account.

100 The difficulty of establishing a causal connection between unjust enrichment arising from the provision of domestic services and the property has been the subject of scholarly debate (See for example: Ralph E. Scane "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 Can. Bar Rev. 260; Keith B. Farquhar, "Causal Connection in Constructive Trusts" (1986-88), 8 Est. & Tr. Q. 161; Berend Hovius and Timothy G. Youdan, *The Law of Family Property* (1991); Ian Narev, "Unjust Enrichment and De Facto Relationships" (1991), 6 Auckland U.L. Rev. 504). As Professor Ralph Scane (at p. 289) put it, the difficulty with looking for a causal connection in such cases is "that the unjust enrichment created by receipt the benefit of [domestic] services ... seeps throughout all of the assets of the defendant". Thus, the contributions which indirectly created accumulated family wealth for the parties cannot be traced to any one property. However, I do not think that the required link between the deprivation suffered and the property in question is as difficult to establish as it may seem.

101 This Court has specifically recognized that indirect financial contributions to the maintenance of property will be sufficient to establish the requisite property connection for the imposition of a constructive trust. In *Pettkus v. Becker*, supra, the fact that Ms. Becker paid the rent, purchased the food and clothing and looked after other living expenses, enabled Mr. Pettkus to save his entire income, a goodly amount of money which he later used to purchase property. Even though Ms. Becker's financial contributions did not directly finance the purchase of the property, it was held that her indirect financial contribution was sufficient to entitle her to a proprietary interest in the property purchased by Mr. Pettkus upon the dissolution of the relationship.

102 It seems to me that in a family relationship the work, services and contributions provided by one of the parties need not be clearly and directly linked to a specific property. As long as there was no compensation paid for the work and services provided by one party to the family relationship then it can be inferred that their provision permitted the other party to acquire lands or to improve them. In this case the work of the appellant permitted the respondent to pay off the mortgage and, as well, to purchase a houseboat and a cabin cruiser. In the circumstances, the trial judge was justified in applying the constructive trust to the property which he felt would best redress the unjust enrichment and would treat both parties in a just and equitable manner.

103 Goff and Jones support the imposition of a constructive trust in family situations where the plaintiff's contributions cannot be traced to a particular property (*The Law of Restitution* (3rd ed., 1984)). They rely on the case of *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105, where the plaintiff paid under a mistake of fact over \$2 million to the defendants, who discovered the mistake within two days, did nothing to correct it and went into liquidation some four weeks later. Goulding J. held that the defendant was a constructive trustee of the money paid under mistake. But he left open the question whether equity's traditional tracing rules should be applied in order to identify the plaintiff's payment. Goff and Jones maintain that if the tracing rules were applied then it is extremely unlikely that the plaintiff's claim would succeed. Yet, as they point out, it would seem unjust to allow the defendant's general creditors to benefit from the mistaken payment when the defendant knew of the mistake and did nothing to correct it. Therefore, the authors argue on p. 80 of their book that:

To protect a plaintiff the court will have to impose a trust on, or a lien over, the defendant's unencumbered assets for the plaintiff's benefit even if those assets cannot be "identified" through the application of traditional equitable tracing rules. If a court reaches this conclusion it will do so because it recognises that a trust or lien should be imposed simply because the defendant's assets were swollen by the mistaken payment.

104 In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, it was determined that the constructive trust is not reserved to situations where a right of property is recognized. As a remedy, the constructive trust may be used to *create* a right of property and this obviates the need to find a pre-existing property right by means of equitable tracing rules. However, La Forest J. indicated that a restitutionary proprietary remedy should not automatically be granted. He found that, since proprietary rights give the plaintiff priority over the legitimate claims of third party creditors, further guidance was needed for determining those situations in which it would be appropriate to award a proprietary remedy. Thus, La Forest J. concluded that the constructive trust should only be awarded when the personal monetary award is insufficient; that is, when there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.

105 I agree with my colleague that there is a need to limit the use of the constructive trust remedy in a commercial context. Yet I do not think the same proposition should be rigorously applied in a family relationship. In a marital or quasi-marital relationship, the expectations the parties will have regarding their contributions and interest in the assets acquired are, I expect, very different from the expectation of the parties engaged in a commercial transaction. As I have said, it is unlikely that couples will ever turn their minds to the issue of their expectations about their legal entitlements at the outset of their marriage or common law relationship. If they were specifically asked about their expectations, I would think that most couples would probably state that they did not expect to be compensated for their contribution. Rather, they would say, if the relationship were ever to be dissolved, then they would expect that both parties would share in

the assets or wealth that they had helped to create. Thus, rather than expecting to receive a fee for their services based on their market value, they would expect to receive, on a dissolution of their relationship, a fair share of the property or wealth which their contributions had helped the parties to acquire, improve, or to maintain. The remedy provided by the constructive trust seems to best accord with the reasonable expectations of the parties in a marriage or quasi-marital relationship. Nevertheless, in situations where the rights of bona fide third parties would be affected as a result of granting the constructive trust remedy it may well be inappropriate to do so. (See: Berend Hovius and Timothy G. Youdan, *The Law of Family Property*, at p. 146.)

106 It follows that in a quasi-marital relationship in those situations where the rights of third parties are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. Ordinarily both partners will have an interest in the property acquired, improved or maintained during the course of the relationship. The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. It too should be based on common sense and a desire to achieve a fair result for both parties.

107 There will of course be situations where an award for a monetary sum may be the most appropriate remedy. For example where the relationship is of short duration or where there are no assets surviving its dissolution, a monetary award should be made. Professors Berend Hovius and Timothy G. Youdan (*Law of Family Property*, at p. 147) provide the following list of factors which I think are helpful in determining that a monetary distribution may be more appropriate than a constructive trust:

108 (a) is the "plaintiff's entitlement ... relatively small compared to the value of the whole property in question";

109 (b) is the "defendant ... able to satisfy the plaintiff's claim without a sale of the property" in question;

110 (c) does "the plaintiff [have any] special attachment to the property in question";

111 (d) what "hardship might be caused to the defendant if the plaintiff obtained the rights flowing from [the award] of an interest in the property."

112 In this case the appellant contributed to the maintenance and the preservation of the home. She painted the fence, planted the cedar hedge, installed the rock garden and built the chicken coop. Nevertheless, her principal contribution was made through the provision of domestic services. Her work around the house and in caring for the children saved the respondent the expense of hiring a housekeeper and someone to care for the children. As a result he was able to use the money which he had saved to purchase other property and to pay off the mortgage on the Sicamous property.

113 The trial judge found, that since the respondent was now retired and living on a War Veteran's Allowance, a monetary award would be "impracticable, probably unrealistic and would not be reasonable under the circumstances" and imposed a constructive trust upon the Sicamous property. I think he was correct in doing so. It could reasonably be inferred that given the work she had done, the appellant would expect to receive a share in the Sicamous property when the relationship ended. Further, although there was no specific evidence that the appellant had formed an emotional attachment to the property, it would not have been unreasonable for the trial judge to have inferred this in light of the work which she had done on the property. In addition, the property was vacant at the time of the trial and the respondent was retired and living on his veteran's pension in another community. Clearly, he has no particular attachment to the property. A monetary award would be meaningless. Therefore, it was both reasonable and appropriate to choose the Sicamous property as the object of the constructive trust. In the circumstances of this case, the application of the constructive trust remedy was eminently suitable.

Was the Amount of the Appellant's Interest Reasonably Determined?

114 There are, generally speaking, two methods of evaluating the contribution of a party in a matrimonial relationship. The first method is based upon the value received. This can be thought of as quantum meruit, that is the amount the

defendant would have had to pay for the services on a purely business basis to any other person doing the work that was provided by the claimant. Alternatively, it can be based upon what is termed "value surviving" which apportions the assets accumulated by the couple on the basis of the contributions made by each. Value surviving is the approach that has been traditionally employed in cases of constructive trust. However, there is no reason why quantum meruit or the value received approach could not be utilized to quantify the value of the constructive trust. The remedy should be flexible so that it can be readily adapted to the situation presented in any given case. In many cases the cost of retaining and presenting expert evidence as to the value of the property may be beyond the reach of the parties and at times clearly impractical. This in itself indicates the need for maintaining flexibility in the remedy.

115 Here, the trial judge undertook the same type of quantum meruit analysis employed in *Herman v. Smith* (1984), 42 R.F.L. (2d) 152 (Alta. Q.B.). That is, he calculated the appellant's contributions on the basis of what the respondent would have been required to pay a housekeeper. It has to be noted that his calculations were favourable to the respondent in that he used the amount paid prior to the commencement of the common law relationship as a basis for the calculation and then reduced it by 50 percent to allow for the value of the accommodation that the appellant received from the respondent. This was a fair means of calculating the amount due to the appellant.

116 Nonetheless, I would observe that the value surviving approach will often be the preferable method of determining the quantum of a claimant's share. This method will usually be more equitable and will more closely accord with the expectation of the parties as to how the assets which they have accumulated should be divided upon termination of the relationship. Further, the utilization of the value surviving method will avoid the difficult task of assigning a precise dollar value to the services provided by someone who has dedicated him- or herself to raising children and caring for a home. Instead, the contributions of the parties can more accurately be expressed as a percentage of the accumulated wealth existing at the termination of the relationship. Thus, for pragmatic reasons, the value surviving method may be the preferable one in many cases. No matter which method is used, equity and fairness should guide the court in determining the value and contributions made by the parties. In this case awarding the Sicamous property to the appellant reflected a fair assessment of her contribution to the relationship.

Disposition

117 In the result, I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The appellant should have her costs throughout these proceedings.

Appeal allowed.

Tab 16

2011 ONSC 4704

Ontario Superior Court of Justice (Divisional Court)

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.

2011 CarswellOnt 8054, 2011 ONSC 4704, 205 A.C.W.S. (3d) 678, 282 O.A.C. 345, 81 C.B.R. (5th) 265

General Electric Canada Real Estate Financing Holding Company and General Electric Canada Holdings Company (Applicants) and Liberty Assisted Living Inc., 729285 Ontario Limited, Amir Kassam, Rahim Bhaloo and Meyers Norris Penny Limited in its Capacity as Receiver and Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc. (Respondents)

S.N. Lederman J.

Heard: August 4, 2011

Judgment: August 10, 2011 *

Docket: Toronto 348/11

Proceedings: refusing leave to appeal *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867 (Ont. S.C.J. [Commercial List])

Counsel: Timothy Pinos for Moving Party, 729285 Ontario Limited

Clifton Prophet, Nicholas Kluge for Respondents, Meyers Norris Penny Limited in its capacity as Trustee in Bankruptcy of the Estates of 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc.

Lou Brzezinski, Grace J. Kim for Applicants

S. Mitra, D. Reiter for Receiver, Albert Gelman Inc.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency

IV Receivers

IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Investigative receiver — 729 Ltd. was majority shareholder of holding company — Holding company controlled bankrupt companies that operated number of retirement residences — Trustee in bankruptcy learned of transfer of funds that took place between interconnected entities, including 729 Ltd., during time bankrupt companies were insolvent — Trustee brought motion for order appointing investigative receiver — Judge appointed investigative receiver over 729 Ltd. pursuant to s. 101 of Courts of Justice Act — 729 Ltd. brought motion for leave to appeal from order appointing investigative receiver — Motion dismissed — Neither test for leave to appeal under R. 62.02(4)(a) nor (4)(b) of Rules of Civil Procedure was met — Judge was alive to correct test in appointing investigative receiver and his decision did not conflict in principle with other cases — There was no good reason to doubt exercise of judge's discretion under s. 101, having regard to the factual context in which decision was made and strong interconnection between 729 Ltd. and bankrupt companies and his finding that monies flowed around this group of companies on regular basis — Appointment of investigative receiver in circumstances was just and convenient to assist trustee in fulfilling his mandate to ascertain true state of affairs — Factors upon which judge based his decision were fact specific and did not give rise to issues of general public importance to administration of justice.

MOTION by 729 Ltd. for leave to appeal from judgment reported at *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867 (Ont. S.C.J. [Commercial List]) appointing investigative receiver over 729 Ltd.

S.N. Lederman J.:

1 The Moving Party, 729285 Ontario Limited ("729") seeks leave to appeal to the Divisional Court from the Order of Brown J. whereby he appointed an investigative receiver over 729, and seeks a stay of the Order if leave is granted.

2 Mr. Pinos, on behalf of 729, submitted that Brown J.'s decision is in conflict with the established case law with respect to the appointment of receiver (including an investigative receiver) in that it was incumbent upon the court to first find evidence of fraud, dissipation of assets or other improper activities that threaten the ability of a creditor to obtain recovery. In the instant case, 729 was not subject to any security agreement or contractual rights allowing for the appointment of a receiver. The sole claim here is in debt and there is no allegation of fraud or improper conduct. Mr. Pinos submits that although Brown J. cited the appropriate principles, he misapplied them and in effect provided an unlimited scope for the appointment of an investigative receiver where a party is dissatisfied with discovery or cross-examination answers. Accordingly, he submits that there is good reason to doubt the correctness of the decision.

3 729 is a majority shareholder of a holding company that controls 2008777 Ontario Inc., 2004631 Ontario Inc., 912087 Ontario Limited and 2007383 Ontario Inc., (the "bankrupt respondents") that operated a number of retirement residences.

4 The GE Group of Companies are secured lenders of the bankrupt respondents and are owed approximately \$20 million.

5 The trustee in bankruptcy of the bankrupt respondents obtained certain financial information in a piecemeal way and learned of the transfer of funds that took place between the interconnected entities, including 729, during a time that the bankrupt respondents were insolvent.

6 Brown J. looked at all the circumstances surrounding these transactions and the less than candid disclosure by the respondents about these matters and concluded that:

- a) the respondents were not completely forthcoming to the trustee about these transactions;
- b) there were serious concerns about the flows of money between the bankrupt respondents and 729 and the use that 729 made of those funds; and
- c) there were misrepresentations made to the trustee and the court about the true state of the Royalton proceeds held in the law firm's trust account and there were serious questions whether 729's investment in the Royalton Residences was by way of debt or equity.

7 Brown J. considered the principles applicable to the appointment of a receiver under s. 101 of the *Courts of Justice Act*, as recently summarized in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.). He applied a comparable *RJR-MacDonald* test for interlocutory injunctions and determined that in all the circumstances it was just inconvenient to appoint a limited investigative receiver over 729. Of importance in this case was that the mandate of the trustee was thwarted and made ineffective by the conduct of the respondents.

8 In his Order it is clear that the receiver is to have limited powers and is not to operate the business or take possession of the assets of 729; that 729 is to remain in possession of its current and future assets and is to continue to carry on business in a manner consistent with the preservation of its business and property.

9 The receivership is to last for a period of 120 days and the receiver is to provide the court with a comprehensive report on the business and affairs of 729.

10 Appointment of an investigative receiver over a company has taken place in circumstances where the company is intricately involved with companies already in receivership, and it is necessary to review and ascertain the transactions that have taken place within the network of companies: *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, [2009] O.J. No. 4285 (Ont. S.C.J. [Commercial List]).

11 Moreover, the Divisional Court has pointed out that the remedy of an investigative receiver is not as intrusive or drastic as a receiver who is put in possession of assets: *Stroh v. Millers Cove Resources Inc.* (1995), 85 O.A.C. 26 (Ont. Div. Ct.).

12 729 serves as a conduit for investments. It does not carry on an active business enterprise and, as stated in *Stroh*, *supra*, paragraph 7:

In the first place, the company is not an operating company and the impact of the receivership will not be the same as it would be if it was engaged in active business. In the second place, the main thrust of the order is to make sure, as far as it will be possible to do so, that the assets of the company and the various arrangements can be fully examined and considered so that future actions can be then planned.

13 Brown J. held that the circumstances stated above justified that appointment of an independent third party:

- a) to look into the transactions that took place between the bankrupt companies and 729;
- b) to determine the true state of 729's interest in the Royaltan proceeds, i.e. whether they were held in trust for others, or whether 729 had a beneficial interest in them; and
- c) to determine who actually received the Royaltan proceeds.

14 Brown J. was alive to the correct test in appointing an investigative receiver and his decision does not conflict in principle with other cases.

15 I have no good reason to doubt the exercise of Brown J.'s discretion under s. 101 of the *Courts of Justice Act*, having regard to the factual context in which his decision was made and particularly the strong interconnection between 729 and the bankrupt companies and his finding that monies flowed around this group of companies on a regular basis. The appointment of an investigative receiver in these circumstances was just and convenient to assist the trustee in fulfilling his mandate to ascertain the true state of affairs.

16 Moreover, the factors upon which Brown J. based his decision are fact specific and do not give rise to issues of general public importance to the administration of justice which transcend the immediate interests of the parties involved.

17 In the end, neither the test for leave to appeal under rule 62.02(4)(a), nor (4)(b) has been met.

18 The motion is, therefore, dismissed. There is no need to consider the motion for a stay.

19 I trust that the parties will come to an agreement with respect to the costs of these motions, failing which they may make written submissions within 30 days.

Motion dismissed.

Footnotes

- * Additional reasons at *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.* (2011), 2011 CarswellOnt 10661, 2011 ONSC 5699 (Ont. Div. Ct.).

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Tab 17

1995 CarswellOnt 275

Ontario Court of Justice (General Division) [Divisional Court]

Stroh v. Millers Cove Resources Inc.

1995 CarswellOnt 275, [1995] O.J. No. 1949, 56 A.C.W.S. (3d) 289, 85 O.A.C. 26

In the Matter of Millers Cove Resources Inc., American Iron Carbide Corporation, and American Iron Carbide International, Ltd.

In the Matter of Parts XVI and XVII of the Business Corporations Act, R.S.O. 1990, c.B-16

In the Matter of Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C-43

Peter W. Stroh, Applicant/(Respondent) v. Millers Cove Resources Inc., American Iron Carbide Corporation, American Iron Carbide International, Ltd., Royal Land and Company, Drew N. Barry and Keady Ltd., Royal Land Company, Frederick Keady, Drew N. Barry and the the Office of the Public Trustee, Ontario and Keady and Company, Ltd., Respondents/(Appellants)

Saunders, Moldaver, Winkler JJ.

Judgment: June 28, 1995

Docket: Doc. B159/94, 258/95

Counsel: *Eric Fournie*, for the Respondents (Appellants) Millers Cove Resources Inc. and American Iron Carbide Corporation.

Joy Casey, for the Respondents (Appellants) American Iron Carbide International Ltd., Royal Land Company, Drew N. Barry and Keady and Company, Ltd.

Scott Hazzard, for the moving parties requesting status as interveners, John Vroom, Carole Dainard and John Kemp.

William J. Burden and *John Sandrelli*, for the Applicant (Respondent).

Carole McAfee Wallace, for Finamax Coal Co. (Respondent).

F. D. Keady in person.

Subject: Corporate and Commercial

Related Abridgment Classifications

Business associations

III Specific matters of corporate organization

III.3 Shareholders

III.3.e Shareholders' remedies

III.3.e.ii Relief from oppression

III.3.e.ii.D Orders for relief

III.3.e.ii.D.1 Order appointing receiver

Headnote

Corporations --- Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Order appointing receiver

Appeal of oppression remedy order — Harshness of remedy — Business Corporations Act, R.S.O. 1990, c. B-16, s. 248. Minority shareholder applied for an oppression remedy under the Act. The trial Judge found that there was oppression in the conduct of respondents and appointed a receiver for respondent company. He remarked that the only way an investigation could have been successful was for the officer to have control of company's assets. Company was not an operating company. Respondents appealed under s. 248 of the Act, arguing that the remedy was drastic. Held, the appeal was dismissed. There had been no error in principle or any injustice to any party. The trial Judge had ample evidence

on which to base his conclusion and he was not wrong to appoint a receiver. The remedy was not drastic, particularly since the impact of the receivership was not the same as it would have been if company had been engaged in active business. Furthermore, the main thrust of the Order was to ensure that company's assets and various arrangements were available to be fully examined and considered. Considering respondents' submissions on the present matter, that was not something that they should have feared.

Endorsement

Per Curiam:

1 The appeals are dismissed. Costs of respondent Stroh payable forthwith by appellants fixed at \$5,000. The respondent Finamax Coal Co. does not ask for costs.

Reasons

2 At the outset, we would like to express our appreciation to counsel and to Mr. Keady. In the limited time scheduled to hear the matter, which was both complex and contentious, they focused on the issues thus making it easier for us to determine how we should deal this appeal.

3 This is an appeal under s.248 of the *Business Corporations Act*, R.S.O. 1990, C.B.16. The principles that govern a court hearing such an appeal are well recognized and are set out in the case of *Re Mason and Intercity Properties Limited*, (1987), 59 O.R. (2d) 631, as follows:

The governing principle is that such a discretion must be exercised judicially and that an appellate court is only entitled to interfere where it has been established that the lower court has erred in principle or its decision is otherwise unjust.

4 The Court of Appeal has recently had the opportunity to review this legislation and the appeal from an oppression remedy order in the unreported case of *Nanef v. Concrete Holdings Ltd. et al.*, released May 18, 1995. In addition to the principle already enunciated, the court in *Nanef* also made clear that the remedy ordered should be directed to the rectification of the oppression and should not go beyond that.

5 In the case before us, Farley J. found that there was oppression in the conduct of Mr. Keady and his colleagues. His conclusion was that their actions were "overwhelming in the sense of requiring the court to do something to protect the interests of minority shareholders". In making that finding, he had ample evidence on which to base such a conclusion. We are not persuaded that we should interfere with his finding that there was an oppressive situation.

6 Farley J. then had a duty to fashion a remedy. In the circumstances, he felt that it should be a neutral remedy. In that connection, he took into account the contentious issues between Mr. Keady and Mr. Stroh and the conduct of Mr. Stroh. Although the remedy had to be neutral, Farley J. ordered the appointment of a receiver. He said, "It is clear that the only way that an investigation stands any chance of being successful would be for the officer to have control over the assets."

7 On the basis of our review of the evidence and the submissions made by counsel, we are not persuaded that he was wrong to appoint a receiver. We can find no error in principle or any injustice to a party. We do not consider the remedy to be as drastic as suggested by counsel for the appellants in the circumstances of this case. **In the first place, the company is not an operating company and the impact of the receivership will not be the same as it would be if it was engaged in active business.** In the second place, the main thrust of the order is to make sure, as far as it will be possible to do so, that the assets of the company and the various arrangements can be fully examined and considered so that future actions can be then planned. This should not, in our view, be any matter that Mr. Keady or his colleagues should fear based on the submissions that they made to us in this hearing.

8 Prior to the hearing of the main appeal, there was a motion on behalf of certain shareholders to intervene in the proceedings. We dismissed that motion without giving reasons at that time. Those shareholders had an ample

opportunity to enter the proceedings but chose not to do so until the very eve of the appeal. Because of the nature of the appeal and the limited scope of it, it is inappropriate, except in very special circumstances, to entertain new evidence. There were no special circumstances existing in this case. The order of Farley J. contains a "comeback" clause which protects the interests of the moving parties in the process. The process is very much an ongoing one. The more appropriate course of action for these shareholders would be to pursue that avenue if they are so advised.

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Tab 18

1988 CarswellOnt 180
Ontario Supreme Court, Toronto Weekly Court

Fisher Investments Ltd. v. Nusbaum

1988 CarswellOnt 180, [1988] O.J. No. 1859, 12 A.C.W.S. (3d) 253, 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185

FISHER INVESTMENTS LTD. et al. v. NUSBAUM et al.

Chadwick J.

Heard: November 15, 1988
Judgment: November 24, 1988
Docket: Toronto No. RE 2293/88

Counsel: *H. Maltz*, for applicants.
S.L. Goldenberg, for respondents.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Debtors and creditors

[VII Receivers](#)

[VII.3 Appointment](#)

[VII.3.b Application for appointment](#)

[VII.3.b.iii Grounds](#)

[VII.3.b.iii.A Just and convenient](#)

Headnote

Receivers --- Appointment — Application for appointment — Grounds

Interim receivers — Appointment — Application to appoint interim receiver and manager of nursing home corporation — Applicants and respondents each owning 50 per cent of corporation — Application for winding-up pending — Court to go further than just applying "just and convenient" test — Effect on parties to be considered — Application dismissed. The applicants sought an order appointing an interim receiver and manager of the assets, property and undertakings of a corporation operating a nursing home. The applicants and the respondents each owned 50 per cent of the enterprise and an application for the winding-up of the corporation was pending and would be heard in about six weeks. The corporation had essentially been owned by the individual respondent N. and his partner, F., and N. had run it. After F.'s death, F.'s children and N. could not co-operate.

Held:

Application dismissed.

The court must go further than just applying the "just and convenient test", and look at the situation in a broader context by examining the effect that the appointment will have upon the parties. There was no evidence of any wrongdoing, nor was there any evidence to suggest that the assets would be dissipated if the respondents continued to manage the business pending the winding-up application. N. had devoted the latter part of his life to establishing, developing and promoting the nursing home operation. An order appointing an interim receiver for a six-week period might have a devastating effect upon N. and the nursing home business itself. By dismissing the application and leaving N. to operate the nursing home, the interests of the parties or the assets of the company would not be jeopardized.

Application for order appointing interim receiver and manager.

Chadwick J.:

1 The applicants seek an order appointing an interim receiver and manager of the assets, property and undertakings of Christie Park Nursing Homes Limited, 180 Sherbourne Ltd., and Hensol Investments Limited, pursuant to s. 114 of the Courts of Justice Act and s. 247 of the Ontario Business Corporations Act.

2 The applicants' corporations own 50 per cent of the common shares of these enterprises and the respondent Nusbaum Investments Ltd. holds the other 50 per cent interest.

3 David Fisher died on 2nd September 1988 and up until that time he had been a partner with the respondent Solomon Nusbaum for many years. The two gentlemen had started out in the painting business and were successful in acquiring properties and expanding their interests until each owned 50 per cent of the three subject respondent companies. The main concern relates to Christie Park Nursing Homes Limited, which operates a nursing home in the city of Toronto and which has been effectively managed and run by Solomon Nusbaum. Mr. Nusbaum is a gentleman of 78 years of age and, based upon all the affidavit material filed on this motion, it is apparent that the relationship between Mr. Nusbaum and David Fisher's children is not an amicable one. The material sets forth numerous mismanagement allegations relating to documents and accounting procedures, failure to consult with the Fishers in decision-making, and that Mr. Nusbaum has treated the Christie Park Nursing Home as a business of which he is sole owner. The books and records have been microscopically examined by the applicants to find a hint of any irregularity which may support them in their motion for the appointment of an interim receiver and the winding-up of the company. It is apparent from the affidavit material filed that the two families cannot continue to operate the business, in view of the lack of trust and goodwill which exists between them at the present time. It would certainly appear that a reasonable solution to the problem would be for one party to buy the other party out under a buy-sell agreement or that the parties agree that the business is to be sold and the assets divided, after proper accounting.

4 The motion before me was for the appointment of Touche Ross as an interim receiver until the hearing of the winding-up application. In order to deal with that issue, I of course have been subjected to all of the material relating to the winding-up. The applicants, however, wish to adjourn the hearing of the winding-up application in order that they can conduct cross-examinations, and they anticipate that it would take approximately six weeks before that matter can be brought back on for hearing.

5 I have some concerns about the appointment of an interim receiver to take over the operation of this nursing home for a six-week period. I have no reservation about the business, management and accounting capabilities of the proposed interim receiver, but I do have reservations about their lack of experience with the day-to-day operation of this nursing home.

6 The applicant has urged me to appoint an interim receiver because of the manner in which Mr. Nusbaum has cut the Fishers out of management participation and for other reasons as alleged. There does not appear to be any evidence to suggest that the assets will be dissipated or that Mr. Nusbaum will not effectively carry on the management of the business during this interval. Mr. Nusbaum, in his supplementary material, has filed an up-to-date affidavit outlining what he has done with reference to accounting and management decisions, and from that material the business does not appear to be in any jeopardy. The applicant has urged me to apply the "just and convenient test" referred to in s. 114 of the Courts of Justice Act.

7 In my view one has to go further than just applying the "just and convenient test" and must look at the situation in a broader context, namely, examining the effect that it will have upon the parties. In this particular case, Mr. Nusbaum has devoted the latter part of his life in establishing, developing and promoting this nursing home operation. If I issue an order appointing an interim receiver for six weeks, it would have a devastating effect upon Mr. Nusbaum and the nursing home business itself. One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window of the business that the proprietors are not capable of managing their own affairs. If the business has to be sold, which is probable, the appointment could have a detrimental effect upon the price received.

8 The grounds for granting extraordinary relief were considered by the Supreme Court of Canada in *Aetna Fin. Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, 55 C.B.R. (N.S.) 1, [1985] 2 W.W.R. 97, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241, where Estey J. stated at p. 166:

A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in *Lister & Co. v. Stubbs*, [1886-90] All E.R. Rep. 797 at p. 799, as follows:

I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.

Likewise, in this case the appointment of an interim receiver is a very strong extraordinary relief prejudging the conduct of the defendant Mr. Nusbaum. I am not satisfied on the evidence before me that the interests of the parties or the assets of the company will be jeopardized in any way by leaving Mr. Nusbaum in the position of operating the nursing home. On the contrary, I would be more concerned with an inexperienced manager stepping in for such a short period of time, and the effect this would have.

9 Therefore, under the circumstances the application is dismissed with costs.

Application dismissed.

Tab 19

2009 CarswellOnt 1128
Ontario Superior Court of Justice

1468121 Ontario Ltd. v. 663789 Ontario Ltd.

2009 CarswellOnt 1128, [2009] O.J. No. 876, 175 A.C.W.S. (3d) 98

**1468121 Ontario Limited (Plaintiff) and 663789 Ontario Ltd.,
Roderick W. Johansen and Carrel and Partners LLP (Defendants)**

G.P. Smith J.

Heard: February 5, 2009
Judgment: March 2, 2009
Docket: Thunder Bay CV-08-0287

Proceedings: refusing leave to appeal *1468121 Ontario Ltd. v. 663789 Ontario Ltd.* (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.)

Counsel: Chantal Brochu for Plaintiff / Responding Party
Robin Clinker for Defendants / Moving Party

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Civil practice and procedure

[XXIII Practice on appeal](#)

[XXIII.10 Leave to appeal](#)

[XXIII.10.b Application](#)

[XXIII.10.b.vi Miscellaneous](#)

Headnote

Civil practice and procedure --- Practice on appeal — Leave to appeal — Application — Miscellaneous

In 2003, C Inc., company related to corporate defendant 663 Ltd. agreed to sell its trucking business to plaintiff corporation 146 Ltd. — Asset purchase agreement provided that 146 Ltd. would lease lands and premises upon which 663 Ltd.'s business was situated plus chattels for \$3,000 per month with option to purchase property for \$300,000 — Agreement also provided that 146 Ltd. would purchase inventory and good will of 663 Ltd. at purchase price payable at rate of \$3,000 per month with balance due in full on October 1, 2008 ("inventory loan") — 146 Ltd. executed promissory note in relation to inventory loan in amount of \$275,000 — Parties also signed general security agreement in favour of C Inc. — 146 Ltd. began to operate business but needed an injection of funds to continue to do so — C Inc. advanced \$380,000 ("operating loan") secured by second promissory note payable at rate of \$5,000 per month with balance due in full on November 15, 2009 — In June 2005 parties executed formal option to purchase ("option agreement") with respect to property mirroring terms of asset purchase agreement, and closing date for deal was set for September 2008 — On January 14, 2008, fire occurred on property and 146 Ltd. elected to take insurance proceeds from fire and close sale and, without agreement or concurrence of 663 Ltd., advanced closing date to June 2008 — On October 1, 2008 outstanding balance of inventory loan became due and payable — When sale did not close, 146 Ltd. brought action for specific performance against 663 Ltd. who counterclaimed for balance owing on inventory and operating loans — Based on information that 146 Ltd. was insolvent and disposing of its assets, 663 Ltd. brought motion for summary judgment for balance owing on inventory loan and for appointment of receiver — Motions judge dismissed motion — 663 Ltd. brought application seeking leave to appeal decision — Application dismissed — Issues in dispute were of importance to parties but did not concern matters of broader importance as they were fact specific — Decision to dismiss motion for summary judgment was not precedent setting lacking sufficient importance to justify leave to appeal — Decision would

not set precedent encouraging others to avoid summary judgment on loan or security agreement by raising collateral issues — As for correctness of decision dismissing motion to appoint receiver, relief sought was equitable remedy and conduct of parties was relevant — No reasons to disagree with motions judge's findings of fact or with exercise of his discretion or to conclude that there was good reason to doubt correctness of decision or that it was open to serious debate.

APPLICATION by corporate defendant for leave to appeal judgment reported at *1468121 Ontario Ltd. v. 663789 Ontario Ltd.* (2008), 2008 CarswellOnt 7601 (Ont. S.C.J.), dismissing its motion for summary judgment.

G.P. Smith J.:

Overview

1 This is a motion for leave to appeal the decision of McCartney J. dismissing the Defendant Corporation's motion for summary judgment.

Factual Background

2 On or about October 2003, Cherry Express Inc., a corporation related to the corporate Defendant, 663789 Ontario Ltd., agreed to sell its trucking business to the Plaintiff corporation, 1468121 Ontario Limited, commonly referred to as Poni Express. Several agreements were entered into between the parties as part of this transaction.

3 The asset purchase agreement provided that the Plaintiff would lease the lands and premises upon which the Defendant's business was situated plus various chattels for the sum of \$3,000.00 per month with an option to purchase the property for \$300,000.00.

4 A credit against the purchase price was agreed to equal to 50 per cent of the lease payments made by the Plaintiff under the lease.

5 The asset purchase agreement also provided that the Plaintiff would purchase the inventory and good will of the Defendant at a purchase price of \$300,000.00 payable at the rate of \$3,000.00 per month with the balance due in full on October 1, 2008, (the "*Inventory Loan*"). The Plaintiff executed a promissory note in relation to the inventory loan in the amount of \$275,000.00.

6 The parties also signed a General Security Agreement in favour of Cherry Express as security for the payment of all existing and future indebtedness.

7 Poni Express began to operate the business but needed an injection of funds to continue to do so Cherry Express advanced the sum of \$380,000.00 (the "*Operating Loan*") secured by a second promissory note in the amount of \$323,453.98 payable at the rate of \$5,000.00 per month with the balance due in full on November 15, 2009.

8 In June 2005 the parties executed a formal Option to Purchase (the "*Option Agreement*") with respect to the property mirroring the terms of the Asset Purchase Agreement. A closing date for the deal was set for September 30, 2008.

9 On January 14, 2008, a fire occurred on the property and the Plaintiff elected to take the insurance proceeds from the fire and close the sale and, without the agreement or concurrence of the Defendant, advanced the closing date from September 30, 2008 to June 20, 2008.

10 On October 1, 2008 the outstanding balance of \$168,693.30 of the inventory loan became due and payable.

11 When the sale did not close the Plaintiff brought an action for specific performance against the Defendant. The Defendant counterclaimed for the balance owing on the inventory and operating loans.

12 On November 17, 2008, as a result of receiving information that the Plaintiff was insolvent and disposing of assets from the trucking business, the Defendant brought a motion for, *inter alia*, summary judgment for the balance owing of

\$168,693.30 on the inventory loan and for the appointment of a receiver pursuant to the terms of the General Security Agreement.

13 On November 28, 2009, McCartney J. dismissed the Defendant's motion. The Defendant now seeks leave to appeal this decision to the Divisional Court.

The Test for Leave to Appeal

14 Rule 62.02(4)(b) provides:

Leave to appeal shall not be granted unless,

.....

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

15 The test set out in the rule is conjunctive requiring an applicant to demonstrate good reason to doubt the correctness of the decision and that the matters are of such importance that leave to appeal should be granted.

16 There are four discreet issues before the court:

1. is there reason to doubt the correctness of Justice McCartney's decision to dismiss the motion for summary judgment?

2. does the appeal in relation to the decision to dismiss the summary judgment motion raise issues of general importance?

3. is there reason to doubt the correctness of the decision to dismiss the motion for the appointment of an interim receiver?

4. does the appeal in relation to the decision to dismiss the appointment of an interim receiver raise issues of general importance?

17 My reasons will begin by addressing the second prong of the test for leave to appeal with respect to issues 2 and 4.

The Decision to Dismiss the Motion for Summary Judgment — The Issue of General Importance

18 Rule 20.04(2)(a) provides that a court will grant summary judgment if it is satisfied that there is no genuine issue for trial with the onus on the moving party to meet this test.¹

19 The Plaintiff, Poni Express, acknowledged the terms of the inventory loan, the amount owing, that the balance was due in full on October 1, 2008 and had not been paid yet defended the motion on the basis that the inventory loan was part of a larger transaction, that the failure of the Defendant, Cherry Express, to complete the transaction prevented it from meeting its financial obligations that both claims were inextricably linked and should be heard together.

20 McCartney J. agreed with the position of Poni Express and dismissed the motion finding that Cherry Express had not established that there was no genuine issue for trial.

21 The argument presented by Cherry Express is that the importance of the matter justifying leave to appeal concerns the principle that parties will be able to avoid summary judgment by "mudding the waters and attempting to tie all outstanding issues together even though the resolution of these issues will not change the result"² which will increase the trial time and costs of the litigation and thwart the purpose of summary judgment procedure.

22 The words "general importance" contained in Rule 62.04(2) refer to matters of general or public importance or to issues relevant to the development of law and/or the administration of justice.³

23 Matters that are not precedent setting and which involve a contractual dispute specific to the parties in the litigation are not of sufficient importance such that leave to appeal should be granted.⁴

24 The issues in dispute in the case at bar are no doubt of importance to the parties but do not concern matters of broader importance in that they are fact specific. The decision to dismiss the motion for summary judgment is not precedent setting lacking sufficient importance to justify leave to appeal to the Divisional Court.

25 I do not agree that the decision of McCartney J. will set a precedent encouraging others to avoid summary judgment on a loan or security agreement by raising collateral issues.

The Decision to Dismiss the Motion to Appoint an Interim Receiver — The Issue of General Importance

26 In his decision to dismiss the motion to appoint an interim receiver McCartney J. held that it was not just and convenient to make an appointment in part, because Poni Express had paid its loans faithfully, had cut the balance of the debt in half, that the reason for the default was unclear and because there was no evidence of wrongdoing.

27 Section 101 of the *Courts of Justice Act* states that a receiver may be appointed where it is just and convenient to do so.⁵

28 In deciding whether to appoint a receiver the following general principles are relevant:

- The decision is discretionary
- The appointment of a receiver is an equitable remedy and, as such, the conduct of the parties may be relevant and where there is no evidence of wrongdoing or unfairness
- The appointment of a receiver is intrusive and should only be granted sparingly
- The decision to appoint a receiver may necessitate a court taking a broader view including an examination of the effect an appointment would have on the parties.⁶

29 Cherry Express argues that there is an important commercial aspect to the issue in that a court's failure to appoint a receiver when agreed to by the parties in a General Security Agreement or other form of contract will send a negative message to the lending community and lessen confidence in the ability to collect on loans in the event of insolvency.

30 I do not agree with this argument and reiterate my comments that this is a fact specific case with no general or public importance such to warrant leave to appeal to the Divisional Court.

The Correctness of the Decision

31 In view of the conjunctive nature of Rule 62.04(2)(b) and my decision on the issue of the "importance" of the issues, I will briefly discuss the issue of the "correctness" of the dismissal of the motion for summary judgment and for the appointment of an interim receiver.

32 It is well established that it is not necessary when deciding the issue of whether to grant leave to appeal for a judge to find that the decision is wrong or even probably wrong.

33 This aspect of the test will be satisfied if a judge is satisfied that the correctness of the decision is open to very serious debate.⁷

The Correctness of the Decision Not to Grant Summary Judgment

34 With regard to the motion for summary judgment, McCartney J. was cognizant of the proper legal test of whether the applicant had demonstrated that there was no genuine issue for trial.

35 The position of Cherry Express is that, although the inventory loan was part of the overall transaction, the motion for summary judgment should have been granted because it was a separate loan to Poni Express and the issues raised by Poni Express provided no defence especially since there had been an admission that there had been a default on the loan.

36 Cherry Express submits that the dismissal of the motion for summary judgment is wrong or at least open to serious doubt because, contrary to the decision of McCartney J., the collateral issues raised by Poni Express had no legal connection to its obligations under the inventory loan and the right of Cherry Express to collect the balance owing on default.

37 In his decision, McCartney J. reviewed all of the evidence including the submissions of counsel and concluded that the issues raised by Poni Express were inextricably linked to the issue of the default on the inventory loan making it unreasonable to piece off the litigation and thereby creating a genuine issue for trial.

38 While I may have come to a different conclusion, I cannot say that the applicant has established that there is good reason to doubt the correctness of the decision or that it is open to very serious debate.

The Correctness of the Decision not to Appoint a Receiver

39 With respect to the correctness of the decision dismissing the motion to appoint an interim receiver, the relief sought is an equitable remedy and the conduct of the parties is relevant.

40 McCartney J. reviewed the conduct of the parties in detail and exercised his discretion finding that it would not be just and convenient to appoint a receiver.

41 This issue was canvassed in *Royal Bank v. Chongsim Investments Ltd.*⁸ where, in declining to appoint a receiver under the terms of a debenture and general security agreement, the court took into account the conduct of the parties reasoning that it would not be just or equitable under the circumstances to do so.

42 Considerable deference is owed to the findings of fact and the exercise of the discretion of a motion court judge.⁹

43 In the case at bar, I am not in a position to disagree with the learned motion judge's findings of fact or with the exercise of his discretion nor to conclude that there is good reason to doubt the correctness of the decision or that it is open to serious debate.

Disposition

44 The motion for leave to appeal the decision of McCartney J. to the Divisional Court is dismissed.

45 The Respondent shall file written submissions on the issue of costs within 14 days. The Applicant shall have 14 days thereafter to respond. No further material may be filed without leave to the court.

Application dismissed.

Footnotes

1 *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33 (Ont. C.A.).

2 Factum of the Applicant, para. 39.

- 3 *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Ont. Div. Ct.); *SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)*, [2005] O.J. No. 4847 (Ont. Div. Ct.).
- 4 *Astellas Pharma Canada Inc. v. WellSpring Pharmaceutical Canada Corp.*, [2008] O.J. No. 4278 (Ont. S.C.J.).
- 5 *Courts of Justice Act*, R.S.O. 1990, c.C.43, s. 101.
- 6 *Royal Bank v. Chongsim Investments Ltd.*, 1997 CarswellOnt 988 (Ont. Gen. Div.); *Fisher Investments Ltd. v. Nusbaum*, 1988 CarswellOnt 180 (Ont. H.C.).
- 7 *King Line Investments Inc. v. 973976 Ontario Ltd.*, 2008 CarswellOnt 3904 (Ont. Div. Ct.); *Ash v. Corp. of Lloyd's* (1992), 8 O.R. (3d) 282 (Ont. Gen. Div.).
- 8 *Royal Bank v. Chongsim Investments Ltd.*, *supra*.
- 9 *Housen v. Nikolaisen*, [2002] S.C.J. No. 31 (S.C.C.).

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Tab 20

2009 QCCS 4109
Cour supérieure du Québec

Stanford International Bank Ltd., Re

2009 CarswellQue 9216, 2009 QCCS 4109, 65 C.B.R. (5th) 14, J.E. 2009-1792, EYB 2009-163769

In the matter of the receivership of : <CRLF/>Stanford International Bank limited et Stanford Trust Company limited, Débitrices, et Nigel John Hamilton-Smith et Peter Nicholas Wastell, Liquidateurs antiguais, et Ralph S. Janvey, Requérent, c. Stanford International Bank Limited, Stanford International Bank, Ltd., Stanford Trust Company Limited, Stanford Group Company, Stanford Capital Management, LLC, Stanford Financial Group, Stanford Financial Group Bldg, Inc., Bank of Antigua, Robert Allen Stanford, James M. Davis et Laura Pendergest-Holt, Intimés, et L'Autorité des marchés financiers, Intervenante

Auclair J.C.S.

Heard: 26 août 2009 - 28 août 2009

Judgment: 11 septembre 2009

Oral reasons: 11 septembre 2009

Written reasons: 14 septembre 2009

Docket: C.S. Qué. Montréal 500-11-036045-090

Counsel: *Me George R. Hendy, Me Martin Desrosiers, Me Nicholas Nadeau-Ouellette*, pour le requérant
Me Julie Himo, Me Philippe Giraldeau, pour les liquidateurs antiguais
Me Émilie Robert, pour l'intervenante

Subject: Insolvency; International

Related Abridgment Classifications

Bankruptcy and insolvency

[IV Receivers](#)

[IV.1 Appointment](#)

Bankruptcy and insolvency

[XVII Practice and procedure in courts](#)

[XVII.5 Orders](#)

[XVII.5.c Miscellaneous](#)

Auclair J.C.S.:

[OFFICIAL ENGLISH TRANSLATION]

1 By their motion dated April 22, 2009, the petitioners Nigel John Hamilton-Smith and Peter Wastell ("Vantis") seek:

1. By this Motion, Petitioners Nigel John Hamilton-Smith and Peter Wastell, licensed insolvency practitioners and partners at Vantis Business Recovery Services (the "**Liquidators**") are seeking the following reliefs:

a) a recognition of the Winding-Up Order pursuant to Sections 267 and *seq.* of Part XIII, *International Insolvencies*, of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**");

b) a recognition that their status as Liquidators of Stanford International Bank Limited (in liquidation) (the "**Bank**") in Antigua and Barbuda granted under the Winding-Up Order is similar to the status of a "foreign representative" of an estate in a "foreign proceeding" pursuant to section 267 and *seq.* of the BIA;

c) a recognition of their powers as Liquidators through the issuance of an order *inter alia*:

i. staying any present or future proceedings against the Bank or any of its property in Quebec, and generally in Canada, and authorizing the Liquidators to institute or continue any present legal proceedings initiated by the Bank in Quebec, and generally in Canada;

ii. ordering the turnover to the Liquidators of any property, assets and any documents, computer records, electronic records, programs, disks, books of account, corporate records, minutes, correspondence, opinions rendered to the Bank, documents of title, whether in an electronic media or otherwise held in the name of or traceable to the Bank; and

iii. availing the Liquidators of the facility to discover and trace any assets or property of the Bank that are located in Quebec and generally in Canada, (whether such assets or property are possessed in the name of the Bank or have in any way been misappropriated, fraudulently transferred and/or otherwise concealed from the Liquidators);

d) any further relief necessary to assist the Liquidators in the due carriage of their duties under the Winding-Up Order and under Sections 267 and *seq.* of the BIA;

2 The motion is opposed by the receiver appointed in the United States, Ralph S. Janvey, the American receiver ("Janvey").

3 Janvey first argues that the Antiguan petitioners Vantis do not come with clean hands and that therefore their proceeding is inadmissible.

4 The Court accepts the following from the chronology prepared by legal counsel for Janvey:

[TRANSLATION]

14. On February 16, 2009, the SEC obtained a receivership order from the U.S. District Court naming Ralph Janvey as receiver of the Stanford Group, which order was amended on March 12, 2009.

15. On the same date, the U.S. District Court issued a freeze order enjoining the members of the Stanford Group from committing any further violations of the U.S. *Securities Act* and from dealing in the assets of the Stanford Group Ltd.

16. On February 19, 2009, the FSRC issued an order naming Messrs. Wastell and Hamilton-Smith of Vantis as the joint receiver-managers of SIB and STC. A similar order was rendered by the High Court of Antigua on February 26, 2009.

17. On February 20, 2009, the Antiguan receivers retained the services of Stroz Friedberg Ltd., a U.K. registered company (the "**IT specialist**"), for the purpose of having it attend the offices of SIB in Montreal in order to review, collect and copy SIB's electronic records.

18. On February 23, 2009, the AMF commenced an investigation into the affairs of SIB.

19. On February 25, 2009, the AMF wrote to Vantis advising it of the commencement of the investigation into the affairs of SIB and requesting information regarding the status of the Montreal office and the records of SIB therein.

20. On February 26, 2009, Mr. Hamilton-Smith "Vantis" prepared a report regarding the progress of his work as co-receiver-manager of SIB and STC (**RSJ-53**).

The Receivers-Managers arranged for members of their team to attend the offices of SIB along with legal counsel from Ogilvy Renault on Monday 23rd February 2009 for the purposes of securing the records and IT equipment held at the office and to advise the staff that operations are to cease. The offices are now shut with access under the control of the Receivers-Managers and their lawyers."

22. On March 3, 2009, Vantis replied to the AMF's letter dated February 25, 2009 (**I-1**), by way of Matthew Peat's e-mail (**I-2**), advising that the employees at the Montreal office had been terminated on February 27, that SIB's landlord had "agreed that no action would be taken against the Company's property without notice to the Receivers", and that it had retained the services of CapCon Holdings "to provide data recovery services".

23. In an earlier e-mail on the same date from Nick O'Reilly (**I-2**), the AMF was advised by Vantis that "the office was closed last Monday. No client file was found on site and no one has dealt with the computers since the closure." (Garon's affidavit, para. 7; **I-2**).

24. On March 5, 2009, Vantis' IT specialist attended SIB's Montreal offices to carry out his mandate, which was completed by March 8 (Admissions, paras. 3 to 7).

25. On March 8, 2009, the IT specialist personally brought the imaged electronic data from SIB's Montreal office to the U.K. and eventually forwarded one of the copies of this imaged data to the Antiguan liquidators in Antigua.

26. On March 27, 2009, Dan Roffman, the IT specialist whose services were retained by Ralph Janvey, attended at the Montreal offices of SIB and saw that some servers appeared to be in the process of being deleted.

28. On March 30, 2009, representatives of the AMF held a telephone conversation with legal counsel for Vantis, during which conversation they were informed that one of their colleagues had attended at the offices of SIB on March 27 [TRANSLATION] "to do an inventory of the assets and was not aware of the request for information that the AMF had sent on February 25, 2009, to the Antiguan receiver" (Garon's affidavit, para. 11).

29. On March 30, 2009, the AMF also spoke to one of Janvey's attorneys, William Stutts, and was advised (based on Dan Roffman's above-described observations of March 27) that the Antiguan liquidators were erasing electronic information in the Montreal office of SIB (Garon's affidavit, para. 12).

30. On March 30, 2009, Janvey's counsel wrote to Ogilvy Renault regarding Mr. Roffman's visit to the Montreal offices on March 27, 2009, and requested that any information destroyed or otherwise erased by Vantis from the servers at the Montreal office be immediately restored to the relevant servers (Janvey's Motion to Revoke and to Rescind, para. 30; see Exhibit **R-9** attached to same).

31. On March 31, 2009, the AMF wrote to Vantis requesting a follow-up to Vantis' e-mail of March 3, 2009 (**I-2**), because the AMF had still not received the list of Canadian investors, and requesting information as to what had happened to the documents and electronic data of SIB (Garon's affidavit, para. 13; **I-3**).

32. On April 1, 2009, Ogilvy responded to Janvey's letter (**R-9**) by stating that: "The information on the Bank's servers located in its Montreal premises has been imaged onto hard disks and have been preserved to the standards required in the criminal investigation matter. This was done by our client to make sure that this data would be securely maintained and that no one entering the Bank's Montreal premises could in any way tamper with said data or take a copy thereof or take a copy thereof without any right" (Motion to Revoke and Rescind, para. 37; **R-10**).

33. On April 1, 2009, Baker Botts replied by e-mail to Mtre Himo's letter of April 1 (**R-10**) (Motion to Revoke and Rescind, para. 37; **R-12**) requesting that Mtre Himo confirm "that there was no erasure or deletion of data from the servers in the Montreal office...in other words, Vantis representatives have done nothing to remove data from those servers". A follow-up e-mail was sent by Baker Botts on the same date, requesting that Mtre Himo confirm whether "Vantis representatives have in fact removed data from the Montreal servers, please advise promptly where the data currently is - - including in what country - - and whose possession...Also, are the servers still in the Montreal office?"

34. On April 1, 2009, Peat of Vantis responded to the AMF's e-mail of March 31 (**I-3**) that he would refer the AMF's request to his colleague, Julian Greenup.

35. On April 1, 2009, a conference call was held between the representatives of the AMF and legal counsel for Vantis, who informed the AMF that they were not authorized to send the list of investors to the AMF, and that an order of the Court in Antigua would probably be necessary.

36. On April 2, 2009, legal counsel for Vantis responded tersely to Mr. Stutts' foregoing e-mail of April 1 (**R-12**): "I will get back to you as soon as possible".

37. On April 3, 2009, Hamilton-Smith of Vantis signed an affidavit in support of the motion for recognition of the decision of the FSRC (**P-1**) and the receivership order of the High Court of Justice of Antigua (**P-2**), which he presented on April 6 before the Registrar Flamand.

38. On April 6, 2009, the Antiguan receivers presented their motion for recognition as receiver-managers of SIB and STC, dated April 3, 2009, which motion was presented on an *ex parte* basis to the Registrar Chantal Flamand, without notice to the AMF or Ralph Janvey.

39. On April 15, 2009, legal counsel for Vantis wrote to Mr. Stutts responding to his e-mail of April 1, advising him for the first time that the servers, desktops, and laptops in SIB's Montreal office had been "wiped", that "there were no client records on the computers that were imaged and erased since the servers in Montreal were designed for recovery purposes and all tests had client data removed given the need to preserve client confidentiality and privacy" and that "the imaged drives are currently held in Antigua under the control of the Antiguan Receivers-Managers". (Motion to Revoke and Rescind, para. 38.)

40. On April 16, 2009, Janvey filed and served his Motion to Revoke and Rescind the decision and order of the Registrar Flamand.

41. On April 22, 2009, Vantis served and filed its Motion Seeking the Recognition of the Winding-Up Order of the High Court of Antigua dated April 17, 2009 (**P-7**).

42. After learning at the hearing of July 15, 2009 in this case that there were three servers in the Montreal office that ostensibly contained information relating to other members of the Stanford Group which were apparently not copied or deleted by Vantis' IT specialist (**Admissions - 5**), legal counsel for Janvey requested access to said servers in an exchange of correspondence between counsel for the parties on August 12, 14, and 18, 2009. Access to said servers was not secured until the August 25 hearing.

43. Until the hearings on August 25, 26, and 27, the Antiguan receivers refused to provide the AMF with the list of Canadian investors as well as any information regarding the documents and records of SIB which were taken from its Montreal office, despite the repeated requests of the AMF (Garon, para. 21).

44. The Antiguan liquidators also refused to give Janvey's representatives the imaged records of SIB.

(Emphasis added.)

The discretionary nature of the remedy or application of *fin de non-recevoir*

5 Part XIII of the BIA, *International Insolvencies*, allows a petitioner to qualify as a foreign representative by requesting the Court's authorization and thereby facilitating the coordination of proceedings in regard to insolvent persons.

6 The powers of the Court are extremely broad, as are the powers requested by the petitioners Vantis. Section 268(6) BIA specifies:

Nothing in this Part requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

7 In the case of *Immeubles Port Louis Ltée*,¹ a decision of the Supreme Court, Gonthier J. relied on the holding in *Homex* and found that a judge may also examine the behaviour of the parties and dismiss the action without even taking a decision on the merits. It is understood that the Court must exercise its power of review in a judicial manner and observe the applicable principles.

8 Thirteen years later, in *Société de la Place des Arts*,² Gonthier J. discussed the granting of an injunction and wrote:

13 ...The power of the Quebec Superior Court to grant injunctions rests on statutory footing. Yet it is a discretionary power of the sort exercised by common law jurisdictions in equity. In Quebec as elsewhere, it is an exceptional and discretionary form of relief. The court will not grant an injunction under arts. 751 *et seq.* simply because the applicant is strictly entitled to one. The applicant must also demonstrate that the circumstances warrant such a potentially intrusive remedy, and that he is deserving of it.

(References omitted.)

(Emphasis added.)

9 A party seeking to have the Court grant a discretionary measure must have acted in good faith and all of its actions must be beyond reproach in regard to the object of its motion.

10 Denis Lemieux, the author of *Le contrôle judiciaire de l'action gouvernementale*,³ writes:

[TRANSLATION]

A similar reasoning is used in regard to judicial review, notably in cases of interlocutory injunctions. This principle, often described as the clean hands doctrine, means that a petitioner who, by his conduct, was party to an illegal act, either by acquiescing to it or committing a wrongdoing or illegal act himself, may not obtain the relief sought even if he meets the general conditions for the remedy sought to be granted. Thus, Sopinka J. recently stated that "in the exercise of the discretion whether or not to grant a declaration, the court may take into account certain equitable principles such as the conduct of the party seeking the relief". This discretion of the court is based on the principle of *fin de non-recevoir*. It is a general principle of the civil law that applies broadly, and may also find support in articles 6, 7, and 1375 of the *Civil Code*, which sanction unreasonable conduct and bad faith.

(Emphasis added.)

11 By way of s. 268(6) BIA, the Court enjoys great discretion in deciding whether or not to recognize a foreign representative.

12 The conclusions sought by Vantis' motion are:

6. **GRANT** the Liquidators the power to take possession of, gather in and realise all the present and future assets and property of the Bank, including without limitation, any real and personal property, cash, choses in action, negotiable instruments, security granted or assigned to the Bank by third parties including property held in trust or for the benefit of the Bank, and rights, tangible or intangible ("**Property**"), wheresoever situate and to take, such steps as are necessary or appropriate to verify the existence and location of all the assets of the Bank, or any assets formerly held whether directly or indirectly or to the order of or for the benefit of the Bank or any present or former subsidiary or company associated with the Bank, including the terms of all agreements or other arrangements relating thereto, whether written or oral, the existence or assertion of any lien, charge, encumbrance or security interest thereon, and any other matters which in the opinion of the Liquidators may affect the extent, value, existence, preservation, and liquidation of the assets and property of the Bank;

7. **ORDER** that all assets, tangible and intangible and wheresoever situated, shall vest in the Liquidators, who shall collect and gather in all such assets for the general benefit of the Bank's creditors and as may be directed by the High Court of Antigua;

11 **ORDER** that the Liquidators shall be at liberty, and without the necessity of any further order, to summon before this Court for examination under oath any person reasonably thought to have knowledge of the affairs of the Bank or any person who is or has been a director, officer, employee, agent, shareholder, accountant of the Bank, or such other person believed to be knowledgeable of the affairs of the Bank and to order such person(s) liable to be examined to produce any books, documents, correspondence or papers in his or her possession or power relating to all or in part to the Bank, its dealings, property and assets and the Liquidators are authorised to issue writs of subpoena ad testificandum and duces tecum for the compulsory attendance of any of the persons aforesaid required for such examination;

12 **ORDER** that the Bank and any person holding or reasonably believed to have in their possession or power any assets or property of the Bank including without limitation, computer records, programs, disks, documents, books of account, corporate records, minutes, opinions rendered to the Bank, documents of title, electronic or otherwise (collectively called "**Papers**") relating in whole or in part to the Bank or such persons, dealings, or property showing that he or she is indebted to the Bank may be required by the Liquidators to produce or deliver over such property forthwith to the Liquidators notwithstanding any claim or lien that such person may have or claim on such assets and property and the Liquidators shall have full and complete possession and control of such assets and property of the Bank including its premises. In the event of a bona fide dispute as to ownership and legal entitlement to such property and Papers, the Liquidators shall take away copies of such Papers;

13 **ORDER** that (i) the Bank; (ii) all of its current and former directors, officers, managers, employees, agents, accountants, holders of powers of attorney, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Liquidators of the existence of any Property in such Person's possession, power, control, or knowledge, shall grant immediate and continued access to the Property to the Liquidators, and shall deliver all such Property to the Liquidators upon the Liquidators' request, subject only to any privilege attaching to solicitor-client communications or statutory provisions prohibiting such disclosure;

14 **ORDER** that all persons shall forthwith advise the Liquidators of the existence of and grant access to and deliver to the Liquidators or to such Agent or Agents they may appoint, any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Bank, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Liquidators or permit the Liquidators to make,

retain and take away copies thereof and grant to the Liquidators unfettered access to and use of accounting, computer, software and physical facilities relating thereto, subject only to any privilege attaching to solicitor-client communications or statutory provisions prohibiting such disclosure;

15 **ORDER** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all persons in possession or control of such Records shall forthwith give unfettered access to the Liquidators for the purpose of allowing the Liquidators to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Liquidators in their discretion deem expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Liquidators. Further, for the purposes of this paragraph, all Persons shall provide the Liquidators with all such assistance in gaining immediate access to the information in the Records as the Liquidators may in their discretion require including providing the Liquidators with instructions on the use of any computer or other system and providing the Liquidators with any and all access codes, account names and account numbers that may be required to gain access to the information;

16 **ORDER** the Persons are hereby restrained and enjoined from disturbing or interfering with the Liquidators and with the exercise of the powers and authority of the Liquidators conferred by this Order;

21. **ORDER** that no person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by the Bank, without written consent of the Liquidators or leave of this Honourable Court;

22 **ORDER** that all persons having oral or written agreements with the Bank or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services; insurance, transportation and freight services, utility or other services to the Bank are hereby restrained until further Order of this Honourable Court from discontinuing, altering, interfering-with or terminating the supply of such goods or services as may be required by the Liquidators; and that the Liquidators shall be entitled to the continued use of the Bank's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Liquidators in accordance with normal payment practices of the Bank or such other practices as may be agreed upon by the supplier or service provider and the Liquidators, or as may be ordered by this Honourable Court;

23 **RECOGNIZE** that the Liquidators shall have the authority as officers of the High Court of Antigua to act in Antigua and Barbuda or any foreign jurisdiction where they believe assets, property or Papers of the Bank may be situate or traced at equity or otherwise, and shall have the right to bring any proceeding or action in Antigua and Barbuda and/or in a foreign jurisdiction for the purpose of fulfilling their duties and obligations under the Winding-Up Order and to seek the assistance of any Court of a foreign jurisdiction in the carrying out of the provisions of the Winding-Up Order, including without limitation, an order of examination of persons believed to be knowledgeable of the affairs, assets, property and Papers of the Bank and to assist the Liquidators in the recovery of the assets and property of the Bank;

24 **ORDER** that the Liquidators shall have the authority to initiate, prosecute and continue the prosecution of any and all proceedings, and to defend all proceedings for the benefit of the Bank's creditors now pending or hereinafter initiated with respect to the Bank and, upon receiving the approval of this Court, to settle or compromise any such proceeding;

30 **ORDER** that all actions, proceedings and any claims whatsoever and wheresoever initiated against the Bank, its assets and property, are hereby stayed and no person, which shall include a body corporate, shall bring or continue

with a claim or proceeding in Antigua and Barbuda or elsewhere as against the Liquidators or the Bank without leave of this Honourable Court;

32 ORDER that the Liquidators, in their names or in the name of the Bank, shall be at liberty to apply for any permits, licenses, approvals or permissions as may be required by or deemed necessary pursuant to any laws, governmental or regulatory authority, in the pursuit and performance of their duties hereunder;

34 ORDER that the Liquidators shall exercise, perform or discharge their duties independently or jointly and in doing so shall be deemed to act as agents for the Bank and they act solely in their capacity as Liquidators and without personal liability if they rely in good faith upon the financial statements of the Bank or upon an opinion, report or statement of any professional adviser retained by them;

37 ORDER the provisional execution of this Order, notwithstanding any appeal and without the necessity of furnishing any security;

13 These conclusions are injunctive and in some cases declaratory, and the powers sought are extremely broad.

14 In *Saargummi*,⁴ the Superior Court confirmed that the *BIA* is an equitable statute and that the exercise of discretionary powers under it is subject to the application of the clean hands doctrine:

[TRANSLATION]

[92] A seventh criterion that is not taken from the *Bankruptcy Act* but rather from the general exercise of discretionary powers of the Superior Court is that a party coming before the Court asking it to exercise judicial discretion must be in good faith and have "clean hands."

...

[117] When an applicant requests that the Superior Court exercise its judicial discretion, he must present himself with "clean hands."

[118] This clean hands doctrine dates from the eighteenth century and has been applied many times in Canada and in Quebec. The doctrine developed out of a concern for equity, and indeed, the *Bankruptcy and Insolvency Act* is an equitable statute.

15 In this case, Vantis seeks not only the recognition of a foreign judgment. Rather, it asks this Court to grant it considerable powers within the territory of Canada and even be allowed to act as an officer of the court.⁵

16 Vantis seeks to exercise considerable powers in Canada. Its conduct must be considered by the Court in exercising its discretion.

17 Cooperation between various jurisdictions must not constitute an obstacle to the Court's exercise of discretion. What is at stake is safeguarding the interests of Quebec and Canadian creditors and upholding the foundations of the Canadian judicial system.

18 With regard to the appointment of a foreign representative under the *BIA*, the Court has broad discretion, similar to that which it exercises in issuing injunctions or declaratory judgments, and nothing demonstrates that the petitioner's conduct must not be a factor considered by the court - quite the contrary, since the receiver and/or trustee are officers of the court.

19 Among the principles outlined in *Holt Cargo*,⁶ the court notes that, although it is generally desirable for the courts of various jurisdictions to cooperate in cases of international insolvencies, "a Canadian bankruptcy court has a responsibility to consider the interests of the litigants before it and other affected parties in this country."⁷

20 In *Holt Cargo*, the Supreme Court ruled that Canadian courts *must* inquire as to whether the recognition of a foreign proceeding and lending assistance in relation thereto would cause an interested party to lose some juridical advantage that it would have had under Canadian law. Although the loss of any type of advantage does not bar cooperation with one jurisdiction (Antigua) rather than another (U.S.), the "extent of juridical advantage for the various parties [is] clearly an important factor to throw into the balance."⁸

21 The Supreme Court in *Holt Cargo* writes that the plurality approach requires that a court coordinate with, but not be subordinate to, foreign courts.

22 In *Menegon v. Philip Services Corp.*,⁹ Blair J. of the Ontario Superior Court of Justice, citing s. 18.6(5) of the *Companies' Creditors Arrangement Act*,¹⁰ ("CCAA") (which is identical to s. 268(6) *BIA*) explains that "comity and international co-operation do not mean that one Court must cede its authority and jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction."¹¹

23 It is thus clear that this Court has broad discretion under s. 268(6) *BIA*, and that this discretion should not be subordinated to a desire for procedural uniformity.

24 The Supreme Court of Ireland, ruling *In the Matter of Eurofood IFSC Ltd and in the Matter of the Companies Acts 1963 to 2001*,¹² gave a liberal interpretation to the public policy exception in Article 26 of *Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*¹³ ("EC Regulation") to refuse recognition of the decision of an Italian court on the grounds that the extraordinary administrator had disregarded the principles of fair procedures.

25 Article 26 of the *EC Regulation* is similar to Article 6 of the *Model Law*, in that it reads as follows:

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to the State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

26 Although Article 26 is narrower than our s. 268(6) *BIA*, the Supreme Court of Ireland was nevertheless shocked by the circumstances before it.

27 In that case, the extraordinary administrator failed to advise the creditors of *Eurofood* of the hearing before the Italian court. Moreover, he only provided the provisional liquidator the documentation relating to the application after the hearing had taken place.

28 Similarly, Vantis failed to inform Janvey as well as the AMF of its actions in the Montreal office and of the filing of its motion before Registrar Flamand.

29 The Supreme Court of Ireland stated the following in regard to the importance of the fair procedures:

I regret to say that it is quite shocking that the appellant should have deliberately refused to provide the Provisional Liquidator with the documents necessary for his appearance before the Parma Court in February 2004.... This Court is fully conscious of the important role now accorded to the principle of mutual recognition of judicial decisions in many contexts of European Community and Union law. It is based on a principle of mutual trust. This Court

respects those principles. They must, therefore, entail respect for principles of fairness that are common to the traditions of the Member States and which have been affirmed again and again by the European Court.

(Emphasis added.)

30 As was argued by counsel for the AMF in the course of the hearing, the Antiguan judgment explicitly deprives Canadian and foreign government and regulatory authorities of the benefits of cooperation from the Antiguan liquidators, except in cases where mutual disclosure obligations exist, which is not the case in this instance.

31 The conclusions of the Antiguan judgment naming Vantis as receiver stated in para. 12 the following:

12. Without prejudice to the provisions of Section 373 of the Act, the Joint Receiver Managers be and are hereby authorized to disclose information concerning the management, operations, and financial situation of the Respondents/Defendants as they consider appropriate in the performance of their functions PROVIDED ALWAYS THAT:

(1) no disclosure of customer specific information is authorized without further or other order of the Court; and

(2) no disclosure of information is permitted under this Order to any foreign governmental or regulatory body unless such disclosure is subject to mutual disclosure obligations.

(Emphasis added.)

32 This is a major irritant in this case. This provision is not restated in the judgment naming Vantis as liquidator, but counsel for Vantis wrote the following in their Notes and Authorities:

[TRANSLATION]

78. ...This confidentiality provision was made by the High Court of Antigua in the Antigua Receivership Order at paragraph 12, and the Flamand Order simply recognized it. It further results from the existence of Section 244 (as amended) of the IBCA, which provides the Bank's duty of confidentiality in favour of its customers. Although this duty is not repeated in the Winding-Up Order, it still applies, and the liquidators cannot disclose any customer information without an order from the High Court of Antigua.

33 The Court notes that the Antiguan court shows no deference for our regulatory authorities. However, SIB did in fact operate an office in Montreal.

34 In *Exchange Bank & Trust inc. v. British Columbia Securities Commission and Bank of Montreal*,¹⁴ the Court of Appeal for British Columbia writes:

EBT stressed that its ability to present evidence was hampered by the privacy laws of Nevis. That may be so. However, the property subject to the Orders is in British Columbia and it is the securities laws of British Columbia, and those of the United States, that are alleged to have been contravened. EBT chose to locate assets outside the jurisdiction of Nevis and must accept that those assets are subject to laws of the jurisdiction in which they are located, in this case British Columbia. It would be an utter abandonment of the public interest if we were to conclude that a party subject to secrecy laws in another jurisdiction could use those laws to shield themselves from the legitimate exercise of powers to enforce securities regulation in British Columbia. In short, the Nevis privacy laws are not relevant.¹⁵

(Emphasis added.)

35 Vantis had an obligation to obey the laws of Canada and Quebec.

36 In *Richter v. Merrill Lynch*,¹⁶ the Court of Appeal of Quebec writes:

[TRANSLATION]

[54] I am of the opinion that the application of a party cannot be lawfully heard when it is based above all on the misconduct and false representations made by that party to its contracting partners from whom it seeks compensation for damages for which it is principally responsible.

...

[57] The legal doctrine in Quebec, rather, is based on certain *fins de non-recevoir* , which are likened to judicial sanctions applied to the wrongful conduct by one party:

...

A *fin de non-recevoir* sanctions conduct that is unfair or uncooperative by refusing to grant an application presented by the very author of the problem.

A *fin de non-recevoir* therefore allows the Court to reject an application, otherwise well founded in law, when the applicant's highly objectionable conduct is precisely what gave rise to the dispute.

...

[60] Here, the *fin de non-recevoir* invoked is above all founded on the obligation of good faith that must guide the conduct of any person in the exercise of his rights and in his contractual relationships (arts. 6, 7 and 1375 C.C.Q.).

...

[62] This is foremost a question of fact that must be reviewed by applying the doctrine of good faith and equity.

(References omitted.)

(Emphasis added.)

37 Vantis does not deserve the trust of the Court, as its own reprehensible conduct in no way offers any assurances for the future in this case. The conduct by Hamilton from Vantis is unacceptable, and the circumstances are such that its motion is inadmissible.

38 Following the appointment in the United States of the American receivers for all of the corporations, the Financial Service Regularity Commission of Antigua, whose president was then Leroy King — who was also criminally accused at some point prior to the proceedings of conspiracy with Allen Stanford, President of the Stanford Group, for having, among other things, assisted in money-laundering operations — requested on February 26, 2009, that the Antiguan Court appoint a receiver for SIB and STC; that is, one week after the American receiver had been named in the United States to act as receiver for all the corporations of the Stanford Group, including SIB and STC.

39 The Antiguan receivers presented before Registrar Chantal Flamand an *ex parte* motion for the appointment of a foreign representative, for recognition of a foreign order, for judicial assistance, and for the appointment of an interim receiver, yet failed to do the following:

A. Notify the AMF and Janvey of the filing of their motion.

B. Mention that approximately one month (that is, on March 8, 2009) before the filing of the motion, Vantis' representatives had gone to the Montreal offices of SIB, took possession of its records and assets (without prior authorization of the Canadian court), and deleted the original electronic data after having made copies and having taken all such copies out of the country.

C. Report that the AMF had begun an investigation into the business dealings of SIB on February 23, 2009, and had requested that the Antiguan receivers provide documents and data from the Montreal office no later than February 25, 2009.

D. Note that they were not authorized trustees in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, which therefore rendered illegal any acts committed by the Antiguan receivers in Canada with regard to the assets and records of SIB prior to this date, as s. 271 *BIA* provides that such actions may only be carried out by a bankruptcy trustee as defined in s. 2 *BIA*, which Vantis is not according to the definition of the *BIA*.

E. Expressly mention the role of Janvey for all the corporations; in their motion they referred only to the freeze order and not the American order instituting the receivership.

40 The moving party must fully and faithfully disclose all important facts.¹⁷

41 By failing to disclose key information, the Antiguan liquidators succeeded in obtaining the *ex parte* order they sought.

42 As explained by Dufresne J., at the time of the Superior Court, the Court may subsequently revoke an *ex parte* order if the applicant has failed to reveal facts that are important for its decision:

[TRANSLATION]

[19] The party whose *ex parte* motion is granted by a Court is then exposed to the possibility that it will subsequently be dismissed upon a showing that significant facts on which the Court based the decision to grant the authorization were omitted, either deliberately or as part of a strategy of the party seeking the motion. The omission must obviously be blatant.¹⁸

43 The omissions of the Antiguan receivers in the present matter are blatant and inexcusable.

44 In *TMR Energy Ltd. v. State Property Fund of Ukraine*, the Federal Court had to rule on the validity of the decision by a prothonotary to accept a request for registration *ex parte*, and recognition and enforcement of a foreign arbitral award. On appeal, the Federal Court quashed the decision of the prothonotary on the grounds that he did not have the power to render such a decision and that the petitioner had in any event not fully disclosed to the prothonotary the impediments to the registration and enforcement of the award.

45 The Federal Court of Appeal upheld the decision of the Federal Court and declared as follows:

[63] I have found no reviewable error in Martineau J.'s conclusion that "where a motion or application is made *ex parte*, the moving party or applicant has a duty of full and fair disclosure with respect to all material facts."¹⁹

46 The circumstances in the present case are similar given that the Antiguan receivers failed to fully and openly disclose material information to the Court.

47 The Antiguan receivers have refused all demands for repatriation of the imaged records of SIB to Quebec or to disclose or provide a copy of these records to Janvey or to the AMF.

Deletion of the data from the servers

48 One month before the issuance of the April 6, 2009, recognition order in Quebec, representatives of the Antiguan receivers went to SIB's Montreal office and deliberately "erased" the SIB servers found there, without advising the American receiver, the AMF, or this Court. To the American receiver's request, through counsel, that the Antiguan receivers explain these actions, their own counsel replied only after two weeks (April 1 to 15), acknowledging that the servers had been erased, that the data had been transformed into imaged data, and that the copies were now in Antigua. The Antiguan receivers removed all the electronic data from Canada to Antigua, and therefore removed the data from the jurisdiction of Canadian courts and regulatory authorities prior to obtaining their *ex parte* recognition order.

49 Hamilton-Smith's statements claimed that in a report he informed Janvey of his intention to image the data on the hard drives at the Montreal office, to delete them, and to send the copies out of Canada to Antigua, on February 26, 2009, and that Janvey raised no objection whatsoever, is unfortunately questionable. Hamilton-Smith's and Janvey's versions of this account contradict each other.

50 Vantis states that the basic terms of its plan were disclosed to the American receiver. Its report states that: "The Receiver-Managers arranged for members of their team to attend the offices of SIB in Montreal along with legal counsel from Ogilvy Renault on Monday 23rd February 2009 *for the purposes of securing the records and IT equipment held at the office and to advise the staff that operations are to cease. The offices are now shut with access under the control of the Receiver-Managers and their lawyers.*" The Court adds: without having been authorized by a Canadian court.

51 James Coulthard's admissions, filed by the Antiguan receivers on August 19, 2009, indicate at para. 6 that the "Antiguan Liquidators were concerned that the electronic data be preserved to a criminal evidential standard for use in any subsequent legal proceedings against Mr. Allen Stanford or others involved in the Stanford fraud". Instead of preserving the evidence in Canada and the originals, the Antiguan receivers made copies, deleted the original version and sent the copies to Antigua, out of the reach of the Canadian authorities, and refused to provide a copy to the American receiver until the time of the hearing.

52 The Antiguan receivers also refused to provide a copy of the imaged data to the AMF. According to Sébastien Garon, the AMF was sent certain documents, but not the list of Canadian investors nor information pertaining to the documents that were removed from SIB's Montreal office, despite repeated requests made to the representatives of the Antiguan receivers after February 25, 2009.

53 The argument that these did not constitute official orders was made very late. If this was Vantis' argument, it should have been raised early on, and it was not. The Court considers this argument a pretext or justification after the fact.

54 Counsel for Vantis informed the AMF that they were not authorized to disclose the list of investors and that an order of the Antiguan Court would likely be necessary. The necessity of an order from the AMF was not raised.

55 At para. 6 of James Coulthard's statement, the Antiguan receivers justified the process of erasure in this way:

... the servers were to be left at SIB's Montreal premises and the Antiguan "Liquidators" were concerned that the Landlord may repossess the premises and/or exercise powers of distraint on the servers, potentially giving access to any data left on them.

56 As if safes were not available in Canada where files could be protected and safeguarded!

57 If the Antiguan receivers had genuinely feared that someone could have unauthorized access to the original servers found at SIB's Montreal office, they had only to remove the servers from the office and put them in a safe place, thus allowing the AMF and Janvey, as well as any other interested person, to have access to them in order to verify whether the copies made by the IT specialist were authentic and complete. It was entirely unnecessary to destroy the original servers which contained SIB's electronic data in Montreal. Where was the urgency? The concern is not a justification but a pretext.

58 What motives — unspoken and unspeakable — justify the *Blue Water* operation, that is, destroying the original, making imaged copies before even obtaining Court authorization, and moving all information out of the country to Antigua?

59 The Court concludes that Vantis' conduct, through the petitioners, disqualifies it from acting and precludes it from presenting the motion, as it cannot be trusted by the Court, given that:

- a) It acted in Canada before even obtaining the necessary permission from the Court;
- b) It destroyed the servers from which it claims to have made copies, and removed such copies from Canada making it impossible for the Court to ever confirm their accuracy;
- c) The Antiguan receiver, personally and/or through its representatives, repeatedly ignored requests from the AMF, or when it did answer them, responded by saying, [TRANSLATION] "Institute proceedings in Antigua", while knowing that such proceedings would be dismissed since no treaty exists between the two countries;
- d) It is unacceptable for the petitioner and/or his representatives to now argue: [TRANSLATION] "We will provide you with a copy of what we destroyed as it does not contain any confidential information" and yet claim to have destroyed and made copies for the very purpose of protecting confidential matters;
- e) They failed to disclose everything to Registrar Chantal Flamand, and furthermore the lease termination was merely a screen and a pretext to obtain the *ex parte* order of April 6, 2009;
- f) In addition, they obtained an order against the AMF without giving notice to the AMF and without disclosing to the Registrar the repeated requests from the AMF, which is after all the Quebec regulatory organization with jurisdiction over the operations that took place in Montreal.
- g) The fact that Janvey had already been appointed by the American court as receiver of the debtors, the respondents, and the entities related to them and that he had the power to control all their assets, wherever they were located;
- h) The fact that they were not authorized trustees in bankruptcy pursuant to the BIA;
- i) The fact that Janvey and the Antiguan liquidators were engaged in a dispute for the control and possession of the assets belonging to the debtors and the respondents (valued at more than US\$20 million), which are in the possession of the TD Bank, in Toronto.

60 The Court does not believe Vantis when it claims to have informed Janvey of the operation of the destruction of the servers, as Vantis' written report refers only to protection and not destruction, for which reason the Court accepts Vantis' written documents rather than its testimony.

61 Even if the liquidator's motion was well founded on the merits, it does not merit the confidence of the Court, an essential element enabling it to submit its motion, and this, because of the absence of good faith and respect for the Canadian public interest, represented by the Court and the regulatory authorities.

61 *FOR THESE REASONS, THE COURT:*

62 *DECLARES* inadmissible the Antiguan liquidators' motion of April 22, 2009;

63 *DISMISSES* the motion of the Antiguan liquidators.

64 *The whole*, with costs.

Footnotes

- 1 [Immeubles Port Louis Ltée v. Corporation municipale du Village de Lafontaine](#), [1991] 1 S.C.R. 326 at 364.
- 2 [I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal](#) [2004] SCC 2 at para. 13.
- 3 Denis Lemieux, *Le contrôle judiciaire de l'action gouvernementale*, looseleaf edition (Brossard: CCH) at para. 15-135.
- 4 *Saargummi*, para. 92 and [Murphy \(Syndic de\)](#), 2006 QCCS 989 at para. 24.
- 5 It should be noted that in conclusion [11] of its Motion, Vantis requests the power to issue subpoenas.
- 6 [Holt Cargo v. ABC Containerline](#), [2001] 3 S.C.R. 907.
- 7 *Ibid.* at para. 33; see also paras. 68-70.
- 8 *Ibid.* at para. 34.
- 9 [Menegon v. Philip Services Corp.](#) (1999), 11 C.B.R. (4th) 262.
- 10 R.S.C. 1985, c. C-36.
- 11 At para. 48.
- 12 [\[2006\] IESC 41](#).
- 13 [\[2000\] O.J. L 160/1](#) at p. 9.
- 14 [2000 BCCA 389](#).
- 15 *Ibid.* at 12.
- 16 [Richter & Associés inc. v. Merrill Lynch Canada inc.](#), 2007 QCCA 124.
- 17 [Microcell Solutions inc. v. Telus Communications inc.](#), J.E. 2004-738.
- 18 *Ibid.* at para. 19.
- 19 [TMR Energy Ltd. v. State Property Fund of Ukraine \(F.C.A.\)](#) 2005 FCA at para. 63.

Tab 21

2006 QCCS 3151
Cour supérieure du Québec

SaarGummi Québec inc., Re

2006 CarswellQue 5372, 2006 QCCS 3151, [2006] R.J.Q. 1644, 152
A.C.W.S. (3d) 993, 37 C.B.R. (5th) 263, J.E. 2006-1363, EYB 2006-106495

Dans l'affaire de la proposition de: SaarGummi Québec inc., personne morale légalement constituée ayant son siège social au 175, rue Péladeau, à Magog, province de Québec (Débitrice) et SG Overseas Limited, personne morale légalement constituée sous les Lois de Guernsey ayant sa place d'affaires à East Wing, Trafalgar Court, Admiral Park, St. PeterPort Guernsey (Requérante) et Samson Bélair Deloitte & Touche inc., personne morale légalement constituée ayant sa place d'affaires au 1, Place Ville-Marie, bureau 3000, à Montréal, province de Québec (Syndic)

Dumas, J.C.S.

Audience: 6 juin 2006

Jugement: 8 juin 2006

Dossier: C.S. Saint-François 450-11-000274-054

Avocat: Me Philippe Buist pour la débitrice
Me Alain Gaul pour la requérante
Me Yanick Vlasak pour le syndic
Me Pierre Le cavalier pour Industrie Canada
Me Éric Lalanne pour Investissement Québec

Sujet: Insolvency; Civil Practice and Procedure

Classifications d'Abridgment connexes

Bankruptcy and insolvency

[VI Proposal](#)

[VI.10 Practice and procedure](#)

Sommaire

Faillite et insolvabilité --- Proposition concordataire — Procédure

Débitrice opérait une entreprise dans le domaine de l'industrie automobile — Elle a vendu une partie de ses opérations à KGI Automotive Systems inc. (« KGI »), le 31 mars 2005 et le reste de ses opérations à GDX Automotive inc. (« GDX »), le 15 avril 2005 — Par la suite, les affaires de la débitrice consistaient en l'administration d'immeubles loués à KGI et à GDX — Débitrice a déposé un avis de son intention de faire une proposition, le 14 février 2006 — Débitrice a déposé sa proposition, le 19 mai suivant, auprès du syndic — Au moment du dépôt de la proposition, tous les actifs de la débitrice étaient grevés d'une hypothèque en faveur de la société mère de la débitrice — Bien que n'ayant pas déposé de preuve de réclamation au syndic, celle-ci a déposé une requête demandant à être autorisée, en vertu de l'art. 109(7) de la Loi sur la faillite et l'insolvabilité (« LFI »), à voter à l'assemblée des créanciers — Requête rejetée — Société mère de la débitrice n'avait pas droit de vote puisqu'elle avait un lien de dépendance avec cette dernière — En vertu de l'art. 109(7) LFI, le tribunal pourrait toutefois lui accorder, à sa discrétion, la permission de voter — Puisque le vote d'un créancier ayant un lien de dépendance était une exception à la règle générale, il appartenait à ce créancier de démontrer par prépondérance de preuve que le tribunal devait exercer sa discrétion — Celle-ci devait être fondée sur les six objectifs recherchés par le législateur lors de la rédaction de la LFI — Premièrement, le tribunal devait favoriser la réhabilitation du débiteur — Puisque, en l'espèce, la débitrice ne pouvait être libérée de ses dettes, le tribunal ne croyait pas que ce critère

devait influencer sa décision — Deuxièmement, il devait y avoir réalisation rapide et ordonnée des biens du débiteur — Or, le tribunal croyait que la société mère était mue par des motifs qui allaient à l'encontre de cet objectif — Laisser la société mère s'ingérer dans le processus pourrait facilement faire en sorte que des recours prévus à la loi ne puissent être exercés et obliger les créanciers de la débitrice à demander l'autorisation à la Cour d'intenter eux-mêmes des procédures — Troisièmement, le tribunal devait annuler les paiements préférentiels et les transactions révisables — Agissements de la société mère et de la débitrice soulevaient de sérieuses questions sur la légalité des transactions ayant eu lieu entre elles — Quatrièmement, le tribunal devait procéder à la distribution juste des actifs de la débitrice — Dans le présent dossier, la créance de la société mère soulevait plusieurs interrogations et il semblait que donner raison à celle-ci ne ferait que compliquer la réalisation des actifs de la débitrice — Cinquièmement, le tribunal devait procéder à une réorganisation commerciale efficace — Or, la proposition présentée s'apparentait beaucoup plus à une proposition de liquidation qu'à une proposition faite dans le but de continuer des affaires et de permettre une réorganisation financière — Sixièmement, le tribunal devait veiller à la protection de l'intérêt public — Comme le rapport du syndic soulevait des questions sérieuses et troublantes, il semblait qu'il serait contre l'intérêt public que le tribunal exerce sa discrétion et que des créanciers puissent être obligés de voter sur une proposition sans pouvoir demander d'investigation de la part du syndic — De plus, il découlait de l'exercice général des pouvoirs discrétionnaires de la Cour supérieure que celui qui se présentait devant le tribunal pour lui demander d'exercer une discrétion judiciaire devait être de bonne foi et avoir « les mains propres » — Or, les transactions faites par la société mère avec la débitrice soulevaient de nombreuses interrogations faisant douter de sa bonne foi — Finalement, il semblait que la requête par la société mère n'était urgente que parce qu'elle avait été présentée à la dernière minute — Or, aucun fait particulier n'est survenu dernièrement pouvant expliquer la raison de ce retard, malgré plusieurs demandes de prorogation de délai.

Bankruptcy and insolvency --- Proposal — Practice and procedure

Debtor pursued business in automobile industry — On March 31, 2005, debtor sold part of its operations to KGI Automotive Systems inc. ("KGI") and rest of it, on April 15, 2005, to GDX Automotive inc. ("GDX") — From then on, debtor's business was limited to managing buildings leased to KGI and GDX — On February 14, 2006, notice of intention to make proposal was filed by debtor — Proposal was filed with trustee on May 19 — At time of filing proposal, debtor had already hypothecated all its assets to its parent company — Although it did not file proof of claim with trustee, parent company brought motion seeking authorization to vote at creditors' meeting, in accordance with s. 109(7) of Bankruptcy and Insolvency Act ("BIA") — Motion dismissed — Parent company did not have right to vote since it was related to debtor — However, it could vote with leave of court, at court's discretion, in accordance with s. 109(7) BIA — Allowing creditor related to debtor to vote was exception to general rule; therefore creditor had burden of establishing, on balance of probabilities, that court should exercise its discretion — Court should exercise its discretion based on six objectives sought by Parliament when BIA was drafted — Firstly, court should seek to rehabilitate debtor — Since debtor could not be discharged in present case, court did not believe it should consider this objective — Secondly, debtor's property should be realized in timely and organized fashion — Here, court believed that parent company's consideration was contrary to this objective — To let parent company interfere with process could mean that remedies provided in act would no longer be available and debtor's creditors would have to seek leave of court to bring actions themselves — Thirdly, court should annul any preferential payments and reviewable transactions — Conduct of debtor and its parent company raised serious issues on legality of transactions entered into between them — Fourthly, court should make fair distribution of debtor's assets — In present case, parent company's claim raised many questions and granting its motion would only complicate realization of debtor's assets — Fifthly, court should operate effective business reorganization — Yet, proposal as filed was much closer to winding-up proposal than proposal made with intent to continue business and to allow financial reorganization — Sixthly, court should ensure that public interest was protected — As trustee's report raised serious and troubling issues, it seemed to be against public interest to have court exercise its discretion and have creditors vote on proposal without being able to ask trustee to investigate — In addition, in accordance with Superior Court's discretionary powers, one who asks court to exercise its discretion should act in good faith and come with "clean hands" — Yet, transactions entered into between debtor and its parent company raised many questions as to whether latter had acted in good faith — Finally, it appeared that parent company's motion was urgent only because it was filed at last minute — Yet, no particular fact could justify delay, despite many applications for extension of time.

REQUÊTE de la société mère de la débitrice demandant à être autorisée, en vertu de l'art. 109(7) de la *Loi sur la faillite et l'insolvabilité* à voter à l'assemblée des créanciers.

Dumas, J.C.S.:

1 Le 14 février 2006, la débitrice a déposé, auprès du séquestre officiel, un avis de son intention de faire une proposition et Samson Bélair Deloitte & Touche inc. a été nommée syndic à l'avis d'intention.

2 La débitrice SaarGummi Québec inc. a modifié sa dénomination sociale pour Orange Peach Real Estate inc. le 10 mai 2006.

3 Il est admis que la requérante SG Overseas Limited est une créancière qui n'a pas droit de vote en vertu de l'article 109 (6) de la *Loi sur la faillite et l'insolvabilité* (L.F.I.) puisqu'elle a un lien de dépendance avec la débitrice.

4 Il est également admis que, conformément à l'article 54 (3) L.F.I., la requérante pourrait voter contre la proposition déposée par la débitrice mais non en faveur.

5 La requérante demande d'être autorisée en vertu de l'article 109 (7) L.F.I. à voter à l'assemblée des créanciers puisqu'elle allègue détenir plus de 80% des créances ordinaires contre la débitrice. La requérante allègue que, puisqu'elle détient plus de 80% des réclamations non garanties, elle rencontre les conditions d'application de l'article 109 (7) L.F.I. Il est donc dans le meilleur intérêt de la requérante que celle-ci puisse voter lors de l'assemblée sur la proposition de la débitrice.

6 La requérante plaide principalement que, puisqu'elle est la créancière qui bénéficiera le plus de l'administration de la faillite, il serait normal qu'elle puisse voter lors des assemblées des créanciers. Selon elle, aucun préjudice ne serait causé au syndic ou à aucun autre créancier si sa requête était accueillie.

7 Son principal argument est qu'il serait injuste et contraire aux intérêts de la justice de l'exclure du vote à l'assemblée des créanciers et permettre à une minorité de créanciers d'être les seuls à avoir un droit de vote à cette assemblée.

8 Sa requête, produite le 1^{er} juin, a été entendue le 6 juin et l'assemblée des créanciers sur la proposition doit être tenue le 9 juin 2006.

9 La requérante allègue qu'elle est créancière ordinaire pour un montant de 48 339 542 \$ sur un total de créanciers ordinaires de 59 637 853 \$.

10 Le syndic à la proposition de la débitrice s'oppose à la requête ainsi qu'Industrie Canada, créancière pour une somme de 2 445 000 \$ et Investissement Québec, créancière pour une somme de 2 458 000 \$.

11 Bref, mis à part la requérante, Industrie Canada et Investissement Québec sont les principales créancières de la débitrice.

12 Une bataille juridique entre les parties semble s'amorcer et il est évident que les stratégies adoptées par la requérante et les autres créanciers sont divergentes.

13 La débitrice, quant à elle, consent à la requête de la requérante et appuie ses prétentions.

14 Aucune jurisprudence ou doctrine discutant des critères d'application de l'article 109 (7) L.F.I. n'a pu être soumise par les parties ou trouvée par le tribunal.

15 Seule une décision non rapportée rendue le 3 mars 1997 par la registraire Chantal Flamand dans le dossier *Greenberg Stores Limited*¹ a pu être consultée par le tribunal. Par contre, cette décision n'est d'aucun secours puisqu'elle n'est pas

motivée et ne semble pas avoir été contestée. Cette décision avait permis à un créancier de voter en vertu de l'article 109 (7) L.F.I. mais avait limité l'exercice de son droit de vote relativement au choix du syndic et la nomination des inspecteurs.

16 Lors des plaidoiries des procureurs, il semblait ressortir trois principaux points sur lesquels la requérante aurait intérêt à voter et sur lesquels les parties ne s'entendent pas.

17 En vertu de l'article 52 L.F.I., il est possible, lorsque les créanciers l'exigent au moyen d'une résolution ordinaire, lors de l'assemblée à laquelle une proposition est étudiée, d'ajourner cette assemblée à une autre date pour permettre que soit effectuée une évaluation ou une investigation plus approfondie concernant les affaires et biens du débiteur.

18 Le procureur du syndic ainsi que les procureurs d'Industrie Canada et d'Investissement Québec ont déjà annoncé qu'ils avaient l'intention de demander qu'une investigation soit faite sur des transactions entre la débitrice et la requérante. Il est donc fort possible qu'ils demandent un ajournement de l'assemblée pour que ces vérifications soient faites. La requérante, quant à elle, s'oppose à une remise de l'assemblée et allègue qu'elle veut que le dossier soit mené avec célérité. Elle entend donc s'opposer à toute remise.

19 En cas de rejet de la proposition, il y aura faillite de la débitrice et les parties ne s'entendent pas sur la confirmation du choix du syndic. La requérante semble avoir l'intention de ne pas confirmer Samson Bélair comme syndic et semble vouloir en choisir un autre.

20 Le troisième principal point de divergence est sur le choix des inspecteurs et du comité de créanciers prévu à la proposition. Il s'agit des trois points de discordance prévisibles à court terme mais il est évident qu'il y en aura d'autres.

21 Il est à noter que la requérante n'a pas encore déposé sa preuve de réclamation au syndic et qu'elle n'a pas, non plus, remis au syndic les informations que celui-ci requiert d'elle depuis plusieurs mois. La collaboration entre la débitrice et le syndic semble déficiente et le syndic a d'ailleurs soulevé ce fait dans le rapport qu'il entend soumettre aux créanciers lors de l'assemblée.

22 CRITÈRE D'APPLICATION DE L'ARTICLE 109 (7) L.F.I.

23 La seule condition d'application de l'article 109 (7) prévue par le législateur est que le tribunal *pourra* accorder à un créancier ayant un lien de dépendance, et qui ne peut voter en vertu de l'article 109 (6), la permission de voter si l'ensemble des créanciers qui ont traité sans lien de dépendance ne représentent pas ensemble au moins 20% en valeur des réclamations contre le débiteur.

24 Dans la présente cause, la requérante représente 85% des réclamations, il n'y a pas lieu d'analyser le statut des autres créanciers. Par contre, il serait possible qu'un créancier lié, qui détient seulement 50% des réclamations, puisse rencontrer les exigences de l'article 109 (7) si d'autres créanciers sont également liés. C'est la raison pour laquelle le législateur, plutôt que d'utiliser un pourcentage de 80, a utilisé l'expression « lorsque tous les créanciers qui ont traité sans lien de dépendance avec le débiteur ne représentent pas ensemble au moins 20% en valeur des réclamations. »

25 Puisque le législateur mentionne qu'un créancier peut voter avec l'autorisation du tribunal, cela signifie, à notre avis, que le tribunal devra exercer sa discrétion pour accorder l'autorisation ou non.

26 Si le législateur avait voulu que le droit de vote soit automatique dès qu'un créancier a plus de 80% des réclamations prouvables, il n'aurait pas prévu la nécessité d'obtenir l'autorisation du tribunal pour voter. Un créancier ne peut donc simplement se contenter d'affirmer qu'il détient 85% des créances pour que lui soit accordée cette permission.

27 Puisque le vote d'un créancier ayant un lien de dépendance est une exception à la règle générale, il appartiendra à ce créancier de démontrer par prépondérance de preuve que le tribunal devrait exercer sa discrétion.

28 LES FAITS

29 Puisque le tribunal doit exercer une discrétion judiciaire, il nous semble que celle-ci doit être exercée selon les faits propres à chaque espèce. Il est essentiel d'analyser la situation dans laquelle se retrouvent les parties.

30 La débitrice opérait jusqu'au 15 avril 2005, une entreprise dans le domaine de pièces de caoutchouc dans l'industrie automobile dont le siège social était situé à Magog, province de Québec. La société offrait une grande variété de pièces de caoutchouc à quelques uns des plus importants manufacturiers dans le domaine de l'automobile, et ce, principalement à General Motors Corporation (GM). La société est une filiale à part entière de SaarGummi Group qui opère des usines de production en Europe, Asie et en Amérique. Le groupe emploie plus de 3 700 personnes.

31 Le 31 mars 2005, la débitrice vend une partie de ses opérations à KGI Automotive Systems inc. (KGI).

32 Le 15 avril 2005, la débitrice vend le reste de ses opérations à GDX Automotive inc. (GDX).

33 À la suite de la vente de ses opérations manufacturières, les affaires de la débitrice consistaient en l'administration des immeubles loués, lesquels sont situés à Magog et loués à GDX Automotive inc., compagnie liée à la débitrice.

34 Le 14 février 2006, un avis d'intention de faire une proposition est déposé et une prolongation de délai est demandée les 14 mars et 27 avril 2006. Finalement, le 19 mai la débitrice dépose sa proposition auprès du syndic.

35 À la suite de la vente des opérations manufacturières en 2005, la débitrice est demeurée propriétaire de cinq bâtiments industriels situés à Magog. Les opérations courantes de la débitrice consistent maintenant en l'administration et la location de ces propriétés qui sont louées et génèrent des revenus mensuels d'approximativement 138 000 \$.

36 Quatre de ces immeubles sont loués à GDX et KGI avec option de renouvellement.

37 En vertu de deux certificats hypothécaires, datés des 23 décembre 2004 et 17 mars 2005, octroyés par la débitrice à sa société mère SG Overseas Ltd (la requérante), tous ses actifs, au moment du dépôt de la proposition, sont grevés en faveur de la requérante.

38 Au moment du dépôt de la proposition, la société avait 2 416 000 \$ dans un compte bancaire détenu en fidéicommiss par ses conseillers juridiques.

39 Dans une requête en prorogation de délai pour déposer sa proposition, la débitrice alléguait, entre autres, que préalablement au dépôt de l'avis d'intention A & R. Belley (Belley) a fait saisir avant jugement le 15 septembre 2005, certains biens de la débitrice dont plusieurs de ses immeubles ainsi que ses comptes bancaires auprès de la Banque Nationale dans lesquels elle détenait la somme de 1 700 000 \$.

40 Elle y allègue un jugement qui avait été rendu le 13 octobre 2005, [*A. & R. Belley inc. c. SaarGummi Québec inc.* (2005), 2005 CarswellQue 9328 (C.S. Que.)] par le soussigné sur une requête en annulation de la saisie avant jugement effectuée par Belley. Puisque ce jugement y est allégué, il fait donc partie du dossier et le tribunal peut en tenir compte.

41 Ledit jugement² mentionne entre autres que:

[7] En avril 2005, SaarGummi a vendu à GDX Automotive ses usines de l'Estrie. GDX Automotive est une des dénominations utilisées par GDX Canada inc., une entreprise constituée en vertu d'une loi étrangère qui est spécialisée dans la fabrication de produits de caoutchouc pour automobiles et dont l'actionnaire majoritaire est GDX International Holdings S.A.R.L.

[8] La vente des usines de SaarGummi a été annoncée sur le site internet de GDX Automotive par le biais d'un communiqué de presse en date du 18 avril 2005, lequel mentionnait que GDX Automotive annonce:

« GDX Automotive today announced the closing of its acquisition of SaarGummi operations in Québec, Canada and Mexico. (. . .) Current SaarGummi operations in Canada and in Mexico include six facilities with approximately 1,000 employees. »

[9] Selon toute vraisemblance, SaarGummi a cessé ses opérations au Canada. Le site internet du Groupe SaarGummi confirme que les opérations du groupe sont désormais aux États-unis, en Amérique Latine et en Europe et en Asie. La seule compagnie qui est identifiée sur le site internet du Groupe SaarGummi à la compagnie SG Technologies a une adresse en Allemagne.

[10] SaarGummi est une filiale de SaarGummi GmbH, une compagnie allemande qui détient d'autres filiales en Allemagne, au Brésil, en Espagne, en Inde, aux États-unis et à la République Tchèque.

[11] Le nombre d'employés de SaarGummi est passé de 1 300 en 2004 à 1 en 2005, ce qui laisse croire que cette dernière n'a plus d'autre opération commerciale au Canada.

[12] La défenderesse SaarGummi plaidera sur la requête en annulation de la saisie qu'il faudrait plutôt lire que SaarGummi n'a plus d'opération manufacturière puisque même si elle n'a qu'un employé, elle a tout de même des opérations commerciales puisqu'elle est propriétaire d'immeubles et perçoit des loyers.

[13] D'autre part, suite à la vente de ses usines à GDX Canada SaarGummi est demeurée propriétaire de plusieurs immeubles dont la plupart abritent les usines vendues à GDX Canada inc.

[14] En fait, quatre des huit immeubles propriétés de SaarGummi sont loués à GDX Canada. Tous ces immeubles sont situés à Magog et ceux loués à GDX Canada sont affectés de baux dans lesquels une option d'achat et un droit de premier refus en faveur de GDX Canada ont été prévus.

[15] Quatre des huit immeubles sont hypothéqués pour un montant total de 10 000 000,00\$ soit presque l'équivalent des évaluations municipales de ces quatre immeubles mises ensemble.

[16] Deux des trois terrains vacants de SaarGummi sont hypothéqués en faveur de la Banque Nationale du Canada. Les hypothèques affectant les quatre immeubles au montant de 10 000 000,00\$ ont été consenties en faveur de S.G. Overseas Limited, une compagnie vraisemblablement reliée à SaarGummi. De plus, les actes d'hypothèques consentis en 2004 et mars 2005 donnent également en garantie à SG Overseas Limited l'universalité des biens meubles de SaarGummi.

(. . .)

[23] La défenderesse ne peut se contenter de plaider que la bonne foi se présume et que le juge appelé à décider de la suffisance de l'affidavit doit tenir pour avéré le fait qu'elle est de bonne foi dans les transactions qu'elle a faits.

[24] Une partie est également présumée connaître les conséquences de ses actes. Le fait de se départir de tous les actifs qu'elle possède au Québec et d'hypothéquer ceux qui lui reste en faveur d'une compagnie qui lui est liée peut certes donner à une personne raisonnable de très bonnes raisons de croire que sans le bénéfice d'une saisie avant jugement le recouvrement de sa créance sera mis en péril.

(. . .)

[28] Dans la présente cause, le présent tribunal doit tenir les faits pour avérés. Au niveau de la fausseté des allégations de l'affidavit, le juge aura à décider si les faits allégués établissent par présomption une intention de la part de la défenderesse de se soustraire à l'exécution d'un éventuel jugement; ou plutôt si tous les faits mis en preuve peuvent faire craindre que sans la saisie, le recouvrement de la créance ne soit mis en péril.

[29] Le tribunal croit qu'une personne raisonnable ayant connaissance de faits allégués dans l'affidavit de la défenderesse tirera la conclusion que la demanderesse ne pourra jamais exécuter un jugement si elle ne met pas les biens de la défenderesse sous la main de la justice pendant l'instance.

[30] Bien sûr, le simple fait pour un défendeur d'être une compagnie étrangère n'est pas suffisant à lui seul pour justifier la saisie avant jugement des actifs. Ainsi, dans Spectra Premium Industries inc. c. Tremplon inc.⁴ une saisie a été cassée bien que la défenderesse était une compagnie étrangère. Par contre, dans ce cas, la demanderesse-intimée savait dès le départ des pourparlers qu'elle avait elle-même amorcés que la défenderesse-requérante était une société commerciale incorporée selon les lois de la République de Panama. Elle n'ignorait pas non plus que les administrateurs et les actionnaires étaient européens.

[31] Il en est de même dans Grenier c. Rauh⁵ où le juge Frenette déclarait insuffisantes les allégations d'un affidavit puisque le défendeur était un médecin pratiquant sa profession en Colombie-Britannique en 1982, date de l'institution de l'action et l'était au moment de l'émission de la saisie avant jugement.

[32] Bref, un fait en lui-même peut ne pas être suffisant pour l'émission d'une saisie avant jugement. Cela ne veut pas dire que ce fait ajouté à tous les autres empêchera l'émission d'un bref de saisie avant jugement.

(...)

[35] Il faut garder à l'esprit que les biens d'un débiteur sont le gage commun de ses créanciers⁷. Un créancier faisant affaires avec un débiteur est en droit de s'attendre à ce que les actifs de celui-ci servent à payer ses dettes et non pas qu'ils soient rapatriés dans un autre pays. Dans un cas où le transfert d'actifs aux États-unis avait des conséquences similaires aux nôtres, la Cour d'appel décida⁸:

« Dans de telles circonstances, du fait des appelants, la seule défenderesse située dans la province de Québec devenait sans biens quelconques, rendant à toutes fins utiles impossible l'exécution contre elle d'un jugement éventuel.

Dans les circonstances, je ne puis qu'être d'accord avec la conclusion du juge de première instance, qui se lit comme suit:

« There is no question but that I arrive at the conclusion that a reasonable man, given the facts of this case, a reasonable man could arrive at a position of objective fear. I find that, given these facts, an objective man would arrive at the conclusion that recovery of the debt would be, and is, a jeopardy, without the remedy of a Seizure Before Judgment. » (page 430)

⁴ AZ-98026241

⁵ AZ-85021089

⁷ Article 2644 C.c.Q.

⁸ Crown Leisure Products of Canada inc. c. Maurice P. Dean, [1989] R.D.J. 426

42 Le rapport du syndic mentionne que la valeur des propriétés immobilières de la débitrice s'élèverait à 18 140 000 \$ selon une évaluation préparée par Turcotte & Associés en date du 25 janvier 2005.

43 La requérante est la seule créancière garantie déclarée à l'actif de la débitrice avec une réclamation garantie de 10 208 388 \$.

44 Le syndic a demandé un avis juridique à la firme Heenan Blaikie, conseillers juridiques indépendants du syndic, en ce qui a trait à la validité et l'opposabilité des garanties publiées contre les actifs de la débitrice. Ce bureau d'avocats a avisé le syndic que les actes de prêt reliés à ses garanties étaient constitués en vertu des lois de Guernsey et que leur firme n'était pas apte à émettre d'avis selon les lois de Guernsey. De plus, le syndic fut avisé qu'un avis simplement restreint à la validité et à l'opposabilité des garanties qui ne tiendrait pas compte des faits, incluant la vente par la société de ses opérations et des transactions intersociété impliquant la débitrice, ses actionnaires et sociétés affiliées ne remplirait pas les intérêts recherchés. En conséquence, Heenan Blaikie a refusé d'émettre un avis juridique pour le moment.

45 Toujours selon le bilan statutaire de la débitrice, celle-ci évalue les créanciers chirographaires à 59 638 000 \$ sur lequel 52 909 990 \$ sont des dettes intersociétés.

46 PROPOSITION

47 La proposition déposée par la débitrice prévoit qu'une somme n'excédant pas 1 150 000 \$ sera distribuée aux créanciers selon les termes de paiement suivants:

- les réclamations des employés seront payées en totalité;
- les réclamations de la Couronne seront payées en totalité dans les six mois suivant l'approbation de la proposition par le tribunal;
- les honoraires professionnels seront payés par la société en priorité de toutes les autres réclamations;
- les parties liées à la personne insolvable ont accepté de renoncer à leur participation dans la distribution dans le but de ne pas diluer le paiement à la masse des créanciers;
- tous les créanciers chirographaires recevront tout d'abord le paiement de leur réclamation jusqu'à un maximum de 2000 \$. Le reliquat, s'il y a lieu, sera attribué au prorata jusqu'à un maximum de 15¢ par dollar;
- transactions révisables, paiements préférentiels, etc.: les dispositions des articles 91 à 101 de la Loi et les dispositions de toute loi provinciale ayant un objectif similaire ne s'appliqueront pas à la proposition;

48 Dans son rapport, le syndic, de façon à évaluer la proposition déposée, a préparé une analyse des différentes possibilités de réalisation qui s'offrent aux créanciers chirographaires dans un scénario de faillite. Celui-ci croit que la valeur de liquidation dans le cadre d'une faillite à la date de la proposition s'élèverait à 14 369 000 \$.

49 Il a également établi des tableaux qui démontrent une analyse comparative de la distribution estimée à la masse des créanciers chirographaires dans les scénarios de faillite et de proposition.

50 Vu l'ambiguïté qui existe en ce qui a trait à la validité et l'opposabilité des garanties de la requérante, le syndic a évalué les deux possibilités impliquant des garanties valides et non valides sur les actifs de la débitrice. Les tableaux préparés par le syndic démontrent que si les garanties sont valides en cas de faillite, la distribution aux créanciers serait d'environ 7% alors qu'il serait de 20,6% si les garanties de la requérante ne sont pas valides. Dans le cas d'une proposition, la réalisation serait de 15,8%.

51 Bien sûr, les tableaux préparés par le syndic tiennent compte que les passifs déclarés de la débitrice sont valides et opposables à l'actif. En conséquence, le scénario de distribution pour une proposition semble beaucoup plus alléchant aux créanciers ordinaires puisqu'il ne tient pas compte des réclamations de la requérante qui s'élèvent à plus 50 000 000 \$.

52 TRANSACTIONS QUI POURRAIENT NE PAS ÊTRE SUJETTES À UNE RÉVISION CONFORMÉMENT À LA PROPOSITION

53 Puisque la proposition exclut la révision possible par les créanciers des transactions révisables et des paiements préférentiels assujettis aux dispositions des articles 91 à 101 de la loi, le syndic a tenté d'en résumer les principales caractéristiques. Il note de façon importante que les transactions que la débitrice propose comme n'étant pas sujettes à révision incluent la vente par la débitrice de la totalité de ses opérations manufacturières lors des deux transactions distinctes survenues en mars et avril 2005. Il résume donc deux transactions intervenues avec la débitrice et leur impact sur ses actifs.

54 VENTE D'ÉQUIPEMENT À KGI AUTOMOTIVE

55 Cette transaction a eu lieu le 31 mars 2005 et comportait deux ventes distinctes, la vente des actifs et la vente de la ligne d'extrusion.

56 VENTE DES ACTIFS

57 Le prix de vente était de 450 000 \$, taxes applicables en sus (517 612,50 \$).

58 La vente des actifs inclut des produits en cours de fabrication et des matières premières. La valeur des produits en cours et des matières premières avait été établie à 139 300 \$.

59 KGI n'a pas remis le prix de vente à la débitrice mais a plutôt payé RPT Industrial inc. (RPT) jusqu'au montant de la dette qu'avait la débitrice envers RPT au 31 mars 2005 soit 571 934 \$. RPT est une société liée à KGI.

60 Lors du dépôt du rapport, le syndic n'était pas en mesure de confirmer si le solde dû à la débitrice (84 979 \$) lui a été payé.

61 En résumé, sur un prix total payé de 656 914 \$, KGI a payé 571 934 \$ à RPT et un solde à payer à la débitrice s'établirait à 84 979 \$.

62 VENTE DE LA LIGNE D'EXTRUSION

63 KGI a payé 520 000 \$ pour les équipements ayant une valeur aux livres de 640 000 \$.

64 TRANSACTION ENTRE LA DÉBITRICE ET GDX AUTOMOTIVE

65 Le syndic résume la convention ainsi: GDX a acheté de la débitrice les comptes à recevoir au 15 avril 2005 et a acheté les stocks détenus exclusivement en relation avec les opérations. GDX a également acheté de la débitrice tous les actifs corporels et a payé pour ces actifs la somme de 1 \$ et a pris en charge toutes les dettes et obligations de la débitrice résultant des opérations courantes âgées de moins de soixante jours au moment de la clôture.

66 Au 15 avril 2005, la liste des comptes à recevoir de la société montrait un solde de 9 551 885 \$ net des comptes exclus qui totalisaient 1 022 765 \$ à cette date. Les états financiers de la société montraient un solde des stocks antérieurs à la transaction pour un montant de 7 800 000 \$. Une évaluation des actifs, préparée par une tierce partie au 21 novembre 2005, conclut que la valeur des actifs inclus dans la convention de vente était de 10 047 000 \$ US (11 955 930 \$ CAN).

67 La liste des comptes fournisseurs au 15 avril 2005 totalisait 5 807 014 \$.

68 En résumé, GDX a acquis des actifs de la débitrice pour un montant de 29 296 850 \$ à un coût de 1 \$ plus la prise en charge de dettes s'élevant à 5 807 014 \$.

69 RECOMMANDATION DU SYNDIC

70 Le syndic n'a pas été en mesure, au cours du processus de la proposition, d'obtenir un accès complet aux livres de la débitrice. Les conseillers juridiques du syndic ont confirmé leur incapacité, dans les circonstances, à fournir un avis juridique sur la validité et l'opposabilité des garanties. En conséquence, la distribution potentielle aux créanciers chirographaires comparativement à la proposition ne peut être adéquatement comparée et pourrait donc être significativement affectée.

71 En conséquence, le syndic ne peut et refuse de faire quelque recommandation que ce soit en faveur ou contre la proposition déposée par la débitrice principalement parce que:

- le statut des garanties octroyées à la société mère en ce qui a trait à leur validité et opposabilité ne peut être confirmé;
- incapable de mesurer convenablement l'impact de l'exclusion des transactions révisables et des paiements préférentiels sur les créances chirographaires.

72 Il est également à noter que la débitrice a modifié sa dénomination sociale puisque, selon le procureur de la requérante, le fait qu'une compagnie du nom de SaarGummi fasse faillite pourrait avoir un impact négatif sur les affaires de la compagnie mère et des compagnies affiliées. Il mentionne qu'une faillite pourrait ternir la réputation de SaarGummi face aux manufacturiers automobiles.

73 POSITION DU SYNDIC

74 Le syndic mentionne qu'il n'a eu aucune collaboration de la débitrice ou des compagnies liées à celle-ci. Il n'a toujours pas reçu de preuve de réclamation de la requérante. Il lui est impossible d'obtenir une opinion sur la validité des garanties de la requérante.

75 Il mentionne qu'un ajournement de l'assemblée des créanciers sera probablement demandé pour pouvoir enquêter sur les transactions révisables. En effet, comment les créanciers pourraient renoncer aux recours prévus aux articles 91 à 101 L.F.I. s'ils sont incapables d'analyser les recours potentiels ?

76 Il craint que la requérante, qui est l'alter ego de la débitrice, contrôle l'élection des inspecteurs, du comité des créanciers et la confirmation de sa nomination.

77 POSITION D'INDUSTRIE CANADA ET INVESTISSEMENT QUÉBEC

78 Ils prétendent que la requérante est essentiellement l'alter ego de la débitrice. Ni la débitrice, ni la requérante n'a fait preuve de transparence dans le présent dossier. La débitrice a vendu ses actifs en catimini il y a 2 ans et l'avis d'intention de déposer une proposition fait suite à une requête pour ordonnance de séquestre déposée le 22 décembre 2005 par Investissement Québec. Ils plaident qu'une personne ne peut voter si elle n'a pas produit sa preuve de réclamation conformément à l'article 109 (1) L.F.I. et qu'en conséquence, la requête en vertu de 109 (7) L.F.I. serait irrecevable. Ils plaident qu'en accordant la requête le tribunal accorderait un droit de vote à une personne qui n'en détient pas en vertu de l'article 109 (1).

79 Ils plaident principalement avoir une grande réserve face à la réclamation de 50 000 000 \$ de la requérante.

80 Aucune preuve de décaissement de ce 50 000 000 \$ ne leur a été faite. Le syndic demande cette information depuis 6 mois sans l'avoir obtenue. Ils plaident également que les hypothèques ont été données en garantie de dettes qui auraient été contractées dans le passé.

81 Ils ont reçu copie d'une convention de cession de 2004 mais n'ont pas reçu copie de la convention originale à laquelle réfère celle de 2004.

82 Bien que la convention de prêt d'août 2004 mentionne une dette de 84 000 000 \$, cette dette aurait été réduite à 50 000 000 \$ quelques mois plus tard, sans que l'on sache pourquoi. Les états financiers de la débitrice ne reflètent pas le dettes qu'elle admet avoir face à la requérante.

83 Les deux créanciers mentionnent que s'il n'y a pas d'événements particuliers d'ici l'assemblée, il est vraisemblable qu'ils voteront contre la proposition. En conséquence, la débitrice sera en faillite.

84 Ils mentionnent qu'un débat judiciaire s'engagera avec la requérante et qu'ils entendent attaquer les transactions effectuées entre la débitrice et la requérante. Ils prétendent donc qu'il ne serait pas dans l'intérêt de la masse des créanciers d'accorder la requête et d'ainsi, leur enlever l'influence qu'ils peuvent avoir lors des assemblées des créanciers.

85 **CRITÈRE D'EXERCICE DE LA DISCRÉTION DU TRIBUNAL**

86 Tel que déjà mentionné, une fois établies, les conditions d'exercice de la demande fondée sur l'article 109 (7) L.F.I., le tribunal doit exercer sa discrétion judiciaire.

87 En exerçant sa discrétion, le tribunal doit éviter de s'immiscer dans le travail du syndic ou du président d'assemblée qui doit recevoir et accepter les preuves de réclamations produites.

88 Le tribunal ne doit donc pas accorder un droit de vote à un créancier qui autrement n'en n'aurait pas eu. En conséquence, lors de l'exercice de son pouvoir discrétionnaire, le tribunal pourra prendre en considération le fait qu'une preuve de réclamation a déjà été produite et acceptée par le syndic. Bien que ce critère ne soit pas déterminant en soi, il pourra être un des critères utilisé par le tribunal pour exercer sa discrétion.

89 Par contre, le libellé de l'article 109 (7) semble permettre au tribunal d'autoriser le vote d'un créancier même si sa preuve de réclamation n'a pas encore été déposée. L'autorisation donnée par le tribunal serait alors conditionnelle au dépôt d'une preuve de réclamation conforme à l'article 109 (1) L.F.I. et jusqu'à concurrence du montant de la preuve de réclamation.

90 Le tribunal croit également que dans l'exercice de sa discrétion, le juge pourrait accorder un droit de vote à un créancier mais en le limitant et en le balisant. Par exemple, le créancier pourrait être admis à voter sur un nombre limité d'inspecteurs ou de membres du comité de créanciers sur la proposition.

91 Mais puisqu'il ne semble y avoir aucun critère établi pour l'exercice de la discrétion, le tribunal croit opportun de baser sa discrétion sur les objectifs recherchés par le législateur lors de la rédaction de la *Loi sur la faillite et l'insolvabilité*. Le tribunal basera donc l'exercice de sa discrétion sur six objectifs recherchés par le législateur lors de la rédaction et des amendements apportés à la loi, à savoir:

- 1- la réhabilitation du débiteur;
- 2- réalisation rapide et ordonnée des biens du débiteur;
- 3- annulation des paiements préférentiels et des transactions révisables;
- 4- distribution juste des actifs du débiteur;
- 5- réorganisation commerciale efficace des entreprises en difficulté financière;
- 6- protection de l'intérêt public.

92 Aucun de ces critères n'est en soi déterminant. Ils n'ont pas tous à être rencontrés mais devraient tout de même servir à l'exercice de la discrétion judiciaire. Un septième critère qui n'est pas tiré de la *Loi sur la faillite*, mais plutôt de

l'exercice général des pouvoirs discrétionnaires de la Cour supérieure, est que celui qui se présente devant le tribunal pour lui demander d'exercer une discrétion judiciaire devrait être de bonne foi et avoir « les mains propres ».

93 RÉHABILITATION DU DÉBITEUR

94 Bien que la réhabilitation du débiteur soit un objectif de la *Loi sur la faillite*, le tribunal ne croit pas que celui-ci doit influencer sa décision dans la présente cause puisque nous sommes en présence d'une corporation qui ne peut, en vertu de la *Loi sur la faillite*, être libérée de ses dettes. Ce critère s'appliquerait donc dans le cas d'une proposition ou d'une faillite d'une personne physique.

95 RÉALISATION RAPIDE ET ORDONNÉE DES BIENS DU DÉBITEUR

96 Comme le mentionne la Cour d'appel dans l'arrêt de *Excavations Sanoduc Inc. c. Morency*³:

Notre Cour a pris position sur le sujet et s'est prononcée en faveur d'une application souple et large de la compétence de la division de faillite afin de faciliter le prompt règlement des affaires d'insolvabilité.

97 Cette décision confirme un courant jurisprudentiel établi depuis déjà fort longtemps à l'effet qu'il doit y avoir réalisation rapide et ordonnée des biens du débiteur⁴. Que nous soyons en matière de faillite ou de proposition, il irait à l'encontre d'un objectif de la *Loi sur la faillite* de permettre que par des stratégies et des moyens dilatoires un créancier lié ayant pu effectuer des transactions révisables avec la débitrice puisse retarder la réalisation des actifs de la débitrice.

98 Ainsi, le tribunal croit que la requérante est mue par des motifs qui vont à l'encontre des objectifs de la loi. Laisser la requérante s'ingérer dans le processus des assemblées et dans le choix du syndic et des inspecteurs pourrait facilement faire en sorte que des recours prévus à la loi ne puissent être exercés et obliger les créanciers de la débitrice à demander l'autorisation à la Cour d'intenter eux-mêmes des procédures avec tous les inconvénients que cela comporte.

99 D'ailleurs, il est révélateur que la requérante accepte de renoncer à ses réclamations contre la débitrice si la proposition est acceptée et si les créanciers acceptent de renoncer aux recours prévus aux articles 91 à 101 de la loi. Elle ne peut donc prétendre vouloir accélérer le processus de réalisation dans le cadre de la proposition pour recevoir son dû puisqu'elle accepte à l'avance de renoncer à sa réclamation.

100 ANNULATION DES PAIEMENTS PRÉFÉRENTIELS ET DES TRANSACTIONS RÉVISABLES

101 Comme le mentionne la Cour suprême dans *Hudson v. Benallack*⁵:

La législation sur la faillite a pour objet de garantir le partage des biens du débiteur failli proportionnellement entre tous ses créanciers. L'article 112 de la loi prévoit que, sous réserve des dispositions de la loi, toutes les réclamations établies dans la faillite doivent être acquittées *pari passu*. La loi vise à mettre tous les créanciers sur un pied d'égalité. En général, jusqu'à ce qu'il soit insolvable ou projette de faire un acte de faillite, le débiteur est tout à fait libre d'administrer ses biens à sa guise et il peut préférer l'un ou l'autre de ses créanciers. Toutefois, dès qu'il devient insolvable, il ne peut plus rien faire qui sorte du cours ordinaire des affaires et ait pour effet de procurer une préférence à un créancier sur les autres. Si un créancier reçoit une préférence sur les autres par suite d'un acte délibéré et frauduleux du débiteur, le principe de l'égalité à la base de la législation sur la faillite est mis en échec.

102 Encore une fois, des transactions et des garanties ont été consenties par la débitrice peu de temps avant le dépôt d'une requête pour ordonnance de séquestre. Le tribunal n'a évidemment pas à se prononcer sur les allégations des créanciers qui contestent la requête de la requérante.

103 Par contre, les agissements de la requérante et de la débitrice soulèvent au tribunal et soulèveraient à toute personne raisonnable de sérieuses questions sur la légalité des transactions.

104 Le tribunal ne croit donc pas que cet objectif serait rencontré si la requête de la requérante était accordée.

105 **DISTRIBUTION JUSTE DES ACTIFS DU DÉBITEUR**

106 C'est, entre autres, la raison pour laquelle le législateur a prévu la suspension de toutes les procédures contre un débiteur dès le dépôt d'un avis d'intention ou contre un failli lorsqu'il fait cession de ses biens⁶.

107 Dans le présent dossier, la créance de la requérante soulève plusieurs interrogations en opposition à plusieurs créanciers, incluant deux créanciers qui gèrent des fonds publics, dont les créances ne sont pas pour le moment contestées. Il nous semble que donner raison à la requérante alors qu'elle refuse ou néglige de répondre aux demandes répétées du syndic et d'Investissement Québec et Industrie Canada de fournir des preuves de décaissement de la somme de 50 000 000 \$ qu'elle prétend lui être due ne ferait que compliquer la réalisation des actifs de la débitrice et la répartition de ses biens.

108 Accueillir la requête pourrait mettre en péril les vérifications légitimes de la créance alléguée de 50 000 000 \$ de la débitrice et pourrait, par le fait même, empêcher une distribution juste des actifs de la débitrice. Si une dette n'est pas due et que l'on accepte sa réclamation, il y aura déséquilibre dans le partage des actifs.

109 **RÉORGANISATION COMMERCIALE EFFICACE DES ENTREPRISES EN DIFFICULTÉ FINANCIÈRE**

110 La proposition présentée s'apparente beaucoup plus à une proposition de liquidation qu'à une proposition faite dans le but de continuer ses affaires et de permettre une réorganisation financière.

111 C'est probablement la raison pour laquelle tous les procureurs ainsi que le syndic semblaient beaucoup plus convaincus que la proposition était vouée à l'échec et que la faillite semblait inévitable.

112 Dans les circonstances, ce critère, bien qu'il pourrait être beaucoup plus décisif dans d'autres cas, devient un critère neutre en l'espèce.

113 **PROTECTION DE L'INTÉRÊT PUBLIC**

114 Comme le mentionnent les auteurs Boucher et Fortin⁷:

Afin de protéger une certaine moralité commerciale dans les relations d'affaires, le tribunal ne peut se restreindre à considérer les seuls intérêts des créanciers et du débiteur. L'intérêt public doit également être protégé, par exemple, lors de la demande d'homologation d'un concordat ou de la demande de libération d'un débiteur.

115 Accorder la requête enverrait, de l'avis du tribunal, un mauvais signal sur l'utilisation que peut faire un créancier de la *Loi sur la faillite et l'insolvabilité*. Le rapport du syndic soulève des questions sérieuses et troublantes. Il nous semble qu'il serait contre l'intérêt public que le tribunal exerce sa discrétion et que par le fait même, des créanciers détenant des créances totalisant 8 000 000 \$ puissent être obligés de voter immédiatement sur une proposition sans pouvoir demander d'investigation de la part du syndic et les obliger à voter sur une proposition qu'ils n'auront pu étudier.

116 **THÉORIE DES MAINS PROPRES**

117 Lorsqu'un requérant demande à la Cour supérieure d'exercer sa discrétion judiciaire, il doit se présenter avec « les mains propres ».

118 Cette théorie des mains propres remonte au 18^{ième} siècle et a été utilisée à plusieurs reprises au Canada et au Québec⁸. Cette théorie a été élaborée par soucis d'équité et justement la *Loi sur la faillite et l'insolvabilité* est une loi d'équité.

119 Ainsi, les transactions faites par la requérante avec la débitrice soulèvent de nombreuses interrogations. Mais il y a plus, les comportements de la débitrice et de la requérante laissent voir que la débitrice est beaucoup plus préoccupée par les conséquences de son insolvabilité sur les compagnies liées à elle qu'à la protection des intérêts de ses créanciers ordinaires.

120 C'est ainsi qu'elle a changé sa dénomination sociale pour ne pas nuire à ses compagnies liées. Aussi, le procureur de la requérante a lui-même affirmé que les transactions entre la requérante et la débitrice ont été faites pour éviter que le nom de SaarGummi soit lié à une compagnie qui ne respecte pas ses contrats.

121 De plus, la débitrice et la requérante qui, selon la preuve *prima facie*, est son alter ego, n'ont collaboré d'aucune façon avec le syndic dans l'élaboration d'une proposition viable. La requérante n'a toujours pas produit sa preuve de réclamation et n'a toujours pas fourni au syndic et aux créanciers de la débitrice des preuves que les sommes sont véritablement dues par la débitrice à la requérante. Les contrats produits au soutien de la requête sont loin d'être impressionnants et font penser beaucoup plus à une réorganisation avant faillite qu'à des transactions faites de bonne foi. Lorsqu'il y a un manque flagrant de collaboration entre la débitrice et le syndic, il ne devrait pas appartenir à la débitrice de choisir un syndic plus « collaborateur ».

122 Finalement, il me semble que la requête urgente présentée par la requérante n'est urgente que parce qu'elle a été présentée à la dernière minute. Aucun fait particulier n'est survenu dernièrement pouvant expliquer la raison pour laquelle elle a attendu à la dernière minute pour présenter sa requête.

123 Bien sûr, il arrivera fréquemment qu'une partie demandera à la Cour d'exercer une discrétion rapidement, surtout dans des dossiers de nature commerciale. Par contre, dans le présent cas, plusieurs demandes de prorogation de délai ont été faites et la proposition a été déposée depuis près d'un mois et ce n'est qu'à la dernière minute que la demande a été présentée.

124 La requérante ne mérite pas le droit exceptionnel qu'elle revendique.

125 **POUR CES MOTIFS, LE TRIBUNAL:**

126 *REJETTE* la requête pour obtenir un droit de vote à un assemblée des créanciers.

127 *LE TOUT* avec dépens.

Requête rejetée.

Notes de bas de page

1 [C.S. 500-11-005873-977](#)

2 [EYB 2005-96579](#)

3 [\[1991\] R.D.J. 423 \(Que. C.A.\)](#)

4 *Commonwealth Investors Syndicate Ltd., Re* (1986), 60 C.B.R. (N.S.) 193 (B.C. S.C.); *Wooltex Recycling (Canada) Ltd., Re* (1985), 56 C.B.R. (N.S.) 271 (Ont. S.C.); *Arnco Business Services Ltd., Re* (1983), 49 C.B.R. (N.S.) 188 (Ont. Bkcty.); *Langille v. Toronto Dominion Bank* (1981), 37 C.B.R. (N.S.) 35 (N.S. C.A.); *Markis v. Soccio* (1954), 35 C.B.R. 1 (Que. S.C.)

5 (1975), [1976] 2 S.C.R. 168 (S.C.C.)

6 *Vachon v. Canada (Employment & Immigration Commission)* (1985), 57 C.B.R. (N.S.) 113 (S.C.C.)

- 7 Bernard BOUCHER et Jean-Yves FORTIN, Faillite et insolvabilité, Une perspective québécoise de la jurisprudence canadienne
- 8 Paul-Arthur GENDREAU, France THIBAUT, Denis FERLAND, Bernard CLICHE et Martine GRAVEL, L'injonction, Les Éd. Yvon Blais, 1998, page 36

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Tab 22

2004 CarswellOnt 115
Ontario Superior Court of Justice

Scavarelli v. Bank of Montreal

2004 CarswellOnt 115, [2004] O.J. No. 109, [2004] O.T.C. 36, 128 A.C.W.S.
(3d) 349, 21 C.C.L.T. (3d) 153, 46 B.L.R. (3d) 322, 69 O.R. (3d) 295

**David Scavarelli and Heather Scavarelli
(Plaintiffs) and Bank of Montreal (Defendant)**

P. Smith J.

Heard: December 16-17, 2003
Judgment: January 8, 2004
Docket: 01-0826

Counsel: Roderick Johansen for Plaintiffs
Stephen Kovanchak for Defendant

Subject: Corporate and Commercial; Torts

Related Abridgment Classifications

Civil practice and procedure

XXIV Costs

XXIV.8 Scale and quantum of costs

XXIV.8.g Bill of costs

XXIV.8.g.iii Miscellaneous

Financial institutions

XIII Tortious liability of banks

XIII.1 Nature of bank's duty to customer

XIII.1.a Fiduciary duty

Headnote

Banking and banks --- Tortious liability of banks — Nature of bank's duty to customer

Plaintiff husband and wife invested in franchise business — Plaintiffs' bank denied their application for small business loan — If granted, loan would have limited plaintiffs' personal liability to 25 per cent — Bank made loan secured by personal guarantees and mortgage on plaintiffs' home — Business failed and bank realized on its security — Plaintiffs brought action for breach of fiduciary duty — Action dismissed — Plaintiffs failed to prove that relationship with bank crossed line from debtor-creditor to fiduciary — Bank did not provide advice upon which plaintiffs relied nor was relationship of confidential nature — There was no implicit dependency by plaintiffs on bank — Bank did not breach ordinary duty of care by failing to advise plaintiffs to apply elsewhere for small business loan or by failing to insist that wife obtain independent legal advice.

ACTION by customers of bank for damages for breach of fiduciary duty.

P. Smith J.:

INTRODUCTION

1 Chartered banks in Canada no longer restrict their business to historical banking activities. Today, banks have branched out and offer a wider variety of services and products to their customers. This development not only changes

the nature of the relationship between a bank and a customer but it also can change the legal aspects of that relationship as well.

2 In June of 1998 the Plaintiffs, David and Heather Scavarelli, through their corporation, DSCAV Ltd., acquired a video rental franchise known as "Gone Hollywood" and approached the Defendant, Bank of Montreal ("the Bank") for financing.

3 The initial documentation supplied to the Bank by the plaintiffs included a package of franchise material along with a letter from the franchisee stating that the franchise qualified for financing under the Canada *Small Business Financing Act* (the "CSBFA"). The CSBFA continued the small business loans program introduced in 1961 by the *Small Business Loans Act*.

4 A loan made pursuant to the CSBFA limits the personal liability of the borrowers to a maximum of 25% of the principal amount of the loan advanced.

5 The Bank denied the request by the plaintiffs for a small business loan but did advance funds totaling \$146,000 secured by personal guarantees and a mortgage on their home.

6 The position of the plaintiffs is that the Bank breached its fiduciary duty or, alternatively, its ordinary duty of care, in failing to provide a small business loan, in failing to properly advise them that they were increasing their personal exposure from 25% to 100% of the principal value of the loan, in failing to recommend that they contact other banks for a small business loan and in failing to recommend independent legal advice for Mrs. Scavarelli.

7 The position of the Bank is that it owed no fiduciary obligation to the plaintiffs nor was it negligent in any fashion. The Bank submits that it carefully reviewed and analyzed the plaintiffs' request and informed them that the Bank was not prepared to provide a small business loan for valid reasons and then proceeded to provide other loan options at the request of the plaintiffs.

8 Unfortunately, the plaintiffs' business venture did not have a happy Hollywood ending. The business failed and the bank realized on its security requiring the plaintiffs to repay the full amount of the outstanding loan.

9 It is the nature of a bank's duty of care and the characterization of its relationship with a customer requesting a specific type of loan or product that is the central issue in the case before the court.

BACKGROUND

10 After several years of searching for a suitable business opportunity, David Scavarelli finally decided to purchase a Gone Hollywood franchise. The plan was that he and his wife would each work part-time to supplement the incomes that they earned from other jobs.

11 The plaintiffs were life long customers of the Bank of Montreal. Neither plaintiff had any experience in negotiating a commercial loan or in operating a business.

12 David Scavarelli is 55 years of age, has a grade 10 education and has been employed as a sales representative since 1977 for a company known as Northern Brewery.

13 Heather Scavarelli is the wife of David Scavarelli. She is 44 years of age with a grade 12 high school certificate and has been working as a part-time Registered Practical Nurse at the Hogarth/Westmont Hospital since 1989.

14 The initial package of information was received by the plaintiffs from the franchisor on June 17, 1998. That material included some financial projections along with an indication that the franchise qualified for financing under the CSBFA.

15 Prior to approaching the Bank the plaintiffs hired a lawyer and an accountant to assist them in incorporating a company and to review the documentation received from the franchisee.

16 Virgil Plotzki was the Bank's loans officer with almost 30 years banking experience. He was contacted by David Scavarelli in June 1998 and asked to review the franchise material and to meet with him. Mr. Plotzki reviewed the material and then met with the plaintiff, David Scavarelli on July 14, 1998.

THE JULY 14TH MEETING

17 The evidence of what took place at the meeting of July 14th is conflicting. The plaintiff does not recall that he was ever informed about the special features of a small business loan that limited his liability to 25%. He does confirm that Plotzki advised him that he would not grant a small business loan although he testified that he was not told why and was not advised to try to obtain one at another bank.

18 It was the evidence of Virgil Plotzki that he reviewed the special features of a small business loan with David Scavarelli and then discussed his reasons for declining the loan at some length. He stated that the basic reason for his decision was because the loan, if approved as a small business loan, required that the loan be amortized over 5 years, which he felt exceeded the expected economic life of the assets financed. He concluded that, since the primary assets being financed were videos, the amortization of the loan far exceeded their expected economic life, which he felt was six months to one year. His review of the financial projections left him with the conclusion that a 5-year amortization was "too tight" leaving too small a cushion in the event that expenses or revenue projections were inaccurate and also because there was no room for either plaintiff to take out wages.

19 Plotzki testified that it was then that David Scavarelli asked him if there were other financing options. He replied by indicating that other options would require different security including a full guarantee.

20 The issue of whether independent legal advice would be required by Heather Scavarelli was also discussed. After discovering that she was an officer and director in DSCAV Ltd. and would be actively involved in the day to day operation of the business, Plotzki decided to waive this requirement since it was the Bank's policy to do so under these circumstances.

21 The meeting concluded by Plotzki agreeing to contact the franchisor to enquire whether other banks were amortizing loans for franchise purchases for a period longer than 5 years and to work on other financing options.

THE JULY 22nd MEETING

22 On July 20, 1998 David Scavarelli called Virgil Plotzki informing him that he would like to review other options available to him through the Bank of Montreal. Plotzki then entered a formal loan application into the Bank's system and arranged to meet both plaintiffs on July 22.

23 Plotzki testified that, on July 22 he again went over his analysis of why he had concluded a small business loan was not an option. He did not discuss with Heather Scavarelli at this meeting or at any time, that her liability with a small business loan would be limited to 25% of the principal value of the loan whereas the options he was discussing required a full covering guarantee.

24 It was Plotzki's recollection that the plaintiffs called a few days after the July 22 meeting to say that they had selected an option. Bank approval was granted that month however it was only on October 8 that David Scavarelli called the Bank to give them the go ahead to prepare the loan documents for signing.

25 The loan documentation was prepared by the Bank and forwarded to the lawyer representing the plaintiffs where they signed it on February 19, 1999.

26 Unfortunately, for a number of reasons, none of which had anything to do with the Bank, the business failed and was forced to close its doors in October 2000. The Bank called the loan and has realized on its security.

THE LAW

27 Unless there are special circumstances, the relationship of a bank to its customers does not give rise to a fiduciary relationship. The relationship is normally one of conventional debtor-creditor. (see: *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (Ont. C.A.), *Foley v. Hill* (1948), 9 E.R. 1002 (U.K. H.L.), and *Bank of Montreal v. Minaki International Resort Corp.*, [1997] O.J. No. 4372 (Ont. Gen. Div.).)

28 This principle is succinctly stated in the text, M.V. Ellis, *Fiduciary Duties in Canada*, looseleaf (Toronto: Thompson Carswell, 2002) at 7-2.1, as follows: "It is rare in the context of an arm's length commercial transaction that there is a finding of a fiduciary relationship between a bank and its customers. Parties' relations are governed by contract in these situations."

29 A fiduciary duty is different from the ordinary duty of care. (see: *Rodaro v. Royal Bank*, [2000] O.J. No. 272 (Ont. S.C.J.) and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.).) In *Hodgkinson v. Simms*, La Forest J., at 405, commented that:

the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain a fiduciary relationship give rise to a corresponding duty of loyalty.

30 The question before this court is whether the defendant Bank has somehow caused the nature of its relationship with its customer to change so that it can be held accountable for its conduct as a fiduciary. Perhaps Sachs J. stated the issue best in *Lloyd's Bank v. Bundy* (1974), [1975] Q.B. 326 (Eng. C.A.) at 340-41 when he stated:

Have the plaintiffs satisfied the onus of proving that the relationship between the plaintiffs as customers and the defendant as Banker has crossed the line of that of a mere debtor - creditor relationship to that of a fiduciary relationship.

31 This change in relationship has been referred to as "crossing the line" by the author Donovan Waters in his article, "Obligations and Unconscionable Transactions" published in Volume 65 of the Canadian Bar Review. At page 65 of that article he states:

Where the Bank in its dealings with a customer (for instance, in the grant of a loan, or the taking of security) adheres simply to explaining the nature and effect of the documentations, it will be regarded as carrying out 'the normal business' of a Bank. But where the Bank 'goes further and advises on more general matters germane to the wisdom of the transaction', then the court may form the view that it has passed from the common-law relationship to a fiduciary with its customer. That is to say, it may have "crossed the line" so that an appropriate Trustee obligation-such as the Rule against conflict of interest and duty-becomes relevant.

32 Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) at 136 proposed the following three-step analysis to guide the courts in identifying fiduciary relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

33 Thus, when examining relationships to determine whether a fiduciary relationship exists, "what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party." (La Forest J. in *Hodgkinson v. Simms*, *supra*, at 408-410.)

34 In determining whether or not the line has been crossed a court must inquire whether "there was an express or implied undertaking to act or to advise scrupulously in the interests of another, which has been relied upon by that other. If so the duty exists and is defined by the scope of the undertaking." (Crawford and Falconbridge, *Banking and Bills of Exchange*, 8th ed.(Toronto: Canada Law Book, 1986) at 829.)

35 In the article "Fiduciary Responsibility of Lenders", published in *Lender Liability and Responsibility* (Toronto: Law Society of Upper Canada, Dept. of Education, 1989) at C-7, the author, John R. Varley, describes the process as follows:

The first indicia of the existence of fiduciary relationship is that there is some form of undertaking to act in the interest of another person, whether voluntary, gratuitous, express or by implication, by contract or by legislation: Scott, "The Fiduciary Principle" (1949), 37 Calif. L. Rev. 539 at 540 and Gautreau, p. 7. Yet not every undertaking will create a fiduciary relationship: a banker who undertakes to respond to a credit inquiry does not thereby become a fiduciary. The lender should be seen to have assumed a particular responsibility beyond what one might expect in the ordinary course of a lender borrower relationship. A giving of business or investment advice can be an area of risk, especially where it is given to a potential customer or guarantor who is not a sophisticated business person or investor. However, the fact that advice may be given to such persons does not, it seems, create a fiduciary relationship. It merely indicates that there has been some form of undertaking by the lender and one goes on from there to see if the other elements of a fiduciary relationship exists. Lender involvement in management of the borrower's business, as sometimes practiced by "venture capitalists", "merchants bankers" can similarly be seen as an assumption of a particular responsibility beyond the scope of the ordinary lender role, especially if share or board seats are taken, or if the lender begins to deal directly with the lender's employees or suppliers on matters of management (not lender) responsibility.

36 The plaintiff has the onus of demonstrating the existence of a fiduciary relationship. (see: *ASCU Community Credit Union Ltd. v. Dunster* (1990), 75 O.R. (2d) 490 (Ont. Gen. Div.) and *Shoppers Trust Co. v. Dynamic Homes Ltd.* (1992), 10 O.R. (3d) 361 (Ont. Gen. Div.))

37 To do so a plaintiff must demonstrate that the following four conditions exist: firstly, that advice was provided and that the advice was relied upon; second, that the defendant was aware of this reliance; third, that the defendant derived a benefit from the transaction; and fourth, that the relationship was one of a confidential nature. (see: *Royal Bank v. Brattberg*, [1993] A.J. No. 548 (Alta. Q.B.), *National Westminster Bank plc v. Morgan*, [1985] A.C. 686 (U.K. H.L.), and *Royal Bank v. Aleman*, [1988] 3 W.W.R. 461 (Alta. Q.B.).)

38 There is an inherent conflict between the interests of a bank and the interests of its customers in every loan transaction. In this case, the Bank had a 75% exposure if a Small business loan was granted whereas the Bank was fully secured under a conventional loan agreement.

39 As stated by Epstein J. in *Accursi v. Hongkong Bank of Canada*, [1997] O.J. No. 3524 (Ont. Gen. Div.), as long it maintains its relationship with its customer as one of debtor-creditor, "the banks are entitled to exercise their rights solely in their interests." (see also: *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (Ont. C.A.).)

40 In *Litwin Construction (1973) Ltd. v. Kiss* (1988), 29 B.C.L.R. (2d) 88 (B.C. C.A.) the court at page 105 wrote:

It would surely be an exceptional case where parties who have different commercial interests and who have entered into a contract to bring about diverse results for each of them, ought to be considered from the circumstances to have assumed a fiduciary relationship in which one of them owes a duty of loyalty and selflessness to the other. That is not a normal expectation of parties contracting at arms length.

THE EVIDENCE

41 I prefer the evidence of Virgil Plotzki and his recollection of what transpired at the meeting that took place on July 14. His evidence was detailed, credible and convincing and his recollection of events and details far superior to the plaintiffs. More specifically, I accept his evidence that he reviewed the special features of a small business loan with the plaintiff, David Scavarelli on July 14 and that he drew to his attention to the fact that liability was limited to 25% of the principal value of the loan under that programme. The admission that this was not discussed with Heather Scavarelli during the meeting of July 22 is not material. Both David and Heather Scavarelli were officers and directors in DSCAV Ltd. and it was admitted by Heather Scavarelli that she was content to allow her husband to act as her agent in all matters relating to the purchase of the franchise which would necessarily include any dealings with the bank.

42 The assessment conducted by Virgil Plotzki was both thorough and professional. Based on that assessment and his considerable experience in commercial lending, Plotzki formed an opinion that a small business loan did not suit the business venture contemplated by the plaintiffs. I find that the Bank was completely within its rights to decline to offer a small business loan to the plaintiffs.

43 The plaintiffs suggest that, when the defendant Bank decided not to proceed with a small business loan it had a duty to advise the plaintiffs to apply elsewhere. Having found that the Bank had not crossed the line and become a fiduciary I find that it had no obligation to provide this advice to the plaintiffs. The plaintiffs had the right to shop around and make enquiries to other lending institutions especially since they were in possession of the letter dated June 17, 1998 written by the franchisee that indicated that the Bank of Nova Scotia and the Royal Bank were offering small business loans for the purchase of other franchises.

44 As well there was a considerable gap in time between the last meeting with the plaintiffs (July 22) and the date when the bank was given the go ahead to put the loan documentation together (October 9). For whatever reason, there was another large gap in time between those instructions and the signing of the loan documents in the office of the plaintiffs' lawyer (February 12, 1999). The plaintiffs had ample opportunity to either back out of the deal, talk to their lawyer or accountant or to investigate financing with other banking institutions.

45 Regarding the argument that the Bank breached its duty of care by failing to insist that Heather Scavarelli receive independent legal advice, I find that the Bank, in these circumstances, had no such duty imposed upon it by law. The policy of the Bank was to waive independent legal advice if a spouse was either actively involved in the business or was an officer and/or director of the company. In this case, Heather Scavarelli qualified on both counts.

46 More importantly, by her own evidence, she acknowledged that she understood the loan documentation signed at her lawyer's office, that she was aware that she and her husband were 100% liable for the balance of the loan principle in the event of a default, and that their home was being taken as security.

47 The evidence, taken as a whole, establishes nothing more than a traditional loan application and approval conducted in the normal course of business of the Bank. Consequently, the relationship is properly characterized as the normal, standard debtor-creditor relationship between an arms length lender and borrower.

48 Although the evidence before the court indicates that the plaintiffs were long-term customers and had no experience in negotiation commercial loans, these factors alone do not create a fiduciary relationship. The plaintiffs have not succeeded in proving three of the four prerequisites required for a finding of a fiduciary relationship. Specifically, they have not established that the Bank provided advice, that they relied upon it or that the relationship was one of a confidential nature.

49 What is also lacking in the evidence is the "implicit dependency" by the plaintiffs on the Bank which Sopinka J. found to be "common to all fiduciary relationships". (see: *International Corona Resources Ltd. v. Lac Minerals Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.)) Nor do I find that any of the three hallmarks of a fiduciary relationship as described by Wilson J. in *Frame v. Smith*, *supra*, have been established by the evidence.

50 I find that the plaintiffs have not succeeded in proving the Bank was a fiduciary or that it breached its ordinary duty of care to the plaintiffs.

DISPOSITION

51 For the above reasons this action is dismissed.

52 With respect to the issue of costs, in the event that counsel are not able to resolve this issue themselves, the defendant shall provide written submissions to this court on or before January 30, 2004. The plaintiffs shall provide their written submissions by February 14, 2004. No further submissions shall be filed without leave of this court. All material shall include sufficient details to allow this court to fix costs in the event that an award of costs is made.

Action dismissed.

Tab 23

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

**PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and
MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM
FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335
BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)**

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.3 Appointment

VII.3.a General principles

Headnote

Receivers --- Appointment — General

Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.

Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* ¹ to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario ² and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*. ³ The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* ⁴ where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate ⁵ and that such consequences would have irreparable harm. ⁶

Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re*⁷ where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*,⁸ the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms*⁹ with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment *ex parte* and without notice to take over one's property, or property which is *prima facie* his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property *prima facie* his and hand the same over to another on an *ex parte* claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*,¹⁰ Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act*¹¹ or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available."¹² Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne *

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

Romaine J.:

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC \$2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of \$72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

- a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;
- b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;
- c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;
- d) an assignment of mortgage-backed debentures;
- e) an assignment of a \$200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;
- f) \$250,000 to be held in trust by Paragon's counsel; and
- g) \$986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of \$2,629,129.99 with a then per diem rate of \$2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, \$2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, \$986,000 in a cash account, \$200,000 in trust with a lawyer, the \$250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was \$200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the \$986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

- a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c) the nature of the property;
- d) the apprehended or actual waste of the debtor's assets;
- e) the preservation and protection of the property pending judicial resolution;
- f) the balance of convenience to the parties;
- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties;
- p) the goal of facilitating the duties of the receiver.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the \$200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain \$986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly \$3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

- a) that there is a serious issue to be tried on appeal;
- b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
- c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before

this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in Georgia Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bkcty.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

[12](#) Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

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Tab 24

2013 ONSC 7259
Ontario Superior Court of Justice

McMurtry v. McMurtry

2013 CarswellOnt 17380, 2013 ONSC 7259, 14 C.B.R. (6th) 306, 237 A.C.W.S. (3d) 101

**Mildred McMurtry, Plaintiff and John McMurtry
and Mic Mac Realty (Ottawa) Limited, Defendants**

John McMurtry, Plaintiff and Jim McMurtry, Defendant

Jim McMurtry, Plaintiff by Counterclaim and John McMurtry, Brenda McMurtry, Barry
Coons, Mic Mac Realty (Ottawa) Limited, Bouris Wilson LLP, Defendants by Counterclaim

Maranger J.

Heard: November 21, 2013

Judgment: December 10, 2013 *

Docket: 11-50312, 12-56265

Counsel: Marc W. Smith for Plaintiff, Mildred McMurtry

Jeff G. Saikaley, Richard Léger for Plaintiff / Defendants by Counterclaim, John McMurtry, Brenda McMurtry and
Mic Mac Realty (Ottawa) Limited

Daniel Mayo for Defendant / Plaintiff by Counterclaim, Jim McMurtry

Christopher Hluchan for Defendants by Counterclaim, Barry Coons and Bouris Wilson LLP

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

Related Abridgment Classifications

Business associations

[III](#) Specific matters of corporate organization

[III.3](#) Shareholders

[III.3.e](#) Shareholders' remedies

[III.3.e.ii](#) Relief from oppression

[III.3.e.ii.E](#) Miscellaneous

Debtors and creditors

[VII](#) Receivers

[VII.3](#) Appointment

[VII.3.a](#) General principles

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief
from oppression — Miscellaneous

Two brothers John and Jim were shareholders in corporation, percentage of ownership of which was contested —
Brothers disagreed on proceeds of sale of property and funds held in trust — Both brothers brought action for relief
from oppression — Jim brought motion for order appointing interlocutory receiver, John brought motion for summary
judgment relating to claim by relative regarding share ownership and for payment of funds from sale — Motions
dismissed — Appointing receiver inappropriate — John and wife had been running company for 30 years and there was
no evidence of mismanagement that could not be rectified with monetary payment or likelihood that irreparable harm
would occur — Cost of receiver manager would be unnecessary expense — Summary judgment not granted — Evidence

regarding purported share ownership was not proper proof and was contradicted by other evidence — Matter was multi-layered — Limitation issue did not determine regarding summary judgment — Funds not paid out.

Debtors and creditors --- Receivers — Appointment — General principles

Two brothers John and Jim were shareholders in corporation, percentage of ownership of which was contested — Brothers disagreed on proceeds of sale of property and funds held in trust — Both brothers brought action for relief from oppression — Jim brought motion for order appointing interlocutory receiver, John brought motion for summary judgment relating to claim by relative regarding share ownership and for payment of funds from sale — Motions dismissed — Appointing receiver inappropriate — John and wife had been running company for 30 years and there was no evidence of mismanagement that could not be rectified with monetary payment or likelihood that irreparable harm would occur — Cost of receiver manager would be unnecessary expense.

MOTION by shareholders in oppression proceedings for summary judgment, appointment of receiver and payment out of funds.

Maranger J.:

Introduction:

1 Jim and John McMurtry are brothers. They are the sons of Mildred McMurtry and the late Keith McMurtry. In the 1960s Keith McMurtry founded a real estate holding company called Mic Mac. Keith McMurtry died in 1998. The main business of the company was and is landholding; and to a lesser extent commercial leasing. John McMurtry is a shareholder in the company as is Jim McMurtry. It is undisputed that Jim McMurtry owns 27% of the shares in the company. The remaining ownership is disputed; John McMurtry either owns 27% with Mildred owning 45% or he owns the remaining 73% of the shares in the company.

2 In any event John McMurtry along with his wife Brenda and more recently their daughter Emily have been running the company for about the last 30 years.

3 The brothers had a falling out over the sale of a property located on Queensdale Avenue. Their dispute concerns the distribution of the proceeds of sale from this property. There is currently \$547,444.98 in trust from this sale. John McMurtry initiated an action against Jim McMurtry and Jim McMurtry counterclaimed. They both seek oppression remedies against the other as shareholders in Mic Mac.

Motions and issues to be determined:

4 The court heard the following motions: a motion brought by Jim McMurtry for an order appointing an interlocutory receiver to oversee the operations and management of MicMac; a motion brought by John McMurtry for a summary judgment dismissing the claim by Mildred McMurtry respecting her ownership of shares in MicMac; a motion by John McMurtry for the disbursement of funds presently held in trust from the sale of the Queensdale Avenue property. Finally depending on the outcome of these motions counsel were seeking directions from the court concerning what can be done to have the matter proceed expeditiously to trial.

The appointment of a receiver:

5 In *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) CanLII at para. 15, Justice Strathy summarized the governing principles respecting the appointment of a receiver-manager in the following manner:

a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudices the conduct of a litigant, and should be granted sparingly...

b) The appointment of receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy...

c) The appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties...

d) In deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto...

e) The test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief:

i. a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried.

ii. It must be determined that the moving party would suffer "irreparable harm if the motion is refused, and irreparable harm refers to the nature of the harm suffered rather than its magnitude, evidence of irreparable harm must be clear and not speculative.

iii. An assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits- that is "the balance of convenience."

f) where the plaintiff's claim is based in fraud, a strong case of fraud coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendant's assets.

6 After considering all of the material filed by counsel, including the affidavits and the transcripts of the cross-examinations on the affidavits, I come to the conclusion that this is not an appropriate case for the appointment of a receiver- manager and for the following reasons:

- John McMurtry and Brenda McMurtry have been running the company for 30 years. Regardless of whether or not they have mismanaged the company, or extracted payments from the company inappropriately, the company has a conservative value of over \$6 million and liabilities of perhaps \$1.5 million.

- There is nothing in the evidence to support the proposition that any mismanagement, whether real or imaginary, could not be rectified after a trial by a payment to the aggrieved party out of the assets of the company.

- There was virtually no evidence of irreparable harm that could befall the moving party in this case. The only evidence presented was speculative evidence relating to the potential tax liabilities of MicMac. No actual liabilities were put forward, nor was there any tangible evidence that disclosed a real liability in the future, only the prospect of the liability.

- The cost of a receiver manager is an expense the company does not need. The only substantial contentious issue that has arisen here concerns the sale of one specific piece of property namely the Stoke Lacey property valued at \$4,050,000.00.

- MicMac is first and foremost a landholding company. Stoke Lacey is its biggest asset. The balance of the day-to-day operations consists of the management of commercial properties that are currently being leased. The biggest complaint in that regard is that the municipal taxes on these properties are in arrears and should be paid directly from monthly rental revenues.

7 Therefore, the motion to appoint a receiver is dismissed.

Summary judgment motion:

8 Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 stipulates that a defendant may, after delivering his or her statement of defence, move with appropriate affidavit material or other evidence for summary judgment dismissing

all or part of the claim in the statement of claim. The court is mandated to grant summary judgment if it is satisfied that there is no genuine issue requiring a trial respecting a claim or defence.

Rule 20.04 (2.1) provides that:

In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

9 In the decision of *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1 (Ont. C.A.), the Ontario Court of Appeal set out the following principles applicable to the determination of Rule 20 summary judgment motions:

- The amended rule permits the motion judge to decide the action where he or she is satisfied that by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution. (At para. 37).
- In deciding if the powers under rule 20 should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of trial? (at para. 50).
- In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interests of justice" requires a trial (at para. 51).
- In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues (at para. 52).

10 In this case the motion is brought by John McMurtry who seeks a summary judgment dismissing Mildred McMurtry's claim for declaratory relief concerning the ownership of shares in MicMac. The thrust of the moving parties' claim is twofold: they assert that there is a letter written by Mildred McMurtry which discloses that prior to the death of Keith McMurtry a further 45% of the shares in the company were transferred to John McMurtry; furthermore, they assert that the limitation period has long been prescribed in the circumstances of this case.

11 After reviewing the material filed including the affidavits and the transcripts of the cross examinations on the affidavits I would dismiss the summary judgment motion and for the following reasons:

- While the letter written by Mildred McMurtry may be compelling evidence of the possibility that 45% of the shares were at one time transferred to John McMurtry, it is not unequivocal evidence that a proper and legal transfer of

shares ever took place. There are no minute books showing the transfer. Furthermore, Jim McMurtry's evidence is that he never attended at a meeting of the Board of Directors to witness a legal transfer of shares.

- There is other documentary evidence including but not limited to the following: a letter from the accountant dated August 6, 1999, a sworn declaration of transmission dated December 8, 1999, and an income tax return dated 1997. These documents either contradict or confuse the notion of the transfer of 45% of the shares in MicMac.
- The cross-examination of John McMurtry discloses that his evidence as to the when, why and what of the transfer of 45% of the shares is far from clear.
- While I agree that Mildred McMurtry's evidence seems at times contradictory and certainly can be argued to be a shifting in position late in the day to benefit Jim McMurtry, it seems to me that this is one of those cases where credibility will be front and center for the trier of fact to determine.
- With respect to the limitation period argument, I agree with counsel representing Mildred McMurtry that a limitation period doesn't start to run without evidence that there has been a transfer of the shares; without a transfer of the shares the will operates to give Mildred McMurtry 45% of the shares. In other words she is not suing for the return of the shares, or for money she says she is entitled to. She is suing for a declaration that a transfer never took place.
- This is a layered and complex case. The issue of the share ownership should go to trial.

12 Therefore, the summary judgment motion is dismissed.

Money in trust:

13 John McMurtry moved to have the \$547,444.98 presently being held in trust by the solicitors who acted on the Queensdale property sale released to him as part of the continued operations of MicMac. This motion was dismissed, however, for reasons given orally at the hearing; it is ordered that from these trust funds, there shall be direct payments to the relevant municipal authorities for the purposes of extinguishing any municipal tax arrears on properties owned by MicMac.

14 The method of disbursement shall be approved by counsel representing each of the parties in this case; failing which an appointment can be made with the court for specific directions. The remaining trust funds shall continue to be held pending completion of this litigation.

Directions going forward:

15 This matter should proceed to trial in an expedited fashion, the cross-examinations that have already taken place on the various affidavits filed should and can be utilized as partial-examinations for discovery. If any further discovery is required a pre-trial should be conducted in the next 90 days. The matter should be listed for trial within the next 120 days.

Costs:

16 I have cost outlines that were given to me at the completion of the motions from all counsel. I will accept written submissions of no more than two pages in length concerning what the appropriate disposition should be with respect to costs. I will accept these written submissions within 15 days of the release of this decision failing which there will be no order as to costs.

Motions dismissed.

Footnotes

- * Additional reasons at *McMurtry v. McMurtry* (2014), 2014 ONSC 1002, 2014 CarswellOnt 1766 (Ont. S.C.J.)

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Tab 25

2010 ONSC 4008
Ontario Superior Court of Justice

Anderson v. Hunking

2010 CarswellOnt 5191, 2010 ONSC 4008, [2010] O.J. No. 3042, 190 A.C.W.S. (3d) 442

**Garth Anderson, et al. (Plaintiffs / Moving Parties and
Bryan Hunking, et al. (Defendants / Respondents)**

G.R. Strathy J.

Heard: June 17, 2010

Judgment: July 16, 2010

Docket: CV-10-8597-00CL

Proceedings: additional reasons at *Anderson v. Hunking* (2010), 2010 ONSC 4920, 2010 CarswellOnt 6724 (Ont. S.C.J.)

Counsel: Lincoln Caylor, Jonathan Bell for Plaintiffs / Moving Parties

Heath Whitely, Gwendolyn L. Adrian for Hunking, et al., Defendants / Respondents

David Preger for Romspen Mortgage Investment Fund

A. Kauffman for Ernst and Young Inc., proposed receiver

No one for Chowdhry, et al.

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Debtors and creditors

[VII Receivers](#)

[VII.3 Appointment](#)

[VII.3.b Application for appointment](#)

[VII.3.b.iii Grounds](#)

[VII.3.b.iii.A Just and convenient](#)

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds

Defendant conducted educational seminars, which were investment advertisements — Defendants allegedly promised defendants that they would receive two-thirds return on investment, which was also tax deductible — Plaintiffs claimed that money was improperly transferred to building interest of defendant which was retirement home — Plaintiffs brought proceedings against defendant for fraud, misrepresentation and unjust enrichment — Plaintiffs claimed that defendants improperly took their investments and used them to invest in property — Plaintiffs brought application to appoint receiver of retirement home — Application dismissed — Plaintiffs did not make strong case that defendant made specifically prohibited use of money — Unjust enrichment not made out as advance of funds was met with corresponding liability — Loan was juristic reason for enrichment — No evidence of irreparable harm — Business interests of defendant appeared solvent — No evidence to support allegation that retirement residence was plan to deplete funds stolen from plaintiff — Balance of convenience did not favour appointment — Appointing receiver is intrusive.

APPLICATION by plaintiffs to appoint receiver.

D.G. Redman Prov. J.:

1 This is a motion by the plaintiffs for an order pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 41.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, appointing a receiver over the assets and business

of a commercial retirement project owned or controlled by the defendant Bryan Hunking ("Hunking") and referred to as the "Retirement Residence".

2 The 79 individual plaintiffs claim that they are victims of a fraudulent investment scheme orchestrated by Hunking, in concert with the defendants Rajesh Chowdhry ("Chowdhry"), Inderpal Bajaj ("Bajaj") and Ajinderpal Singh ("Singh") (collectively, including Hunking, the "Partners"). They claim that, contrary to assurances made to them that their money would be put in low risk/high return investments, some \$5 million, or more than half of their investments, ended up in the Retirement Residence.

3 At the hearing of the motion, the plaintiffs asked that the receiver be given power to sell the Retirement Residence, which they say is either insolvent or at risk of imminent insolvency.

4 I will begin by describing the circumstances that give rise to this motion. I will then set out the court's jurisdiction to appoint a receiver and the principles that govern the exercise of that jurisdiction. I will then apply those principles to the facts of this case.

Background

5 The plaintiff, Dr. Robert Gibb ("Gibb"), who has sworn an affidavit in support of the motion, claims that, at some time in 2000, he and the other plaintiffs (who appear to be unrelated individual investors) began attending investment seminars conducted by the Partners. These seminars, although ostensibly for educational purposes, served as a platform to promote the Partners' investment vehicle, which has been referred to as the "Netbusmodel Group".¹ Gibb alleges that the Partners represented that 80% of investors' money contributed to Netbusmodel would be placed in "secure" investments, which would yield returns of 18-30% per annum and the balance would be placed in more speculative, high tech start-up companies. Some of the investors were induced to participate in a charitable donation plan, referred to as "Help for Humanity - Canada" on the basis that their "investment" would be fully tax deductible but that they would eventually receive a return of two-thirds of their investment.

6 This is an individual action in which 79 investors are joined as plaintiffs. It is not advanced as a class action. Gibb is the only plaintiff who has sworn an affidavit in support of this motion. Singularly lacking from his evidence, and presumably from the records of the other plaintiffs is any documentary evidence of the allegedly fraudulent misrepresentations made by the Partners. While different investors were allegedly induced to participate in different investments within the Netbusmodel Group, and to make their investments in different ways, it is acknowledged that none of the plaintiffs were told that their money would be used to finance the Retirement Residence.

7 In approximately October, 2001, the Partners purchased a corporation called Emmanuel Village Homes (Kitchener) Inc. ("EV Homes") for a price of one dollar. In return, they took over that corporation's outstanding liabilities of about \$2.4 million. The assets of EV Homes consisted of 42 town homes, all of which were subject to life leases, and a tract of land.

8 In December of 2001, the Partners began to construct the Retirement Residence on the tract of land owned by EV Homes. The money to finance the construction came from a company called Commonwealth Capital Corporation ("Commonwealth"), which was also owned by the Partners.

9 As construction of the Retirement Residence progressed, the Partners acquired additional funding by way of a \$7.5 million first mortgage from Romspen Investment Corporation ("Romspen") and they severed the lands on which the Retirement Residence was being built from the balance of the lands containing the town homes. They created Emmanuel Village Residence Inc. ("EV Residence"), which took title to the lands on which the Retirement Residence was being built. EV Homes retained the town homes lands and held an unsecured debt from EV Residence, representing the money put into the Retirement Residence by EV Homes.

10 Plaintiffs' counsel claim to have established that in excess of \$5 million of the \$8.63 million invested by the plaintiffs found its way into the Retirement Residence. Some of that (\$1.4 million) came from Help for Humanity - Canada, and some came from Commonwealth (approximately \$3.7 million). The funds provided by Commonwealth are alleged to have been provided by six sources:

- (a) Alcorp (\$520,000);
- (b) VM Press (\$45,000);
- (c) S & P Trading (\$180,000);
- (d) Harsajan Singh (\$2.086 million);
- (e) Birchwood (\$530,000);
- (f) Baby Alcorp (\$370,224).

11 In March, 2003, through a series of transactions, three of the Partners, Chowdhry, Bajaj and Singh, transferred their interests in EV Homes, EV Residence and Commonwealth to a holding company owned by Hunking. In the result, Hunking now owns the Retirement Residence. The validity of these transactions is challenged in litigation between Hunking and the other three Partners.²

12 The plaintiffs claim that at least \$3.166 million of their investments in the Netbusmodel Group was fraudulently transferred to Commonwealth and was used to construct the Retirement Residence.

13 A fundamental factual issue raised by this motion is whether Hunking, who now owns the Retirement Residence, participated in the alleged diversion of the plaintiffs' investments to the Retirement Residence.

14 The plaintiffs have provided no direct evidence on this critical question. Gibb has no direct evidence on the issue and much of his affidavit is either argumentative or the statement of information that has been provided to him as a result of investigations carried out by his counsel. The plaintiffs also rely on evidence of the Partners other than Hunking, but this evidence is disputed by Hunking and the plaintiffs concede that some of that evidence is unreliable. The other Partners are in litigation with Hunking and may well have their own reasons to embarrass him financially. While plaintiffs' counsel appear to have done an admirable job of forensic investigation, the evidence falls short of establishing that Hunking was a knowing participant in the diversion of the plaintiffs' funds into the Retirement Residence.

Jurisdiction to appoint a receiver

15 Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order "where it appears to a judge of the court to be just or convenient to do so." The following principles govern motions of this kind:

(a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudices the conduct of a litigant, and should be granted sparingly: *Fisher Investments Ltd. v. Nusbaum* (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);

(b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy: *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (Ont. H.C.);

(c) the appointment of a receiver is very intrusive and should only be used sparingly, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: *1468121 Ontario Ltd. v. 663789*

Ontario Ltd., [2008] O.J. No. 5090 (Ont. S.C.J.), 2008 CanLII 66137, referring to *Royal Bank v. Chongsim Investments Ltd.*, 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Ont. Gen. Div.);

(d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), 1996 CanLII 8258;

(e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.);

(i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

(ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused, and "irreparable" refers to the nature of the harm suffered rather than its magnitude - evidence of irreparable harm must be clear and not speculative: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience": See *1754765 Ontario Inc. v. 2069380 Ontario Inc.* (2008), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff's claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff's right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants' assets: *Loblaw Brands Ltd. v. Thornton*, 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (Ont. S.C.J.).

16 The appointment of a receiver for the purposes of preserving the defendant's assets as security for a potential judgment in favour of the plaintiff is, like a *Mareva* injunction, an exception to the general principle that our courts do not grant execution before judgment. As Salhany L.J.S.C. observed in *Ryder Truck Rentals Canada Ltd. v. 568907 Ontario Ltd.*, above, at para. 6:

[T]here is always a risk that a judgment may never be satisfied. It can also probably be said that whenever A claims money from B, it is "just" or "convenient" or both that a receiver be appointed or an interlocutory injunction be issued restraining the debtor from dealing with his assets. The Courts, however, have never been prepared to grant to a creditor such extraordinary relief, which is, in effect, an execution before judgment unless there is strong evidence the creditor's right to recovery is in serious jeopardy.... [referring also to *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at 533, 30 C.P.C. 205 (C.A.)].

Analysis

17 In this section, I will apply the test for the appointment of an interlocutory receiver, having regard to the principles expressed above.

(a) Preliminary assessment of the merits of the case

18 The plaintiffs' case is based on (i) fraud; (ii) conspiracy; and (iii) unjust enrichment. The plaintiffs also claim the remedy of constructive trust over the Retirement Residence which they say was constructed using their funds.

19 The plaintiffs say that they have established a strong *prima facie* case of fraudulent misrepresentation. They claim that their investment, which was made based on the representation that it would be "secure", was in fact "funneled" into the Retirement Residence".

20 A fundamental problem with the fraudulent misrepresentation aspect of this case is that Gibb, (who is the only affiant on behalf of the plaintiffs) gives only general evidence as to what the Partners told him would be done with his money. Although he claims that 80% of his money was to be put in "secure" investments and the balance in "risky start-up high tech companies", there is no evidence that there were specific limits on the use that could be made of his funds. There were certainly no limits reduced to writing that have been put in evidence and there are no limits identified by Gibb. His evidence, and the other evidence adduced by the plaintiffs, is really to the effect that, "[n]o one ever told the investors their money would ever go into the Retirement Residence".

21 Moreover, there is no evidence of specific representations that were made to any one of the other 78 investor plaintiffs, other than the foregoing general representations.

22 A second problem is that the plaintiffs' case in fraud and conspiracy against Hunking will fall to be determined on questions of credibility as between Hunking and the other Partners.

23 Hunking's evidence is that he understood that the construction of the Retirement Residence was being funded by Commonwealth through loans advanced by the other Partners, and their families, as well as by private loan agreements with other lenders. Hunking swears that he did not participate in a fraud, that the representations made to investors concerning their investments in Netbusmodel reflected his understanding of the facts, and that he was not aware of any wrongdoings in relation to the plaintiffs' investments.

24 For the purposes of this motion, it is not disputed that the plaintiffs invested over \$8 million in the Netbusmodel Group and that much of that money has not been returned to them. Nor is it disputed that some of this money found its way through Commonwealth and into EV Homes and EV Residence. What is altogether unclear is what happened in the "messy middle" to use the expression of counsel for the plaintiffs. The plaintiffs have not established anything more than that Hunking *might* have been responsible for the misappropriation of investors' funds and the use of those funds for the Retirement Residence.

25 While the plaintiffs' counsel points to a number of circumstances that cast doubt on Hunking's explanation that the money was provided by the other Partners, there are - equally - circumstances that suggest that the other Partners controlled the flow of funds from Netbusgroup through Commonwealth and to EV Homes and/or EV Residence. On the evidence before me, I cannot say that a strong case of fraud (or, for that matter, a *prima facie* case of fraud) has been made out against Hunking. For the same reason, I cannot say that there is strong evidence that Hunking was a party to a conspiracy to defraud the plaintiffs.

26 The plaintiffs' alternative claim is in unjust enrichment. The well-settled elements of this cause of action are: (a) enrichment of the defendant; (b) corresponding deprivation of the plaintiff; and (c) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.); *Richardson Estate v. Mew*, 2009 ONCA 403, 96 O.R. (3d) 65 (Ont. C.A.) at para. 36. While there is a basis for concluding that there has been a deprivation of the plaintiffs because they have lost their investments, it does not follow that there has been an enrichment of the defendant because the advance of funds by Commonwealth is reflected by a liability of EV Residence to Commonwealth. As well, there is a juristic reason for the "enrichment" - namely, the funds were advanced as a loan.

(b) Irreparable Harm

27 The plaintiffs rely on the following observation of Sopinka and Cory JJ. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, above, at para. 59:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

28 The plaintiffs say that the liabilities of the "EV Group" are increasing daily and that, because of Hunking's actions, there is a strong likelihood that by the time of trial the amount of equity in the EV Group, and in the Retirement Residence in particular, will be insufficient to satisfy the plaintiffs' claim. They say that there is no evidence that Hunking has any asset other than the Retirement Residence to satisfy their claims.

29 The plaintiffs rely on unaudited financial statements of EV Residence for the year ended February 28, 2009, which show assets of approximately \$11.75 million (with lands and buildings reflected at book value) as against liabilities of over \$18 million and a negative cash flow. The notes to the financial statements indicate that:

The company has incurred significant losses from operations, has a working capital deficiency and a deficit of \$6,640,465 as at February 28, 2009. The continuation of the company as a going concern is dependent on its ability to generate sufficient cash to meet its obligations as they come due and achieving a profitable level of operations.

30 In spite of this, it was acknowledged by counsel for Romspen, which does not oppose the appointment of a receiver provided it does not have to fund the cost, that his client's mortgage and the realty taxes are current and in good standing.

31 Hunking has tendered the affidavit of Theresa Landry, Executive Director of the Retirement Residence, to the effect that the facility has, since late 2005, maintained occupancy levels at approximately 96% and has a number of long-term employees. Contrary to the plaintiffs' assertions, through Gibb, that Hunking is living an "extravagant" and "luxurious lifestyle" from the profits of the Retirement Residence. Ms. Landry deposes that from approximately 2004 to February 2009, Hunking and his wife received no salary from the Retirement residence and were only reimbursed for their expenses in the amount of about \$24,000. Commencing in February, 2009, Hunking was paid a salary of about \$95,000 per annum before taxes and his wife (who has worked at the Retirement Residence on a full-time basis since 2008) was paid about \$60,000 per annum before taxes.

32 There is no evidence to support the plaintiffs' inflammatory allegations (which appear to be fueled by hearsay information supplied by the other Partners who are in litigation with Hunking) that Hunking is using the Retirement Residence as his personal bank account to deplete funds "stolen" from them. Nor is there any current, independent, reliable evidence to show that the Retirement Residence is being operated as anything other than a going concern or that it is a wasting asset or being dissipated in any way.

33 The Retirement Residence is subject to a substantial mortgage in favour of Romspen, an apparent arms-length commercial lender, which presumably has a keen interest in ensuring that the asset is not dissipated. It is also subject to two certificates of pending litigation, obtained by the plaintiffs, which will effectively prevent the sale or further encumbrance of the Retirement Residence.

34 The plaintiffs' submission on irreparable harm overlooks the fact that, apart from Hunking, his wife and his companies, there are other defendants, including the other three Partners, who may well be either wholly or partly liable to the plaintiffs and there is no independent evidence to show that these parties lack the means to satisfy a judgment. I conclude that it would be pure speculation to say that the plaintiffs will suffer irreparable harm if a receiver is not appointed.

(c) Balance of convenience

35 I have noted above that the appointment of a receiver is intrusive and that the effect on the parties must be considered in the exercise of the court's discretion. In this case, the plaintiffs are neither judgment creditors nor secured parties. They simply have a potential claim against Hunking. The plaintiffs seek, at a minimum, the appointment of a receiver to take possession of and manage the Retirement Residence and, at the more extreme end, to sell it. It is quite obvious that the appointment of a receiver could have drastic consequences in terms of the business itself, and the confidence of staff, suppliers and residents in the viability of the business. It would take out of the hands of Hunking an enterprise in which he appears to have invested some seven years of work and could well see the enterprise sold from under him. I note, in that regard, that the plaintiffs have not given any undertaking as to damages, should it be determined that this relief ought not properly to have been granted. I also note that there has been no guarantee by the plaintiffs that Hunking and his wife would remain employed by the receiver.

36 In a nutshell, the appointment of a receiver would likely have disastrous consequences for Hunking, someone who may, at the end of the day, be found innocent of wrongdoing.

37 Balanced against this is the existing security that the defendants have by way of a certificate of pending litigation against the Retirement Residence as well as the potential for recovery against the other defendants, and Hunking, in the event that they prove liability and damages at trial. There is no evidence of dissipation of the Retirement Residence and it appears to be operating as a going concern. While there is a risk that the plaintiffs will not be able to enforce a judgment against Hunking, should they obtain one, I am not satisfied that the appointment of a receiver will attenuate that risk.

Conclusion

38 For these reasons, the plaintiffs' motion for the appointment of a receiver is dismissed, with costs. If costs are not agreed upon, written submissions may be made to me care of Judges' Administration.

39 Counsel for the defendants indicated that he is prepared to cooperate with counsel for the plaintiffs to finalize a schedule in order to bring this matter on to trial within a reasonable time. If the parties are unable to agree on a timetable an appointment can be made through my assistant in order to set a timetable.

40 I encourage counsel to discuss the removal of one of the two certificates of pending litigation and the temporary lifting of the certificate to enable the Retirement Residence to refinance the Romspen mortgage, which is at 11%, a rate which is a burden on the defendant. I will remain seized of the matter should a motion be necessary.

Application dismissed.

Footnotes

1 The "Netbusmodel Group" consisted of three companies, which have been referred to as "Netbusmodel", "Alcorp" and "Baby Alcorp".

2 Superior Court of Justice File 04-CV-271509CM3.

Tab 26

2017 ABQB 519
Alberta Court of Queen's Bench

Bourque v. Tensfeldt

2017 CarswellAlta 1554, 2017 ABQB 519, [2017] A.W.L.D. 4788, 140 W.C.B. (2d) 497, 282 A.C.W.S. (3d) 757

Stephanie Bourque (Plaintiff) and Sylvia O. Tensfeldt (Defendant)

Peter Michalyshyn J.

Heard: August 10, 2017
Judgment: August 25, 2017
Docket: Edmonton 1503-12891

Counsel: Stephanie Bourque, Plaintiff, for herself
Donald J. McGarvey, Q.C., for Defendant

Subject: Civil Practice and Procedure; Public; Torts

Related Abridgment Classifications

Judges and courts

[XX](#) Contempt of court

[XX.7](#) Punishment for contempt

[XX.7.c](#) Remedies available to court

[XX.7.c.vi](#) Miscellaneous

Headnote

Judges and courts --- Contempt of court — Punishment for contempt — Remedies available to court — Miscellaneous Striking pleadings — Defendant was lawyer and plaintiff was former spouse of one of lawyer's clients — Plaintiff sued defendant on several grounds including defamation, extortion, conspiracy and deceit in relation to matrimonial property and spousal support — Defendant defended and obtained order in October 2016 barring further proceedings in action owing to lack of service — Plaintiff appealed October 2016 order and filed eight subsequent applications and numerous affidavits — Defendant sought to question plaintiff on her affidavits and plaintiff did not attend in response to notice of appointment, nor did she attend offices of defendant's counsel for purposes of questioning under court order of December 2016 — In May 2017 plaintiff was declared to be in civil contempt owing to non-attendance for questioning — Her action was stayed pending purging of contempt, and contempt could be purged by attending questioning by specified date — Plaintiff appealed unsuccessfully and plaintiff did not attend questioning as ordered on appeal in May 2017 — Defendant applied for order striking plaintiff's statement of claim — Application granted — Plaintiff's statement of claim struck with costs — Given Alberta Rules of Court and circumstances of application, plaintiff's insistence on written interrogatories amounted to refusal to attend questioning under Part 6 of Rules — Original contempt was based on finding of deliberate defiance of December 2016 order and balance of plaintiff's behaviour, with one possible exception, since May 2017 could not be called inadvertent failure to comply with May 2017 order — There was little reason to find that plaintiff would be convinced by lesser sanction to engage appropriately in litigation or to follow court orders — Record was clear regarding paucity and credibility of plaintiff's efforts to purge her contempt — Contempt of court order and fact that contempt was unpurged could not be more clear — Record displayed clear evidence regarding plaintiff's refusal to be questioned or give credible reasons for failing to purge her contempt — While in contempt, plaintiff continued to use filed applications and affidavits as vehicles of abuse against defendant and her counsel — Further costs order was not suitable in circumstances as plaintiff was already subject to previous costs order and as early as October 2016, plaintiff alleged that she was unable to pay those costs and that she was impecunious.

APPLICATION by defendant for order striking plaintiff's pleadings on basis of contempt.

Peter Michalyshyn J.:

Introduction

1 The defendant Sylvia Tensfeldt is an Edmonton lawyer sued by Stephanie Bourque, once the wife of Tensfeldt's former client and Bourque's former spouse. The parties were long ago divorced. Property issues were resolved soon after the divorce. Bourque now takes issue with Tensfeldt's alleged role giving rise to the divorce and related matters. Tensfeldt applies for an order striking Bourque's pleadings. For reasons which follow, the application is granted.

Summary of events

2 Bourque sued Tensfeldt in a Statement of Claim filed August 28, 2015. The claim alleges a great many things. The core of it is alleged defamation, made worse by alleged extortion, conspiracy and deceit in relation to matrimonial property and spousal support. Damages are sought in excess of \$5.2 million.

3 Tensfeldt defended on September 14, 2016. She denies any liability. She also pleads a limitations defence, alleging that all matters of substance were concluded by mid-August, 2013. And she pleads that the claim was not served in time. On the record before me, there is at least an air of reality to each of the latter defences.

4 Soon after defending, Tensfeldt obtained an order from Master Schulz on October 5, 2016 barring further proceedings in the action owing to a lack of service in accordance with the Rules of Court, and ordering costs of \$5,550.

5 Bourque appealed the October 5, 2016 order. She has also filed eight subsequent applications: in 2016 - on October 14, 31, November 4, 28 and December 12; and in 2017 — on April 28, May 12 and August 4. In support of these various applications, Bourque has filed 14 affidavits: in 2016 — on October 14, 24, 31, November 7, 30, December 6, 12; and in 2017 — April 28, May 3, 15, 26, June 22, August 4, 9. (In addition, Bourque has filed at least two applications in the Court of Appeal, each supported by filed affidavits.)

6 On November 23, 2016, Tensfeldt's counsel sought to question Bourque on her then-filed affidavits. A Notice of Appointment and conduct money were served on Bourque on October 24, 2016 (by email) and on October 26, 2016 (by recorded mail).

7 Bourque did not attend in response to the Appointment.

8 On December 8, 2016, Justice Clackson ordered that Bourque attend the offices of Tensfeldt's counsel on December 12, 2016 for purposes of questioning.

9 Bourque did not attend the December 12, 2016 questioning in response to Justice Clackson's order.

10 Through counsel Tensfeldt applied for, amongst other things, an order holding Bourque in contempt for failing or refusing to comply with Justice Clackson's December 8, 2016 order.

11 Justice Ackerl heard the contempt application on May 18, 2017. Bourque was declared to be in civil contempt owing to her non-attendance as ordered by Justice Clackson. Her action was stayed pending the purging of her contempt. Her contempt could be purged by attending questioning by July 30, 2017. Certain accommodations favourable to Bourque were set out in Justice Ackerl's May 18, 2017 order.

12 Bourque appealed the May 18, 2017 order. Bourque also applied to a justice of the Court of Appeal for an order staying enforcement of Justice Ackerl's order. The stay application was heard July 12, 2017. In reasons filed July 17, 2017 (and reported at *Bourque v. Tensfeldt*, 2017 ABQA 236 (Alta. C.A.)), Justice Greckol dismissed the stay application. Justice Greckol also ordered that Bourque attend on each of the dates of July 19, 20 and 25, 2017. At para 18 of the stay decision, Justice Greckol noted Bourque's assurance that she was available on at least those three dates.

13 Bourque did not attend questioning in response to Justice Greckol's order.

14 Through counsel Tensfeldt applied for an order, amongst other things, striking Bourque's pleadings on account of Bourque's ongoing contempt. That application was returnable initially on July 27, 2017. It was then adjourned until August 10, 2017. On August 4, 2017 Bourque filed a response to this most recent contempt application. Bourque also filed a new application on August 4, 2017, and subsequently on August 9, 2017, an affidavit in response.

Analysis and decision

15 The application before me is for relief owing to Bourque's ongoing, unpurged contempt flowing from Justice Ackerl's May 18, 2017 order.

16 Bourque resists the application on a number of grounds, but fundamentally her objections are two-fold: she disputes that she has ever refused to attend questioning; and she maintains that she is disabled both physically and — by reason of medications and other conditions, cognitively — and cannot therefore engage conventionally in the litigation process other than through written answers to questions.

Has Bourque refused, or merely failed, to attend questioning?

17 In her submissions before me on August 10, 2017 Bourque was adamant that she has never *refused* to attend questioning. The record, including the attendances pre-dating Justice Ackerl's order, clearly suggests otherwise.

18 I pause to note that in analysing Bourque's arguments I am not revisiting Justice Ackerl's May 18, 2017 decision holding her in contempt. However, the events leading up to the May 18, 2017 order are part of the context I must consider in assessing the relief sought in the application before me.

19 It is important also to note that at issue is questioning under Part 6 of the *Alberta Rules of Court* AR 124/2010.

20 Rules 6.7, 6.8 and 6.14-6.20 apply and entitle the defendant to seek to question Bourque orally under oath as a party who has filed an affidavit in support of or in response to an application.

21 Under Part 6 there is no equivalent, except by analogy, to Part 5 of the *Rules*, and in particular r 5.28 dealing specifically with "Written questions". Rule 5.28 exists alongside r 5.24, which provides that unless the parties agree or the Court otherwise orders, Part 5 questioning to which a party may be entitled "must be oral".

22 I note that r 6.11(1)(c) does specifically allow the Court to consider evidence by way of written answers to questions under Part 5. It was not argued before me, and I make no finding, whether written answers to questions other than under Part 5 are admissible in a Part 6 application. I do not hesitate to find however, and at the risk of stating the obvious, that oral questioning under oath is at least the default mode of questioning under Part 6, with written interrogatories as contemplated under r 5.28 being, at most, the exception.

23 This threshold discussion is relevant inasmuch as Bourque insists she has not refused to attend questioning because she has offered to be questioned by way of written interrogatories. Given the *Rules*, and in the circumstances of this application, I find that Bourque's insistence on written interrogatories amounts to a refusal to attend Part 6 questioning.

24 As noted earlier, the defendant served Bourque with an appointment and conduct money for a November 23, 2016 questioning on affidavits. Bourque initially responded by her letter to defendant's counsel dated October 28, 2016. It cannot be read other than as a refusal to be questioned other than by way of interrogatories.

25 To a similar effect is Bourque's letter to defendant's counsel dated December 9, 2016, the relevant parts of which follow:

1. Appointment for Oral Questioning

Although the court has suggested that oral questioning be performed and that I cover the cost of such venture, this has not been thoroughly considered and is not possible at this time

Further, the fact is that the affidavits consist only of factual detail that will not change upon questioning and there is nothing to learn from questioning. There is also the fact that there have been no questions provided to me in advance, and I need to have these such that I can prepare in advance of such an appointment

For these reasons, I will not be attending the suggested appointment on December 12, 2016. This is not being done to violate any court order, but there is no possible manner for me to afford to pay for such task and therefore this needs to be cancelled

To reiterate, at this time I am not able to afford to pay for the costs of oral questioning. This will cause me undue financial hardship and is simply impossible at this time. Either written questions or postponing such an appointment are the reasonable alternatives that I can suggest at this time . . . this should not be construed as an intentional violation of the court order. There is just no money to put forward to cover this rendering this [is] an impossible request to force upon me at this time.

26 Though no transcript of the December 8, 2016 appearance is before me, it is apparent that Justice Clackson did more than "suggest" that Bourque attend for questioning. The order from the December 8, 2017 appearance could not be clearer; Bourque knows it too, as she did not wish to be heard to be 'intentionally' breaching the order. Further, based on correspondence of defendant's counsel forming part of the record before me, I am satisfied that Justice Clackson ordered Bourque's personal appearance, and told her in chambers that she could not insist on "written questioning". What's more, on the record before me, there is no merit to Bourque's position that by reason of financial hardship she was unable to prepare for and/or attend questioning. She has been self-represented in this action throughout. She was served with appropriate conduct money. What other 'money was needed to be put forward' by her is not identified in the record before me.

27 Bourque wrote a further letter to defendant's counsel, dated December 10, 2016. It is further evidence of her refusal to attend questioning. She confirms that she has "never agreed to Oral Questioning". She refers to her earlier letters "each [of which] has had specific clear statements that I WILL NOT BE APPEARING OT [sic] APPOINTMENT" (capitals in original). She then adds that she does not agree to oral questioning because, as she states:

For health reasons I am unable to sit in specific types of chairs, and these hurt my back. No attendance at Oral Questioning appointment.

28 On December 12, 2016 — the day Bourque was ordered to attend questioning — she attended at the Law Courts to swear an affidavit and file an application returnable December 15, 2017. The application is styled "Application by Stephanie Bourque — Ex Parte RE: Defense Counsel & Safety Issues".

29 Of immediate relevance arising from the December 12, 2016 application, Bourque indicates that "I did cancel the December 12, 2016 Appointment for Questioning" She says further that she "stated several times . . . that [I] would not be attending the Oral Questioning". In the December 12, 2016 affidavit accompanying her application, she states that in three separate letters she proposed an alternative to oral questioning: "Take note in each of these letters that I do cancel each and every Appointment for Questioning".

30 Also relevant are Bourque's further objections to attending oral questioning — that she is "not comfortable" attending defence counsel's office alone, that she has no one who can accompany her, that defence counsel has been demanding and threatening and that she is "fearful for my personal safety".

31 There is nothing in her December 12, 2016 affidavit — nor indeed in the record before me — that supports the conclusion that Bourque's subjective fears are objectively reasonable.

32 The December 12, 2016 affidavit attaches a series of letters, one dated December 6, 2016, and two dated November 25, 2016. The three letters are directed to defendant's counsel, and are attributed to one Stephen Bourque. He is identified as Stephanie Bourque's son. The letters are not personally signed; two are digitally signed, one has no signature at all. One of the November 25, 2016 letters states that Stephen Bourque is "assisting" her mother in the action.

33 All three of the letters attributed to Stephen Bourque are aggressive and critical of defendant's counsel. The letters take positions and make argument on the facts and law which the apparent author, Stephen Bourque, says exist and applies to the action. On their face, the author of the letters is clearly legally representing Stephanie Bourque in the action. And so to the extent these letters were written and sent by a non-lawyer on behalf of Stephanie Bourque, their author is arguably in breach of s. 106 of the *Legal Profession Act* RSA 2000 c L-8.

34 The *Legal Profession Act* aside, these letters attributed to Stephen Bourque have little if any value as evidence before me. Indeed, in her own December 12, 2016 affidavit, Stephanie Bourque fails to identify or distinguish the letters attributed to Stephen Bourque from her own letters. In the context of her ongoing refusal to attend oral questioning, Bourque simply states: "I did respond with a reasonable alternative, via 3 separate letters. These are attached as Exhibit #2".

35 (I pause to acknowledge that in a subsequent affidavit of May 26, 2017, Bourque more fully identifies letters which she attributes to her son Stephen Bourque.)

36 Bourque's affidavit filed April 28, 2017 is further evidence of her position on attending oral questioning. At para 18(3) she states that she did attempt to attend November 23 and December 12, 2016 appointments for questioning, but was unable to locate defendant's counsel's office; at para 18(7) however she states that with regard to both questioning dates she "did alert [counsel] in advance that I would not be attending and to cancel the Reporter".

37 The April 28, 2017 is revealing also with regard to what may be Bourque's bottom line position with regard to questioning (capitals in original):

Given that the Defense has built its case through reliance upon SHARP Practice and presenting misleading and incomplete information to the court that has literally caused the current Oral Question issue to be a Non-Issue given the basis upon fraudulent and deceptive conduct that renders the present matter for all purposes VOID.

...

For this to have been permitted to progress to a point where I am being made to answer to allegations of ME being held in Contempt of Court is RIDICULOUS, ABSURD, OUTRAGEOUS.

This is a display of deplorable conduct that is not consistent with being a Professional in any such field recognized as such. This is conduct that is borderline on criminal when the issues of Elder Fraud and Abuse are applied to such conduct . . .

38 Bourque repeats her evidence, in her affidavit filed May 3, 2017, that she was unable to find defendant's counsel's office on both November 23 and December 12, 2016. She states that without directions, or without a cell phone or GPS, she was unable to find the law office. This averment by Bourque can easily be dealt with: as noted by defendant's counsel, the address of the law firm in question is identified repeatedly in correspondence and filed documents. Without more, it is implausible and frankly impossible to believe that Bourque was unable to locate the law office, and on not one but two separate occasions. What's more, there is little reason to believe that Bourque looked for but was unable to find the law firm, when she had repeatedly stated that she had no intention to attend questionings in the first place.

39 The May 3, 2017 affidavit also revisits Bourque's health-related concerns. In the record before me, such concerns were first raised in her letter to defendant's counsel dated December 10, 2016, mentioned above. On May 3, 2017 she said that that owing to unspecified "medical conditions" it would not be possible to sit in one place for two hours, nor

would it be safe to drive home afterwards. She stated that she has requested a letter from her family physician. The content of these letters, including those produced only after Justice Ackers's May 18, 2017 contempt order, is canvassed later in these reasons.

40 On May 18, 2017 Justice Ackers found Bourque in contempt of Justice Clackson's December 8, 2016 order; she was given until July 30, 2017 to attend oral questioning as a means of purging her contempt.

Health-related issues/medical evidence

41 As noted above, Bourque has long raised certain medical concerns in opposition to oral questioning. On the evidence, the concerns raised prior to May 18, 2017 were unsubstantiated. Soon after the May 18, 2017 order, however, Bourque raised new medical issues that she says have since made it impossible for her to attend the questioning by July 30, 2017.

42 The starting point is a letter Bourque obtained from her family physician Dr. Dennis Mung dated June 15, 2017. The letter notes a number of medical conditions, then recommends that Bourque not be "forced" to attend oral questioning. The letter does not particularly associate the medical conditions with Dr. Mung's recommendation against oral questioning. The closest such association is Dr. Mung's recommendation that questions be put to Bourque in writing, "... enabling her to have time to adequately answer them when she does not feel stressed".

43 Dr. Mung's June 15, 2017 letter was preceded by a briefer letter dated May 17, 2017. That letter says no more than that owing to Bourque's "health issues" she is precluded from sitting for any extended period of time. In her affidavit of May 26, 2017, Bourque refers to yet another letter from Dr. Mung, but dated September 11, 2011. She implies that for the reasons articulated in the 2011 letter, Dr. Mung now recommends that Bourque not attend oral questioning. However, that is plainly not what Dr. Mung says in his May 17, 2017 letter. Nor does the September 11, 2011 letter bear such an interpretation. It fails even to mention a back condition, or any issues with sitting for extended periods of time.

44 It appears that Dr. Mung's June 15, 2017 letter was before Justice Greckol at the July 12, 2017 stay application. Justice Greckol nevertheless concluded that questioning should proceed on the dates of July, 19, 20 and 25, 2017, arranged soon after Justice Ackers's May 18, 2017 order.

45 Bourque now also relies on an x-ray of July 5, 2017 and, amongst other things, a finding of a "new compression fracture" at L3. Bourque attributes this finding to a fall she says she sustained on July 4, 2017 at the Edmonton Law Courts. There is no medical evidence however that the 'new compression fracture' was sustained on July 4, 2017.

46 Bourque also now relies on an alleged pinched nerve. In her written submissions before me on August 10, 2017, she refers to a pinched nerve in her left leg; later in the same written submission she refers to a pinched nerve in her upper right leg. That discrepancy aside, there is no independent evidence of a pinched nerve in either of Bourque's legs. Dr. Mung does not address it. Nor is a history of any such symptom mentioned in the July 5, 2017 x-ray report. Nor does the same report mention any finding of a pinched nerve.

47 Justice Greckol's decision coming out of the July 12, 2017 stay application fails to mention an alleged pinched nerve, or indeed any alleged new injury, whether sustained on July 4, 2017, or on some other occasion.

July 18, 2017 materials

48 Bourque has sworn an affidavit July 18, 2017 in support of a further stay application before Justice Greckol now scheduled for in the Court of Appeal September 5, 2017. She also had filed a July 18, 2017 Memorandum of Argument, also in the Court of Appeal. These court records were brought to my attention by defendant's counsel. I am mindful that they are filed in support of an application in the Court of Appeal which will be heard in the near future. Nevertheless, they contain information that is clearly relevant to the application before me, and as such I have given these court records some consideration.

49 In her July 18, 2017 affidavit, Bourque alleges the July 4, 2017 fall at the Law Courts. She notes that she received the July 5, 2017 x-ray results on July 10, 2017.

50 She does not address in her July 18, 2017 affidavit if she put the x-ray results before Justice Greckol, or if she said anything at the July 12, 2017 stay application about her alleged new injury and the severe symptoms she says arise from it.

51 It is her unsworn Memorandum of Argument, also filed July 18, 2017, that Bourque refers to her unsuccessful attempts, on July 11, 2017, to file further evidence regarding the alleged July 4, 2017 spinal injury.

52 In the same Memorandum, but notably not in her sworn affidavit, that Bourque refers to a visit with Dr. Mung on July 13, 2017. She refers to "four referrals for various further imaging procedures and Orthopedic Specialists for treatment". None of these are mentioned by name or date. She refers to being prescribed "high dose pain medication for severe and incapacitating pain that itself does cause impairment of judgement and drowsiness". Later in the same Memorandum, she refers to "mind altering prescription medications". Again, no details are provided, and again none of this information is given under oath.

53 Bourque finally notes, in the Memorandum, that owing to the release of Justice Greckol's reasons on July 17, 2017, she had effectively only one-day's notice of the July 19, 2017 questioning date ordered in those reasons. Bourque says that was inadequate notice for her to prepare to be questioned. She also says that medical appointments had been scheduled to deal with her spinal fracture that conflicted with the dates of July 19 and 20, 2017. She does not say when these appointments were scheduled — keeping in mind that on July 12, 2017 Bourque told Justice Greckol that she was available to be questioned on July 19, 20 and 25, 2017. (Bourque says nothing in any of these July 18, 2017 filings about the July 25, 2017 date also ordered for questioning.) Finally, Bourque complains of inadequate conduct monies, and again that "the pain medication currently prescribed does not permit for the Applicant to partake in any activities that have legal implications such as the questioning appointment".

August 4 and 9, 2017 affidavits

54 Squarely in response to the application before me, Bourque brought forward two additional affidavits filed August 4 and 9, 2017.

55 I have noted above Bourque's written submissions on August 10, 2017 regarding a pinched nerve. She also mentions a pinched nerve in her leg in her August 4, 2017 affidavit. She also alleges a "serious adverse drug reaction" and pain medication that "causes significant mental impairment" — neither of which is supported by any other evidence.

56 As to the timing of ordered questioning dates, at paragraphs 10 and 11 of her August 4, 2017 affidavit Bourque states:

10. Defence Counsel was further provided notice in advance that I would be unable to attend the June 19, 20, and 25 dates he had himself set without consulting me on my availability, due to the medical appointments that had been set for me and could not be changed.

11. A true and complete copy of the June 19, 20 and 25 medical appointment email messages which confirm that I was unable to attend appointments on these dates due to medical necessity that was outside of my control are attached as Exhibit #4.

57 Bourque's reference to "June 19, 20 and 25" are presumably meant to refer to *July* 19, 20 and 25. What's more, Exhibit 4 to her August 4, 2017 affidavit refers only to a July 25, 2017 Diagnostic Ultrasound Imaging Appointment. There is no information regarding when the appointment was made — mindful again of Bourque's assurance before Justice Greckol that she was available on July 19, 20 and 25, 2017.

58 Exhibit 3 of Bourque's August 4, 2017 affidavit refers to two documents of interest. The first is a letter dated July 11, 2017 to defendant's counsel, and attributed to Dr. Stephen Bourque. The second is a July 20, 2017 email addressed from Dr. Stephen Bourque, to defendant's counsel, and copied to Stephanie Bourque. Both the letter and email are signed "Stephen Bourque for Stephanie Bourque".

59 For what it's worth, the July 11, 2017 letter to counsel states that owing to her fall on July 4, 2017, "it is impossible for [Stephanie Bourque] to attend with you on July 11, 2017, and most likely anytime in the foreseeable future". It is not apparent that the July 11, 2017 letter was copied to Stephanie Bourque.

60 As to the July 20, 2017 email, the following is attributed to Dr. Stephen Bourque:

I wanted to let you know that Stephanie is unable to attend for the questioning appointment today. She did not read your email until after 6 pm yesterday evening as she was at a medical appointment most of the day. So, sorry for the short delay in responding. FYI. She does further have appointments today, and also on the 25th. These were not chosen dates, but rather were provided with no option to choose any alternative dates. Her physician did stress to her that the severity of the recent spinal fracture does require prompt attention which does take ultimate priority over all other matters. So, she is following Doctors Orders.

61 Assuming that Dr. Stephen Bourque is indeed the author of this correspondence, and assuming it is properly before me as evidence of anything, I note the following lack of supporting detail: no specific appointments noted, for what, with whom, or when first scheduled; and nothing is offered regarding the severity of the back injury, or the prompt attention it apparently required.

62 Turning to her August 9, 2017 affidavit, it is 16 pages and 54 paragraphs in length, much of it being repetitive of Stephanie Bourque's statements made in earlier affidavits. Bourque does attach a further medical record, an August 3, 2017 radiology report of her pelvis and left hip showing mild degenerative changes at her left hip, diffuse osteopenia, and additional non acute findings. Bourque also repeats, at paragraph 20, the alleged fracture of her spine, but now alleges a "Pinched Nerve and/or Fracture Femur Right leg", being prescribed three pain medications, and suffering a "serious debilitating drug reaction to one medication". No detail or substantiating records accompany these allegations.

63 In stark contrast to this history of alleged medical disabilities was Bourque's own presentation before the court the morning of August 10, 2017. Bourque was able to attend court. She was able to participate without evident distress — physically or cognitively — from about 9 am till past noon. With the exception of a short break about mid-way through, Bourque sat and/or stood for the entire half-day's proceedings. She did complain that she could hardly sit, and was on heavy medication. Yet she made oral submissions, rebutted those of defendant's counsel, and was appropriately responsive to questions from the court. In sum, her presentation on August 10, 2017 was entirely inconsistent with being disabled from the litigation process by any physical or cognitive shortcomings.

64 Also speaking against such 'litigation disability' is the fact that since July 4, 2017 — and indeed for a long time before then — Bourque has been able to prepare and file at least two court applications, and prepare, swear and file at least four affidavits in support.

65 Having reviewed every affidavit sworn by Bourque in this action (and her July 18, 2017 affidavit in the Court of Appeal), I conclude that I am unable to accept her sworn evidence at face value if only owing to the very fact that she has resisted all efforts to be questioned on them, but also because to the extent the affidavits swear to facts, they are at times contradictory, and at other times implausible. I am mindful of the danger of deciding credibility based on affidavits alone. But equally, the court is not a rubber stamp for every unsubstantiated and unexamined allegation a party chooses to place before it. (Another remedy would have been to consider striking the affidavits, or some of them, outright.) This is particularly the case when at issue is whether the evidence supports a party's cause that she should

be purged from an earlier finding of contempt. This all being said, I have viewed Bourque's sworn evidence differently where it is supported by some independent evidence.

66 The independent medical evidence before me hardly supports Bourque's position that she should not or could not attend oral questioning. It utterly fails to do so for the period of time leading up to the alleged July 4, 2017 fall and spinal fracture. And even following the alleged fall and injury, the evidence is strikingly inadequate, especially given the context of Bourque's obligation to purge her contempt by July 30, 2017.

67 In the post-July 4, 2017 period, Bourque refers only to one specific medical appointment that conflicted with her obligation to attend questioning. That was the July 25, 2017 ultrasound appointment which is at Exhibit 4 of Bourque's August 4, 2017 affidavit.

68 The only other evidence is that attributed to Dr. Stephen Bourque, as mentioned above, being the July 20, 2017 email to defendant's counsel. The evidence attributed to Dr. Bourque does not satisfy me that in fact Stephanie Bourque was unable to attend July 19 or 20 questionings. The evidence attributed to Dr. Bourque is not sworn by him. Nor, inexplicably, is it sworn by Stephanie Bourque herself. In any event, the evidence is unacceptably vague and uncertain, again given the imperatives arising from Justice Ackers's order.

69 Even as to the July 25, 2017 ultrasound appointment, there is no evidence with regard to when it was first scheduled, and no explanation for the disconnect between the date of the appointment and Stephanie Bourque's commitment to Justice Greckol, on July 12, 2017, that she was available for questioning on July 25, 2017, amongst other dates. Nevertheless, the independent evidence of the ultrasound appointment supports Bourque's cause that she was unable to attend questioning on that date.

The August 15, 2017 affidavit

70 Since the parties' August 10, 2017 appearance before me Bourque has sworn yet a further affidavit filed August 15, 2017. It is the third affidavit filed since the defendant's application to strike her pleadings. Though not in compliance with the Rules, and though largely comprised of argument, to give Bourque every benefit of the doubt my consideration of the facts set out in the August 15, 2017 affidavit follows.

71 Bourque says the August 15, 2017 affidavit is necessary in that she had insufficient time to respond to the defendant's application. As will be noted, I have concluded that Bourque was served with the defendant's application on July 28, 2017 by email, and on August 3, 2017 by recorded mail.

72 Bourque objects to the defendant's draft bill of costs provided on August 10, 2017. I note however that with regard to claimed fees, a substantially similar draft bill of costs was attached to the defendant's affidavit filed April 7, 2017. Claimed disbursements appear to have been brought to Bourque's attention only in the August 10, 2017 draft bill of costs. I have taken Bourque's objections into account in my assessment of costs, which is toward the end of these reasons.

73 In order to put it into evidence, Bourque has exhibited to her August 15, 2017 affidavit a copy of her self-described "Cheat Sheets" provided to me at the August 10, 2017 hearing. As it is now in evidence, I repeat my earlier observations coming out of her written submission: that Bourque alleges a lumbar spine fracture but also a pinched nerve in her left leg (at page 1) or in her right upper leg (at page 5); there continues to be no independent evidence of a pinched nerve in either leg; the balance of the "Cheat Sheets" exhibit, and of the August 15, 2017 affidavit, is repetitive of Bourque's evidence filed previously. If nothing else, the August 15, 2017 affidavit, which is nine pages and 30 paragraphs in length not including six exhibits, is some further evidence that Bourque is able to function in the litigation process.

Remaining issues

74 Bourque objects to a lack of service leading to defendant counsel's July 27, 2017 appearance. That objection fails in light of proper service leading to the August 10, 2017 application before me.

75 Bourque objects to service by email on July 28, 2017 leading to the August 10, 2017 application. That objection fails in light of service by recorded mail effected on August 3, 2017. It fails too in light of my order of July 27, 2017, permitting service by email. Finally, there is good reason to believe that email service on July 28, 2017 was effective, given that Bourque's affidavit filed August 4, 2017, is dated August 1, 2017. She must therefore have received service by email prior to the recorded mail service on August 3, 2017.

76 Bourque objects that the defendant's application is premature, in that it was returnable July 27, 2017, and thus prior to the July 30, 2017 questioning deadline imposed by Justice Ackerl. This objection fails in light of the fact the July 27, 2017 application was adjourned to August 10, 2017. It fails also in light of the absence of evidence that Bourque was prepared to attend on at least two of the three dates ordered for oral questioning prior to July 30, 2017.

77 Bourque objects that given Justice Ackerl's order staying the action, the defendant too should be prevented from bringing any applications in the action. That objection fails if only because the impugned application comes after Bourque's failure to purge her contempt. That the action remains stayed from the plaintiff's perspective — and owing to the plaintiff's unpurged contempt — cannot bar the defendant from pursuing a remedy flowing from that very unpurged contempt.

78 Bourque objects that Justice Ackerl's order having been appealed, I have no jurisdiction to hear the defendant's application. That objection fails if only because Bourque's application in the Court of Appeal for a stay of Justice Ackerl's order was dismissed on July 17, 2017. And as noted above, in the circumstances I am not persuaded that I should avoid deciding the application before me by reason of Bourque's further application in the Court of Appeal scheduled to be heard on September 5, 2017.

79 Yet further objections are raised in Bourque's August 4, 2017 application. They do not arise in response to the defendant's application currently before me, or have already been addressed, or are not supported by any credible evidence, or are not properly before me in light of Justice Ackerl's order generally staying the action.

80 Finally, it must be noted that in various places in her sworn affidavits the question of settlement discussions is raised, presumably as a reason this application should not proceed. It appears that Bourque expressed much the same sentiment to Justice Greckol at the July 12, 2017 stay application: *Bourque v. Tensfeldt*, 2017 ABQA 236 (Alta. C.A.), at para 17. However, as noted to the parties in chambers on August 10, 2017, I find that without more, I should have no regard for any settlement discussions in what I have to decide on the application before the court.

Law of contempt

81 It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice: *Demb v. Valhalla Group Ltd.*, 2016 ABQA 172 (Alta. C.A.), at para 42, citing *Carey v. Laiken*, 2015 SCC 17 (S.C.C.) (CanLII) at para 38, [2015] 2 S.C.R. 79 (S.C.C.).

82 The application before me is not for a new finding of contempt but rather for a further sanction for Bourque's ongoing, unpurged contempt. The sanction of striking pleadings may follow the refusal of a party to comply with court orders and Rules of Court: *Koerner v. Capital Health Authority*, 2011 ABQA 289 (Alta. C.A.), leave denied [2011] S.C.C.A. No. 559 (S.C.C.); *Richard v. Lee-Knight*, 2009 ABQA 224 (Alta. C.A.).

83 As mentioned, I have had close regard for the circumstances giving rise to Justice Ackerl's May 18, 2017 contempt finding because those same circumstances are relevant to the application now before me. And though it is unnecessary for me to say so, the *Carey* test is clearly met on the evidence of Bourque's refusal to attend the December 12, 2016 questioning as ordered by Justice Clackson.

84 I have had equally close regard for the circumstances that have unfolded since the May 18, 2017 order. I have found that though by a thin margin, the evidence shows that Bourque was reasonably unable to attend questioning on July 25, 2017. That said, the evidence provides no credible justification for Bourque's non-attendance on the July 19 and 20, 2017 questioning dates. She either simply refused to attend — as she has in the past — or for reasons best known to herself, she has inexplicably failed to justify on any reasonable basis her non-attendance.

85 As to sanction, again the court in *Demb v. Valhalla Group Ltd.* noted as follows, at para 55:

55 Contumacy, or lack thereof, goes to the penalty to be imposed after a finding of contempt: *Carey* at para 38. In assessing contumacy, context is important. In *McDonald Estate*, 2012 ABQB 704 (CanLII), 552 AR 308, the court, at para 55, lists a number of factors to be taken into account in determining the penalty for contempt. These include:

1. Whether there was deliberate defiance of a Court order or whether there was an inadvertent failure to comply with the Court order;
2. The role of legal counsel;
3. Where there has been a failure to give discovery, the object of the exercise is more to secure the discovery rather than to punish;
4. Attempts to purge contempt or to apologize are relevant;
5. The entire context in the history of the litigation;
6. The amount of reasonable thrown-away costs properly incurred;
7. The nature of the contempt; and
8. The degree of culpability of the contemnor.

See also *Michel v Lafrentz*, 1998 ABCA 231 (CanLII), 219 AR 192 at paras 31-32 and *Dreco Energy Services Ltd v Wenzel*, 2005 ABCA 185 (CanLII), 371 AR 11 at para 12.

86 Applying these factors:

1. Whether there was deliberate defiance of a Court order or whether there was an inadvertent failure to comply with the Court order;

The original contempt is clearly based on a finding of deliberate defiance of Justice Clackson's order. And on the record before me, the balance of Bourque's behavior since May 18, 2017 cannot be called an 'inadvertent failure to comply' with Justice Ackerl's order, again with the possible exception of the July 25, 2017 questioning date.

2. The role of legal counsel;

Bourque has been self-represented throughout. On the record before me, defendant's counsel has acted without fault; as in *Koerner*, at para 7, the record does not disclose that Bourque was unfairly dealt with because she is self-represented.

3. Where there has been a failure to give discovery, the object of the exercise is more to secure the discovery rather than to punish;

Questioning on affidavits can be likened to discovery, and so the object of the exercise is more to secure questioning than to punish. But on the record before me there is little reason to conclude that Bourque will or can be convinced by a lesser sanction to engage appropriately in the litigation or to follow court orders.

4. Attempts to purge contempt or to apologize are relevant;

The record as set out in these reasons speaks for itself regarding the paucity and indeed credibility of Bourque's efforts to purge her contempt.

5. The entire context in the history of the litigation;

The record as set out also speaks for itself as to the merits of the action, the arguable defences based on the *Limitations Act* and late service, the October 5, 2016 order of Master Schulz, the proliferation of applications and affidavits by the plaintiff and, not least, the damaging contents of those pleadings.

6. The amount of reasonable thrown-away costs properly incurred;

As noted below, the defendant has incurred disbursements of at least \$2,265.52 plus GST, and properly claims costs of 18,000, plus GST.

7. The nature of the contempt;

The contempt arises from Bourque's refusal to be questioned on numerous affidavits filed initially as part of her effort to overcome the effect of the order of Master Schulz made early in the proceedings, then Justice Ackerl's order finding contempt. The contempt is of a court order and could not be clearer. Nor could it be clearer that the contempt remains unpurged.

8. The degree of culpability of the contemnor.

Again, the record speaks for itself regarding Bourque's stubborn refusal to be questioned, or to provide credible reasons for why she has failed to purge her contempt. And while in contempt, if not before, Bourque has continued to use filed applications and affidavits as, amongst other things, vehicles of abuse against the defendant and her counsel.

87 Virtually all of these factors weigh in favour of a serious sanction in light of Bourque's ongoing contempt.

88 The question must be asked whether a sanction less severe than striking pleadings is appropriate. The action is already stayed. No one seriously suggests that imprisonment is appropriate. Should there be a further order for costs? Bourque is already subject to Master Schulz' order for \$5,550 in costs. As early as her affidavit filed October 24, 2016, Bourque stated that she was unable to pay those costs awarded by Master Schulz. Elsewhere she has expanded on her impecuniosity. There is no reason to believe that a further order for costs would have any impact.

89 An appropriate sanction therefore for her ongoing contempt, in all of the circumstances, is the remaining sanction referred to at r 10.53(1)(i) — that the plaintiff's Statement of Claim be struck, with costs.

90 Through counsel Tensfeldt produced a draft Bill of Costs. It is based on double column 5, for all things attracting schedule C fees since December 8, 2016. A claim is made for the July 12, 2017 appearance before Justice Greckol. Fees properly claimed are \$7,500 (x 2) = \$15,000 plus GST of \$750. Given the contents of the pleadings, including the numerous affidavits filed, damaging both to the defendant and to counsel for the defendant, double column 5 costs are more than appropriate. Disbursements including GST are claimed of \$2,817.08. I allow the disbursements claimed for transcripts, and for court reporters' fees for Certificates of Non-Attendance, with the exception of the July 25, 2017

questioning date. I make no order regarding the further disbursements claimed, though the defendant may of course pursue such an order on notice to the plaintiff. The earlier costs of \$5,550 are in addition to this assessment.

Application granted.