Court File No.: CV-11-9532-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Crystallex International Corporation

CRYSTALLEX INTERNATIONAL CORPORATION

Applicant

BRIEF OF AUTHORITIES OF THE APPLICANT CRYSTALLEX INTERNATIONAL CORPORATION

Re: Stay Extension and Sealing of Information
Returnable November 18, 2021

November 10, 2021

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26. *U.S. Steel Canada Inc, Re*, 2016 ONSC 3106

27. *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 764

SECONDARY SOURCES

28. Lloyd W Houlden, Geoffrey B Morawetz & Dr Janis P Sarra, *Bankruptcy and* Insolvency *Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada, 2009, loose-leaf), Companies' Creditors Arrangement Act

29. Denis Ferland, "The Evolving Role of the Monitor, Confidential Information and the Monitor's Cross-examination, a Quebec Perspective" (2011) Annual Rev of Insolvency Law 17

30. Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Irwin Law, 2016)

31. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Lexis, 2014)

32. Canada, Parliament, Debates of the Senate, 38th Parl, 1st Sess, Vol 142, No 100 (25 November 2005)

33. Order Fixing September 18, 2009 as the Date of the Coming into Force of Certain Sections of the Acts, Proclamation, 19 August 2009, SI/2009-68, (2009) C Gaz II, 1711, 1712

TAB 1

Paras. 66-67.

Federal Court  Cour fédérale

Date: 20141121

Docket: T-1823-13

Citation: 2014 FC 1100

Ottawa, Ontario, November 21, 2014

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GUIDA BELO-ALVES

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Ms. Guida Belo-Alves (the "Applicant") seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c-7 (the "Federal Courts Act"), of a decision dated July 16, 2013 of a Member (the "Member") of the Appeal Division of the Social Security Tribunal (the "SST" or the "Tribunal"), refusing the Applicant leave to appeal a decision of a Review Tribunal (the "Review Tribunal"). In its decision, the Review Tribunal determined that it did not have the jurisdiction to deal with the matter before it because the issues being raised had already

been finally decided by a different review tribunal, and therefore the principle of *res judicata* applied.

II. BACKGROUND

[2] This matter has a long and complicated history, arising out of a series of claims made by the Applicant for Canada Pension Plan Disability Benefits ("CPP Disability Benefits"), pursuant to paragraph 42(2)(a) of the *Canada Pension Plan*, R.S.C. 1985, c-8 (the "Plan"). The following facts are taken from the Tribunal Record and the Application Records filed by the Applicant and the Respondent.

[3] The Applicant was previously employed as a "systems coordinator" in a dress manufacturing company and a part-time translator for the Immigration Department at the Toronto Airport.

[4] In September 1988, the Applicant was involved in a motor vehicle collision. As a result of the collision, the Applicant suffered a whiplash type injury. She returned to work after the injury, but required physiotherapy.

[5] In May 1989, the Applicant was again involved in another, more serious motor vehicle collision, which resulted in serious injuries to her scalp, neck, back, left foot and knee and right hand. As a result of the injuries, the Applicant has had on-going medical issues. She has not worked as of May 6, 1989.

[6] The Applicant applied for CPP Disability Benefits for the first time on October 10, 1995. The Applicant's Minimum Qualifying Period ("MQP"), that is, the date by which she would have qualified for CPP Disability Benefits by demonstrating she was disabled, was, and remains, December 31, 1996.

[7] The Applicant's initial application for CPP Disability Benefits was denied on December 18, 1995. In a decision dated September 10, 1997, the Minister of Human Resources and Skills Development upheld the denial. The Applicant appealed this decision to a review tribunal of the Office of the Commissioner of Review Tribunals.

[8] In a decision dated February 25, 1999, the review tribunal dismissed the Applicant's appeal. The tribunal concluded that the Applicant was not precluded from performing some type of substantially gainful employment, and was therefore not disabled within the meaning of paragraph 42(2)(a) of the Plan. Leave to appeal to the Pension Appeals Board was denied.

[9] On May 20, 2003, the Applicant submitted a second application for CPP Disability Benefits. Human Resources and Skills Development Canada denied the Applicant's second application for CPP Disability Benefits on the grounds that the issue was *res judicata*, having already been determined finally by the first review tribunal.

[10] The Applicant applied to a second review tribunal to appeal the denial of her second CPP Disability Benefits application. At the same time, she made a request to re-open her first appeal

on the basis additional medical reports, which she claimed raised new facts. The hearing before the second review tribunal took place on March 10, 2005.

[11] In a decision dated April 12, 2005, the review tribunal denied the appeal and the request to re-open the first appeal. It concluded that the issue of the Applicant's eligibility for CPP Disability Benefits was *res judicata*, having been finally decided in the proceedings arising out of the Applicant's first application.

[12] In relation to the new facts application, the review tribunal concluded that the reports presented either did not constitute new facts, or were established too long after the Applicant's MQP of December 31, 1996 to assist in evaluating her conditions at the time of her MQP.

[13] On December 19, 2007, the Applicant applied to the Pension Appeals Board for an extension of time to file an appeal from the second review tribunal decision. That application was denied by the Pension Appeals Board in a decision dated May 1, 2007. The Applicant applied for judicial review of that decision.

[14] On April 24, 2009, Justice Campbell of the Federal Court quashed the Pension Appeals Board's decision and sent the matter back for re-determination.

[15] On May 27, 2009, the Pension Appeals Board granted the Applicant leave to appeal. On September 16, 2010, the Pension Appeals Board dismissed the appeal, finding that the evidence submitted by the Applicant did not constitute "new facts."

[16] On October 18th, 2010, the Applicant filed a Notice of Application for judicial review of the decision of the Pension Appeals Board in the Federal Court of Appeal. On May 18, 2011, the Federal Court of Appeal dismissed the application for judicial review, holding that the Pension Appeal Board's decision reasonably concluded that the reports did not constitute new facts.

[17] On December 19, 2005, the Applicant made a third application for CPP Disability Benefits. The application was denied in a decision dated August 31, 2006. The Applicant sought reconsideration of the denial.

[18] In a decision dated January 30, 2007, Human Resources and Skills Development Canada upheld the denial of her application. The Applicant once again appealed the decision to the Review Tribunal. The hearing of the third appeal was held in abeyance until various appeals in relation to her second application for CPP Disability Benefits were resolved.

[19] On July 31, 2012, the hearing for the denial of the Applicant's third claim for CPP Disability Benefits took place before the Review Tribunal. Its decision was issued on September 21, 2012, with the Review Tribunal finding that it had no jurisdiction to review all the evidence and substitute its decision for that of the first review tribunal. It found that the issue was already decided, and was therefore *res judicata*.

[20] On December 17, 2012, the Applicant applied to the Pension Appeals Board for leave to appeal the decision of the third Review Tribunal.

[21] On April 1, 2013, the Office of the Commissioner of Review Tribunals and the Pension Appeals Board were replaced by the Social Security Tribunal – General Division and Social Security Tribunal – Appeal Division. Pursuant to section 260, which is a transitional provision of the enabling legislation, the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012 c. 19 (the "Jobs, Growth and Long-term Prosperity Act") the Applicant's application for leave to appeal was treated as if it had been filed with the SST on April 1, 2013.

[22] On July 16, 2013, the SST dismissed the Applicant's application for leave to appeal.

[23] On August 8, 2013, the Applicant filed her Notice of Application for judicial review in the Federal Court of Appeal. In an Order dated October 31, 2013, Justice Stratas of the Federal Court of Appeal transferred the application for judicial review to the Federal Court. On November 14, 2013, Justice Roy of the Federal Court made an Order to amend the style of cause.

III. THE DECISION UNDER REVIEW

[24] In her decision, the Member of the SST provided a brief history of the proceedings leading up to the Applicant's application for leave to appeal the decision of the Review Tribunal.

[25] Pursuant to subsection 58(2) of the *Department of Human Resources and Skills Development Act*, S.C. 2005 c. 34 (the "DHRSDA") the Member identified the issue as whether the appeal from the Review Tribunal's decision of September 21, 2012 had a reasonable chance of success.

[26] The Member held that the Application would be examined on the basis of the legitimate expectations of the Applicant at the time the leave application was filed with the Pension Appeals Board. As such, the determination of whether the application had a reasonable chance of success would be evaluated as a *de novo* appeal, pursuant to subsection 84(1) of the Plan, as it read immediately before April 1, 2013.

[27] The Member noted that adducing new evidence, and demonstrating an error of law or a significant error of fact can demonstrate that an appeal has a reasonable chance of success, relying in this regard on the decision in *Canada (Attorney General) v. Zakaria*, 2011 FC 136.

[28] In response to the Applicant's argument that her matter was not properly considered at prior hearings before the third Review Tribunal, the Member found that the decisions of the previous Review Tribunals were final, and that the Review Tribunal did not have jurisdiction to consider issues relating to those decisions.

[29] The Member concluded that the Applicant's argument that the third Review Tribunal did not return the review tribunal file to her was not a ground of appeal that had a reasonable chance of success. The Member found there was also no reasonable chance of success for the Applicant's argument related to the administrative procedures with the Plan disability appeal process. The Member noted that neither argument presented new evidence, nor pointed to a reviewable error in fact or law by the Review Tribunal.

[30] The Member found there was no merit to the Applicant's argument that the Review Tribunal did not provide a complete file for the hearing. The Member observed that it is the obligation of the parties to a proceeding to ensure that the tribunal has all relevant material before it.

[31] Finally, the Member considered the Applicant's argument that the Review Tribunal discriminated against her and her children. The Member found the Applicant's arguments relative to this complaint to be unclear, and consequently, did not have a reasonable chance of success. In this regard, the Member relied on the decision in *Pantic v. Canada (Attorney General)*, 2011 FC 591.

[32] The Member refused the application for leave to appeal on the basis that the Applicant had not produced any new evidence, nor pointed to an error in fact or law, nor presented any argument that would have a reasonable chance of success.

IV. RELEVANT LEGISLATION

[33] The following legislation is relevant to this application for judicial review:

[34] Paragraph 42(2)(a) of the Plan states:

42(2) For the purposes of this Act, (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental	42(2) Pour l'application de la présente loi : a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou

or physical disability, and for the purposes of this paragraph, (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and …	mentale grave et prolongée, et pour l'application du présent alinéa : (i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice, (ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès; …

[35] Sections 260 and 262 of the Jobs, Growth and Long-term Prosperity Act state:

260. Any application for leave to appeal filed before April 1, 2013 under subsection 83(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to be an application for leave to appeal filed with the Appeal Division of the Social Security Tribunal on April 1, 2013, if no decision has been rendered with respect to leave to appeal.	260. Toute demande de permission d'interjeter appel présentée avant le 1er avril 2013, au titre du paragraphe 83(1) du Régime de pensions du Canada, dans sa version antérieure à l'entrée en vigueur de l'article 229, est réputée être une demande de permission d'en appeler présentée le 1er avril 2013 à la division d'appel du Tribunal de la sécurité sociale si aucune décision n'a été rendue relativement à cette demande.
262. The provisions of the *Canada Pension Plan* and *Old Age Security Act* repealed by this Act, and their related	262. Les dispositions du Régime de pensions du Canada et de la Loi sur la sécurité de la vieillesse abrogées par la

regulations, continue to apply to appeals of which a Review Tribunal or the Pension Appeals Board remains seized under this Act, with any necessary adaptations.	présente loi et leurs règlements continuent de s'appliquer, avec les adaptations nécessaires, aux appels dont un tribunal de révision ou la Commission d'appel des pensions demeure saisi au titre de la présente loi.

[36] The DHRSDA, which is the legislation governing the SST has since been renamed the *Department of Employment and Social Development Act*, S.C. 2005 c. 34. However, the relevant provisions of the statute have not changed. In any event, at the time the Member made her decision, subsections 58(1) and 58(2) of the DHRSDA read as follows:

58. (1) The only grounds of appeal are that	58. (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

V. ISSUES

[37] This application for judicial review raises the following two issues:

1. What is the appropriate standard of review; and
2. Did the SST commit a reviewable error in refusing the Applicant's application for leave to appeal the decision of the third Review Tribunal.

VI. SUBMISSIONS

A. *Applicant's Submissions*

[38] The Applicant did not make submissions on the appropriate standard of review.

[39] The Applicant argues that the SST erred in denying her application for leave to appeal. She submits that she is disabled within the meaning of paragraph 42(2)(a) of the Plan, and that she should be allowed to submit certain medical reports that she considers new facts**,** in order to show that she is disabled.

[40] The Applicant submits that these reports raise new material facts that were not previously discoverable with reasonable diligence. She argues that there are certain disability claims that must be assessed as a claimant's condition, treatment, and prognosis evolve.

[41] As well, the Applicant pleads that there have been breaches of procedural fairness. She argues that the refusal to admit the reports has denied her the right to a fair hearing.

[42] The Applicant also argues that certain information that she requested from the Minister and the Office of the Commissioner of Review Tribunals was not produced. As well, she submits that the condition of the review tribunal file, concerning her third application for CPP Disability Benefits, gave rise to a breach of procedural fairness because the pages were not numbered.

B. *Respondent's Submissions*

[43] The Respondent submits that the appropriate standard of review of the decision to deny leave to appeal is reasonableness.

[44] The Respondent then argues that the issue of whether the Tribunal selected the correct test for granting leave to appeal is likewise reviewable on the standard of reasonableness**.** In this regard, he relies on the decisions in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654 at paragraph 30 and *Agraira v. Canada (Public Safety and Emergency Preparedness),* [2013] 2 S.C.R. 559.

[45] The Respondent submits that previously, the test for leave to appeal was whether there was an "arguable case". Pursuant to subsection 58(2) of the DHRSDA, there is a new test for granting leave to appeal, that is whether the appeal has a "reasonable chance of success." Subsection 58(1) specifically sets out the grounds for appeal, that is a failure to observe a principle of natural justice; an error of law; or an erroneous finding of fact made in a perverse or capricious manner. The new test does not include the submission and consideration of new evidence.

[46] The Respondent argues that although the Member appears to have analysed the Applicant's application for leave based on the former test, the grounds of appeal set out in subsection 58(1) of the DHRSDA were still addressed in her decision.

[47] He submits that the doctrine of *res judicata* applies, and that the Member's decision to deny leave was reasonable. As well, he argues that the Applicant has failed to provide new facts that would justify re-opening the decision of the first review tribunal, and that the SST had no authority to reconsider the issues that were before the previous two review tribunals or the Pension Appeals Board.

[48] Further, the Respondent submits that the Applicant does not have a reasonable chance of success in the present application because previous proceedings have already determined that the evidence presented by the Applicant, specifically the reports of Drs. Esperanca and Brock and the Sleep Analysis report, do not constitute new facts. That issue is *res judicata*.

[49] Finally, the Respondent submits that the Applicant's complaint that the third Review Tribunal did not return the tribunal file to her is an administrative complaint that is irrelevant to this application. The Respondent argues that this complaint is not a ground of appeal that has a reasonable chance of success.

VII. DISCUSSION AND DISPOSITION

[50] I will first address the Applicant's arguments about procedural fairness. Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[51] In my opinion, there has been no breach of procedural fairness in respect of the preparation of the tribunal record. The fact that pages were not numbered in the review tribunal's file is immaterial and does not give rise to a breach of procedural fairness.

[52] Further, the fact that the records were not admitted into the record is an issue related to the merits of the decision since those records were deemed to not constitute new facts. That issue is *res judicata*. It is not a procedural fairness issue.

[53] I will now consider the decision of the SST to refuse the Applicant's application for leave to appeal.

[54] The SST is a new federal tribunal that replaced the Pension Appeals Board as of April 1, 2013 pursuant to section 260 of the Jobs, Growth and Long-term Prosperity Act.

[55] Although the SST is a new tribunal, it shares similar functions with its predecessor, the Pension Appeals Board, including the interpretation and application of the Plan; see the decision in *Atkinson v. Canada*, 2014 FCA 187.

[56] The grounds for appeal and the test for granting leave to appeal have changed under the new legislation; however, the process for applying for leave to appeal is substantially similar to that of the previous regime and as such, the same analysis will continue to apply in judicial review of decisions made under the new scheme.

[57] Under the previous scheme, this Court held that judicial review of decisions to grant or refuse an application for leave to appeal involves a two-step inquiry. First, the Court must ask whether the tribunal applied the correct test, and second, whether a reviewable error was made in determining whether the requirements of the test were made out; see the decision in *Consiglio v. Canada (Minister of Human Resources and Skills Development)*, 2014 FC 485 at paragraph 20.

[58] The first question, that is whether the correct test was applied, is reviewable on the correctness standard; see the decision in *Zakaria, supra* at paragraph 35. The first stage does not involve an inquiry into the merits of the decision; see the decision in *Callihoo v. Canada (Attorney General),* (2000) 190 F.T.R. 114 at paragraph 15. The second question of whether the test was properly applied is subject to review on a standard of reasonableness; see the decision in *Consiglio, supra* at paragraph 25.

[59] I do not agree with the submissions of the Respondent that the first question is reviewable on a standard of reasonableness.

[60] Although granting or refusing leave to appeal involves an interpretation of the SST's home statute, the question of whether the correct test was selected by the Member only has two

possible outcomes: either the correct test was selected or it was not. Adoption of the reasonableness standard could lead to uncertainty as to what test is to be applied in deciding to grant leave. Earlier jurisprudence applied the correctness standard of review to the question of choosing the right test.

[61] I will first address whether the Member selected the correct test for assessing the application for leave to appeal. In my opinion, she did not.

[62] At paragraph 7 of the decision, the Member said the following

> To ensure fairness, the Application will be examined based on the Applicant's legitimate expectations at the time of its filing with the PAB. For this reason, the determination of whether the appeal has a reasonable chance of success will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the Canada Pension Plan (CPP) as it read immediately before April 1, 2013.

[63] The test for granting leave to appeal under the current legislation is to be discerned from the provisions of the DHRSDA. The new legislation speaks of a "reasonable chance of success"; see the DHRSDA at subsection 58(2).

[64] The test under the former regime was one developed by the jurisprudence, that is, at common law. It required an appellant to show that an appeal raised "an arguable case"; see the decision in *Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141 (F.C.A.).

[65] Under the former regime an appellant could rely on the submission of new material facts to establish an arguable case. I refer to the decision in *Callihoo, supra* at paragraph 15 where the Court said the following:

> On the basis of this recent jurisprudence, in my view the review of a decision concerning an application for leave to appeal to the PAB involves two issues,
>
> 1. whether the decision maker has applied the right test – that is, whether the application raises an arguable case without otherwise assessing the merits of the application, and
>
> 2. whether the decision maker has erred in law or in appreciation of the facts in determining whether an arguable case is raised. If new evidence is adduced with the application, if the application raises an issue of law or of relevant significant facts not appropriate considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the grant of leave.

[66] The test for obtaining leave to appeal has changed. Insofar as the "arguable case" test was developed by decisions of the Courts, it is subject to statutory override. In the event of a conflict between legislation and the common law, the legislation will prevail; see Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law Inc., 2007) at 313-14.

[67] The Supreme Court of Canada has held that there is no basis for imputing common law tests into statutory provisions where the legislature has clearly designed the provisions so as to replace the common law; see the decision in *Prebushewkski v. Dodge City Auto (1984) Ltd.*, [2005] 1 S.C.R. 649 at paragraph 37.

[68] In my opinion, the Member erred when she considered the Applicant's leave application on the basis of her expectations at the time of filing her application for leave to appeal, and in accordance with subsection 84(1) of the Plan as it read immediately before April, 1 2013.

[69] Pursuant to section 260, which is a transitional provision of the Jobs, Growth and Long-term Prosperity Act, the Applicant's application for leave to appeal was deemed to be filed with the SST on April 1, 2013.

[70] Pursuant to subsection 58(2) of the DHRSDA, which is the legislation governing appeals to the SST, leave to appeal to the SST is refused if the appeal has no reasonable chance of success. This means that the critical factor in obtaining leave to appeal is a reasonable chance of success.

[71] Pursuant to subsection 58(1), there are now only three grounds of appeal, first, a breach of natural justice; second, an error law; and third, an erroneous finding of fact made in a perverse and capricious manner.

[72] The use of the word "only" in subsection 58(1) of the DHRSDA means that no other grounds of appeal may be considered. *The Oxford English Dictionary*, Vol. X, 2nd ed *sub verbo* "only", defines "only" as "a single solitary thing or fact; no one or nothing more or else than… *Only* may limit the statement to a single or defined person, thing, or number (a) as distinguished from *more*, or (b) as opposed to any *other*."

[73] Under the current legislation, an appeal will only have a reasonable chance of success if it is based on one of the three enumerated grounds. This test is narrower than the test that was previously applied, which did not list grounds of appeal. Adducing new evidence is no longer a ground of appeal, and the Member erred in considering it as such.

[74] In her decision denying leave to appeal, the Member did not refer to subsection 58(1) of the DHRSDA. Rather, she relied on the common law factors of adducing new evidence, or demonstrating an error of law or significant error of fact, as addressed in *Zakaria, supra*.

[75] In my opinion, the Member was required to apply the test set out in section 58 of the DHRSDA. She did not have discretion to deviate from that statutory regime and apply the former test, notwithstanding the fact that the Applicant applied for leave to appeal prior to the introduction of new legislation governing applications for leave to appeal under the Plan. I find that the Member erred by failing to apply the correct test in determining whether or not to grant the Applicant's application for leave to appeal.

[76] Further, in my opinion and notwithstanding the fact that the Member acted out of fairness considerations for the Applicant, she erred in considering the Applicant's application based on her legitimate expectations at the time of its filing with the Pension Appeals Board.

[77] It is unclear as to what the Member means by the words "legitimate expectations" at the time the Applicant filed the application for leave to appeal. The doctrine of legitimate expectations is an aspect of procedural fairness and is limited to the rules of procedural fairness.

In this regard, I refer to the decision in *Reference Re Constitutional Question Act (B.C.)* (1991), 127 N.R. 161 (S.C.C.) at paragraphs 56 and 57 as follows:

> 56. The doctrine of legitimate expectations was discussed in the reasons of the majority in **Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)**, [1990] 3 S.C.R. 1170, 116 N.R. 46, 69 Man. R. (2d) 134. That judgment cites seven cases dealing with the doctrine, and then goes on:
>
> > The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It afford a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation. (At p. 1204 S.C.R.):
>
> …
>
> 57. There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representations or to be consulted. It does not fetter the decision following the representation or consultation.

[78] The Supreme Court of Canada has held that no one has a vested right to continuance of the law as it stood in the past; see the decision in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at 282.

[79] In the present case, the transitional provisions of the Jobs, Growth and Long-term Prosperity Act provide that the provisions of the Plan repealed by that statute continue to apply to matters for which the Pension Appeals Board remains seized, that is appeals that were filed

and heard before April 1, 2013; see subsection 258(1) and section 262 of the Jobs, Growth and Long-term Prosperity Act. These provisions make it clear that Parliament intended that matters dealt with by the SST would be subject to the new legislation. The Pension Appeals Board remained subject to the former legislation during the transitional period.

[80] I note that subsection 44(c) of the *Interpretation Act*, R.S.C. 1985 c I-21 states that where a former enactment is repealed and replaced by a new enactment, proceedings commenced under the former enactment are to be continued in conformity with the new enactment, insofar as it is possible to do so consistently with the new enactment.

[81] In my opinion, the Member erred in assessing the Applicant's leave application in accordance with the doctrine of legitimate expectations at the time the leave application was filed. That doctrine applies to questions of procedural fairness; see the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 26. It does not apply to an expectation that the law would remain unchanged.

[82] The next question for consideration is what is the effect of the Member's error in choosing the test. In other words, is that error a sufficient basis to allow this application for judicial review?

[83] Pursuant to section 18.1(3) of the Federal Courts Act, relief in applications for judicial review is discretionary; see the decision in *Khosa, supra* at paragraph 40. "Discretionary" in this context means that not every error of law will result in a remedy to an applicant.

[84] The Supreme Court of Canada has held that prerogative relief, such as setting aside the decision under review, may be refused on the ground of futility in circumstances where issuing the relief will be of no value or have no practical effect; see the decisions in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 80 and *Lavoie v. Canada (Minister of the Environment)* (2002), 291 N.R. 282 (F.C.A.) at paragraphs 18-19.

[85] In my opinion, sending this matter back to the SST for re-determination will have no practical effect.

[86] If the matter is sent back and a different member applies the correct test, the application for leave to appeal will fail because a final decision has already been made on the issue whether she is disabled within the meaning of paragraph 42(2)(a) of the Plan. A new assessment of her application for leave to appeal will also fail for another reason, that is the Applicant's attempt to introduce "new facts" to challenge the finding that she is not disabled.

[87] Both these issues, that is the finding of no disability within the meaning of the Plan and the finding that there are no new facts, have already been finally decided and are subject to the evidentiary rule *res judicata* and the law of estoppel.

[88] The application of the legal principle of *res judicata* means that the Applicant has no ground of appeal that would have a reasonable chance of success and that standard is the relevant standard that she must meet.

[89] *Res judicata* is a rule of evidence and a part of the law of estoppel. Generally speaking, the law of estoppel prevents parties from proceeding with certain actions. *Res judicata* stands for the concept that once a dispute has been decided with finality, it cannot be re-litigated; see the decision in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraph 20. When *res judicata* applies, a litigant is "estopped" by the previous proceeding.

[90] There is a public policy element to *res judicata* because it is intended to advance the interests of justice and prevent abuses of the decision making process. It aims to avoid duplicative litigation, possible inconsistent results, undue cost, and vexing litigants multiple times with the same cause; see the decision in *Danyluk, supra* at paragraphs 18-20.

[91] In Canada, *res judicata* has two forms: cause of action estoppel and issue estoppel; see the decision in *Toronto (City) v. C.U.P.E., Local 79* [2003] 3 S.C.R. 77 at paragraph 23.

[92] In the present proceedings, the Respondent submits that issue estoppel applies. Issue estoppel stands for the proposition that once a question of fact or law has been litigated and determined by a competent decision maker, the decision is final and it cannot be re-determined in subsequent proceedings; see the decision in *Danyluk, supra* at paragraphs 24-25.

[93] In *Danyluk, supra* at paragraph 25, the Supreme Court of Canada held that the elements of issue estoppel are as follows:

1. The same question has been decided;
2. The judicial decision was final; and

3. The parties to the previous decision are the same parties to the proceeding in which issue estoppel is raised.

[94] In the present proceeding, two issues have been finally decided. The first issue that has been finally decided is the status of the Applicant as not being disabled for the purposes of the Plan. "Disability" for that purpose means that a person falls within the definition of "disability" pursuant to paragraph 42(2)(a) of the Plan. The Plan does not allow a person to self-assess as "disabled."

[95] The second issue that has been finally decided is that the medical reports presented by the Applicant do not constitute new material facts.

[96] Applying the rule of *res judicata* and the principle of issue estoppel, neither the question of the Applicant's "disability" nor the status of the medical reports as "new material facts" can be re-litigated.

[97] The Applicant is claiming disability benefits under the Plan. I note that the Plan is a statutory scheme that allows for the payment of benefits in defined situations as set out in the legislation.

[98] As discussed in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, the Plan is not a social welfare scheme, but a program to provide social insurance to eligible Canadians who lose earnings due to disability, among other things.

[99] Whether or not a person is eligible for CPP Disability Benefits depends on whether the individual meets the definition of disability set out in paragraph 42(2)(a) of the Plan. It is not a self-assessment process. Under the Plan, "disability" is determined by a Disability Adjudicator for the Plan. The decision to grant a disability benefit requires compliance with the statutory terms.

[100] Under the statutory test for disability, the question is not whether an applicant has health problems, but rather, whether an applicant has a disability that is both severe and prolonged, so as to render the claimant disabled within the meaning of the Plan.

[101] A disability will only be considered severe if it renders the claimant incapable of regularly pursuing any substantially gainful employment; see subparagraph 42(2)(a)(i) of the Plan. A disability will only be considered prolonged if it is determined that it is to be long continued and of indefinite duration, or likely to result in death; see subparagraph 42(2)(a)(ii) of the Plan. Both of these elements must be satisfied to be eligible for CPP Disability Benefits.

[102] The initial decision denying the Applicant's claim was made on December 10, 1995. In that decision, it was found that the Applicant was not disabled within the meaning of the Plan because the Applicant was deemed able to perform some form of light work on a regular basis. That decision was upheld on reconsideration on September 10, 1997. It was reviewed and upheld by the first review tribunal on February 25, 1999 and the Applicant's application for leave to appeal was refused on October 29, 1999. At that point, the decision that the Applicant was not disabled within the meaning of the Plan became final.

[103] The Applicant's second claim for CPP Disability Benefits was made on May 20, 2003. This claim involved an application to re-open the decision of the first review tribunal on the basis of new facts, as set out in certain medical reports. The review tribunal concluded that the reports did not constitute new facts. This finding was ultimately upheld on appeal to the Federal Court of Appeal. At that point in the proceedings, a final decision was made that there were no new facts.

[104] The present proceedings arise out of the Applicant's third claim for CPP Disability Benefits. The claim is in respect of the same injuries, arising from the same accident, that were assessed in her first claim. Her MQP has not changed from December 31, 1996.

[105] As such, the question of whether the Applicant is disabled within the meaning of the Plan has been decided. That first decision, having been reviewed and appealed through all the processes available under the Plan, was final. The claims for benefits were all made pursuant to the Plan, and involved the same parties, notwithstanding the fact that the Pension Appeals Board's role is now fulfilled by the SST.

[106] Similarly, the status of the medical reports presented by the Applicant, as constituting new facts, has also been finally decided in the proceedings related to her second claim.

[107] In my opinion, the doctrine of issue estoppel applies, and the matter is *res judicata*. The Applicant was found not to be disabled within the meaning of paragraph 42(2)(a) of the Plan. The additional reports presented by her were found not to raise new facts in the proceedings arising from her second claim for CPP Disability Benefits.

[108] Further, the changes to the legislative scheme mean that adducing new facts is no longer a ground of appeal. The Applicant does not have a ground of appeal with a reasonable chance of success, and sending the matter back to the SST for re-determination will make no difference to the outcome of the application for leave to appeal.

[109] In the exercise of my discretion pursuant to subsection 18.1(3) of the Federal Courts Act, I decline to grant a remedy for the Member's error of law and this application for judicial review is dismissed.

[110] The Respondent seeks costs on the basis that that the Applicant has pursued her claim for CPP Disability Benefits through several proceedings up to and including the Federal Court of Appeal.

[111] Pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106 the Court enjoys full discretion over costs. I am not persuaded that costs against the Applicant are justified in this case and make no Order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. In the exercise of my discretion pursuant to the *Federal Courts Rules* SOR/98-106, I make no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1823-13
STYLE OF CAUSE:	GUIDA BELO-ALVES v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 22, 2014
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	NOVEMBER 21, 2014

APPEARANCES:

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Sara Jane Harvey	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT

TAB 2

See paras. 42, 53, 55 and 72.

2021 SCC 33, 2021 CSC 33
Supreme Court of Canada

Canadian Broadcasting Corp. v. Manitoba

2021 CarswellMan 554, 2021 CarswellMan 555, 2021 SCC 33, 2021 CSC 33, [2021] S.C.J. No. 33, 174 W.C.B. (2d) 32, EYB 2021-408386

Canadian Broadcasting Corporation (Appellant) and Her Majesty The Queen, Stanley Frank Ostrowski, B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Centre for Free Expression, Canadian Association of Journalists, News Media Canada, Communications Workers of America/Canada and Ad Idem/Canadian Media Lawyers Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: March 17, 2021
Judgment: September 24, 2021
Docket: 38992

Proceedings: reversing *R v. Ostrowski* (2019), 2019 CarswellMan 923, 2019 MBCA 122, Holly C. Beard J.A., Jennifer A. Pfuetzner J.A., William J. Burnett J.A. (Man. C.A.)

Counsel: Jonathan B. Kroft, Sean A. Moreman, for Appellant
Michael Bodner, Denis Guénette, for Respondent, Her Majesty The Queen
Harvey T. Strosberg, Q.C., James Lockyer, for Respondent, Stanley Frank Ostrowski
Robert Gosman, for Respondents, B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.
Michael Bernstein, for Intervener, Attorney General of Ontario
Lesley A. Ruzicka, for Intervener, Attorney General of British Columbia
Fredrick Schumann, for Interveners, Centre for Free Expression, Canadian Association of Journalists, News Media Canada and Communications Workers of America/Canada
Tess Layton, for Intervener, Ad Idem/Canadian Media Lawyers Association

Kasirer J. **(Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 The principal issue in these appeals concerns a court's jurisdiction to render, vary or vacate orders — sealing orders, publication bans and the like — that limit the open court principle. The question is whether a court retains jurisdiction over these ancillary matters after it has decided the merits of the case and has entered its formal judgment. Does the doctrine of *functus officio* — the notion that once a court has performed its function, it has exhausted its authority — preclude that court from revisiting a publication ban that it had ordered or a sealing order put in place in the course of criminal proceedings?

2 An affidavit filed in a criminal matter before the Court of Appeal of Manitoba had been held under seal and subject to a publication ban pending a decision as to its admissibility as new evidence. In its reasons allowing the appeal on the merits, the court dismissed the motion for new evidence because it was not relevant to the issue at hand. It nevertheless ordered that the publication ban remain in place indefinitely.

3 Relying on the open court principle and the constitutionally-protected right of freedom of the press with which it is bound up, the appellant Canadian Broadcasting Corporation ("CBC") brought a motion in which it sought access to the affidavit and asked to have the publication ban set aside. It had been covering the proceedings as a representative of the media. Lifting the publication ban, said the CBC, would shed light on the principal matter before the Court of Appeal and its conclusion on the merits that a miscarriage of justice had occurred at trial. The Crown opposed the motion to disturb the ban, however, arguing that the affidavit was not relevant and the Court of Appeal had no continuing authority over the matter. Family members of a deceased person mentioned in the affidavit under seal also opposed lifting the ban since, they said, doing so would result in an unjustifiable violation of their privacy.

4 The Court of Appeal declined to consider the CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion and said the CBC should turn to this Court, on appeal, to seek redress.

5 In point of fact, this Court is seized of two appeals. In the first, leave was granted from the Court of Appeal's refusal to hear the motion in which it was asked to reconsider its own publication ban and, in addition, to grant the CBC access to the affidavit. This first appeal raises preliminary issues about the Court of Appeal's powers to reconsider such decisions after it had entered the formal order on the merits of the miscarriage of justice case, including consideration of the doctrine of *functus officio*. In the second appeal for which leave was also granted, the CBC challenges the publication ban directly. This second appeal is taken directly from the publication ban itself, and unlike the first appeal, it does not concern the order granting access to the affidavit also sought in the CBC's motion. It raises the sole issue of whether the Court of Appeal was correct to order the final, indefinite publication ban made in the judgment which disposed of the merits of the appeal.

6 As to the first appeal, and so said with great respect, I do not share the Court of Appeal's view that it was without jurisdiction to consider the motion brought by the CBC. It is true that, in the exercise of its appellate authority, the Court of Appeal could not rehear the appeal on the merits and that the doctrine of *functus officio* precludes it from reconsidering the substance of the appeal. But after a court loses jurisdiction over the merits, it generally retains the authority to supervise access to the record of its own proceedings. Even after the formal judgment on the merits is filed, this ongoing authority allows the court to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. Indeed, it is critical to upholding the responsibility all courts have to manage their records in accordance with the *Canadian Charter of Rights and Freedoms* and the proper administration of justice. As ancillary court openness issues have no bearing on the judgments on the merits, there was no reason for the Court of Appeal to tie its own hands in service of the finality of the underlying judgment that was not at risk.

7 Moreover, the Court of Appeal had ordered the continuing publication ban in its judgment on the merits without a hearing to determine whether the open court principle should be limited in the circumstances. The Court of Appeal ought to have considered whether it was appropriate to set aside its publication ban on motion by the CBC in these circumstances.

8 For the reasons that follow, to dispose of the first appeal I propose that the matter should be remanded to the Court of Appeal to decide the CBC's motion. That court is best placed to decide the discretionary and fact-specific issues raised, including whether the CBC should be granted standing to challenge the publication ban, whether the motion was unreasonably delayed such that it is not in the interests of justice to hear it and whether the lifting of the publication ban is justified here taking into account this Court's decision in *Sherman Estate v. Donovan*, 2021 SCC 25.

9 Given that I propose to dispose of the first appeal by returning the matter to the Court of Appeal to decide the CBC's motion, in my respectful view it would be inappropriate for this Court to decide the second appeal challenging the ban directly now, before the Court of Appeal has had a chance to reconsider the matter. Accordingly, I would adjourn the second appeal *sine die*.

II. Background and Proceedings Below

A. The Miscarriage of Justice Reference

10 Following a jury trial in 1987, Stanley Ostrowski was convicted of first degree murder. He appealed the conviction unsuccessfully to the Court of Appeal and later this Court (*R. v. Ostrowski and Correia*, (1989), 57 Man. R. (2d) 255, aff'd *R. v. Ostrowski*, [1990] 2 S.C.R. 82).

11 In 2014, the Minister of Justice referred the matter to the Court of Appeal pursuant to ss. 696.1 and 696.3(3)(a)(ii) of the Criminal Code, R.S.C. 1985, c. C-46. These provisions allow matters to be referred back to the Court of Appeal in circumstances where, in the Minister's view, there is a reasonable basis to conclude that a miscarriage of justice has likely occurred.

12 Certain new evidence relating to the conviction at trial in 1987 was proposed for consideration by the Court of Appeal upon joint motion of the Crown and Mr. Ostrowski. Unusually, this included the live testimony of 12 witnesses heard before a panel of appellate justices. The Crown conceded this evidence was admissible, that it proved a miscarriage of justice had occurred and, accordingly, that the 1987 conviction should be set aside. The concession was based on evidence pointing to the existence of a deal made between prosecutors and a witness whose testimony had linked Mr. Ostrowski to the murder. The evidence had not been disclosed to Mr. Ostrowski at trial, violating his right to make full answer and defence.

13 The parties did not agree on the appropriate remedy for the miscarriage of justice. The Crown sought a new trial order and a judicial stay of those proceedings, while Mr. Ostrowski asked that an acquittal be entered by the Court of Appeal.

14 Mr. Ostrowski also sought to introduce further new evidence, specifically an affidavit sworn by his lawyer, Richard Posner ("Posner affidavit"). The affidavit contained details of certain events that had occurred after one of the 12 witnesses, M.D., had testified before the Court of Appeal in this matter. Unlike the material relating to the other motion for new evidence, the Crown did not consent to the Posner affidavit being admitted into evidence.

15 The Court of Appeal heard oral argument from the parties on May 28, 2018, including submissions regarding the admissibility of the Posner affidavit. The affidavit was sealed, pursuant to the *Court of Appeal Rules*, Man. Reg. 555/88R, relating to motions for new evidence, but the Court of Appeal nevertheless reviewed it on the consent of the parties (r. 21(4)). It also ordered a publication ban respecting this material at the outset of the May 28 hearing:

> THE COURT: ... [I]n our view, unless counsel feel otherwise, there must be a publication ban. There's no point in having the sealed material to the extent that it's referred to in argument without a publication ban. So there will be a publication ban as well unless counsel wish to address that?
>
> **Ban on Publication**
>
> (R.R. (Crown), at p. 137)

16 As it would later concede before the Court of Appeal, the CBC was reporting on the proceedings, and its journalists could have attended any of the hearings, including the May 28 hearing.

B. The 2018 Publication Ban Judgment (2018 MBCA 125, 369 C.C.C. (3d) 139 — Beard, Burnett and Pfuetzner JJ.A.)

17 The Court of Appeal found a miscarriage of justice as a result of the non-disclosure based on material revealed by the first motion for new evidence, accepting the concession of the Crown noted above. This was sufficient to conclude the conviction should be set aside. The Court of Appeal ultimately quashed the conviction, ordered a new trial and entered a stay of any further proceedings, and continued the publication ban indefinitely ("2018 Publication Ban Judgment").

18 The court declined to admit the Posner affidavit as further new evidence, because it concluded that it was not relevant to the determination of the only live issue of the appropriate remedy for Mr. Ostrowski. Instead, the evidence went to "the issue of whether there was Crown misbehaviour, which was relevant to whether there had been a miscarriage of justice" (para. 82). Beard J.A. wrote the following in concluding: "I am of the view that the evidence is not relevant to the issues to be determined and the motion should be dismissed. I would order that the publication ban regarding this evidence should remain in effect" (*ibid.*).

19 For our purposes, it bears emphasizing that the publication ban that the Court of Appeal had ordered at the hearing was, in para. 82 of the court's reasons on the merits, ordered to "remain in effect." This was done without either a motion to that end or particularized pleadings on the appropriateness of the continuing order in light of the open court principle. The Posner affidavit had been sealed pursuant to a rule of court during the proceedings on appeal (Court of Appeal Rules, r. 21(4)). That sealing order is not mentioned in the 2018 Publication Ban Judgment.

20 A formal certificate of decision of this judgment was entered in January 2019, recording the orders on the appeal and the two new evidence motions. The certificate made no reference to a sealing order or a publication ban.

C. The 2019 Jurisdiction Judgment (2019 MBCA 122 — Beard, Burnett and Pfuetzner JJ.A.)

21 Following the disposition of the appeal on the miscarriage of justice, the CBC petitioned the Court of Appeal to obtain access to the Posner affidavit and to ask the court to set aside the publication ban referred to in the 2018 Publication Ban Judgment. The CBC's motion was brought in May 2019, following the release of reasons on the merits of Mr. Ostrowski's appeal and the filing of the formal judgment in that matter.

22 The CBC had contacted the Registrar at the Court of Appeal seeking access to the Posner affidavit. Evidence suggests the CBC received word from the Court of Appeal's media relations officer alerting it to the existence of the publication ban in the days following the release of the 2018 reasons on the merits of Mr. Ostrowski's appeal. However, it was over five months later that the CBC filed the above-mentioned motion.

23 The CBC relied on s. 2(b) of the Charter and alleged that the evidence did not support "any continued restriction on the right of the media and the public to access and report upon the full record of these [p]roceedings" (A.R., at p. 75). In its motion brief, the CBC emphasized its purpose to render transparent the circumstances that led to the miscarriage of justice, arguing that it was of the utmost importance that material in the Posner affidavit concerning M.D., one of the 12 witnesses at the miscarriage of justice proceeding, be open to public scrutiny. In an affidavit filed in support of the motion, the CBC's Director of Investigative Journalism: Regions observed that there had been no formal motion filed requesting a publication ban of the material and there was no notice to the public or the media that a ban was being sought.

24 M.D.'s spouse, B.B., and the executor of his estate, J.D. (collectively, "interested parties") opposed the CBC's motion on jurisdictional grounds, as did the Crown. Noting that the certificate of decision had already been entered, the interested parties and the Crown argued that the Court of Appeal had no authority to decide the motion by reason of the rule against rehearing in the *Court of Appeal Rules*.

25 The Court of Appeal dismissed the motion, citing a lack of jurisdiction ("2019 Jurisdiction Judgment"). It explained that the CBC was seeking a rehearing of a publication ban order made as part of the final disposition of Mr. Ostrowski's appeal. "[N]o rehearing of an appeal, or any issue dealt with on an appeal, can occur once the certificate of decision has been entered", wrote Pfuetzner J.A. for the court, relying on r. 46.2 of the Court of Appeal Rules and the common law doctrine of *functus officio* (para. 17 (CanLII)). The certificate had been entered well before the motion was brought. The fact that the certificate did not mention the publication ban was held not to be determinative because it was "subsidiary" to the ruling on the new evidence motion and the final disposition of the appeal. It was further barred by r. 46.2(12), which provides a motion cannot be reheard. The Court of Appeal concluded that the "proper route for a third party ... to challenge a publication ban issued by a superior court (including one issued by an appellate court) is to seek leave to appeal to the Supreme Court of Canada" (para. 21). It dismissed the motion on this jurisdictional basis alone.

III. Issues

26 As is plain from the CBC's two applications seeking leave, the terms of the leave judgment and the arguments of the parties before us, this matter raises two distinct appeals. The CBC is appealing both from the 2019 Jurisdiction Judgment dismissing the motion for reconsideration, and from the 2018 Publication Ban Judgment, which made the indefinite publication ban at issue in this case.

27 In these two appeals, the CBC seeks three orders from this Court. First, the CBC asks for an order setting aside the 2019 Jurisdiction Judgment. It argues the Court of Appeal erred in concluding it had no jurisdiction to hear its motion and should have addressed the issues of whether to reconsider the publication ban and of whether the public and the press have the right to access the Posner affidavit. Notably, the CBC argues that neither the rule against rehearings in the *Court of Appeal Rules* nor the doctrine of *functus officio* deprived the Court of Appeal of jurisdiction to consider the motion based in constitutional principles of court openness. It says that the publication ban could be reconsidered on the basis of a change in circumstances or because, as an affected party, it did not have notice of the making of this order.

28 The CBC also asks this Court for a second order setting aside the continuing publication ban in the 2018 Publication Ban Judgment and a third giving it access to the Posner affidavit as part of the court record. It argues the open court principle applies to material that is tendered as new evidence even if, at the end of the day, it is not admitted. In this instance, it says the publication ban fails the test for discretionary limits on this principle set forth in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. It contends further that the public is legally entitled to access the Posner affidavit because the applicable rules do not provide for continued sealing of this material. Mr. Ostrowski adopts the CBC's position and adds that the orders of the Court of Appeal preclude the proper accountability of public officials whose actions he alleges contributed to his wrongful conviction.

29 The Crown takes the position that the Court of Appeal was right to conclude that it had no jurisdiction to consider the CBC's motion. The Crown says, however, that if the Court of Appeal had authority to consider these issues, this Court does not have jurisdiction with respect to the publication ban and, if it does, it should decline to exercise its authority. Should this Court proceed to consider the merits, the Crown's position is that the Court of Appeal's decision to impose a continuing publication ban was correct, even if it might have given more fulsome reasons. The material in the Posner affidavit is deeply personal and speaks to intimate details about M.D. that would re-traumatize the family, such that a discretionary limit on court openness was justified here. Similarly, the interested parties argue that the limits on court openness are necessary to protect the privacy of M.D.'s family and that the limit is justified given the inadmissible, irrelevant and unreliable nature of the proposed new evidence.

30 The parties raise a broad series of questions before this Court bearing on jurisdiction over and the appropriateness of a publication ban or sealing order in the circumstances. It is sufficient to answer the following questions to dispose of this matter:

1. Did the Court of Appeal err in concluding it had no jurisdiction to consider the CBC's motion to reconsider the publication ban and gain access to the Posner affidavit?

2. Should the matter be remanded to the Court of Appeal to hear the merits of that motion?

31 For the reasons that follow I am respectfully of the view, in the first appeal from the 2019 Jurisdiction Judgment, that the Court of Appeal did err on the issue of jurisdiction and that as a result the matter should be remanded to that court. This ends the analysis. The second appeal from the 2018 Publication Ban Judgment would best not proceed until the Court of Appeal decides the CBC's motion.

IV. Analysis

A. Jurisdiction to Make, Vary and Set Aside Orders Concerning Court Openness

(1) Supervisory Jurisdiction Over the Court Record Survives Entering a Judgment on the Merits

32 In concluding that it lacked jurisdiction to vary or set aside the relevant orders concerning court openness, the Court of Appeal relied, in part, on the doctrine of *functus officio*. The term *functus officio* — often rendered as "having performed his or her office" — has traditionally been understood to mean that once a judge decided a matter, they had discharged their office and did not have the ability to return to and correct their decision (A. S. P. Wong, “Doctrine of Functus Officio: The Changing Face of Finality's Old Guard” (2020), 98 Can. Bar Rev. 543, at pp. 546-47; see A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at p. 193, who also uses the term *functa officio*).

33 In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision (see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 860; *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23; Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 77-79). A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered (R. v. Adams, [1995] 4 S.C.R. 707, at para. 29; R. v. Smithen-Davis, 2020 ONCA 759, 68 C.R. (7th) 75, at paras. 33-34). After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits (*Chandler*, at p. 861, citing *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186; *R. v. H. (E.)*, (1997), 33 O.R. (3d) 202 (C.A.), at pp. 214-15, citing *The Queen v. Jacobs*, [1971] S.C.R. 92; see also R. v. Burke, 2002 SCC 55, [2002] 2 S.C.R. 857, at para. 54).

34 This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure (*Chandler*, at p. 861; *H. (E.)*, at p. 214). As Doherty J.A. wrote in *Tsaoussis (Litigation Guardian of) v. Baetz*, (1998), 41 O.R. (3d) 257 (C.A.), for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole (pp. 264-65). More specifically, if lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court (*Doucet-Boudreau* , at para. 79; see also Ayangma v. French School Board, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103, at paras. 11-12). The appeal record would be written on "shifting sand", ultimately inhibiting effective review (Wong, at p. 548).

35 That said, *functus officio* is only one of several legal principles designed to promote the goal of finality. Indeed, given it is inherently tied to the entering of the formal judgment and its exceptions are relatively restrictive, this Court has described the doctrine of *functus officio* as narrow in scope (*Reekie*, at pp. 222-23; see also Wong, at pp. 555-56). So, while it is an important norm recognized in our jurisprudence to serve this necessary purpose, no one rule has a monopoly on finality.

36 It is useful to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. As I will endeavour to explain, even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter (see, e.g., GEA Refrigeration Canada Inc. v. Chang2020 BCCA 361B.C. C.A. , 43 B.C.L.R. (6th) 330, at paras. 185-86).

37 Supervisory authority over the court record has long been recognized as a feature of the jurisdiction of all courts (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189; see also *Canadian Broadcasting Corp. v. The* Queen, 2011 SCC 3, [2011] 1 S.C.R. 65, at para. 12). As Goudge J.A. observed in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)*, (2002), 59 O.R. (3d) 18 (C.A.), "it is important to remember that the court's jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts" (para. 13). Specifically, courts must ensure compliance with the robust and constitutionally-protected principle of court openness, while also remaining responsive to "competing important public interests" that may be put at risk by that openness (Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 26 and 28).

38 The need to attend to the appropriate balance between these fundamental public interests does not disappear merely because the order on the merits is final and could have been appealed. Court records may be accessed even when proceedings have come to an end. Indeed, important decisions about the openness of the court record may need to be taken after the proceeding on the merits is over (see, e.g., *R. v. Wagner*, 2017 ONSC 6603; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190). If jurisdiction over court openness ceased when the formal order on the merits were entered, courts would lose control over their own record without good reason. Consider, for example, a case where no order limiting court openness is made before the formal judgment on the merits is entered, and a need to protect an important public interest is later discovered. In my respectful view, to conclude that this power is wholly lost once the formal order on the merits is entered would risk undermining the proper administration of justice in service of a reading of the doctrine of *functus officio* unconnected with its purpose.

39 Recognizing that this jurisdiction survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments associated with the doctrine of *functus officio*. Relief granted pursuant to this power leaves the substance of the underlying proceeding and the reasons that support it undisturbed. While some interlocutory motions, such as motions relating to the admissibility of evidence, may have an impact on the final decision on the merits, deciding public access to the court record has no bearing on the underlying proceeding or its appeal. The doctrine of *functus officio* reflects the transfer of the decision-making authority in respect of final judgments from the court of first instance to the appellate court (*Chandler*, at p. 860, citing *In re St. Nazaire Co.*, (1879), 12 Ch. D. 88). It was never intended to restrict the ability of those lower courts to control their own files in respect of these decisions.

40 To be clear, this does not mean that *functus officio* never applies to publication bans or sealing orders. The point is simply that a court is not precluded from deciding a motion concerning court openness merely because it is *functus officio* with respect to the merits of the underlying proceeding.

(2) Decisions Regarding Court Openness May Be Reconsidered in Limited Circumstances

41 That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to reconsideration at any time or for any reason. Where a decision concerning court openness is formalized in an order, *functus officio* may apply, regardless of whether or not it is ancillary to some other proceeding. Even where, as here, a decision concerning court openness is not formalized in an order, finality remains an important value in the making of publication bans and sealing orders. Indeed, in this case the CBC has in fact appealed an ancillary publication ban that has never been formalized in an order. The need to provide litigants with a stable basis from which to launch an appeal — a central rationale underpinning *functus officio* (see Doucet-Boudreau, at para. 79) — can apply, even where *functus officio* technically does not.

42 Therefore, regardless of whether a court is deprived of jurisdiction by the doctrine of *functus officio*, the importance of finality will mean courts will be rightly reluctant to reconsider questions of court openness. A publication ban or sealing order is, however, susceptible to reconsideration by the issuing court, albeit on narrow grounds. This will include cases where an affected party not given notice proposes to make novel submissions that could affect the result, or on the basis of a material change in circumstances. This applies to both publication bans and sealing orders that are formalized in an order and those that are not.

43 Central to the CBC's claim that the Court of Appeal had jurisdiction to vary the 2018 publication ban is that it was made without proper notice to the press as an affected party.

44 One basis for revisiting a publication ban or sealing order may indeed arise when an affected person who was not given notice of the making of the order later seeks to vary it or have it set aside. Natural justice is understood to require that whenever a person is affected by a decision, they generally have the right to appropriate notice of that decision and an opportunity to be heard (*Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at pp. 233-34). When an order is made without the submissions of an affected person because that person was not given proper notice, such as an *ex parte* order, the law recognizes that the court that made that order generally has authority to review it on motion of that affected person (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 607, citing *Dickie v. Woodworth*, (1883), 8 S.C.R. 192). This ensures that affected persons are not unfairly subjected to orders made without the benefit of their submissions (see, generally, F.-O. Barbeau, "Rétractation du jugement", in *JurisClasseur Québec — Collection droit civil — Procédure civile I* (2nd ed. (loose-leaf)), by P.-C. Lafond, ed., fasc. 31, at No. 39). This principle also finds expression in various rules of court procedure (see, e.g., Court of Queen's Bench Rules, Man. Reg. 553/88R, r. 37.11 ("Queen's Bench Rules")). Similar principles apply to orders concerning court openness: I note for example that courts in Ontario have relied on the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, to decide challenges to sealing orders brought by media representatives who were not given proper notice of the hearing at which the order was made (Hollinger Inc. v. The Ravelston Corp., 2008 ONCA 207, 89 O.R. (3d) 721, at para. 43, per Juriansz J.A., dissenting in part but not on this point).

45 To challenge an existing order concerning court openness, the moving party must qualify as an affected person to whom standing should be granted. Further, where so required, that party must have acted with due dispatch in seeking to set aside the impugned order. Both of these points merit brief comment in view of arguments made here.

46 First, it is important to recognize that applying this principle to publication bans or sealing orders requires some consideration of standing, because of the broad effects of such an order. Insofar as a publication ban or a sealing order impinges on the open court principle, such orders can, for example, affect the public's right to freedom of expression and freedom of the press under s. 2(b) of the Charter (Vancouver Sun, at para. 26). Court openness is understood as a public good, not an interest that belongs to a particular individual or entity. Further, the risks to competing important interests which justify limits on court openness must also reflect public values, even if they might be aimed at protecting particular persons (Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 55). Yet, in the interest of the orderly administration of justice, it cannot be that every member of the public or media entity has standing to bring an individual motion to set publication bans aside in the absence of such notice. This would make the number of parties entitled to reconsideration potentially endless. Instead, as this Court held in *Dagenais* , with regard to publication bans in criminal matters, standing in these cases should be thought of as a matter of the court's discretion (pp. 869 and 872; see also R. v. White, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, at para. 12, aff'd *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721).

47 In respect of standing, an order limiting court openness engages the constitutionally-protected right of a free press to report on judicial proceedings (Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 2; *Vancouver Sun*, at para. 26). When that order has been made in the absence of notice to the media, a representative of the media should generally have standing to challenge an order that threatens the open court principle where they are able to show that they will make submissions that were not considered in its making that could affect the result (see, generally, *Hollinger* , at paras. 36-39). In practice, and properly in my view, standing is seldom refused to the media to participate in open court proceedings where it is sought (J. Rossiter, Law of Publication Bans, Private Hearings and Sealing Orders (loose-leaf), s. 8.1.10). Equally, a person directly affected by an order concerning court openness because it might harm their individual interests should, as a matter of course, have standing to challenge that order (see, generally, *Ivandaeva Total Image Salon Inc. v. Hlembizky*, (2003), 63 O.R. (3d) 769 (C.A.), at para. 27). Courts should nevertheless retain some residual discretion to deny standing where hearing the motion would not be in the interests of justice, as in the case, for example, that it would unduly harm the parties or merely duplicate argument that is already before the court (*Dagenais*, at p. 869; *White* , at para. 12; see, e.g., *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press*, (2000), 184 N.S.R. (2d) 159 (S.C.), at paras. 18-21). The requirement of standing, therefore, by limiting who may challenge a publication ban or sealing order, serves the goals of finality and mirrors the discretionary approach to standing that this Court has previously endorsed.

48 Second, as to delay, courts may decline to hear a motion to vary or set aside an order dealing with court openness made without notice if the moving party was unreasonably slow in bringing that motion after becoming aware of the order, such that it is no longer in the interests of justice to hear it. Once the moving party has become aware the order exists, they are then expected to take prompt action to challenge the order or otherwise acquiesce to its existence (see, e.g., *9095-7267 Québec inc. v. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878(Que. C.A.), at para. 46; see also Rules of Civil Procedure, r. 37.14 (Ontario); Code of Civil Procedure, CQLR, c. C-25.01, art. 349 (Quebec); Alberta Rules of Court, Alta. Reg. 124/2010, r. 9.15; Queen's Bench Rules, r. 37.11 (Manitoba)). Strathy J., as he then was, explained that a timeliness requirement reflects the common sense presumption that "a party who sits on his or her rights in the face of a court order has accepted the legitimacy of the order" (*Attorney General of Ontario v. 15 Johnswood Crescent*, 2009 CanLII 50751(Ont. S.C.), at para. 43).

49 In some instances, the legislature will provide indications of the appropriate period of delay. In the absence of legislative direction, courts must be guided by the purpose of the rule and the circumstances of each case (see, generally, *Johnswood*, at para. 45). As in other cases where courts are asked not to hear proceedings by reason of an unacceptable delay, the task is not a mechanical calculation, but rather a contextual balancing of finality and timely justice against the importance of the matter being heard on its merits (Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd., 2007 ONCA 695, 87 O.R. (3d) 660, at para. 34; 1196158 Ontario Inc. v. 6274013 Canada Ltd., 2012 ONCA 544, 112 O.R. (3d) 67, at para. 19). By way of example, under the *Rules of Civil Procedure*, a period of three months to bring a motion to set aside an order dismissing

the action for delay was held to be reasonable in the context of one dispute (Toronto Standard Condominium Corporation No. 2058 v. Cresford Developments Inc., 2019 ONSC 801, 97 C.L.R. (4th) 306, at para. 36), but a largely unexplained ten-month delay meant in another case that the applicant had not moved forthwith (1202600 Ontario Inc. v. Jacob, 2012 ONSC 361, at paras. 102 and 121 (CanLII)). In one Manitoba case, a delay of five months in moving to set aside a judgment was found not to be unreasonable in the circumstances (585430 Alberta Ltd. v. Trans Canada Leasing Inc., 2005 MBQB 220, 196 Man. R. (2d) 191, at para. 56). I stress, however, that this determination is inherently tied to the facts of each particular case and the nature of the issue raised. Especially where this delay has caused meaningful prejudice to the responding parties, courts may conclude it is not in the interests of justice to hear a motion. This requirement safeguards finality by circumscribing reconsideration in the temporal dimension.

50 On the basis of these principles, then, and in the absence of explicit legislation to the contrary, a court may vary or set aside an order concerning court openness it has made on timely motion by an affected person who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose.

51 To be clear, limits on court openness, such as a publication ban, can be made without prior notice to the media. Given the importance of the open court principle and the role of the media in informing the public about the activities of courts, it may generally be appropriate to give prior notice to the media, in addition to those persons who would be directly affected by the publication ban or sealing order, when seeking a limit on court openness (see Jane Doe v. Manitoba, 2005 MBCA 57, 192 Man. R. (2d) 309, at para. 24; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6). But whether and when this notice should be given is ultimately a matter within the discretion of the relevant court (*Dagenais*, at p. 869; *M. (A.)* , at para. 5). I agree with the submissions of the attorneys general of British Columbia and Ontario that the circumstances in which orders limiting court openness are made vary and that courts have the requisite discretionary authority to ensure justice is served in each individual case.

52 Indeed this Court has explicitly recognized the discretion of courts to decide when notice to the media is required in the case of search warrants and production orders. In *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, this Court held that granting a search warrant in the absence of the affected media organization was not a jurisdictional error; the issuing judge had discretion regarding the timing and modality of notice to the media (paras. 83-84). Similarly, in *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374, Moldaver J. considered a media organization's argument that notice of an application for a production order affecting it was required (para. 59). He rejected that submission because the *Criminal Code* explicitly provided for *ex parte* proceedings and the negative impact on the media was mitigated by the statutory right to apply to have the order varied or revoked at a later stage (paras. 61-62). It follows from these authorities that giving notice is not a pre-requisite to the issuance of a valid order in these circumstances. At the same time, this jurisprudence does not exclude the possibility of providing notice after an order has been granted or entertaining a motion to vary or set aside an order by an affected person who was not given prior notice.

53 I also agree with the CBC that courts may exercise discretion to vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed in accordance with the principle set out by this Court in *Adams* . As Sopinka J. observed in that case, "[a]s a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed" (para. 30). This rule applies to orders involving court openness (see, e.g., British Columbia v. BCTF, 2015 BCCA 185, 75 B.C.L.R. (5th) 257, at paras. 15-22; *Morin v. R.*, (1997), 32 O.R. (3d) 265 (C.A.), at pp. 272-73).

54 I hasten to say, however, that I do not read *Adams* to bear the meaning the CBC attributes to it in their factum. The CBC says the case was about "whether the doctrine of *functus officio* prevented a trial judge from rescinding a publication ban it had previously issued" and suggests that it is a case about how the doctrine of *functus officio* applies to ancillary orders (A.F., at paras. 82-83). On my understanding, *Adams* dealt simply with the question as to when a judge could reconsider a previous order made in the course of trial. The impugned order, which purported to lift a publication ban previously made, was decided as the trial judge dismissed the charges against the accused (*Adams* , at para. 5). This Court concluded that the trial judge did not have the power to revoke the order because the circumstance that made the order mandatory had not changed (para. 31). Subsequent appellate jurisprudence has interpreted the judgment to provide a general rule about varying such orders, rather than a rule about

functus officio (see, e.g., *BCTF*, at para. 22; R. v. B. (H.), 2016 ONCA 953, 345 C.C.C. (3d) 206, at para. 51; R. v. Le, 2011 MBCA 83, 270 Man. R. (2d) 82, at para. 123). The principles in *Adams* balance finality and flexibility even when the court is not *functus officio*, by permitting the reconsideration of such orders where there has been a material change of circumstances.

55 In deciding whether this rule from *Adams* applies, I do agree that a first question for the court will be whether there has been a material change in circumstances since the making of the initial order (para. 30). The burden of establishing this change falls to the party seeking a variation in the order (see, by analogy, L.M.P. v. L.S., 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 31). That party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms (*L.M.P.* , at para. 32; *Droit de la famille-132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1, at paras. 75-76; *R. v. Baltovitch*, (2000), 47 O.R. (3d) 761 (C.A.), at para. 6). The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances (*L.M.P.* , at para. 33; *Droit de la famille-132380* , at para. 78).

56 Instances in which a court may reconsider a decision respecting its court record are distinct from an appeal or application for *certiorari* made to a higher court from such decisions (see, generally, *Dagenais*, at pp. 870-72). In a motion to reconsider on both grounds described above, the original court is not being asked to reconsider its decision because it is wrongly decided, but rather because it was made without relevant submissions from an affected party or on the basis of a material change in the circumstances that justified the initial decision.

57 Finally, I note that the general principles considered here can, of course, be displaced by legislation, such as the applicable rules of court, designed to determine more exactly when it is appropriate to reconsider orders concerning court openness.

B. Application to the Facts of This Case

(1) The Court of Appeal Erred in Concluding It Had No Jurisdiction to Consider the CBC's Motion

58 In answer to the preliminary question raised by the first appeal from the 2019 Jurisdiction Judgment, I turn now to whether the Court of Appeal erred in concluding it did not have jurisdiction to hear the CBC's motion to gain access to the Posner affidavit and set aside the publication ban.

59 The CBC submits that the Court of Appeal was mistaken when it declined jurisdiction on the basis of the doctrine of *functus officio*. For the CBC, the flexible approach to *functus officio* spoken to in *Adams* requires ancillary orders, such as the publication ban here, to be treated separately from the merits of the main proceeding. Moreover, the circumstances in which the ban was ordered had changed. It was made without notice to the affected parties and no mention in a certificate of decision of the publication ban had been entered. The CBC maintains that it was not asking for a "rehearing" of the appeal or of the motion which, it recognizes, is prohibited by the *Court of Appeal Rules*. In the alternative, even if the prohibition against rehearings does apply, it must be interpreted flexibly as is the case with the doctrine of *functus officio*.

60 The Crown answers that the Court of Appeal rightly held it was without jurisdiction given that the formal judgment had been entered. In its view, the only exception to the doctrine of *functus officio* that might conceivably apply here is that the CBC's arguments were never heard on their merits. That exception, says the Crown, does not apply here. While the CBC did not make submissions, it was covering the case and could have challenged the ban anytime between when the initial publication ban was made in May 2018 and when the certificate of decision was entered in January 2019. The CBC provides no proper explanation for its delay in taking action to set aside the publication ban. Even if a material change of circumstances would allow the Court of Appeal to reconsider its order, there was no such change in this case. The Court of Appeal's jurisdiction over the matter was exhausted.

61 I agree with the CBC that the Court of Appeal did have the authority to uphold, vary or vacate the 2018 publication ban and grant or withhold access to the court record.

62 It is best to note at the outset that appellate jurisdiction, such as that being exercised by the Court of Appeal in the proceeding below, must be grounded in legislation (R. v. Smith, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 21). In addition to

any explicit grant, statutory and appellate courts should be understood to have the implicit power to control their own process and exercise other powers that are practically necessary to accomplish the role the law assigns them (*R. v.* Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; Lochner v. Ontario Civilian Police Commission, 2020 ONCA 720, at para. 27 (CanLII)). I agree with the Attorney General of British Columbia that it may be unhelpful to describe this implicit authority as "inherent jurisdiction" given that appellate powers are, ultimately, rooted in statute (transcript, at pp. 100-1).

63 The legislative foundation for the Court of Appeal's jurisdiction over the motion on court openness is plain here. As I have said, the supervisory jurisdiction over the court record is a feature of all courts (*MacIntyre* , at p. 189) and this is no less true of an appellate court. As part of the court's authority to control its own process, the power over the openness of proceedings and over the court record arises here by necessary implication from the legislative grant of the appellate court's adjudicative authority (see, generally, *Cunningham* , at para. 19). As a matter of procedural necessity — a publication ban or a sealing order may remain in place long after the substance of the appeal has been decided — this jurisdiction continues even after the formal judgment on the merits of a given appeal has been entered unless ousted by legislation. The Court of Appeal therefore had continuing, ancillary jurisdiction to consider the CBC's motion regarding sealing orders and publication bans. This included implied jurisdiction to vary or vacate its orders limiting court openness in accordance with the common law principles considered above. The only remaining question is whether any applicable legislation limits this jurisdiction for the Court of Appeal in this case.

64 The *Court of Appeal Rules* do prohibit a "rehearing of an appeal" (in French, "*appel ... entendu de nouveau*") after the certificate of decision has been entered, a rule on which the Court of Appeal relied in this case (r. 46.2(1) and (2), applicable by virtue of r. 45 of the Manitoba Criminal Appeal Rules, SI/92-106). This rule also prohibits the "rehearing" of motions (in French, "*faire l'objet d'une nouvelle audience*") (r. 46.2(12)). Relevant portions of r. 46.2 are as follows:

> **46.2(1)** There shall be no rehearing of an appeal except by order of the court or at the instance of the court.
>
> **46.2(2)** A rehearing of an appeal may be ordered before the certificate of decision has been entered.
>
> **46.2(12)** There shall be no rehearing on an application for leave or a motion.

65 It is true that the certificate of decision referred to in r. 46.2(2) has been entered here in respect of the appeal bearing on the miscarriage of justice. Accordingly, a rehearing of Mr. Ostrowski's appeal on the merits is precluded in accordance with r. 46.2. Similarly, any motion that had been heard in the course of the proceeding cannot now be reheard, as this is foreclosed by r. 46.2(12).

66 But these rules did not deprive the Court of Appeal of the ability to hear the CBC's motion concerning court openness. This is certainly not a "rehearing of an appeal" as contemplated by r. 46.2(1) and (2). The CBC brought a motion concerning access to the court file and did not seek to reopen the miscarriage of justice proceeding itself. Interpreting the prohibition against rehearing an appeal as precluding the Court of Appeal from hearing a motion concerning court openness, distinct from the merits of the appeal, is not plain from the text. The appeal is not to be "*entendu de nouveau*", to advert to the French text of r. 46.2(1) and (2). Nor does it accord with the purpose of rules prohibiting rehearings of the appeal that reflect the same core objectives of finality and stability of judgments associated with the doctrine of *functus officio* (see Doucet-Boudreau, at para. 79). There is nothing in r. 46.2 that prevents the CBC from seeking ancillary orders related to court openness after the certificate of decision has been entered on the merits.

67 Similarly, the prohibition on the rehearing of motions in r. 46.2(12) cannot be interpreted to prohibit the CBC from moving to set aside the publication ban made without notice and which affects the open court principle. The impugned order was made of the Court of Appeal's own accord, with the consent of the parties, at the oral hearing and then continued indefinitely in para. 82 of the 2018 Publication Ban Judgment. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the impugned ban shortly after the reasons were released. The CBC was not asking the Court of Appeal for a "rehearing" of a motion. The idea of a "rehearing" spoken to in r. 46.2 necessarily implies there was an original hearing and that the court would be hearing the same motion again, as the French ("*nouvelle audience*") in r. 46.2 makes plain.

68 Instead, the CBC brought an altogether new motion to set aside the 2018 publication ban made in its absence. This may engage, as the CBC suggests, a fundamental principle of the administration of justice that parties affected by orders be given the opportunity to be heard. There is nothing in the text of r. 46(12) that modifies the generally applicable rule allowing the Court of Appeal to vary or rescind its publication ban or sealing order on motion from an affected person not given notice of the making of the order.

69 The CBC also argued that the Court of Appeal should have taken up its rightful jurisdiction to vary the publication ban covering the Posner affidavit because there had been a material change of circumstances.

70 I disagree. I think it should be recorded that the CBC did not, in the proceedings below, establish a material change of circumstances.

71 While it may be the case that the finding of a miscarriage of justice by the Court of Appeal increased the public interest in the materials, that conclusion was made in the 2018 Publication Ban Judgment in which the continuation of the publication ban was ordered. It cannot, therefore, be a change of circumstances that has occurred *since* the impugned order was made, as is required (*Adams* , at para. 30; *L.M.P.* , at para. 31).

72 Equally, the subsequent appearance of the CBC in the proceedings as a party did not constitute, in itself, a material change in circumstances. Assuming the initial order was correctly made, as one must at this stage (*L.M.P.* , at para. 33), and recognizing that the CBC did not make submissions on the initial order, in my view the CBC's mere presence would not likely have resulted in a different outcome for the purposes of the applicable test. This is not to exclude the possibility that, had the CBC made submissions, the result might have been different. But acknowledging this possibility requires one to consider whether the Court of Appeal may have erred in applying the relevant test without the benefit of the CBC's argument. This is contrary to the well-established principle that one must not consider the possibility that the original court erred when determining whether a material change has occurred (*L.M.P.* , at para. 33). The Court of Appeal is therefore presumed at this stage to have balanced the interest of the media in open court proceedings with competing public interests even in the absence of a representative of the press, as is required (*Mentuck* , at para. 38). The CBC's absence at the making of the initial order is more properly considered in reference to the principles relating to orders made without notice to an affected party, since it is a lost opportunity to make submissions, and not in reference to a change in the circumstances relied on by the Court of Appeal.

73 In sum, the Court of Appeal erred in concluding that r. 46.2 or the doctrine of *functus officio* deprived it of jurisdiction to hear the CBC's motion. Said respectfully, the Court of Appeal's interpretation of these principles was unnecessary to protect the values of finality and orderly appellate review. It had an adverse impact on the opportunity of the media to make representations in respect of this order limiting the open court principle. The better view is that the Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered.

(2) The Matter Should Be Remanded to the Court of Appeal

74 That the Court of Appeal had jurisdiction to consider the CBC's motion and its request for access to the Posner affidavit, does not mean, of course, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts here, a determination that would be best made at first instance by the Court of Appeal.

75 In respect of the publication ban, the CBC will rely on the Court of Appeal's power to rescind an order on the basis that it was made without notice to an affected party. As a preliminary matter, the Court of Appeal must determine, in keeping with the principles sketched above, whether the CBC has standing to challenge the relevant order. This initial hurdle, which the CBC must clear, serves to restrict the scope of those who are able to challenge an order made without notice to the media to those representatives who were deprived of the ability to make useful submissions that may have affected the result.

76 The CBC will also be required to show that the delay from the time it became aware of the impugned order to the time it filed its motion in May 2019 was not unreasonable. I note that the Crown argues the CBC ought to have brought its motion earlier. In response to questions from my colleagues at the oral hearing, the CBC rightly conceded it knew of the publication ban

shortly after the 2018 Publication Ban Judgment was released. Its delay in bringing the motion was in the order of six months. While the matter was not advanced by the Crown as a basis for dismissing the appeal, at the hearing before this Court the CBC did say the delay was justified in the circumstances, pointing to initial confusion as to the nature of the order, and asserted the public interest in deciding this open court issue that affects the rights of all Canadians.

77 Turning to the substance of the CBC's motion, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test from *Sierra Club* as recently recast by this Court in *Sherman* . Court proceedings are presumptively open to the public (A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11). A court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects (*Sherman* , at para. 38, citing Sierra Club, at para. 53).

78 Before this Court, both the Crown and M.D.'s family invoke the privacy and dignity of the interested parties as an important public interest that would be threatened if the publication ban was lifted. The CBC answers that the interests raised are merely personal, without the public component required to displace the open court principle. Much like in *Sherman* , the parties' disagreement is rooted in the inherent tension between the open court principle and what Dickson J., as he then was, once described as competing "superordinate" values (*MacIntyre* , at pp. 186-87). Both privacy and court openness have been recognized in law as pillars of a free and democratic society (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23; Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25). If open courts are to remain the rule rather than the exception, some degree of privacy loss for those whose lives are the subject of litigation is inevitable. But circumstances do exist where openness poses a serious risk to an aspect of privacy that evinces an important public interest.

79 The Court of Appeal did not have the advantage of considering the judgment of this Court in *Sherman* where it was held that there is an important public interest in a narrower dimension of privacy concerning the protection of individual dignity. In order to show a serious risk to this interest, an individual must establish that the information about them that would be disseminated as a result of court openness is sufficiently sensitive such that it strikes at their biographical core, revealing something "intimate and personal about the individual, their lifestyle or their experiences" (*Sherman* , at paras. 73-77, 79 and 85). If they succeed, the question becomes whether, in light of the totality of the circumstances, court openness poses a risk to individual dignity that strikes meaningfully at this important public interest. A serious risk need not be supported by direct evidence but may be reasonably inferred on the basis of available circumstantial facts (*Bragg*, at paras. 15-16). If the party succeeds in establishing this serious risk, they must then show that the order they seek is necessary to prevent the risk and that the benefits of the order outweigh its negative effects, including the effects on constitutionally-protected court openness (*Sierra Club* , at para. 53).

80 The parties disagree about the extent to which the test for discretionary limits on court openness applies to determine access to and publication of the Posner affidavit. The CBC argued that the sealing order that applied to the affidavit by operation of the *Court of Appeal Rules* ended once the new evidence motion was dismissed. The Crown took the position that the relevant rule is silent on what happens to material under seal after a new evidence motion is dismissed such that the Court of Appeal was entitled not to enter the proposed evidence into the public record. As for the publication ban covering the details of this evidence, the CBC argued that it fails the test for discretionary limits on court openness, which it says applies even though the Posner affidavit was ultimately not admitted into evidence. The Crown and the interested parties stressed instead the Posner affidavit's alleged irrelevance as a factor in this analysis.

81 For two reasons, I conclude that any limits on access to or publication of the Posner affidavit in this case must meet the generally applicable test for discretionary limits on court openness. First, I agree with the CBC that r. 21(4) of the Court of Appeal Rules does not provide for a permanent sealing order over the Posner affidavit. Rule 21(4), which specifies that the new evidence remains sealed "until the motion is decided", explicitly anticipates that the sealing prescribed by this rule will cease once there is a decision. This decision occurred when the new evidence motion was dismissed. There is nothing in the rule to indicate that the seal is to protect the information from public dissemination and that this is meant to extend indefinitely after the motion is decided. In my view, r. 21 does not continue to seal the Posner affidavit.

82 Second, the fact that the Posner affidavit was not admitted as new evidence for the purposes of the miscarriage of justice proceeding should not shield the publication ban from review. The Crown submits that the Court of Appeal's "practice" not to admit such evidence into the court registry fills the silence in r. 21(4). But an administrative practice cannot have the effect of taking this matter outside the scope of the test for discretionary limits on the open court principle. Court openness serves to maintain the legitimacy of the exercise of judicial power — including the decision to dismiss the motion for new evidence — by allowing the public to scrutinize this exercise in service of ensuring that justice is being dispensed fairly (*Vancouver Sun*, at para. 25). Public access to the court record facilitates this scrutiny (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339, per Cory J.).

83 Consistent with this purpose, all materials that are made available to the court for the purposes of deciding the case — in other words, for the purposes of exercising its judicial power — are subject to the open court principle (see Canadian Broadcasting Corp. v. R., 2010 ONCA 726, 102 O.R. (3d) 673, at paras. 42-44; see also Aboriginal Peoples Television Network v. Alberta (Attorney General), 2018 ABCA 133, 70 Alta. L.R. (6th) 246, at para. 48). In this case, the Court of Appeal had before it a motion to admit the Posner affidavit as new evidence. With the consent of the parties, the court reviewed that affidavit in considering the motion. While the court ultimately declined to admit it, the affidavit was considered in deciding the new evidence motion. It follows that any discretionary limit on access to or publication of the Posner affidavit must meet the requirements affirmed in *Sierra Club* and *Sherman* .

84 In sum, to the extent the requested relief required it to reconsider its publication ban, the Court of Appeal should have asked whether it was appropriate to vary or set aside that decision on motion by the CBC given it was made without notice. On the substance of the motion, the Court of Appeal should have considered whether any discretionary limits it imposed on publication of the court record, which includes the Posner affidavit, complied with the test for discretionary limits on court openness.

85 The remaining question is which court should decide these issues raised in the context of the first appeal from the 2019 Jurisdiction Judgment. I recall that the Crown suggests that if the Court of Appeal had jurisdiction to hear the motion for reconsideration, it follows that this Court does not. It argues that in this scenario the publication ban is not a "final or other judgment of ... the highest court of final resort" for the purposes of s. 40(1) of the Supreme Court Act, R.S.C. 1985, c. S-26, under which leave to appeal in this matter was granted.

86 I disagree. The Court of Appeal's reconsideration of its publication ban is not, as we have seen, an appeal of the publication ban order. The only route of appeal from either the Court of Appeal's 2018 Publication Ban Judgment or the 2019 Jurisdiction Judgment was to this Court with leave pursuant to s. 40(1) of the Supreme Court Act (see, generally, *Dagenais*, at p. 872). Accordingly, I have no difficulty concluding that both were "final or other judgment[s] of ... the highest court of final resort" from which this Court has jurisdiction to hear an appeal with leave (see, generally, *Mentuck* , at paras. 20-21).

87 That said, I am of the view that fairness to all the parties requires that we remand the motion that resulted in the 2019 Jurisdiction Judgment to the Court of Appeal. The remaining issues raised are best decided by the Court of Appeal. The Court of Appeal ended its analysis after concluding it was *functus officio* and we do not have the benefit of any reasons below on these issues. As I have noted above, the motion required the Court of Appeal to make several discretionary decisions: whether to grant the CBC standing, whether to hear the motion given the delay, and ultimately whether to uphold a discretionary limit on the openness of its own record. These are decisions the Court of Appeal is best placed to make given they are intimately connected to the facts and procedural history of this case, in which that court effectively acted as a court of first instance.

88 In my view, it is not in the interests of justice for this Court to step into the Court of Appeal's shoes and decide these matters at first instance. This is quite different from considering such issues on appeal through the deferential lens this Court would take in reviewing the exercise of discretion below (see R. v. Regan, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117). Other appellate courts have been rightly cautious to dictate to lower courts in this way (see, e.g., *GEA Refrigeration* , at para. 184).

89 I note as well that the issue of delay was not fully argued before this Court and we are therefore not well placed to come to the appropriate balance in this case in any event. This Court has remanded matters to the Court of Appeal where a question

was not addressed below and the record and arguments are "too sparse to ... resolve the matter confidently" (see, e.g., Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 46). The CBC did not raise the issue in its factum because it considered the issue to have been resolved when we granted its motions for extensions of time to seek leave to appeal. While the Crown pointed to the delay in passing, it never argued the appeal bearing on the motion for reconsideration could be dismissed on that basis alone. This further militates towards remanding the matter.

90 Even if this Court were to exercise its jurisdiction to decide these issues, it does not have the benefit of submissions from the parties on how the principles from *Sherman* outlined above apply to these facts. That decision was released only after this matter had been heard and, in my view, fairness would require further submissions from the parties with respect to its impact on the issue at hand. This Court had previously considered privacy in the context of this test in *Bragg*, but was clear that it was not a question of privacy without more but was combined with "the relentlessly intrusive humiliation of sexualized online bullying" (para. 14).

91 *Sherman* provided an opportunity for this Court to confront this issue directly from a distinct perspective. The Court of Appeal had identified privacy interests as mere personal concerns that could not "without more" justify a limit on court openness (*Sherman* , at para. 18). This Court concluded on appeal that it was "inappropriate ... to dismiss the public interest in protecting privacy as merely a personal concern" (para. 52), and went on to recognize that "privacy understood in relation to dignity is an important public interest for the purposes of the test" (para. 86).

92 Of course, it is not uncommon that this Court clarifies the law in an appeal, or series of appeals heard together, and then applies that clarified law to those appeals. But the situation here is different because these parties were not heard in settling the approach taken in *Sherman* . That they would also not be heard on how this approach applies on the facts of their case would be fundamentally unfair to them, not to mention a disadvantage to this Court in deciding the matter. The need for these further submissions on *Sherman* attenuates any judicial economy that would be gained by deciding the matter here rather than remanding it below.

93 I recognize, as the Crown argued at the hearing, that remanding the matter will prolong the period of uncertainty for the interested parties as to whether the publication ban will ultimately be set aside. It is important to remember, however, that the interested parties will continue to benefit from the publication ban they say is necessary to protect their privacy in the interim.

94 This is a completely different situation from cases such as *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, and *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, where it had been approximately a decade since the impugned conduct that was the subject of the litigation and this Court had the benefit of a reasonable decision supported by the record and made by the appropriate first instance decision-maker (*Saadati* , at para. 45; *Wells* , at para. 68). In this case, the publication ban that is the subject of these proceedings was made less than three years ago and we have no decision from a first instance decision-maker on the motion, let alone a reasonable one.

95 In the circumstances, the value of shortening this period of uncertainty does not outweigh the importance of fairness to all parties, served by ensuring the matter is decided by the appropriate first instance decision-maker and with the benefit of appropriate submissions.

96 I would therefore allow the appeal from the 2019 Jurisdiction Judgment and remand the matter to the Court of Appeal to decide the CBC's motion in accordance with these reasons (Supreme Court Act, s. 46.1).

97 The second appeal from the 2018 Publication Ban Judgment itself presents a procedural complication. As I mentioned above, the CBC sought and was granted leave not only from the dismissal of its motion for reconsideration, but also directly from the publication ban. This is plain from the leave judgment and the parties specifically argued both appeals before this Court. That appeal raises a single remaining issue concerning the legality of the publication ban as an exception to the open court principle.

98 In light of my conclusion that the Court of Appeal did have jurisdiction to hear the CBC's motion, I would not decide the issues raised in the appeal from the 2018 Publication Ban Judgment before the Court of Appeal has decided the motion

for reconsideration. I note that appellate courts in similar circumstances have generally insisted that recourse be sought at the original court before hearing an appeal (see, e.g., Secure 2013 Group Inc. v. Tiger Calcium Services Inc., 2017 ABCA 316, 58 Alta. L.R. (6th) 209, at paras. 54-55; *GEA Refrigeration* , at para. 184). Similarly, in this case, it is not in the interests of justice to consider the appeal from the 2018 Publication Ban Judgment before the CBC's motion is decided, given this appeal could be rendered moot as a consequence of that proceeding. We are accordingly not in a useful or informed position to dismiss or allow the second appeal.

99 Nor would it be appropriate to remand this appeal in whole to the Court of Appeal. Unlike remanding the 2019 Jurisdiction Judgment to the Court of Appeal to reconsider the publication ban following submissions from an affected party not given notice, which as I noted earlier is distinct from an appeal, returning the 2018 Publication Ban Judgment to the Court of Appeal would require it to sit in appeal of its own publication ban.

100 It follows, in the unusual circumstances of this case, that the appeal from the 2018 Publication Ban Judgment should be adjourned *sine die* pending determination of the motion for reconsideration at the Court of Appeal (see, e.g., Canadian Planning and Design Consultants Inc. v. Libya (State), 2015 ONCA 661, 340 O.A.C. 98, at para. 61). I note that if the Court of Appeal engages with the merits of the publication ban and the 2018 Publication Ban Judgment appeal is then reopened, then those reasons will be before this Court and it will benefit from them as it decides this appeal.

101 This Court heard appeals thus both directly from a judgment and, simultaneously, from the denial of reconsideration of that same judgment. Leave was granted from both judgments here, a fact that has created the procedural difficulty, but this difficulty is not insurmountable. Appellate courts have used the *sine die* adjournment to deal with appeals identified as premature due to ongoing proceedings below which ought to be completed before the appeal is heard (*Libya*, at para. 83; Gray v. Gray, 2017 ONCA 100, 137 O.R. (3d) 65, at para. 33; MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board, 2014 ABCA 58, 68 Admin. L.R. (5th) 135, at para. 22; Aleong v. Aleong, 2013 BCCA 299, 340 B.C.A.C. 44, at para. 47). This is more than a procedural concern here: we cannot, in my respectful view, dismiss the second appeal now without conflating the issues at stake on reconsideration of the 2019 Jurisdiction Judgment and those at play in a direct appeal of the 2018 Publication Ban Judgment.

102 Finally, even if it were appropriate for this Court to decide the reasonableness of the CBC's delay in bringing its motion, and even if its view was that the motion should have been dismissed on this basis, that conclusion alone would be insufficient to dismiss the appeal directly from the 2018 Publication Ban Judgment. This Court granted leave to appeal, and an extension of time to seek leave to appeal, directly from this separate judgment. I am of the respectful view that it would be inappropriate to effectively reverse these decisions or retroactively limit their scope. If this Court sought only to dispose of the reconsideration issues raised in the appeal from the 2019 Jurisdiction Judgment, it could have granted leave from that judgment alone. But it granted leave from both judgments.

103 The CBC has not acquiesced in the 2018 Publication Ban Judgment from which it appeals directly to this Court and, with respect for other views, this second appeal has not "lost its *raison d'être*" (*Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, [1977] 2 S.C.R. 740, at pp. 744 and 747). The question it raises is whether the publication ban should be set aside, which is an ongoing issue of live controversy between the parties, and which is distinct from the appropriateness of the reconsideration raised in the appeal from the 2019 Jurisdiction Judgment. There is no basis to say this second appeal has become moot.

104 Unlike in the first appeal bearing on the reconsideration motion, in the direct appeal from the 2018 Publication Ban Judgment there is no preliminary issue about the delay in bringing the motion, a motion that was not even filed before this judgment was rendered. The only issue in this second appeal is the validity of the final and indefinite publication ban imposed in the 2018 Publication Ban Judgment, which requires the application of the test for discretionary limits on court openness. To resolve this issue now, this Court would have to advert to and apply this test, including, with proper submissions, the recent judgment of this Court in *Sherman* . In my respectful view, that task should not be undertaken until the motion for reconsideration is resolved by the Court of Appeal.

V. Conclusion

105 I would allow the appeal from the 2019 Jurisdiction Judgment of the Court of Appeal, set aside that judgment, and remand the matter to that court to decide the CBC's motion in accordance with these reasons.

106 I would adjourn the appeal from the 2018 Publication Ban Judgment of the Court of Appeal *sine die*. I would order that if no motion for directions is filed in this Court within 30 days after the date of the judgment of the Court of Appeal deciding the matter remanded to it in accordance with these reasons, the appeal will be dismissed as abandoned.

107 The CBC does not request costs of these appeals and I would make no order as to costs.

***Abella J.* (dissenting):**

108 These appeals involve a request by a member of the media to reconsider a publication ban after the underlying proceedings have ended. While I generally agree with Justice Kasirer's analysis of the "notice" issues, I do not share his view that the appeal should be remanded to the Manitoba Court of Appeal for disposition.

109 As this Court has repeatedly stressed, the media is a crucial voice in protecting and promoting the openness of courts. That is why the media's right to challenge orders like publication bans is undisputed and why the courts have the discretion to give them notice of publication ban hearings. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, this Court clearly stated that members of the media are "third parties" and that notice remains "in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law" (p. 869).

110 But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot be reconsidered by the court that rendered the decision. In *R. v. Adams*, [1995] 4 S.C.R. 707, Sopinka J. recognized that the application of *functus officio* is "less formalistic and more flexible" in respect of ancillary orders including publication bans (para. 29). It is therefore imperative to maintain circumscribed avenues through which the media can ask a court to reconsider a publication ban after the underlying proceedings are over.

111 The rationales underlying the doctrine of *functus officio* show that it has a role to play in respect of publication ban orders, even when those orders are ancillary to the underlying proceedings. *Functus officio* is "commonly described as a 'rule about finality'" (A. S. P. Wong, "Doctrine of Functus Officio: The Changing Face of Finality's Old Guard" (2020), 98 Can. Bar Rev. 543, at p. 549, citing *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, (2006), 246 N.S.R. (2d) 104 (C.A.), at para. 36). As Doherty J.A. observed in *Tsaoussis (Litigation Guardian of) v. Baetz*, (1998), 41 O.R. (3d) 257 (C.A.):

> Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation ... .
>
> The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. [pp. 264-65]

112 Finality is important, in part, because it provides a stable basis for an appeal (Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, at para. 79). But finality is also important because it provides economic and psychological security to parties who are dragged into the justice system, including those impacted by publication ban decisions.

113 It has been settled since *Adams* that publication ban orders, which are ancillary to the underlying proceedings, "can be varied or revoked if the circumstances that were present at the time the order was made have materially changed" (para. 30; R. v. Henry(2012), 327 B.C.A.C. 190, at para. 11; British Columbia v. BCTF201575 B.C.L.R. (5th) 257 (C.A.), at para. 22). The change must "relate to a matter that justified the making of the order in the first place" *and* the moving party must act "at the earliest opportunity" after the change in circumstances occurs (*Adams* , at para. 30, citing *R. v. Khela*, [1995] 4 S.C.R. 201, at pp. 210-11). I agree with the majority that a material change in circumstances cannot be established in this case.

114 In the absence of a material change, trial and appellate courts have recognized that the media are "affected by" orders relating to court openness, meaning that they can generally apply for reconsideration when such an order is issued without notice (see e.g. *Hollinger Inc. v. The Ravelston Corp.*, (2008), 89 O.R. (3d) 721 (C.A.), at para. 43, and cases cited therein). As Justice Kasirer confirms, this approach applies if the media can show that their submissions are made with "due dispatch" and "prompt action", could make a material difference to the outcome and that the nature of those submissions was not originally considered by the court that issued the ban. The courts have discretion to decide whether it is in the interests of justice to reopen a publication ban under such circumstances.

115 These two avenues for after-the-fact media challenges to publication bans reflect the fact that the media is indispensable to court openness. But the applicable tests also take the concept of finality seriously. At a certain point, the parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over.

116 That is why reconsideration of a publication ban must be sought in a timely manner, and why a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media's application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests underlying finality and the interests in support of the open court principle.

117 In balancing these principles, and with great respect, I come to a different conclusion from the majority on whether to remand the matter to the Manitoba Court of Appeal.

118 As noted, the CBC is unable to establish a material change in circumstances under *Adams* . As a result, the only basis on which it could move for reconsideration once the proceedings are over is by showing that the publication ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met in this case.

119 To start, the CBC's argument that the publication ban was issued without notice is difficult to accept in the circumstances. At the hearing before the Manitoba Court of Appeal, counsel for the CBC candidly admitted that the CBC was reporting on the Ostrowski case throughout the course of the proceedings. And before this Court, counsel confirmed that the CBC had a representative in the courtroom when the publication ban was originally ordered on May 28, 2018. At no point in the intervening period between the original publication ban order and its continuation in the Court of Appeal's reasons of November 27, 2018 did the CBC attempt to assert its interests.

120 In any event, it is not clear to me what further "notice" would be required in such circumstances. Courts do not issue formal invitations to their hearings — the courtroom is, and should be, open to all, including and especially the media. If the media is present in the courtroom when a publication ban is issued, it follows that it knows of its existence. That is what notice is supposed to be for.

121 Nor has the CBC discharged its burden of showing that its proposed submissions could make a material difference in the outcome. It is well-established that courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions (*R. v.* Mentuck, [2001] 3 S.C.R. 442, at para. 38). There is no reason to assume that did not happen in this case. The CBC does not propose to advance a new or unique position or to introduce evidence of which the Court of Appeal was unaware. It simply wishes to argue that the open court principle outweighs the interests supporting the ban, a foundational submission that the Court of Appeal is presumed to have already

considered. Furthermore, having heard the CBC's complete argument on the propriety of the publication ban in this Court, I find it difficult to see how its submissions could make a difference in the result.

122 More significantly, and relatedly, the CBC's failure to act in a timely manner is, in my respectful view, determinative. The publication ban was originally ordered on May 28, 2018 and was continued by the Court of Appeal in its reasons for judgment on November 27, 2018. But the CBC did not file its motion for reconsideration until May 10, 2019, over five months later. And it did not file its application to this Court for leave to appeal the original publication ban until January 27, 2020, nearly two years after the ban was first imposed and well over a year after it was continued in the November 2018 reasons for judgment.

123 The CBC has suggested that its delay can be explained in part by its confusion as to the nature and scope of the publication ban, resulting in communications with the Court of Appeal to determine precisely what was prohibited.

124 The correspondence between the CBC and the Manitoba Court of Appeal following the November 27, 2018 reasons demonstrates clearly that this is hardly a robust explanation. On November 30, 2018, the Executive Assistant to the Chief Justices and the Chief Judge informed the CBC that the media was entitled to review the material "protected by the ban on publication", but that the actual fresh evidence affidavit was not available for review because the fresh evidence was not filed with the court after the motion was dismissed. After some further clarifying correspondence, by January 21, 2019, the Registrar had spelled out in unmistakeable terms that "at the outset of proceedings on May 28, 2018, the [c]ourt imposed a publication ban preventing the publication of any of the details of the proposed fresh evidence. In paragraph 82 of the reasons, the [c]ourt ordered that the publication ban would remain in effect". Yet it took the CBC another four months to file a motion for reconsideration.

125 It is useful to put this delay in perspective by reference to some timelines provided for by Manitoba's *Court of Appeal Rules*, Man. Reg. 555/88R. If a party to an appeal before the court of appeal wants a rehearing before the certificate of decision has been entered, they presumptively have 30 days to file a motion after reasons for judgment are delivered (r. 46.2(4)). If the appellant fails to file its factum in accordance with the timelines set out in the rules, its appeal will be deemed to be abandoned 30 days after the appellant receives notice from the registrar (r. 33(4)). These timelines are a legislated acknowledgement of the importance of timeliness in the resolution of court cases.

126 An unexplained six month delay for filing a motion to have a publication ban reconsidered — even a four month delay, on a charitable interpretation of when the CBC had full and complete notice of the nature of the publication ban — is inordinate. Under no definition of "due dispatch" or "prompt action" can this delay be justified, particularly since the CBC was fully aware — and present — from the outset of the proceedings, the ban, and the ban's continuation. On the other hand, the delay in this case causes acute harm to the family, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings and that they would not be brought back to court. I see no reason to prolong their distress further.

127 While it is true that the CBC's appeal directly from the publication ban technically came to this Court on a separate application for leave to appeal from that of its appeal from the Court of Appeal's refusal to reconsider that ban, both appeals ultimately seek the same relief: that the publication ban be set aside. In the unique context of this case, it makes sense that leave was granted concurrently in both appeals since the ultimate relief sought in both was the same. Moreover, the legal question of when the media can reopen a publication ban order after the case is over raised an issue of "public importance" requiring this Court's guidance (Supreme Court Act, R.S.C. 1985, c. S-26, s. 40(1)).

128 Since, in my respectful view, the CBC was not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay, it would be incongruous to conclude that the impact of the CBC's delay is different for its appeal from the ban itself and for the appeal from the reconsideration motion. The reconsideration appeal is an appeal of that same ban. It would be the triumph of procedural formalism over substantive reality to pretend that these are two different and unrelated legal issues requiring separate conceptual consideration. An undue delay in one is an undue delay in the other.

129 As for how to deal with this Court's recently released decision in *Sherman Estate v. Donovan*, 2021 SCC 25, it was open to the majority to seek further submissions based on the *Sherman* reasons. This would have been more consistent with this Court's usual practice in dealing with appeals of publication bans, namely, deciding them in our Court rather than remanding

them back to the issuing court. It would also have curtailed the prolongation of these proceedings. In any event, with respect, I do not see anything in the *Sherman* decision of such determinative relevance to the CBC's interests that it justified ignoring the unjustified delay.

130 This Court retains a narrow discretion to refuse to entertain the merits of an appeal even after leave has been granted. As Laskin C.J. wrote for the Court in *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, [1977] 2 S.C.R. 740,

> Although it will be rarely that this Court, leave having been granted, will thereafter refuse to entertain the appeal on the merits, its power to do so is undoubted ... . [p. 742]

This is one of those rare cases where the interests of justice warrant a refusal to entertain the appeal on the merits.

131 I would dismiss the appeals.

Appeal concerning broadcaster's motion allowed; appeal from publication ban judgment adjourned sine die.

Pourvoi à l'encontre du jugement sur la motion accueilli; pourvoi à l'encontre du jugement sur l'interdiction de publication ajourné sine die.

TAB 3

Paras. 23 and 26

1992 CarswellNat 4
Supreme Court of Canada

Chrysler Canada Ltd. v. Canada (Competition Tribunal)

1992 CarswellNat 4, 1992 CarswellNat 657, [1992] 2 S.C.R. 394, [1992] S.C.J. No. 64, 12 Admin. L.R. (2d) 1, 138 N.R. 321, 34 A.C.W.S. (3d) 596, 42 C.P.R. (3d) 353, 7 B.L.R. (2d) 1, 92 D.L.R. (4th) 609, J.E. 92-943, EYB 1992-67219

COMPETITION TRIBUNAL v. CHRYSLER CANADA LTD. and DIRECTOR OF INVESTIGATION AND RESEARCH

DIRECTOR OF INVESTIGATION AND RESEARCH and THE COMPETITION TRIBUNAL v. CHRYSLER CANADA LTD.

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. *

Heard: January 31, 1992
Judgment: June 25, 1992 **
Docket: Docs. Nos 22151, 22152

Counsel: *Rory R. Edge* and *William J. Miller*, for appellant Director of Investigation and Research.
C. Christopher Johnston, Q.C., and *Jane Graham*, for appellant Competition Tribunal.
Thomas A. McDougall, Q.C., and*Richard A. Wagner*, for respondent Chrysler Canada Ltd.

***Gonthier J. (La Forest L'Heureux-Dubé, Sopinka* and *Cory JJ.* concurring):**

1 These appeals are concerned with the jurisdiction of the Competition Tribunal (hereinafter the "Tribunal") to entertain proceedings for civil contempt of its orders under Part VIII of the *Competition Act*, R.S.C. 1985, c.C-34, as amended by R.S.C. 1985, c. 19 (2nd Supp.) (hereinafter "C.A.").

I — Facts and Proceedings

2 On October 13, 1989, the Tribunal issued an order against the respondent under s.75 C.A., requiring it to resume the supply of Chrysler automotive parts to one Richard Brunet. This order was upheld by the Federal Court of Appeal on September 19, 1991: 129 N.R. 77, 38 C.P.R. (3d) 25.

3 On February 19, 1990, the Director of Investigation and Research (hereinafter the "Director"), having reason to believe that the respondent was not complying with the order, filed a motion with the Tribunal for an order directing the respondent and others to appear before the Tribunal to show cause why they should not be held in contempt of the Tribunal. At the hearing of the motion, on February 20, 1990, the respondent objected to the jurisdiction of the Tribunal. On the same day, the Tribunal ruled that it had jurisdiction to entertain contempt proceedings. The respondent appealed from that decision. On July 10, 1990, the Federal Court of Appeal unanimously reversed and denied the jurisdiction of the Tribunal, for the reasons of Iacobucci C.J. (as he then was) [reported [1990] 2 F.C. 565, 48 B.L.R. 125, 31 C.P.R. (3d) 510, 111 N.R. 368]. This court granted leave to appeal this judgment on May 2, 1991.

II — Relevant Statutory Dispositions

4 *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 8 (hereinafter "C.T.A."):

8.(1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto.

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

III — Judgments Below

Competition Tribunal

5 Reed J. stated that inferior tribunals do not have the power to punish for contempt committed outside of their presence (contempt *ex facie curiae*), unless a statute confers such a power on them. She found that s. 8 C.T.A. did grant such jurisdiction to the Tribunal, a conclusion that was further buttressed by the nature of the competition scheme, especially the separation of investigative and adjudicative powers between the Director and the Tribunal respectively.

Federal Court of Appeal

6 Iacobucci C.J. began with the same premise as Reed J., referring to Dickson J. (as he then was) in *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, [1979] 2 S.C.R. 618, 14 C.P.C. 60, 28 N.R. 541, *(*sub nom. *C.B.C. v. Cordeau)* 48 C.C.C. (2d) 289, 101 D.L.R. (3d) 24 (hereinafter *C.B.C.*), for the proposition that the statutory grant must be clear and unambiguous. He examined the three subsections of s. 8 C.T.A. He found that the words "hear and determine" in s. 8(1) limited the jurisdiction of the Tribunal to the issuance of the order determining the application under Part VIII C.A. The phrase "enforcement of its orders" in s. 8(2) was qualified by the phrase "necessary or proper for the due exercise of its jurisdiction" and therefore could not give the Tribunal a greater jurisdiction than s. 8(1) outlines. Finally, s. 8(3) does not indicate that it applies to anything more than contempt in the presence of the Tribunal (in facie curiae). He concluded that the Tribunal did not have any jurisdiction over contempt proceedings for breaches of its orders under Part VIII C.A.

IV — Issue

7 As stated at the outset of these reasons, the sole issue before the court is whether the Tribunal has jurisdiction over civil contempt for breaches of its orders under Part VIII C.A. The parties made numerous references to contempt ex facie curiae in general, and I wish to underscore that the powers of the Tribunal over contempt ex facie curiae as such are not at issue here. This court is only concerned with one species of ex facie contempt, failure to comply with an order of the Tribunal.

V — Analysis

8 It is not contested by the parties, and the court agrees, that the Tribunal is an inferior court of record, as stated in s. 9(1) C.T.A.

A. The Common Law

9 This court reviewed the common law with respect to the contempt powers of inferior tribunals in *C.B.C.*, supra. There, the C.B.C. had broadcast a photograph of a witness before the Quebec Police Commission (hereinafter the "commission"), despite a publication ban from the commission. The commission ordered the C.B.C. to appear before it and show cause why it should not be held in contempt. The C.B.C. challenged the jurisdiction of the commission. Various legislative grounds had been advanced in support of the jurisdiction of the commission, including ss. 7, 11 and 12 of the *Public Inquiry Commission Act*, R.S.Q. 1964, c. 11:

> 7. A majority of the commissioners must attend and preside at the hearing of witnesses, and they, or a majority of them, shall have, with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court in term.
>
> 11. Any person refusing to be sworn when duly required, or omitting or refusing, without just cause, sufficiently to answer any question that may be lawfully put to him, or to render any testimony in virtue of this act, shall be deemed to be in contempt of court and shall be punished accordingly. ...
>
> 12. If any person refuse to produce, before the commissioners, any paper, book, deed or writing in his possession or under his control which they deem necessary to be produced, or if any person be guilty of contempt of the commissioners or of their office, the commissioners may proceed for such contempt in the same manner as any court or judge under like circumstances.

Articles 46 (general powers of courts and judges) and 49 to 54 (contempt of court) of the *Code of Civil Procedure* were also invoked.

10 For the majority of the court, Beetz J. first reviewed the common law. He concluded at p. 638 [S.C.R.]:

> ... the Anglo-Canadian authorities on the power to punish for contempt committed *ex facie curiae* have been firmly established for more than two hundred years. According to these authorities, this power is enjoyed exclusively by the superior courts.
>
> Such a rule is moreover justified in principle by the following considerations. The power to punish for contempt committed *ex facie* is liable to result in inquiries which may well involve a lower court in areas which are practically impossible to define in terms of jurisdiction and completely foreign to its own area of jurisdiction, which by definition is limited. Such an obstacle does not arise in the case of a court like the Superior Court, which is a court of original general jurisdiction (art. 31 *C.C.P.*) with *a priori* jurisdiction, or courts sitting in appeal from decisions of the Superior Court, which may in general render the decisions which the latter would have rendered. Moreover, the power to punish a contempt committed *ex facie* is necessarily bound up with the superintending and controlling power which only a superior court may exercise over inferior courts. This controlling power could become illusory if, in the case of a contempt committed *ex facie*, an inferior court had the right to go beyond its own particular field. There would also be the danger of conflict between the superior and inferior courts, of the kind that formerly existed in England between the common law and equity courts. Finally, the inferior courts are not without any means of ensuring that their lawful orders are observed ... the superior courts may come to their aid ...

Beetz J. went on to examine whether any of the above enactments conferred a power over contempt ex facie curiae on the commission. He held that s. 7 of the *Public Inquiry Commission Act* was limited to the examination of witnesses, and therefore could not give the commission more than the in facie contempt power it already had. Similarly, ss. 11 and 12 could be read as concerning contempt in facie curiae only. As for the articles of the *Code of Civil Procedure*, art. 46 was suppletive in nature and arts. 49 to 54 merely codified the common law of contempt. In adopting this interpretation, Beetz J. was guided by the principle of constitutionality of statutes: in deciding as to the appropriate interpretation of a statute, one should prefer a construction that conforms with the constitution.

11 Beetz J. did not enunciate any formal requirement with respect to the wording of a statutory grant of ex facie contempt powers to an inferior court. In his analysis of the *Code of Civil Procedure*, though, he wrote that "[w]hen the legislator wishes to amend the common law, he does so by express provision" (p. 644), referring to art. 51 C.C.P., which reduced the discretion formerly enjoyed by courts of law as to punishment. Dickson J., writing for himself and Martland J., held that statutory language must be clear and unambiguous to override the common law and confer ex facie contempt powers on an inferior tribunal. I fail to see much difference between "express" and "clear and unambiguous." Both opinions adopt in substance the same interpretation principle. The common law may be modified through express statutory language, such as the grant of a power in terms different from the common law.

12 Furthermore, when dealing with common law rules on the jurisdiction of superior courts, it is important to distinguish between enactments which deprive superior courts of their jurisdiction, or privative clauses, and enactments which convey part of the jurisdiction of superior courts to another tribunal, while not extinguishing the jurisdiction of superior courts. In the former case, courts have insisted on a narrow construction, since the citizen may be deprived of a recourse to the superior court (see the line of cases culminating in *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, 38 N.R. 541, 127 D.L.R. (3d) 1, where the rule of strict interpretation is given constitutional significance). In the latter case, I would think that there is little point in insisting upon precise formulae to the extent that the intention of Parliament may be thwarted (see P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Yvon Blais, 1992), at pp.420-421). Barring constitutional considerations, if a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of its jurisdiction, it should be given effect.

B. The Functions of the Competition Tribunal

13 The Tribunal was created in 1986, in the wake of "Stage II" of competition law reform. Part I of *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, R.S.C. 1985, c. 19 (2nd Supp.) (hereinafter the "*1986 Act*"), became the C.T.A., and Part II made in-depth amendments to the C.A.

14 The *1986 Act* completed the broad division of the C.A. into two substantive parts, one criminal (Part VI) and one civil/administrative in nature (Part VIII), in accordance with proposals put forward as early as in 1969 by the Economic Council of Canada in its *Interim Report on Competition Policy*. Jurisdiction over the criminal part lies with the courts ordinarily dealing with criminal cases, as well as the Federal Court, Trial Division (ss. 67, 73 C.A.). As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) C.T.A. confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the C.A. therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the C.A. and the C.T.A. that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII C.A., since it involves complex issues of competition law, such as abuses of dominant position and mergers.

15 Moreover, the 1986 reform also concentrated the administration of the C.A. in the hands of the Director of Investigation and Research. The Director is responsible for the conduct of inquiries under the C.A. (s. 10 C.A.), and he holds a number of powers in this respect. He may request the Attorney General of Canada to consider a prosecution under Part VI C.A. For all intents and purposes, since competition matters generally require extensive inquiry, prosecution will rarely be instigated without a request from the Director. Hence, the Director has a substantial amount of control over prosecutions under the C.A. He has even more control over proceedings under Part VIII C.A. since, aside from exceptions of limited scope in ss. 86, 99 and 106 C.A., only the Director may bring a matter before the Tribunal.

16 Coming to the core of this case, when one considers the criminal part of the C.A., it becomes clear that Parliament had definite concerns about enforcement when enacting the C.A. For instance, in Part IV, entitled "Special Remedies," at ss. 33 and 34, superior courts of criminal jurisdiction are given powers to issue interim injunctions (the Federal Court is also given this power) and prohibition orders to prevent violations of Part VI C.A. These powers are exceptional in the criminal law context. Given the nature of competition law offences, which often involve continuous or continuing business practices, it is quite understandable that Parliament may have wanted to expand the criminal part of the C.A. beyond retribution in order to ensure the benefits of free competition in the longer term.

17 The same concern for the proper long-term functioning of the free market lay at the very heart of the enactment of Part VIII in 1986. Civil remedies can be more finely attuned and stand a better chance of leading to lasting compliance with the C.A. than criminal convictions. Parliament, in order to provide for the supervision of the orders of the Tribunal, has given the Tribunal at s. 106 C.A. a power to rescind or vary its orders upon request from the Director or a person against whom the order has been made. Yet Parliament has not included in the C.A. itself a mechanism to ensure compliance with the orders of the Tribunal.

18 The respondent argues that s. 74 C.A., which makes it an offence to contravene or fail to comply with an order of the Tribunal, is functionally equivalent to a contempt power for breaches of orders under Part VIII. I disagree. First of all, s. 74 C.A., unlike ss. 33(7) and 34(6) C.A. for interim injunctions and prohibition orders, aims at punishment of breaches, and not at securing compliance. It provides for definite fine and prison terms, and does not allow for the kind of flexibility available in contempt proceedings. It is in essence retrospective, and not prospective. Furthermore, a charge under s. 74 C.A. will be tried before a criminal court, and not before the Tribunal. The expertise of the Tribunal is lost in proceedings under s. 74 C.A. If it is only possible to prove a breach of an order through a process comparable in complexity to the issuance of the order, as is often the case, some violations may well escape scrutiny and remedial action, if the expertise of the Tribunal is not available at the enforcement stage. Given the complexity of orders under Part VIII, monitoring their application could not be made a completely separate process, before a court of general or criminal jurisdiction, without a corresponding loss of effectiveness.

19 Moreover, a duality of criminal and civil remedies against a breach of an order is found in other areas, where criminal provisions similar to s. 74 C.A. protect the orders of an inferior tribunal created by Parliament. Yet Parliament, in these other areas, has also provided for the filing of their orders with the Federal Court to ensure compliance (see the *Broadcasting Act*, S.C. 1991, c. 11, ss. 13 and 32, and the *Oil and Gas Production and Conservation Act*, R.S.C. 1985, c. O-7, ss. 13 and 62). Section 74 C.A. is not an adequate substitute for contempt proceedings for breaches of orders of the Tribunal.

20 This cursory examination of the C.A. shows that Parliament intended the Tribunal to oversee Part VIII and that Parliament was strongly concerned with long-term compliance with the C.A., in both its criminal and civil parts. The C.A. itself, however, does not make any provision for the enforcement of the orders of the Tribunal through contempt or similar proceedings.

C. Section 8 of the Competition Tribunal Act

21 Section 8 C.T.A. complements the C.A. The attention of this court has been drawn to other federal statutes which contain provisions similar in wording to parts of s. 8 C.T.A., in particular to s. 8(2) C.T.A. None of these provisions, however, is similar to the three subsections of s. 8 C.T.A. taken as a whole. Moreover, all of the statutes in which these provisions are found offer schemes different from that of the C.A. and C.T.A., inasmuch as the issue of enforcement through contempt proceedings does not arise in any of them. Either they provide for a particular enforcement mechanism, through filing of the Tribunal's order with the Federal Court, or the relief granted by the Tribunal is self-executory in nature. In other cases, the Tribunal only has powers of recommendation. Section 8 C.T.A. is thus unique, and it must be interpreted in light of its wording and its context.

1. Section 8(1)

22 Section 8(1) C.T.A., the basis of the Tribunal's jurisdiction, reads as follows:

> 8.(1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto.
>
> 8.(1) Le Tribunal entend les demandes qui lui sont présentées en application de la partie VIII de la *Loi sur la concurrence* de même que toute question s'y rattachant.

The core of the Tribunal's jurisdiction is the hearing and determination of Part VIII applications. When both versions are read together, it becomes apparent that the additional powers conferred by the phrase "any matters related thereto"/"toute question s'y rattachant" pertain to the applications, and not to the hearing and determination of the applications. In English, the phrase "any matters related thereto" may refer to the applications or to their hearing and determination, though, to my mind, the latter reading is constrained and does not reflect the natural meaning of the words, namely: "... hear and determine all applications made under Part VIII of the *Competition Act* and hear and determine all matters related to the applications." In French, "s'y rattachant" can only refer to the noun "demandes," and not to the verb "entend," or otherwise the clause would read "toute question se rattachant aux auditions." Section 8(1) C.T.A. therefore confers on the Tribunal jurisdiction not only over the hearing and determination of applications, but also over related matters. The jurisdiction of the Tribunal does not terminate upon the

determination of an application, as the respondent argues, but it may encompass other matters related to the application, such as the enforcement of an order made pursuant to the application.

23 Beyond the natural grammatical construction of s. 8(1) C.T.A., this interpretation is also supported by other considerations. The respondent claimed that the phrase "any matters related thereto" essentially added to the Tribunal's jurisdiction various ancillary matters that may arise in the course of the hearing of an application. Such an interpretation would, in my opinion, fail to give its full meaning to s. 8(1) C.T.A. It is an established principle of common law, codified to a certain extent in s. 31 of the *Interpretation Act*, R.S.C. 1985, c. I-21, that "[t]he powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured" (*Halsbury's Law of England*, 4th ed., vol. 44, para. 934, p. 586; see also P.-A. Côté, supra, at pp. 76-77). This principle has been recently applied in *Newfoundland Telephone Co. v. TAS Communications Systems Ltd.*, *(*sub nom. *Newfoundland Telephone Co. v. Canada (Director of Investigation & Research, Combines Investigation Act))* [1987] 2 S.C.R. 466, 29 Admin. L.R. 22, 80 N.R. 321, 68 Nfld. & P.E.I.R. 1, 209 A.P.R. 1, 85 N.B.R. (2d) 183, 217 A.P.R. 183, 45 D.L.R. (4th) 570, 20 C.P.R. (3d) 19, and in a line of cases from the Federal Court of Appeal, starting with *Interprovincial Pipe Line Ltd. v. Canada (National Energy Board)*, [1978] 1 F.C. 601, 48 D.L.R. (3d) 401, 17 N.R. 56 (C.A.). Since the Tribunal has jurisdiction to hear and determine Part VIII applications, the common law would have conferred upon it jurisdiction over incidental and ancillary matters arising in the course of the hearing and determination. No need would arise to add the phrase "and any matters related thereto." Since this phrase should be given some meaning, it should be taken as a grant of jurisdiction over matters related to Part VIII applications, but arising *outside* of the hearing and determination of these applications. These matters may include for instance the enforcement of the orders made under Part VIII.

2. Section 8(2)

24 While s. 8(1) C.T.A. extends the jurisdiction of the Tribunal to all matters related to applications under Part VIII C.A. and gives jurisdictional foundation to the power of the Tribunal over contempt for breaches of its orders, s. 8(2) C.T.A. expressly confers upon it the powers of a superior court with respect to the enforcement of its orders. Section 8(2) C.T.A. displaces the common law presumption. It reads as follows:

> 8. ...
>
> (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
>
> 8. ...
>
> (2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

The position of the phrase "other matters necessary or proper for the due exercise of its jurisdiction"/"toutes autres questions relevant de sa compétence" in this paragraph leads to the conclusion that the enumerated powers come within the jurisdiction of the Tribunal as well. Section 8(2) confirms and consolidates the jurisdiction of the Tribunal. In the context of s. 8(2), the words "enforcement of its orders" coupled with the phrase "necessary or proper for the due exercise of its jurisdiction" cannot be read otherwise than as a grant to the Tribunal of the powers of a superior court of record with respect to the enforcement of its orders, which includes the power over contempt for breaches of its orders.

3. Section 8(3)

25 This conclusion is further supported by s. 8(3) C.T.A., which requires that the judicial member of the Tribunal concur in a finding of contempt and in the consequences attached to this contempt by the Tribunal. While s. 8(3) C.T.A. makes express reference to contempt, this reference as such is not indicative of the powers of the Tribunal, since all inferior courts have power

over contempt in facie. Section 8(3), though, is unique to the C.T.A. No other federal statute contains a similar provision. Inferior tribunals, whose members are seldom all lawyers or judges, may generally find persons in contempt in facie and punish them without the need for judicial endorsement (this is implicit in *C.B.C.*, supra). It would seem somewhat incongruous that the Tribunal be subject to such a unique requirement if it only had power over contempt in facie, like others. Section 8(3), because of this unique requirement, is indicative of the intention of Parliament to give the Tribunal contempt powers going beyond those which an inferior tribunal would ordinarily exercise.

D. Conclusions on the Interpretation of the C.A. and C.T.A.

26 In summary, I find that s. 8 C.T.A., when given its normal meaning in the context of the C.A. and C.T.A., gives the Tribunal power over contempt for breaches of its orders. No issue arises in this case nor was raised as to criminal contempt. The governing statutes in this case distinguish it from *C.B.C.*, supra. There s. 12 of the *Public Inquiry Commission Act*, the statutory provision purportedly conferring ex facie contempt powers upon the Quebec Police Commission, only contained one phrase that could extend to contempt ex facie ("contempt of the commissioners or of their office"), and it was among a list of cases of contempt in facie. Beetz J. concluded that this phrase did not extend to contempt ex facie. Here, the issue is narrower: only the power over civil contempt for breaches of orders is at stake. Moreover, the C.A. and C.T.A. show that Parliament directed its mind to the enforcement of the orders made under the C.A. Section 8 does not differentiate between types of orders, and neither does it limit the meaning of "order" in the same fashion as former s. 17 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Rather, "order" is used by Parliament throughout Part VIII C.A. to designate the decisions of the Competition Tribunal pursuant to applications under that part. It is in my view incorrect and inappropriate to ignore the meaning given by Parliament to "orders" of the Tribunal in the overall scheme of the C.A. and C.T.A. The legislative scheme creates a need for the Tribunal to address the enforcement of its orders. Section 8 C.T.A., as was expounded above, sets out the jurisdiction and powers of the Tribunal in general terms, and its normal meaning is broad and clear. It is an express statement that the powers of the Tribunal include the contempt powers of a superior court for the enforcement of its orders. These include orders under Part VIII C.A., which are central to its mandate.

27 On the level of principle, while Beetz J. in *C.B.C.* legitimately feared that the Quebec Police Commission through a power over contempt ex facie might get involved "in areas which are practically impossible to define in terms of jurisdiction and completely foreign to its own area of jurisdiction" (p. 638 [[1979] 2 S.C.R.]) and encroach upon the jurisdiction of superior courts, these obstacles do not arise here. The power at issue here is narrower, and it can safely be left to the Tribunal to deal with breaches of its dispositive orders, since they involve the examination of issues analogous to those arising when the order was first issued, and are similarly circumscribed. In terms of expertise, the Tribunal is in fact better suited than a superior court to decide these matters. In comparison, the commission in *C.B.C.* only enjoyed powers of inquiry. For the commission to rule on a contempt for breach of a non-publication order would have involved, first of all, a decision as opposed to a recommendation, and secondly, consideration of matters extraneous to the inquiry itself, i.e., the publication of a photograph of a witness (see *C.B.C.* at pp. 640-641). The commission would have been outside of both its function and its field of expertise.

28 Furthermore, while the commission's inquiry resulted from a particular mandate limited in time and scope, here the Tribunal is given a broad role in the continuous operation of the C.A. The Tribunal has already made and will make numerous orders under Part VIII C.A. It is integrated within the federal court system, and its decisions are subject to appeal as if they emanated from the Federal Court, Trial Division (s. 13 C.T.A.). It is not set apart or its decisions protected by any privative clause. Even if the Tribunal exercises powers that at common law belong to a superior court, it is still subject to full review by the Federal Court of Appeal. The Tribunal has none of the characteristics that would inspire fear for the integrity of the powers of superior courts.

E. Constitutional Considerations

29 Until it came to this court, this case had centred on interpretation. At the end of its factum, the respondent briefly raises the constitutionality of s. 8 C.T.A., should it purport to confer upon the Tribunal power over contempt for breaches of its orders. Both parties addressed the issue more thoroughly in oral argument.

30 At the outset, the applicability to Parliament of the case law of this court regarding s. 96 of the *Constitution Act, 1867* comes into question. I will not rule on this point, since I am of the opinion that, even if s. 96 of the *Constitution Act, 1867* limited the powers of Parliament in the same manner and to the same extent as it limits the powers of provincial legislatures, it would have been respected in this case.

31 *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 (hereinafter *Residential Tenancies*), has established a three-step analytic approach to s. 96 of the *Constitution Act, 1867* problems. This approach was further developed and refined in *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, 25 C.C.E.L. 162, 89 C.L.L.C. 14,017, 92 N.R. 179, 57 D.L.R. (4th) 1, 90 N.S.R. (2d) 271, 230 A.P.R. 271 (hereinafter *Sobeys*), and in *Reference re Young Offenders Act (Canada)*, *(*sub nom. *Reference re Young Offenders Act P.E.I.))* [1991] 1 S.C.R. 252, 89 Nfld. & P.E.I.R. 91, 278 A.P.R. 91, *(*sub nom. *Reference re Young Offenders Act & Youth Court Judges)* 121 N.R. 81, 77 D.L.R. (4th) 492, 62 C.C.C. (3d) 385. In *C.B.C.*, supra, although the three-step analytic framework of *Residential Tenancies* had not yet been articulated, this court made in substance the same inquiry. For the majority, Beetz J. held that the National Assembly could not validly confer upon the Quebec Police Commission power over contempt ex facie curiae, since this came within the jurisdiction of superior courts in 1867, and these powers were not an integral part of the mandate of the commission (at pp. 639-641).

1. Historical Inquiry

32 The parties have advanced two different characterizations of the powers of the Tribunal for the purposes of the historical inquiry. The appellants have characterized them as powers in relation to competition law, while the respondent has narrowed them to powers over contempt ex facie curiae. This type of conflict between a broader and a narrower characterization is not atypical in s. 96 of the *Constitution Act, 1867* cases. Wilson J. discussed it in *Sobeys*, supra, at p. 254 [S.C.R.]:

> Viewed against this background the first step of the *Residential Tenancies* test, which is drawn from the 'inferior court' cases, represents a kind of threshold test, a method of deciding whether, in a formal sense, s. 96 has been violated at all. The second and third steps serve to validate some legislative schemes *despite* the fact that they trench on the traditional jurisdiction of s. 96 courts. The purposes of s. 96 require a strict, that is to say a narrow, approach to characterization at the first stage. Given what I have to say below on concurrent superior/inferior court jurisdiction at Confederation, any other approach would potentially open the door to large accretions of jurisdiction and thereby defeat the purposes of the constitutional provision.

(Emphasis in original.) Wilson J. then defined the jurisdiction given to the Nova Scotia Labour Standards Tribunal by s. 67A of the *Labour Standards Code*, S.N.S. 1972, c. 10, as jurisdiction over unjust dismissal, as opposed to employer/employee relations or labour standards.

33 I will follow this approach. I am not unmindful that, in *C.B.C.*, supra, Beetz J. faced the same problem to a certain extent. He could proceed to his analysis on the basis either of the commission's power to prohibit publication or of its power over contempt ex facie curiae. He chose the latter at p. 640, since it was more consistent with the crux of the case. Similarly, here, a characterization of the impugned powers as pertaining to competition law would mask in its generality the essence of the case. Should the appellants' proposed characterization be retained, the inquiry would really bear on the overall jurisdiction conferred upon the Tribunal through Part VIII C.A. and s. 8 C.T.A. The jurisdiction of the Tribunal over civil contempt for breaches of its orders, and not its overall jurisdiction over Part VIII C.A., is at issue here.

34 The appellants have also submitted that such a characterization would place too much emphasis on the remedial aspects of the Tribunal's jurisdiction over its substantive aspects, contrary to the judgment of Wilson J. in *Sobeys*, supra, at p. 267. The appellants may be right, had the characterization been "jurisdiction over imprisonment" or "jurisdiction over fines." These focus unduly on the remedy ordered by the court and neglect the substantive grounds for ordering it. As Wilson J. put it in *Sobeys*, supra, at p. 255, to retain them "would be to freeze the jurisdiction of [s. 96] courts at 1867 by a technical analysis of remedies." Characterization as "jurisdiction over civil contempt for breaches of the tribunal's orders" corresponds to the actual debate in this case while not falling into the trap of technical, remedy-oriented analysis.

35 Contempt over breaches of a tribunal's orders is a species of contempt ex facie curiae, and as such, following *C.B.C.*, supra, it fell within the purview of s. 96 courts at the time of Confederation. I will therefore proceed to the second and third stages of the inquiry.

2. Judicial Function

36 In *Residential Tenancies*, Dickson J., at p. 743 [[1981] 1 S.C.R.], outlined the distinguishing features of a judicial function:

> ... the hallmark of a judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.

The appellants relied on this passage in their submission that the Tribunal does not fulfil an adjudicative function, as it really seeks to mediate the interests of the collectivity, in ensuring the proper functioning of the economy according to a competitive model, with the rights of the individual parties. Indeed the Director does not represent before the Tribunal the interests of any particular party, but rather the interests of the general public in the application of the C.A. and in the furtherance of its policy objectives.

37 The Tribunal, however, disposes of the applications under Part VIII C.A. in a judicial manner. One should beware of trying to pigeonhole the role of the Tribunal within a "judicial" or "administrative" model. This court has since long warned of the dangers of relying on too tight a dichotomy between these models of decision (*Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 78 C.L.L.C. 14,181, 23 N.R. 410, at p. 325 [S.C.R.]). Nevertheless the decisions of the Tribunal, if anything, come much closer to a judicial model than to any other model. The Tribunal is presented with evidence in an adversarial fashion, and it must decide in favour of the Director or in favour of the defendant. The structure of the C.A. and C.T.A. bears some similarities to the structure of labour standards adjudication in Nova Scotia, examined in *Sobeys*, supra, where Wilson J., at pp. 274-275, observed a separation of "administrative" and "judicial" functions between a director and a tribunal, respectively.

38 Courts which have addressed this issue have found that the Tribunal proceeds judicially (see Iacobucci C.J. (as he then was) in *Canada (Director of Investigation & Research) v. Air Canada*, *(*sub nom. *American Airlines Inc. v. Canada (Competition Tribunal))* [1989] 2 F.C. 88, 33 Admin. L.R. 229, 23 C.P.R. (3d) 178 (C.A), at pp. 97-98 [F.C.], affirmed [1989] 1 S.C.R. 236, 92 N.R. 320, 26 C.P.R. (3d) 95). I agree, and my conclusion is further strengthened by the particular nature of contempt proceedings, where of all matters within the Tribunal's jurisdiction the debate will likely be the most adversarial.

3. Institutional Setting

39 A substantial portion of these reasons has already been devoted to showing how the Tribunal is an integral part of the framework created by the C.A. and C.T.A. Within this framework, the Tribunal is the judicial authority in charge of the civil parts of the C.A. Furthermore, the C.A. and C.T.A. show how Parliament specifically provided for the enforcement of orders made under the C.A. In the context of competition law, particularly of Part VIII C.A., where the subject-matter lies largely in the realm of contractual relationships, effective enforcement of orders is essential, for fear of seeing these orders circumvented through elaborate relational arrangements which, although on the surface innocuous, effectively create the same obstacles that the orders sought to remove. Only a specialized tribunal such as the Tribunal can properly ensure the enforcement of the orders it makes. Because of the institutional setting, the jurisdiction conferred by s. 8 C.T.A. upon the Tribunal with respect to civil contempt for breaches of its orders would not infringe s. 96 of the *Constitution Act, 1867*, in the event it should apply to Parliament.

VI — Conclusion

40 I would allow both appeals. The matter is referred back to the Tribunal for disposition on the merits.

McLachlin J. **(dissenting):**

Introduction

41 Having read the reasons of my colleague Justice Gonthier, I find myself in respectful disagreement. My review of the authorities leads me to the conclusion that the court below correctly concluded that Parliament did not confer jurisdiction over contempt ex facie curiae on the Competition Tribunal.

42 These appeals are a simple exercise in statutory interpretation; they are subject to and determined by the principles governing the construction of federal statutes. The issue is not whether the court is of the opinion that the Competition Tribunal *should* be given the power to punish as contempt a violation of a final order under Part VIII of the *Competition Act*, R.S.C. 1985, c. C-34, nor whether extending this power to the Tribunal would seriously undermine the exclusive jurisdiction accorded superior courts by the common law. The issue is rather whether Parliament, in constituting the Competition Tribunal an inferior court, has clearly and expressly conferred on the Tribunal the power to punish contempt not only in facie (in the face of the court) but ex facie curiae (outside the presence of the court), a power traditionally reserved to the superior courts of record.

43 I dissent from the judgment of my colleague Gonthier J. for three fundamental reasons. First, I see no justification for departing from the common law presumption that inferior courts, absent clear and express legislation to the contrary, are strictly limited in their jurisdiction to the punishment of contempt in the face of the court. Application of this presumption to ambiguous legislation leads to the conclusion that Parliament did not intend to confer upon the Tribunal the power to punish for contempt outside the presence of the court, and indeed that Parliament may have relied upon the presumption in drafting s. 8 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.) (hereinafter the "Act").

44 Second, and in the alternative, my reading of the text of s. 8 of the Act leads me to conclude that, quite apart from the presumption, the proper construction of the legislation is that no general contempt power nor a specific power to enforce final orders via contempt, was conferred, as the court below held (per Iacobucci C.J., as he then was).

45 Finally, adoption of Gonthier J.'s reasons makes it necessary, in my view, to consider the constitutional question of whether Parliament can confer on an inferior tribunal a power which the Constitution arguably reserves to courts created under s. 96 of the *Constitution Act, 1867* — a question on which the parties provided only cursory written and oral submissions.

46 I proceed below to enunciate more fully the basis of these three positions.

Analysis

A. The Governing Presumption

47 As Gonthier J. acknowledges in his judgment, the common law is the source of the law of contempt in every province of Canada; it therefore governs our determination of these appeals. At common law an "inferior court" such as the Competition Tribunal is limited in its jurisdiction to the punishment of contempt in facie curiae absent *clear and express* statutory language to the contrary. The appellants bear the burden of establishing that the *Competition Tribunal Act* runs contrary to the common law. To succeed, the appellants must rebut this common law presumption, not an easy task in any context.

48 By long tradition, exercise of the power to punish for contempt of court has been confined to superior courts. This court visited this question in *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, [1979] 2 S.C.R. 618, 14 C.P.C. 60, 28 N.R. 541, *(*sub nom. *C.B.C. v. Cordeau)* 48 C.C.C. (2d) 289, 101 D.L.R. (3d) 24 (hereinafter "*C.B.C.*"). In a comprehensive and thorough judgment, Beetz J. for the majority reviewed the history and policy of the rule which distinguished contempt in the face of the court from contempt outside the presence of the court, confining the latter to superior courts. From an historical perspective, he pronounced that at common law, the power to conduct an inquiry into a contempt committed ex facie curiae and to punish it "is enjoyed exclusively by the superior courts." He elaborated (at pp. 627-628 [S.C.R.]):

> This proposition derives from the apparently unanimous, longstanding and consistent opinion of a great many judges and commentators. The opinions of the judges are for the most part *obiter*, but the reason for this is that in English and Canadian decisions of the last two hundred years, of which there have been a great many concerning contempt of court, there is so

far as I know virtually no precedent in which a court of inferior jurisdiction has claimed the power to punish for contempt committed *ex facie*, and I have found none in which such a court has exercised it with the approval of a superior court. Superior courts, on the other hand, have always claimed and exercised this power, as an inherent power enjoyed by them exclusively. This consistency in usage is more than just significant; it is decisive. Moreover, when the legislator dealt with the question, he did so in terms which indicate that he recognized this usage and intended to sanction it, or at least in terms that in no way indicated his intention to alter it. Finally, the rule of exclusive jurisdiction of the superior courts is justifiable in principle.

49 From the perspective of policy, Beetz J. concluded (at p. 638):

> Such a rule is moreover justified in principle by the following considerations. The power to punish for contempt committed *ex facie* is liable to result in inquiries which may well involve a lower court in areas which are practically impossible to define in terms of jurisdiction and completely foreign to its own area of jurisdiction, which by definition is limited. Such an obstacle does not arise in the case of a court like the Superior Court, which is a court of original general jurisdiction (art. 31 *C.C.P.*) with *a priori* jurisdiction, or courts sitting in appeal from decisions of the Superior Court, which may in general render the decisions which the latter would have rendered. Moreover, the power to punish a contempt committed *ex facie* is necessarily bound up with the superintending and controlling power which only a superior court may exercise over inferior courts. This controlling power could become illusory if, in the case of a contempt committed *ex facie*, an inferior court had the right to go beyond its own particular field. There would also be the danger of conflict between the superior and inferior courts, of the kind that formerly existed in England between the common law and equity courts. Finally, the inferior courts are not without any means of ensuring that their lawful orders are observed: as Dorion C.J. notes in *Denis*, the superior courts may come to their aid; see also *R. v. Davies* (*supra*) and *Re Regina and Monette*.

50 We arrive then at this conclusion. At common law the power to inquire into and punish contempt outside the presence of the court has been confined to superior courts. The restriction is sound, grounded in significant policy considerations. Parliament can expressly legislate to confer a general contempt power on an inferior tribunal, subject to the constitutional issue which I will consider later. But there is a presumption, in construing statutes conferring powers on inferior tribunals, that they will not be considered to possess the power of contempt outside the presence of the court unless the language of Parliament is clear and unequivocal. Dickson J., in *C.B.C.*, supra, put it this way (at pp. 647-648):

> It is sufficient ... to state *that the powers conferred upon the Police Commission, given the general limitation at common law upon the contempt powers of an inferior tribunal, must be strictly interpreted, and a strict interpretation in this case leads inevitably to the conclusion that such power was not invested in the Commission*. There can be no doubt that the common law draws a sharp line between the power to punish for contempt committed outside the presence of the court, and the power to punish where the contempt is committed in the face of the court. In the discussion following his fourth proposition, Mr. Justice Beetz demonstrates *that it is possible to read the relevant statutory provisions affecting the Police Commission's contempt powers in a manner which maintains the common law distinction. In the absence of clear statutory language expressing an intention to confer broader contempt powers upon the Commission, it must be presumed that the Legislature granted to the Commission only those contempt powers ordinarily exercised by an inferior tribunal*.

(Emphasis added.)

51 In short, it is not enough that it is possible or even desirable that the inferior tribunal have the power to punish for contempt outside the presence of the court. The language must be clear. The courts must assume that Parliament was aware of the well-recognized history of the presumption in drafting the provisions empowering the inferior tribunal and accordingly, that if Parliament failed to use language clearly conferring the general contempt power, it did not intend to confer it. To presume otherwise invites mischievous interference by the courts in the legislative function and heightens the potential for corruption of Parliament's intent.

52 Viewed thus, these appeals reduce to a single question: does the language in the legislation empowering the Competition Tribunal clearly confer on the Tribunal the power to condemn and punish contempt outside the Tribunal proceedings? The

answer to this question is negative, in my view. Indeed, I do not take my colleague Gonthier J. to suggest that his interpretation of the legislation is the *only* interpretation, but rather that it is the *better* interpretation. The Act contains no phrase expressly conferring on the Tribunal the power to find and punish contempt for acts outside the hearing process, and the language used is entirely consistent with the Tribunal's contempt power being confined to contempt in the context of Competition Tribunal hearings. One searches in vain for the clear and unequivocal language required on the principles enunciated in *C.B.C.*, supra, to defeat the presumption against the conferral on an inferior tribunal of the power to condemn and punish for contempt *outside* the presence of the court.

53 Gonthier J. seeks to avoid this result by finding that the presumption relied on by this court in *C.B.C.*, supra, applies only in cases where the enactment extinguishes or diminishes the power of a superior court. He states at p. 9 [p. 12, ante] of his reasons:

> ... when dealing with common law rules on the jurisdiction of superior courts, *it is important to distinguish between enactments which deprive superior courts of their jurisdiction, or privative clauses, and enactments which convey part of the jurisdiction of superior courts to another tribunal, while not extinguishing the jurisdiction of superior courts*. In the former case, courts have insisted on a narrow construction, since the citizen may be deprived of a recourse to the superior court (see the line of cases culminating in *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, ... where the rule of strict interpretation is given constitutional significance). *In the latter case, I would think that there is little point in insisting upon precise formulae to the extent that the intention of Parliament may be thwarted* (see P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Yvon Blais, 1992), at pp. 420-421). Barring constitutional considerations, if a statute, read in context and given its ordinary meaning, clearly confers upon an inferior tribunal a jurisdiction that is enjoyed by the superior court at common law, while not depriving the superior court of jurisdiction, it should be given effect.

(Emphasis added.)

54 The restriction of the presumption to legislation which *deprives* a superior tribunal of its powers runs counter to the authorities and to the clear and historical policy of the common law that quite apart from its effect on superior courts, the power of contempt *outside* the presence of the court is one of such importance to the liberty of the subject that it should be confined to superior courts, absent clear language to the contrary. Indeed, none of the cases reviewed in *C.B.C.*, supra, involve taking away the power of a superior court. In *C.B.C.* itself, no power was taken from the superior tribunal. The issue in such cases has never been the removal of powers of a superior court, but rather the conferring of such powers on an inferior court of record.

55 Gonthier J. also suggests that *C.B.C.*, supra, can be distinguished and the presumption against conferring the power of contempt ex facie curiae avoided by reason of the fact that the power here at issue is the narrow power to enforce mandatory and prohibitive orders, made on a Part VIII hearing, by contempt. This proposition is based on the language of s. 8(2) referring to the "enforcement of orders." The argument is arguably at odds with the acknowledgement elsewhere in his reasons that the governing section is s. 8(1), given that s. 8(2) is confined to jurisdiction otherwise established; and with the broad interpretation he places on the power given to the Tribunal under s. 8(1). Be that as it may, the fact remains that even on the narrower interpretation of the power, what is at issue is the power of the Tribunal to punish contempt outside the presence of the court. In short, narrowing the issue does not avoid the presumption.

56 Having concluded that *C.B.C.* is distinguishable, Gonthier J. goes on to construe s. 8 as though the presumption against an inferior tribunal possessing power to punish for contempt outside the presence of the court did not apply. He finds the section to be ambiguous, and goes on to choose the interpretation which best "fits" the administrative framework within which the Tribunal functions, as he perceives that framework.

57 My reflections lead me to a different conclusion. Unable as I am to distinguish *C.B.C.* from this case, I see no way to avoid applying the presumption against conferring on an inferior tribunal the power to punish contempt outside the presence of the court here. This presumption, combined with the absence of language in the Act clearly conferring such power on the Competition Tribunal, leads inescapably, as I see it, to the conclusion that Parliament cannot be taken to have intended to grant the Tribunal the power to enforce its final orders by punishing for contempt.

B. Interpretation of Section 8, Competition Tribunal Act, Apart from the Presumption

58 Alternatively, if the presumption against conferring on an inferior tribunal the power of contempt *outside* the presence of the court did not apply, I would nevertheless conclude that ss. 8 and 9 of the Act, correctly construed, do not confer that power on the Competition Tribunal. I made the argument above that the interpretation adopted by Gonthier J. is not the *only* plausible interpretation and in the case of ambiguity, the common law presumption of inferior court jurisdiction must govern; here I argue that the interpretation adopted by the court below, per Iacobucci C.J., is to be preferred.

59 I turn first to the policy and purpose behind Part VIII of the *Competition Act* in the context of Parliament's scheme. Section 1.1 and Part VIII of the *Competition Act*, read with s. 8 of the *Competition Tribunal Act*, make it clear that the Tribunal's role is to act as an impartial adjudicative body. Its task is to determine the absence or presence of a party's compliance with the business norms set out in the *Competition Act*. Having found non-compliance, the Tribunal is empowered to remedy the situation by issuance of the mandatory and prohibitive orders authorized by Part III. At this point, as far as the express legislative scheme goes, the formal role of the Tribunal ends; the Tribunal has no general supervisory power. The task of enforcement is left to others. Part VIII expressly provides two different mechanisms by which the Tribunal's orders can be enforced: criminal prosecution under s. 74 at the behest of the Attorney General; and a private civil action for damages under s. 36. Thus the primary role of the Tribunal in the scheme is seen as that of dispute resolution, and the most natural reading of its provisions is in this context.

60 Against this background, I turn to the language which is said to confer on the Tribunal the power to enforce its orders by the contempt outside the presence of the court. For ease of reference I set out ss. 8 and 9 of the Act in their entirety:

> 8.(1) The Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto.
>
> (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.
>
> (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.
>
> 9.(1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed. ...

61 The first thing to note is that the power of the Tribunal is confined to applications for the resolution of disputes under Part VIII of the Act, i.e., to the resolution of disputes and making of orders, as opposed to their enforcement. The appellant says that the phrase in s. 8(1) "and any matters related thereto" extends these powers to enforcement of final orders outside the presence of the court. But even if it were conceded that this is *one* way of reading that phrase, it is not the *only* way. The phrase can quite naturally be construed as relating to the application process, which goes no further than to support the Tribunal's power over contempt in the face of the court. Given the Tribunal's primary role of dispute resolution, the most natural construction of the phrase "and any matters related thereto" is that it refers to interlocutory matters arising in the course of an "application."

62 We come then to s. 8(2), which gives the Tribunal the powers of a superior court with respect to certain matters. Most of the powers referred to here ("the attendance, swearing and examination of witnesses, the production and inspection of documents") relate to the conduct of the hearing — i.e., to the subject-matter of contempt *in the face of* the court. The appellant relies on the phrase "enforcement of its orders." But that phrase can be entirely explained in the context of interlocutory orders made in the course of the hearing. The appellant also relies on the general phrase that follows: "and other matters necessary or proper for the due exercise of its jurisdiction," suggesting that this confers on the Tribunal a power of contempt *outside* the presence of the court. But the words "necessary or proper for the due exercise of its jurisdiction" merely refer us back to whatever jurisdiction the Tribunal is granted by other provisions, primarily s. 8(1). These words do not create new jurisdiction. Thus we must ask,

are there other provisions conferring a power to condemn and punish for contempt outside the face of the court? This brings us back to s. 8(1), which, as we have seen, does not, whether read contextually or literally, confer such powers.

63 As for s. 8(3), it does not purport to deal with the power or jurisdiction of the Tribunal. Its requirement that the judicial member of the Tribunal concur in any finding of contempt, relied on by Gonthier J. as an indicator of an intention to confer broad powers, is completely explicable by reference to the power of contempt in the face of the court conferred by ss. 8(1) and (2) and the exclusive jurisdiction accorded judicial member(s) of a (Competition Tribunal) Panel over all *questions of law*, of which contempt is but one.

64 In the end, having regard to the role of the Tribunal in the scheme of the Act and the wording of s. 8, I find it impossible to fault the interpretation placed on the section by the court below, [1990] 2 F.C. 565, 48 B.L.R. 125, 31 C.P.R. (3d) 510, 111 N.R. 368, per Iacobucci C.J., at pp. 570-572 [F.C.], which I set out in full:

> Proceedings instituted to punish a party for its failure to obey an order previously made by the Tribunal under Part VIII of the *Competition Act* are clearly not applications under Part VIII of the *Competition Act*. *Nor are they, in my view, 'matters related' to such applications or the hearing and determination of such applications. The enforcement of an order is certainly a matter related to that order; it is not, however, related to the application or its hearing and determination that culminated in the making of that order*. Subsection 8(1) therefore does not define the jurisdiction of the Tribunal as including the power to punish for failure to comply with the orders made under Part VIII of the *Competition Act*.
>
> Subsection 8(2), at first sight, seems to give that power to the Tribunal since it grants it all the powers that are vested in a superior court of record with respect to, *inter alia*, 'the enforcement of its orders'. However, these words must be read in their context. The phrase 'the enforcement of its orders' in the subsection is part of an enumeration of matters that are said to be 'necessary or proper for the due exercise of [the Tribunal's] jurisdiction'. The enforcement of a final order made under Part VIII of the *Competition Act* cannot possibly be considered as necessary or proper for the exercise of the Tribunal's jurisdiction as described in subsection 8(1). The expression 'enforcement of its orders' in subsection 8(2), therefore, refers only to the enforcement of the many orders that the Tribunal may make in order to ensure that the applications made under Part VIII of the *Competition Act* are disposed of in a fair and rational manner. The enforcement of these orders is certainly necessary or proper for the due exercise of the Tribunal's jurisdiction.
>
> Finally, subsection 8(3) also does not help the respondent. Although it refers expressly to the powers of the Tribunal to entertain contempt proceedings, there is nothing in the subsection indicating that the extent of the contempt power is not restricted to contempt *in facie curiae*. The subsection shows, however, that the power to punish for contempt was clearly in the mind of the draftsman of section 8 so that the failure to confer expressly the power to punish for contempt *ex facie* cannot be attributed to an oversight.

(Emphasis added.) [Footnotes omitted.]

65 The remaining question is whether the arguments put forward by Gonthier J. prevail over this interpretation. With the greatest respect, I cannot agree that they do.

66 Gonthier J.'s first argument is based on the French version of s. 8(1). He argues that while the English version of s. 8(1) may not clearly confer the power to commit and punish for contempt *outside* the presence of the court, the French version does. It reads:

> 8.(1) Le Tribunal entend les demandes qui lui sont présentées en application de la partie VIII de la *Loi sur la concurrence* de même que toute question s'y rattachant.

Gonthier J. argues that, although "any matters related thereto" in the English text refers directly to the "hearing and determination" of Part VIII applications, the French equivalent, "toute question s'y rattachant," clearly pertains to the word "*demandes*" (*applications*) and not to the word "entend" (to hear). In essence, the French version of s. 8(1) states that the Tribunal is to hear all applications or "demandes" presented it under Part VIII, and any questions related to such applications.

The English version, using a different (potentially characterized as more complex or legalistic) structure, sets out the Tribunal's jurisdiction as limited to *hearing and determining* Part VIII applications, and any matters related to this task.

67 I have difficulty seeing how this advances the matter. The reference in the French text of s. 8(1) to "demande," or application, is not necessarily broader than "hearing and determining." The argument begs the question of what is meant by "demande." If "demande" is read as referring to the dispute resolution procedure, as Iacobucci C.J. read it, the "application" process does not extend to the enforcement of the final order, with the result that the French wording, like the English, fails to support the intention to confer the power of contempt outside the presence of the court.

68 Moreover, when faced with an English version that clearly limits the Tribunal's jurisdiction to matters relating to the "hearing and determination" of an application and a French version that provides jurisdiction over all questions related to the "application," the principles of statutory interpretation demand that the court accord the section an interpretation in which both versions are consistent or have a shared meaning. In his comprehensive treatise on statutory interpretation entitled *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Yvon Blais, 1992), Prof. P.-A. Côté sets out the governing rules for bilingual statutes (at pp. 275-276):

> According to the principle of internal coherence of the statute, its various parts are construed so as to eliminate contradictions. This applies particularly when two versions of the same enactment seem contradictory. The authorities are unequivocal in declaring that because the two versions are both official, reconciliation must be attempted:
>
> > In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other.
>
> In practice, this involves finding a shared or common meaning in the two enactments. Three possibilities may arise. The versions may be irreconcilable, in which case other principles of interpretation are immediately brought to bear. In *Klippert v. The Queen*, the phrase 'person who ... has shown a *failure* to control his sexual impulses' appeared in French as 'personne ... qui ... a manifesté une *impuissance* à maîtriser ses impulsions sexuelles ...'. The two versions were manifestly irreconcilable; the court favoured the English one after studying the provision's history.
>
> The second possibility involves one version that is itself ambiguous, while the other is plain and unequivocal. *A priori*, the latter is preferred. For example, in *Tupper v. The Queen*, section 295(1) of the *Criminal Code* referred, in English, to 'any instrument for house-breaking'. The expression was ambiguous, and could mean an instrument *capable of being used* as well as one *intended to be used* for house-breaking. If the second meaning were adopted, the prosecution would be required to prove not only that an instrument could be used but that in the circumstances it had been destined for that purpose. The Supreme Court of Canada resolved the issue by citing the French version, which it felt clarified the section: 'un instrument pouvant servir aux effractions de maison'. The wider meaning was chosen.
>
> In such situations, the shared meaning is that of the version which is not ambiguous. There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two.
>
> The French 'tramway' was used to clarify the meaning of the more general English 'railway' in *Toronto Railway Co. v. The Queen*. In *R. v. Dubois*, 'chantier public' restricted the meaning of the more general term 'public works'. The adjective 'mentioned' had its scope limited by 'enumérés' in *Pollack Ltée v. Comité paritaire du commerce de détail*. And in *Pfizer v. Deputy Minister of National Revenue* and *Gravel v. City of St-Léonard*, Justice Pigeon preferred the more restrictive of the two meanings, which in both cases was derived from the French version.

69 In this case, we are faced on the one hand with an English version which by reference to "hearing and determining" the applications, clearly and expressly limits the Tribunal's jurisdiction; and on the other hand with a French version which is at best ambiguous. To give the two versions a commonality of meaning and make them consistent, the Court must interpret the section as limiting the Tribunal's jurisdiction to any matters related to the hearing and determination of applications brought under Part VIII of the *Competition Act*.

70 Reference may also be had to former s. 8(2)(*c*) of the *Official Languages Act*, R.S.C. 1970, c. O-2:

(*c*) where a concept, matter or thing in its expression in one version of the enactment is incompatible with the legal system or institutions of a part of Canada in which the enactment is intended to apply but in its expression in the other version of the enactment is compatible therewith, a reference in the enactment to the concept, matter or thing shall, as the enactment applies to that part of Canada, be construed as a reference to the concept, matter or thing in its expression in that version of the enactment that it is compatible therewith; ...

Although repealed, the principle of statutory interpretation upon which this provision was based is maintained within the common law, providing some assistance to the court in these appeals. The principle is simple: where one version of a provision accords with the accepted principles of the governing legal system, e.g., in a part of the country or in this case the whole country, and the other version may be read either to contradict such principle(s) or to accord with such principle(s), the provision should be given an interpretation which best protects the continuing integrity of the principle(s) at issue. A strong presumption exists "that ambiguity should not be resolved in a manner that would substantially alter an institution or fundamental principle of the common law or 'droit commun' ": See M. Beaupré, *Interpreting Bilingual Legislation*, 2nd ed. (Toronto: Carswell, 1986), at p.37. It follows that insofar as a discrepancy exists between the French and English versions of s. 8(1), it should be resolved in accordance with the time-honoured presumption in Canada that an inferior court lacks the jurisdiction to punish contempt ex facie curiae. As pointed out by Iacobucci C.J., where it is clear the legislature actually had in mind the contempt power and may be assumed to have knowledge of the limited jurisdiction of an inferior court of record, the court is bound to construe the statute so that it is consistent with the governing legal system's fundamental principles.

71 Gonthier J. raises a second argument in support of his interpretation of s. 8(1). He argues that unless the phrase "and any matters related thereto"/"toutes questions s'y rattachant" is interpreted as conferring the power of contempt outside the presence of the court, it is redundant. With great respect, I cannot accept that it follows from the general rule that all parts of an enactment should if possible be given meaning (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 31) that the courts are free to confer on an inferior tribunal, a new power which Parliament has failed to mention. The precept that redundant interpretation should be avoided does not extend so as to give the courts a mandate to create new powers simply to avoid redundancy. Moreover, one must approach such general phrases against the background that they are commonly used in many statutes, not to confer unmentioned powers, but to ensure that the powers clearly given be exercised without undue restraint. It is true, as Gonthier J. points out, that ancillary powers can be inferred and need not be set out. Yet the reality is that statutes commonly do set them out, if only in the hope of avoiding arguments seeking to unduly restrict the effective exercise of expressly conferred powers. Many statutes conferring powers on inferior tribunals use such language. For example, the Canadian International Trade Tribunal ("C.I.T.T.") by s.16 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), is given jurisdiction to: "(*c*) hear, determine and deal with all appeals that, pursuant to any other Act of Parliament or regulations thereunder, may be made to the Tribunal, *and all matters related thereto*." Are we to infer in each case that Parliament intended to confer the historically anomalous power of contempt ex facie curiae on each of these tribunals in order to give some meaning to the statute? I think not. Given the relatively common use of phrases like "and all [or any] matters related thereto" in legislative drafting, I do not find this argument persuasive.

72 With respect to s. 8(2), Gonthier J. relies heavily on inclusion of the phrase "enforcement of [the Tribunal's] orders." However, as seen above, given the emphasis in s. 8(2) on the evidence-gathering powers of the Tribunal, it is equally if not more plausible to interpret this phrase as referring to interlocutory orders made in the course of the hearing, an interpretation which fits with the traditional distinction between the power of contempt in the face of the court, frequently accorded to inferior tribunals, and the quite different power to punish for contempt outside the presence of the court, seldom accorded to inferior tribunals.

73 With respect to s. 8(3), Gonthier J. acknowledges that taken alone, the reference to contempt is not indicative of the extent of the powers of the Tribunal. For him, the determinative factor is the s. 8(3)'s requirement that a finding of contempt and choice of punishment be approved by a *judicial* member of the Panel. This requirement is said to evidence an intention to accord the Tribunal contempt powers going beyond those which an inferior tribunal would ordinarily exercise.

74 The short answer to this argument is that the approval by a judicial member of the Tribunal is equally compatible with the view that the Tribunal's contempt power is confined to contempt in the face of the court as with the view that it extends to

contempt outside the presence of the court. The narrower interpretation, although less invasive than the broader, nevertheless involves questions of law which may affect the liberty of the subject. In these circumstances, it makes sense to require approval of the judicial member even on the narrower version, particularly where such judicial member(s) has been granted *exclusive* jurisdiction over all *questions of law* arising in a Part VIII application. I do not take my learned colleague to suggest that Parliament included judicial officers in the Tribunal primarily to supervise its exercise of a "special" power over contempt ex facie. Thus, it is quite possible, indeed probable, that reference to such officers in s. 8(3) has no bearing on the question of Parliament's intention. The decision by Parliament to confer this power exclusively upon the "judicial" member(s) of a given Panel may reflect its concern with the danger of providing non-judicial personnel with the power to punish contempt *in the face of the court* where unnecessary.

75 Justice Gonthier argues that the effective functioning of the legislative scheme requires that the Tribunal be accorded the power to condemn and punish, as contempt, the violation of its final orders outside the presence of the court. In his view, the regulatory scheme embodied in the *Competition Act* and the *Competition Tribunal Act* demands that the Tribunal have jurisdiction to enforce its orders via contempt in order to give effect to the legislation's objectives. In the words of s. 12 of the *Interpretation Act*, referred to by Gonthier J., the court should accord the Act a remedial interpretation that "best ensures the attainment of its [the statute's] objectives." Parliament, it is argued, must have intended that the Tribunal's Part VIII orders be effective.

76 The assumption is that absent a power *in the Tribunal* to punish contempt of its Part VIII orders, such orders are ineffective, i.e, there are no other means to secure compliance. In my opinion, this assumption is unwarranted. The Act provides a variety of remedies for the enforcement of the Tribunal's Part VIII orders.

77 Section 74 makes it an offence to fail to comply with the order of the Tribunal. The Attorney General of Canada is empowered, under ss. 73 and 74 of the *Competition Act*, to enforce the Tribunal's Part VIII orders; she may prosecute the violation of an order, seeking the imposition of sanctions (penal and monetary) in a provincial superior court, or she may seek such sanctions in the Federal Court, Trial Division, on consent.

78 Gonthier J. argues that this provision differs from enforcement by means of the ex facie contempt power, in that it provides for definite fines and prison terms and lacks the flexibility of the power of contempt outside the court. Be that as it may, it does not support the assumption that without the power of contempt outside the court, the Tribunal will be disadvantaged. In fact it has at its disposal statutory quasi-criminal remedies remarkably similar, although perhaps more restricted, than the contempt power traditionally confined to superior courts. It does not follow from the fact that Parliament has chosen to circumscribe the means of criminal enforcement at the Tribunal's disposal that the Tribunal should be accorded the broader common law power of contempt ex facie. On the contrary, I would think the inference should be the opposite, namely that Parliament considered the matter, and gave the Tribunal the means to ensure, in a quasi-criminal context, the power of enforcement of its final orders that Parliament thought it should possess. I do not share Gonthier J.'s view that these provisions are directed at punishment rather than "securing compliance" (p. 9 [p.13 ante]), nor understand how, if this were the case, it would distinguish the quasi-criminal remedies of the Act from contempt outside the presence of the court. In either case, enforcement and punishment are inextricably intertwined.

79 In addition to these quasi-criminal remedies, the Act provides that a private party may sue the offending party for damages suffered as a result of the violation of the Tribunal's order, pursuant to s. 36 of the *Competition Act*. Indeed, s. 36(2) provides that a finding of non-compliance in another proceeding, e.g., brought by the Attorney General of Canada under s. 74, is sufficient proof of the defendant's non-compliance with the Tribunal's order; thus, only the complainant's damages remain to be assessed.

80 In extending the power to punish the violation of a Part VIII order to the Tribunal as well as in answer to the above options, Gonthier J. relies, inter alia, on the absence of an express provision for the enforcement of these orders by the Federal Court, a provision present in other Acts to which he refers us (see p. 13 [p. 31, ante]). I fail to see how the absence of an express provision for filing the Tribunal's Part VIII orders with the Federal Court, or any other superior court, is either determinative or relevant to the question under consideration. First, Parliament may be assumed to know of the residual jurisdiction of the superior courts, which arguably permits enforcement through the courts by way of contempt: *C.B.C.*, supra, at pp. 636 and 638

[[1979] 2 S.C.R.], per Beetz J. Second, it is equally persuasive to argue that this so-called "lacuna" in the legislation indicates Parliament's intention that the Tribunal's orders be enforced only through the means provided in ss. 73 and 74 and s. 36 of the *Competition Act*. Such a lacuna does not, in my respectful opinion, evidence an intent to confer upon the Tribunal jurisdiction over contempt ex facie.

81 I note, in addition, that express provision for filing appears in a number of regulatory schemes but does not appear in others. A comparative examination of the tribunals (and their enabling legislation) expressly directed to a superior court for the enforcement of their orders with those tribunals which are not so directed evidences *no* pattern of subject-matter (e.g., degree of national importance) nor adjudicative structure which would lend support to the argument that Parliament intended that some tribunals have resort to superior courts to enforce their orders while others are empowered to enforce their orders via a power over contempt ex facie. Absent convincing evidence that the failure to *expressly* include this common law right (to seek enforcement from a superior court) indicates a legislative intent to accord a tribunal certain special powers, I am of the opinion that Parliament did not intend that the Competition Tribunal exercise jurisdiction over contempt ex facie.

82 Gonthier J. also argues that, given the complexity inherent in monitoring and enforcing Part VIII orders, the methods expressly chosen by Parliament to enforce its policies (criminal and civil enforcement, outlined above) lead to a "corresponding loss of effectiveness," i.e., the expertise of the Tribunal is lost. I make three points in response.

83 First, if the methods of enforcement which Parliament has chosen are defective, it is for Parliament and not the courts to rectify them.

84 Second, no evidence was placed before the Court which established either the complexity or non-complexity of orders typically made by the Tribunal under Part VIII, or the alleged "loss of effectiveness" of the Tribunal. The actual order at issue in this case was simple and easily enforced: Chrysler Canada Ltd. was ordered to sell its parts to Mr. Richard Brunet on trade terms "usual and customary" to its relationship with Mr. Brunet. The Tribunal, in its determination of the Application, may define such "terms"; quick reference could be had to such definition by a superior court seeking to enforce the Tribunal's order. There is no suggestion that the particular expertise of the Tribunal was required for its enforcement, nor any evidence that the powers of enforcement expressly set out in the Act were inadequate to the task.

85 Third, the Act, while not (theoretically) conferring on the Tribunal the power to initiate proceedings for the enforcement of its final orders, permits access to the Tribunal's expertise in the process of enforcement. In a criminal proceeding under s. 74, the prosecutorial arm of the government may utilize the Tribunal's expertise to assist the court. In a contempt proceeding before a superior court, if it is the Director who is seeking enforcement of a Part VIII order, the Director may, as the Attorney General of Canada may with s. 74, use the Tribunal's expertise. If the Tribunal brings the contempt motion, the Tribunal itself may provide assistance to the court as a party. Finally, the Tribunal may be able to seek and obtain the status of an intervenor in the criminal proceedings under s. 74 (by application, for example, of r. 2 of the *Ontario Supreme Court Rules Respecting Criminal Proceedings — Part I*, SI/85-152); on a motion for contempt to a superior court; or on a civil action under s. 36. For example, if the prosecution, action or motion is before the Ontario Court, General Division, a motion for leave to intervene simpliciter may be made under r. 13.01 or the Tribunal may seek leave to intervene as a "friend of the court" under r. 13.02, *Rules of Civil Procedure*, O. Reg. 560/84. See, for example, *Vachliotis v. Exodus Link Corp.* (1987), 23 C.P.C. (2d) 72 (Ont. Master) in which the City of Toronto was granted intervenor status where the interpretation of one of its zoning by-laws was at issue. Similarly, leave to intervene in the Federal Court may be available to a party such as the Tribunal under R. 1716 of the *Federal Court Rules*, C.R.C. 1978, c. 663. Given these options, it is clear that the Tribunal's expertise would not necessarily "go to waste" in the absence of power to directly enforce its final orders via a power over contempt ex facie.

86 In summary, I remain unpersuaded that the arguments advanced in support of the proposition that s. 8 confers on the Tribunal the power to convict and punish for contempt outside the presence of the Tribunal establish that the interpretation of the court below was wrong. On the contrary, the wording of s. 8 and the role of the Tribunal in the statutory scheme support the conclusion that Parliament did not intend to confer on the Tribunal the power to enforce its final orders by the general power to find and punish contempt outside its presence.

C. Section 96 of the Constitution Act, 1867

87 The respondent correctly noted in its factum that the court, should it choose to allow the appeals, would be called upon to determine whether Parliament is constitutionally empowered to enact s. 8 of the *Competition Act*. In other words, the court must ensure that Parliament has the competence, under ss. 96 to 101 of the *Constitution Act, 1867*, to confer superior court powers upon administrative appointees.

88 Neither of the appellants addressed this question in their written materials; the respondent makes only cursory reference to it in its factum. Nor did the Trial Division or the Court of Appeal below address this issue. This court heard only brief and generalized oral submissions on it. The dearth of materials before the court on such an important constitutional issue, coupled with the conclusion at which I have arrived on the main issue in these appeals, dictate a cautious approach, following the lead of Dickson J. in *C.B.C.*, supra. My remarks are accordingly brief.

89 Gonthier J. avoids the difficult s. 96 issue by using a more generous application of the third branch of the test set out by this court in *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158, than I would be inclined to adopt. In that case this court held that s. 96 constitutes no bar to vesting s. 96 judicial powers in an inferior tribunal *provided* three tests were met: (1) the power in question is broadly conformable to the powers of s. 96 courts at the time of Confederation; (2) the power is a "judicial power"; and (3) the power is "necessarily incidental" to the achievement of a broader policy objective by the government: see *Reference re Young Offenders Act (Canada)*, *(*sub nom. *Reference re Young Offenders Act (P.E.I.))* [1991] 1 S.C.R. 252, 89 Nfld. & P.E.I.R. 91, 278 A.P.R. 91, *(*sub nom. *Reference re Young Offenders Act & Youth Court Judges)* 121 N.R. 81, 77 D.L.R. (4th) 492, 62 C.C.C. (3d) 385, at pp. 276-277 [S.C.R.]. In essence, provinces are empowered to vest ancillary judicial powers formerly exercised by s. 96 courts (exclusively) so long as the judicial or quasi-judicial function bestowed is a necessary part of an otherwise valid administrative structure. Accepting, as my learned colleague does, that the power to punish for contempt outside the presence of the court is a s. 96 judicial power, the question is whether the grant of the power is "necessarily incidental" or "essential" to the functioning of the Tribunal. Gonthier J. so finds, concluding that "[o]nly a specialized tribunal such as the Tribunal can properly ensure the enforcement of the orders it makes" (p. 27) [p. 22, ante].

90 In my view, the record does not support such a broad and categorical conclusion. As already noted, the Act provides a variety of methods of enforcing the final orders of the Tribunal: see supra at pp. 20-21 [pp. 18-19, ante]. There is no evidence before us supporting the proposition that these methods are inadequate, much less that supplementing them with the power to punish for contempt outside the presence of the court is essential or necessarily incidental to the Tribunal's functioning. Nor has Parliament clearly said the power is necessary; the language relied on for the power is at best ambiguous and stands in sharp contrast to the express language in which the other methods of enforcement envisaged by Parliament are set out.

91 If the case cannot be brought within the *Residential Tenancies* analysis, the s. 96 question of whether empowering federally appointed members of the Competition Tribunal with jurisdiction to punish contempt outside the presence of the court must be met directly. This casts us into new waters, for the most part uncharted.

92 None of the governing authorities are particularly helpful. Neither *Re Residential Tenancies Act, 1979*, supra; *Re Court of Unified Criminal Jurisdiction*, *(*sub nom. *McEvoy v. New Brunswick (Attorney General))* [1983] 1 S.C.R. 704, 46 N.B.R. (2d) 219, 121 A.P.R. 219, 48 N.R. 228, 4 C.C.C. (3d) 289; *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, 25 C.C.E.L. 162, 89 C.L.L.C. 14,017, 92 N.R. 179, 57 D.L.R. (4th) 1, 90 N.S.R. (2d) 271, 230 A.P.R. 271, nor *Reference re Young Offenders Act (P.E.I.)*, supra, assess whether the focus of ss. 96 to 101 is the protection of the *federal* executive's exclusive right to control and supervise persons exercising the "core jurisdiction" of a superior court of record, *or* whether the focus of ss. 96 to 101 is the broader principle that statutory bodies, *both provincial and federal*, should not be allowed to usurp the "judicial" function reserved to those (special) bodies accorded the general jurisdiction of a superior court of record. The absence of a focused argument, coupled with the absence of judicial consideration of this issue in the courts below as well as in the authorities cited supra, militates against any pronouncement by the court on this question of fundamental constitutional significance. Fortunately,

my conclusion on the primary ground of appeal herein provides me with the option of waiting for another day to address this important issue. In the circumstances, I believe it wise to exercise this option.

Disposition

93 I would dismiss the appeals and affirm the decision of the court below.

Appeal allowed.

Footnotes

* Stevenson J. took no part in the judgment.

** On July 17, 1992, the court issued amendments to the text of the judgment, which have been incorporated herein.

TAB 4

2020 CarswellOnt 19896
Ontario Superior Court of Justice [Commercial List]

Crystallex International Corp., Re

2020 CarswellOnt 19896

In the Matter of Crystallex International Corporation

Hainey J.

Judgment: August 31, 2020
Docket: CV-11-9532-00CL

Counsel: Counsel — not provided

***Hainey J.*:**

1 On June 8, 2020, I dismissed Crystallex's Motion for a Sealing Order.

2 In my endorsement I referred to certain redactions that the Monitor had suggested should be made to its 33rd Report if I did not grant the full sealing order requested by Crystallex.

3 I invited parties to make full submissions with respect to the Monitor's proposed redactions which I indicated made "sense to me".

4 I apologize to the parties for taking so long to consider those additional submissions and finalize my endorsement.

5 Having carefully considered the additional submission and the supplementary affidavit of Mr. Fung, I continue to be of the view that the Monitor's proposed redactions make good sense under the circumstances and constitute a fair and reasonable balance between the protection of Crystallex.s important commercial interest and public disclosure in keeping with the open-court principle.

6 The Monitor.s 33rd Report shall be redacted in accordance with the Monitor.s proposed redaction.

TAB 5

Jake Friesen *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: FRIESEN *v.* CANADA

File No.: 23922.

1995: March 1; 1995: September 21.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Income tax — Deductions — Taxpayer purchasing parcel of raw land for resale at profit — Taxpayer engaged in adventure in the nature of trade — Land declining in value in subsequent years — Taxpayer claiming decline in fair market value of land as business loss in taxation years prior to its sale — Whether taxpayer entitled to make use of valuation scheme in s. 10(1) of Income Tax Act — Meaning of "business" and "inventory" — Income Tax Act, S.C. 1970-71-72, c. 63, ss. 9, 10(1), 248(1) "business", "inventory" — Income Tax Regulations, C.R.C. 1978, c. 945, s. 1801.

In 1982, the appellant and several others bought a parcel of land for the purpose of reselling it at a profit. In the years immediately following its acquisition, the property substantially decreased in value and was eventually foreclosed in 1986. The appellant, relying on ss. 248(1), 10(1), 9 and Regulation 1801 of the *Income Tax Act*, sought to deduct the decline in the fair market value of the land as a business loss in his 1983 and 1984 tax returns. The appellant argued that he was entitled to make such deductions because s. 10(1) permits the use of such a valuation scheme should the initiative to purchase the land be deemed a "business" and should the land be defined as "inventory". The Minister of National Revenue disallowed these business losses on the basis that the property was not "inventory in a business" within the meaning of ss. 10(1) and 248(1). The taxpayer appealed and both the Federal Court, Trial

Jake Friesen *Appelant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: FRIESEN *c.* CANADA

N° du greffe: 23922.

1995: 1er mars; 1995: 21 septembre.

Présents: Les juges L'Heureux-Dubé, Sopinka, Gonthier, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Impôt sur le revenu — Déductions — Contribuable achetant un terrain vierge dans le but de le revendre avec bénéfice — Contribuable engagé dans un projet comportant un risque de caractère commercial — Baisse de valeur du terrain au cours des années subséquentes — Contribuable déduisant la diminution de la juste valeur marchande du terrain à titre de perte d'entreprise pour les années d'imposition antérieures à sa vente — Le contribuable peut-il recourir au régime d'évaluation établi à l'art. 10(1) de la Loi de l'impôt sur le revenu? — Sens des termes «entreprise» ou «affaire» et «inventaire» — Loi de l'impôt sur le revenu, S.C. 1970-71-72, ch. 63, art. 9, 10(1), 248(1) «entreprise» ou «affaire», «inventaire» — Règlement de l'impôt sur le revenu, C.R.C. 1978, ch. 945, art. 1801.

En 1982, l'appelant a acheté avec plusieurs autres personnes un terrain dans le but de le revendre avec bénéfice. Pendant les années qui ont suivi immédiatement son acquisition, le terrain a subi une perte de valeur importante, et a fini par être repris par le créancier hypothécaire en 1986. Invoquant les par. 248(1) et 10(1) et l'art. 9 de la *Loi de l'impôt sur le revenu*, ainsi que l'art. 1801 du *Règlement de l'impôt sur le revenu*, l'appelant a demandé la déduction de la diminution de la juste valeur marchande du terrain à titre de perte d'entreprise dans ses déclarations de revenus de 1983 et 1984. L'appelant a soutenu qu'il avait le droit de faire ces déductions parce que le par. 10(1) permet de recourir à ce régime d'évaluation dans le cas où l'achat du terrain est réputé être une «entreprise» et où le terrain est défini comme un bien figurant dans un «inventaire». Le ministre du Revenu national a refusé d'admettre ces pertes d'entreprise pour le motif que le bien ne figurait pas dans «l'inventaire d'une entreprise» au sens des par. 10(1) et 248(1). Le contribuable a interjeté appel et tant la Cour fédérale, Section de première instance, que la

Division and the Federal Court of Appeal upheld the Minister's disallowance of the losses.

Held (Gonthier and Iacobucci JJ. dissenting): The appeal should be allowed.

Per L'Heureux-Dubé, Sopinka and Major JJ.: In interpreting sections of the *Income Tax Act*, the correct approach is to apply the plain meaning rule. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, it must be applied. Here, on a plain reading of the relevant sections of the Act, the appellant was entitled to make use of the inventory valuation method in s. 10(1) in order to recognize a business loss on the property in the 1983 and 1984 taxation years.

Section 10(1) requires a taxpayer who computes income from a "business" to value the "inventory" at the lower of cost or market value or as permitted by regulation. The definition of "business" in s. 248(1) of the *Income Tax Act* specifically includes an adventure in the nature of trade. The appellant's venture is thus a "business" pursuant to that definition since it meets the judicially established test for an adventure in the nature of trade — namely, that the taxpayer has a trading or business intention with respect to the property. Indeed, the factual record reveals a legitimate "scheme for profit-making" with respect to the property.

The property is also "inventory" pursuant to the definition in s. 248(1). Under that definition, an item of property is not required to contribute directly to income in each taxation year in order to qualify as inventory. Provided that the cost or value of an item of property is relevant in computing business income in a year, that property will qualify as inventory. As a general principle, items of property sold by a business venture will always be relevant to the computation of income in the year of sale. The property at issue is therefore correctly categorized as "inventory" for the purposes of the *Income Tax Act*, both in the taxation year of disposition and in preceding years, because its cost or value is relevant to the computation of business income in a taxation year. The plain meaning of the definition of "inventory" in s. 248(1) is consistent with the commonly understood definition of the term and also reflects the definition of inventory which is accepted according to ordinary prin-

Cour d'appel fédérale ont maintenu le refus du Ministre d'admettre ces pertes.

Arrêt (les juges Gonthier et Iacobucci sont dissidents): Le pourvoi est accueilli.

Les juges L'Heureux-Dubé, Sopinka et Major: Pour interpréter les dispositions de la *Loi de l'impôt sur le revenu*, il convient d'appliquer la règle du sens ordinaire. Lorsqu'une disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée. En l'espèce, suivant le sens ordinaire des dispositions pertinentes de la Loi, l'appelant avait le droit de recourir à la méthode d'évaluation des biens figurant dans un inventaire, prévue au par. 10(1), pour déclarer une perte d'entreprise à l'égard du terrain pour les années d'imposition 1983 et 1984.

Le paragraphe 10(1) oblige le contribuable, lors du calcul de son retenu tiré d'une «entreprise», à évaluer les biens figurant dans l'«inventaire» au moindre de leur coût et de leur valeur marchande, ou d'une autre façon permise par les règlements. La définition du mot «entreprise», au par. 248(1) de la *Loi de l'impôt sur le revenu*, inclut expressément un projet comportant un risque de caractère commercial. Le projet de l'appelant est donc une «entreprise» au sens de cette définition puisqu'il satisfait au critère établi par les tribunaux pour déterminer s'il s'agit d'un projet comportant un risque de caractère commercial, à savoir que le contribuable a une intention commerciale à l'égard du bien. Les faits consignés au dossier révèlent en effet la présence d'un «plan [légitime] visant la réalisation d'un bénéfice» à l'égard du terrain.

Le terrain est également un bien figurant dans un «inventaire» au sens de la définition donnée au par. 248(1). Selon cette définition, il n'est pas nécessaire qu'un bien contribue directement au revenu pour une année d'imposition pour pouvoir être considéré comme un bien figurant dans un inventaire. Il suffit que le coût ou la valeur d'un bien entre dans le calcul du revenu d'entreprise pour une année, pour que ce bien fasse partie des biens figurant dans un inventaire. En règle générale, les biens vendus par une entreprise commerciale entrent toujours dans le calcul du revenu pour l'année de la vente. C'est donc à juste titre que le terrain en question est classé comme un bien figurant dans un «inventaire» aux fins de la *Loi de l'impôt sur le revenu*, à la fois pour l'année d'imposition au cours de laquelle il a été aliéné, et pour les années antérieures, parce que son coût ou sa valeur entre dans le calcul du revenu d'entreprise pour une année d'imposition. Le sens ordinaire de

ciples of commercial accounting and of business. While the express wording of the *Income Tax Act* is capable of overruling these principles where it is sufficiently explicit, a court should be cautious to adopt an interpretation which is clearly inconsistent with the commonly accepted usage of a technical term particularly where an interpretation consistent with common usage is more natural on a plain reading of the definition.

Under s. 9 of the *Income Tax Act*, the determination of profit is a question of law to be determined according to the business test of well-accepted principles of commercial or accounting practice, except where these are inconsistent with the specific provisions of the Act. Since these principles establish that the value of inventory is relevant to the calculation of business income because it contributes to the cost of sale, the appellant was entitled to use the valuation scheme set out in s. 10(1). This section recognizes the well-accepted commercial and accounting principle of requiring a business to value its inventory at the lower of cost or market value. This specific legislated exception to the principle of realization is well accepted in the valuation of real estate inventory. Section 10(1) also represents an exception to the principles of matching and symmetry. The underlying rationale for the s. 10(1) exception to the general principles is usually explained as originating in the principle of conservatism. Moreover, s. 10(1) is not a mere codification of the common law as it existed in 1948 when the provision first appeared in the *Income Tax Act*. While the common law rule was restricted to stock-in-traders, s. 10(1) explicitly states that it applies to the inventory of a "business". Since the word "business" in the Act specifically includes adventures in the nature of trade, to confine the scope of s. 10(1) to stock-in-traders would place a judicial limit on the clear and unambiguous wording of the section. As well, if Parliament had intended to restrict the ambit of s. 10(1) to taxpayers which "carry on a business" it would have done so. Lastly, policy considerations cannot serve to override the explicit wording of s. 10(1). In sum, the plain reading of this section allows single items of inventory held as part of an adventure in the nature of trade to utilize the inventory valuation method contained therein. This conclusion is consistent with the basic dichotomy

la définition du mot «inventaire», donnée au par. 248(1), est compatible avec le sens que l'on donne habituellement à la définition du terme et reflète aussi la définition du terme «inventaire» qui est acceptée selon les principes comptables et commerciaux ordinaires. Bien qu'une disposition expresse de la *Loi de l'impôt sur le revenu* puisse l'emporter sur ces principes si elle est suffisamment explicite, une cour ne devrait adopter qu'avec prudence une interprétation manifestement incompatible avec l'usage généralement accepté d'un terme technique, particulièrement lorsque, selon le sens ordinaire de la définition, l'interprétation conforme à l'usage courant est plus naturelle.

En vertu de l'art. 9 de la *Loi de l'impôt sur le revenu*, la détermination du bénéfice est une question de droit qui doit être tranchée selon le critère des principes reconnus de la pratique commerciale ou comptable, sauf lorsque ceux-ci sont incompatibles avec les dispositions expresses de la Loi. Puisque ces principes établissent que la valeur des biens figurant dans un inventaire entre dans le calcul du revenu d'entreprise parce qu'elle contribue au coût des ventes, l'appelant avait le droit de recourir à la méthode d'évaluation établie au par. 10(1). Cette disposition sanctionne le principe commercial et comptable reconnu, selon lequel une entreprise doit évaluer les biens figurant dans son inventaire au moindre de leur coût et de leur valeur marchande. Cette exception particulière, d'origine législative, au principe de réalisation est reconnue dans l'évaluation de biens immeubles figurant dans un inventaire. Le paragraphe 10(1) représente également une exception aux principes de rattachement et de symétrie. La raison d'être de l'exception que constitue le par. 10(1) aux principes généraux est habituellement rattachée au principe de prudence. En outre, le par. 10(1) n'est pas qu'une codification de la common law telle qu'elle existait en 1948 lorsque cette disposition est apparue pour la première fois dans la *Loi de l'impôt sur le revenu*. Alors que la règle de common law ne s'appliquait qu'aux marchands d'articles de commerce, le par. 10(1) précise qu'il s'applique aux biens figurant dans l'inventaire d'une «entreprise». Puisque le mot «entreprise», utilisé dans la Loi, désigne expressément les projets comportant un risque de caractère commercial, restreindre le champ d'application du par. 10(1) aux marchands d'articles de commerce imposerait une limite judiciaire au texte clair et net de cette disposition. De même, si le législateur avait voulu restreindre la portée du par. 10(1) aux seuls contribuables qui «exploitent une entreprise», il l'aurait fait. Enfin, des considérations de politique générale ne peuvent servir à annuler le libellé explicite du par. 10(1). Bref, selon son sens ordinaire, ce paragraphe permet qu'on emploie à l'égard

in the Act between income and capital and the different schemes for taxing each of these.

Per Gonthier and Iacobucci JJ. (dissenting): The appellant cannot benefit from the application of the valuation scheme established by s. 10(1) of the *Income Tax Act* to deduct as a business loss in 1983 and 1984 the decline in the fair market value of the property. While the appellant's real estate purchase was an adventure in the nature of trade and, consequently, a "business" under s. 248(1) of the Act, he is not the kind of businessperson intended to be covered by s. 10(1) and, furthermore, the property is not "inventory" under s. 248(1) for the taxation years in question.

Neither s. 10(1) nor Regulation 1801 provides a deduction from income, nor do they mandate that any person with inventory can deduct any loss on fair market value arising therefrom. They simply give some direction as to how the valuation procedure should take place once ordinary commercial principles establish whether a business loss should be claimed under s. 9 of the *Income Tax Act*. The key taxation principle relevant to this case is the realization principle, which provides that, in the computation of income from an adventure in the nature of trade, gains or losses must be realized in order for them to be included in the computation of income for tax purposes. This principle is subject to an exception in the case of stock-in-trade, an exception which is codified in s. 10(1). Such stock-in-trade can be valuated at the lower of cost and fair market value and, consequently, a dealer therein can recognize as a loss the decline in the market value of its inventory in the year in which this decline occurs. The commercial principles and jurisprudential authority underpinning the *Income Tax Act*, however, do not recognize that this exception should operate for unsold single pieces of land alleged to be inventory that are held by adventurers in trade. The situation of dealers in stock-in-trade is markedly different from that faced by a business adventurer such as the appellant. The former are engaged in the "carrying on of a business", regularly purchasing hundreds of goods which are quickly sold. Since it is not practicable for them to determine their profit by looking at each individual item sold, an averaging formula is used. By contrast, the appellant has launched a single adventure and the profit/loss from the property is readily ascertainable in the year of disposition. While s. 10(1) applies to a business which includes an adventure in the

d'un bien unique figurant dans un inventaire, qui est détenu dans le cadre d'un projet comportant un risque de caractère commercial, la méthode d'évaluation des biens figurant dans un inventaire qui y est prévue. Cette conclusion est compatible avec la dichotomie fondamentale que la Loi établit entre le revenu et le capital, et avec leurs régimes d'imposition respectifs.

Les juges Gonthier et Iacobucci (dissidents): L'appelant ne saurait bénéficier du régime d'évaluation établi par le par. 10(1) de la *Loi de l'impôt sur le revenu* pour déduire à titre de perte d'entreprise la diminution de la juste valeur marchande du bien pour les années 1983 et 1984. Bien que l'acquisition immobilière de l'appelant fût un projet comportant un risque de caractère commercial et, par conséquent, une «entreprise» au sens du par. 248(1) de la Loi, il n'est pas le genre d'homme d'affaires que le par. 10(1) est destiné à viser et, de plus, le bien n'est pas un bien figurant dans un «inventaire», au sens du par. 248(1), pour les années d'imposition en question.

Ni le par. 10(1) de la Loi ni l'art. 1801 du Règlement ne prévoient la déduction du revenu, ni n'édictent qu'une personne ayant un inventaire peut déduire une perte relative à la juste valeur marchande en découlant. Ces dispositions ne font que donner des indications sur la façon dont l'évaluation devrait être faite, une fois qu'il a été établi en vertu des principes commerciaux ordinaires qu'une perte d'entreprise devrait être déclarée en vertu de l'art. 9 de la *Loi de l'impôt sur le revenu*. Le principe fiscal clé s'appliquant en l'espèce est le principe de réalisation qui prévoit que, dans le calcul du revenu d'un projet comportant un risque de caractère commercial, les gains et les pertes doivent être réalisés pour pouvoir être inclus dans le calcul du revenu aux fins de l'impôt. Ce principe souffre une exception dans le cas des articles de commerce, une exception qui est codifiée au par. 10(1). Ces articles de commerce peuvent être évalués selon la méthode d'évaluation au moindre du coût et de la juste valeur marchande et, par conséquent, la personne qui en fait le commerce peut reconnaître comme perte la diminution de la valeur des biens figurant dans son inventaire, pendant l'année où cette diminution a lieu. Toutefois, les principes commerciaux et la jurisprudence qui sous-tendent la *Loi de l'impôt sur le revenu* ne reconnaissent pas que cette exception au principe de réalisation devrait s'appliquer dans le cas de terrains uniques non vendus, qui sont détenus par des spéculateurs et qui, allègue-t-on, constituent des biens figurant dans un inventaire. La situation du marchand d'articles de commerce est nettement différente de celle d'un spéculateur comme l'appelant. Ces marchands «exploitent une entreprise», achetant régulièrement des centaines de biens qui sont rapidement vendus. Parce qu'il ne leur est pas possible de calculer leur béné-

nature of trade, only persons who "carry on a business" ought to be entitled to benefit from that section. Adventurers do not "carry on" a business and there is no need to extend the reach of s. 10(1) to that group. An interpretation which would entitle the appellant to make use of the inventory valuation method would undermine the matching principle underpinning s. 9 and the broad principles of symmetry. Moreover, and most importantly in this case, the applicable method of accounting within the taxation context should be that which best reflects the taxpayer's true income position. In the case of an adventurer such as the appellant, who is not carrying on business, and who has made no disposition, it is not appropriate to determine profit using the inventory valuation method. His income position is best reflected by not declaring the decline in the fair market value of the property as a business loss in 1983 and 1984, but instead waiting until the year of disposition to enter any such losses, in this case 1986.

As well, the land is not inventory for the 1983 and 1984 taxation years under the *Income Tax Act*'s definition in s. 248(1). The key element of that definition is that the property, in order to be properly classified as "inventory", must have a cost or value which, in the particular taxation year in question, bears some relevance to the amount of the taxpayer's income (profit or loss) for that particular year. Here, since the land was not involved in any transaction in 1983 and 1984, it bears no relation whatsoever to the appellant's income in the taxation years in question. The appellant should be able to claim, under the ordinary tracing formula (proceeds less the purchase cost), the drop in the value of the land in the year in which the property is disposed of, but not in years where the property remains dormant.

Cases Cited

By Major J.

Followed: *Bailey v. M.N.R.*, 90 D.T.C. 1321; *Weatherhead v. M.N.R.*, [1990] 1 C.T.C. 2579; *Van Dongen v. The Queen*, 90 D.T.C. 6633; *Skerrett v. M.N.R.*, 91 D.T.C. 1330; *Cull v. The Queen*, 87 D.T.C. 5322; **not followed:** *Canada v. Dresden Farm Equip-*

fice à partir de chaque article vendu, une formule d'étalement est utilisée. Par contre, l'appelant ne s'est engagé que dans un seul projet et le bénéfice ou la perte se rapportant au terrain est facilement vérifiable pendant l'année où il est aliéné. Bien que le par. 10(1) s'applique à une entreprise qui inclut un projet comportant un risque de caractère commercial, seules les personnes qui «exploitent une entreprise» devraient pouvoir se prévaloir de cette disposition. Les spéculateurs n'«exploitent» pas une entreprise et il n'est pas nécessaire d'étendre la portée du par. 10(1) à ce groupe. Une interprétation qui permettrait à l'appelant de recourir à la méthode d'évaluation des biens figurant dans un inventaire minerait le principe de rattachement qui sous-tend l'art. 9 et les principes généraux de symétrie. En outre, et qui plus est en l'espèce, aux fins de l'impôt, la méthode comptable applicable devrait être celle qui reflète le mieux la situation véritable du contribuable sur le plan de ses revenus. Dans le cas d'un spéculateur comme l'appelant, qui n'exploite pas une entreprise et qui n'a fait aucune aliénation, il ne convient pas de calculer le bénéfice au moyen de la méthode d'évaluation des biens figurant dans un inventaire. La meilleure façon de présenter la situation de l'appelant quant à ses revenus consiste non pas à déduire la diminution de la juste valeur marchande du terrain à titre de perte d'entreprise en 1983 et 1984, mais plutôt à attendre l'année de l'aliénation, soit 1986, pour inscrire toute perte de cette nature.

De même, le terrain n'est pas, pour les années d'imposition 1983 et 1984, un bien figurant dans un inventaire, au sens de la définition donnée au par. 248(1) de la *Loi de l'impôt sur le revenu*. L'élément clé de cette définition est que le bien, pour pouvoir être qualifié à bon droit de bien figurant dans un «inventaire», doit avoir un coût ou une valeur qui, durant l'année d'imposition en cause, a une incidence sur le revenu du contribuable (bénéfice ou perte) pour cette année. En l'espèce, puisque le terrain n'a fait l'objet d'aucune opération en 1983 et en 1984, il n'a pas la moindre incidence sur le revenu de l'appelant pour les années d'imposition en question. L'appelant devrait être capable de réclamer, en vertu de la formule d'identification ordinaire (produit moins coût d'acquisition), la diminution de la valeur du terrain pendant l'année de l'aliénation du bien, mais pas durant les années où le bien ne fait l'objet d'aucune opération.

Jurisprudence

Citée par le juge Major

Arrêts suivis: *Bailey c. M.R.N.*, 90 D.T.C. 1321; *Weatherhead c. M.R.N.*, [1990] 1 C.T.C. 2579; *Van Dongen c. La Reine*, 90 D.T.C. 6633; *Skerrett c. M.R.N.*, 91 D.T.C. 1330; *Cull c. La Reine*, 87 D.T.C. 5322; **arrêt non suivi:** *Canada c. Dresden Farm Equipment Ltd.*,

ment Ltd., [1989] 1 C.T.C. 99; **referred to:** *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Canada v. Antosko*, [1994] 2 S.C.R. 312; *Californian Copper Syndicate v. Harris* (1904), 5 T.C. 159; *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662; *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309; *Neonex International Ltd. v. The Queen*, 78 D.T.C. 6339; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Ostime v. Duple Motor Bodies, Ltd.*, [1961] 2 All E.R. 167; *Minister of National Revenue v. Anaconda American Brass Ltd.*, [1956] A.C. 85; *Whimster & Co. v. Inland Revenue Commissioners* (1925), 12 T.C. 813; *BSC Footwear Ltd. v. Ridgway*, [1971] 2 All E.R. 534; *Minister of National Revenue v. Consolidated Glass Ltd.*, [1957] S.C.R. 167.

By Iacobucci J. (dissenting)

Bailey v. M.N.R., 90 D.T.C. 1321; *Van Dongen v. The Queen*, 90 D.T.C. 6633; *Weatherhead v. M.N.R.*, [1990] 1 C.T.C. 2579; *Skerrett v. M.N.R.*, 91 D.T.C. 1330; *Minister of National Revenue v. Shofar Investment Corp.*, [1980] 1 S.C.R. 350; *Californian Copper Syndicate v. Harris* (1904), 5 T.C. 159; *Edwards v. Bairstow*, [1956] A.C. 14; *Irrigation Industries Ltd. v. Minister of National Revenue*, [1962] S.C.R. 346; *Regal Heights Ltd. v. Minister of National Revenue*, [1960] S.C.R. 902; *The Queen v. Cyprus Anvil Mining Corp.*, 90 D.T.C. 6063; *Daley v. M.N.R.*, [1950] C.T.C. 254; *Dominion Taxicab Association v. Minister of National Revenue*, [1954] S.C.R. 82; *Friedberg v. Canada*, [1993] 4 S.C.R. 285; *Minister of National Revenue v. Consolidated Glass Ltd.*, [1957] S.C.R. 167; *Whimster & Co. v. Inland Revenue Commissioners* (1925), 12 T.C. 813; *BSC Footwear Ltd. v. Ridgway*, [1971] 2 All E.R. 534; *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662; *Oryx Realty Corp. v. Minister of National Revenue*, [1974] 2 F.C. 44; *Tara Exploration and Development Co. v. M.N.R.*, 70 D.T.C. 6370, aff'd [1974] S.C.R. 1057; *Neonex International Ltd. v. The Queen*, 78 D.T.C. 6339; *West Kootenay Power and Light Co. v. Canada*, [1992] 1 F.C. 732; *Tobias v. The Queen*, 78 D.T.C. 6028; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Ken Steeves Sales Ltd. v. M.N.R.*, 55 D.T.C. 1044; *M.N.R. v. Publishers Guild of Canada Ltd.*, 57 D.T.C. 1017; *Associated Investors of Canada Ltd. v. M.N.R.*, 67 D.T.C. 5096; *Maritime Telegraph and Telephone Co. v. The Queen*, 91 D.T.C. 5038.

Statutes and Regulations Cited

Income Tax Act, S.C. 1970-71-72, c. 63, ss. 3, 5, 9, 10, 13(7), 18(2), 38, 39, 41, 45(1), 48 [rep. 1994, c. 21, s. 19], 54(*b*), 54.2, 63(3)(*c*), 70, 110.6(4)(*f*), 111, 127.2(6)(*a*), 127.3(2)(*a*), 248(1) "appropriate percent-

[1989] 1 C.T.C. 99; **arrêts mentionnés:** *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536; *Canada c. Antosko*, [1994] 2 R.C.S. 312; *Californian Copper Syndicate c. Harris* (1904), 5 T.C. 159; *Minister of National Revenue c. Irwin*, [1964] R.C.S. 662; *Gresham Life Assurance Society c. Styles*, [1892] A.C. 309; *Neonex International Ltd. c. La Reine*, 78 D.T.C. 6339; *Symes c. Canada*, [1993] 4 R.C.S. 695; *Ostime c. Duple Motor Bodies, Ltd.*, [1961] 2 All E.R. 167; *Minister of National Revenue c. Anaconda American Brass Ltd.*, [1956] A.C. 85; *Whimster & Co. c. Inland Revenue Commissioners* (1925), 12 T.C. 813; *BSC Footwear Ltd. c. Ridgway*, [1971] 2 All E.R. 534; *Minister of National Revenue c. Consolidated Glass Ltd.*, [1957] R.C.S. 167.

Citée par le juge Iacobucci (dissident)

Bailey c. M.R.N., 90 D.T.C. 1321; *Van Dongen c. La Reine*, 90 D.T.C. 6633; *Weatherhead c. M.R.N.*, [1990] 1 C.T.C. 2579; *Skerrett c. M.R.N.*, 91 D.T.C. 1330; *Ministre du Revenu national c. Shofar Investment Corp.*, [1980] 1 R.C.S. 350; *Californian Copper Syndicate c. Harris* (1904), 5 T.C. 159; *Edwards c. Bairstow*, [1956] A.C. 14; *Irrigation Industries Ltd. c. Minister of National Revenue*, [1962] R.C.S. 346; *Regal Heights Ltd. c. Minister of National Revenue*, [1960] R.C.S. 902; *La Reine c. Cyprus Anvil Mining Corp.*, 90 D.T.C. 6063; *Daley c. M.N.R.*, [1950] C.T.C. 254; *Dominion Taxicab Association c. Minister of National Revenue*, [1954] R.C.S. 82; *Friedberg c. Canada*, [1993] 4 R.C.S. 285; *Minister of National Revenue c. Consolidated Glass Ltd.*, [1957] R.C.S. 167; *Whimster & Co. c. Inland Revenue Commissioners* (1925), 12 T.C. 813; *BSC Footwear Ltd. c. Ridgway*, [1971] 2 All E.R. 534; *Minister of National Revenue c. Irwin*, [1964] R.C.S. 662; *Oryx Realty Corp. c. Ministre du Revenu national*, [1974] 2 C.F. 44; *Tara Exploration and Development Co. c. M.R.N.*, 70 D.T.C. 6370, conf. par [1974] R.C.S. 1057; *Neonex International Ltd. c. La Reine*, 78 D.T.C. 6339; *West Kootenay Power and Light Co. c. Canada*, [1992] 1 C.F. 732; *Tobias c. La Reine*, 78 D.T.C. 6028; *Symes c. Canada*, [1993] 4 R.C.S. 695; *Ken Steeves Sales Ltd. c. M.N.R.*, 55 D.T.C. 1044; *M.N.R. c. Publishers Guild of Canada Ltd.*, 57 D.T.C. 1017; *Associated Investors of Canada Ltd. c. M.N.R.*, 67 D.T.C. 5096; *Maritime Telegraph and Telephone Co. c. La Reine*, 91 D.T.C. 5038.

Lois et règlements cités

Loi de l'impôt sur le revenu, S.C. 1970-71-72, ch. 63, art. 3, 5, 9, 10, 13(7), 18(2), 38, 39, 41, 45(1), 48 [abr. 1994, ch. 21, art. 19], 54*b*), 54.2, 63(3)*c*), 70, 110.6(4)*f*), 111, 127.2(6)*a*), 127.3(2)*a*), 248(1) «taux

age", "balance-due day", "business" [rep. & sub. 1979, c. 5, s. 66(3)], "gross revenue", "inventory", 253.

Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), s. 95(1).

Income Tax Regulations, C.R.C. 1978, c. 945, s. 1801.

Income Tax Regulations, amendment, SOR/89-419.

de base pour l'année», «date d'exigibilité du solde», «entreprise» ou «affaire» [abr. & rempl. 1979, ch. 5, art. 66(3)], «revenu brut», «inventaire», 253.

Loi de l'impôt sur le revenu, L.R.C. (1985), ch. 1 (5e suppl.), art. 95(1).

Règlement de l'impôt sur le revenu, C.R.C. 1978, ch. 945, art. 1801.

Règlement de l'impôt sur le revenu — Modification, DORS/89-419.

Authors Cited

Arnold, Brian J. *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes*. Toronto: Canadian Tax Foundation, 1983.

Arnold, Brian J., Tim Edgar and Jinyan Li, eds. *Materials on Canadian Income Tax*, 10th ed. Scarborough, Ont.: Carswell, 1993.

Canada. Department of National Revenue. Taxation. Interpretation Bulletin IT-218, "Profit from the Sale of Real Estate", May 26, 1975.

Canada. Department of National Revenue. Taxation. Interpretation Bulletin IT-218R, "Profit, Capital Gains and Losses from the Sale of Real Estate, Including Farmland and Inherited Land and Conversion of Real Estate from Capital Property to Inventory and Vice Versa", September 16, 1986.

Canada. Department of National Revenue. Taxation. Interpretation Bulletin IT-459, "Adventure or Concern in the Nature of Trade", September 8, 1980.

Canada. Department of National Revenue. Taxation. Interpretation Bulletin IT-473, "Inventory Valuation", March 17, 1981 (revised December 5, 1986).

Canada. Royal Commission on Taxation. *Report of the Royal Commission on Taxation*, vol. 3. Ottawa: Queen's Printer, 1966.

Canadian Institute of Chartered Accountants. *Terminology for Accountants*, 3rd ed. Toronto: Canadian Institute of Chartered Accountants, 1983.

Canadian Institute of Public Real Estate Companies. *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies*, November 1985.

Canadian Institute of Public Real Estate Companies. CIPREC Handbook, September 1990.

Harris, Edwin C. *Canadian Income Taxation*. Toronto: Butterworths, 1979.

Hogg, Peter W., and Joanne E. Magee. *Principles of Canadian Income Tax Law*. Scarborough, Ont.: Carswell, 1995.

Doctrine citée

Arnold, Brian J. *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes*. Toronto: Association canadienne d'études fiscales, 1983.

Arnold, Brian J., Tim Edgar and Jinyan Li, eds. *Materials on Canadian Income Tax*, 10th ed. Scarborough, Ont.: Carswell, 1993.

Canada. Commission royale d'enquête sur la fiscalité. *Rapport de la Commission royale d'enquête sur la fiscalité*, t. 3. Ottawa: Imprimeur de la Reine, 1966.

Canada. Ministère du Revenu national. Impôt. Bulletin d'interprétation IT-218, «Profits sur la vente de biens immeubles», 26 mai 1975.

Canada. Ministère du Revenu national. Impôt. Bulletin d'interprétation IT-218R, «Bénéfices, gains en capital et pertes provenant de la vente de biens immeubles, y compris les terres agricoles et les terres transmises par décès et la conversion de biens immeubles qui sont des biens en immobilisation en biens figurant dans un inventaire et vice versa», 16 septembre 1986.

Canada. Ministère du Revenu national. Impôt. Bulletin d'interprétation IT-459, «Projet comportant un risque ou une affaire de caractère commercial», 8 septembre 1980.

Canada. Ministère du Revenu national. Impôt. Bulletin d'interprétation IT-473, «Évaluation des biens figurant dans un inventaire», 17 mars 1981 (révisé le 5 décembre 1986).

Canadian Institute of Chartered Accountants. *Terminology for Accountants*, 3rd ed. Toronto: Canadian Institute of Chartered Accountants, 1983.

Canadian Institute of Public Real Estate Companies. *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies*, November 1985.

Canadian Institute of Public Real Estate Companies. CIPREC Handbook, September 1990.

Harris, Edwin C. *Canadian Income Taxation*. Toronto: Butterworths, 1979.

Huot, René. *Understanding Income Tax for Practitioners* (1994-95 edition). Scarborough, Ont.: Carswell, 1994.

Kieso, Donald E., and Jerry J. Weygandt. *Intermediate Accounting*, 2nd Canadian ed. Prepared by V. Bruce Irvine and W. Harold Silvester. Toronto: John Wiley & Sons Canada Ltd., 1986.

Krishna, Vern. *The Fundamentals of Canadian Income Tax*, 4th ed. Scarborough, Ont.: Carswell, 1993.

APPEAL from a judgment of the Federal Court of Appeal, [1993] 3 F.C. 607, 93 D.T.C. 5313, [1993] 2 C.T.C. 113, 156 N.R. 199, affirming a judgment of the Trial Division, [1992] 2 F.C. 552, 92 D.T.C. 6248, [1992] 1 C.T.C. 296, 53 F.T.R. 49, upholding the Minister of National Revenue's decision to disallow the appellant's claim. Appeal allowed, Gonthier and Iacobucci JJ. dissenting.

Craig C. Sturrock, for the appellant.

Roger E. Taylor and *Al Meghji*, for the respondent.

The judgment of L'Heureux-Dubé, Sopinka and Major JJ. was delivered by

MAJOR J. —

I. Background

1 As set out in greater detail in the reasons of my colleague Iacobucci J., the appellant was a participant in an adventure in the nature of trade involving a piece of Calgary real estate known as the "Styles Property". The Styles Property was acquired for the sole purpose of reselling it at a profit. The anticipated profit was to be split between a charitable donation to Trinity Western College and other organizations and the investors in their personal capacity. Contrary to the expectations of the investors, real estate prices fell instead of rising.

2 The appellant claimed business losses on his 1983 and 1984 tax returns relying on s. 10(1) of

Hogg, Peter W., and Joanne E. Magee. *Principles of Canadian Income Tax Law*. Scarborough, Ont.: Carswell, 1995.

Huot, René. *Cours d'impôt* (édition 1994-95). Sainte-Julie, Qué.: Thourene Ltée, 1994.

Kieso, Donald E., et autres. *Comptabilité intermédiaire*. Version française de l'édition canadienne de *Intermediate Accounting* préparée par Louis Ménard et Nadi Chlala. Montréal: Éditions du Renouveau Pédagogique Inc., 1991.

Krishna, Vern. *The Fundamentals of Canadian Income Tax*, 4th ed. Scarborough, Ont.: Carswell, 1993.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1993] 3 C.F. 607, 93 D.T.C. 5313, [1993] 2 C.T.C. 113, 156 N.R. 199, qui a confirmé un jugement de la Section de première instance, [1992] 2 C.F. 552, 92 D.T.C. 6248, [1992] 1 C.T.C. 296, 53 F.T.R. 49, qui avait maintenu la décision du ministre du Revenu national de refuser la déduction de l'appelant. Pourvoi accueilli, les juges Gonthier et Iacobucci sont dissidents.

Craig C. Sturrock, pour l'appelant.

Roger E. Taylor et *Al Meghji*, pour l'intimée.

Version française du jugement des juges L'Heureux-Dubé, Sopinka et Major rendu par

LE JUGE MAJOR —

I. Le contexte

Comme en font état plus en détail les motifs de mon collègue le juge Iacobucci, l'appelant s'est engagé dans un projet comportant un risque de caractère commercial visant un terrain situé dans la ville de Calgary et désigné sous le nom de «domaine Styles». Le domaine Styles a été acheté à seule fin de revente avec bénéfice. Le bénéfice anticipé devait être partagé en un don de charité au Trinity Western College et à d'autres organismes, et un versement aux investisseurs à titre personnel. Contrairement aux attentes des investisseurs, les prix des immeubles ont baissé au lieu de monter.

Invoquant le par. 10(1) de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63, qui permet que

the *Income Tax Act*, S.C. 1970-71-72, c. 63, which permits inventory to be valued at the lower of cost or market value. The Minister of National Revenue disallowed this claim.

II. Analysis

A. *Introduction*

The narrow issue in this appeal is whether land held for resale as an adventure in the nature of trade may be valued as inventory under s. 10(1) of the *Income Tax Act*. I have read the reasons of my colleague Iacobucci J., and, with respect, I disagree with his conclusion. In my opinion the provisions of the *Income Tax Act* allow land held as an adventure in the nature of trade to be valued as inventory under s. 10(1) and therefore I would allow this appeal.

B. *The Scheme of the Income Tax Act*

It is necessary to make some comments on the basic scheme of the *Income Tax Act* given my analysis of the issue raised in this appeal.

Section 3 of the *Income Tax Act* sets out the ground rules for the computation of a taxpayer's income for a taxation year. Section 3 recognizes two basic categories of income: "ordinary income" from office, employment, business and property, all of which are included in s. 3(*a*), and income from a capital source, or capital gains which are covered by s. 3(*b*). The whole structure of the *Income Tax Act* reflects the basic distinction recognized in the Canadian tax system between income and capital gain.

Subdivision b of Division B of the Act entitled "Income or Loss from a Business or Property" contains all the rules which govern business and

les biens figurant dans un inventaire soient évalués au moindre de leur coût et de leur valeur marchande, l'appelant a réclamé des pertes d'entreprise dans ses déclarations de revenus de 1983 et de 1984. Le ministre du Revenu national a refusé d'admettre ces pertes.

II. Analyse

A. *Introduction*

Il s'agit précisément, en l'espèce, de savoir si un terrain détenu en vue d'être revendu dans le cadre d'un projet comportant un risque de caractère commercial peut être évalué comme un bien figurant dans un inventaire en vertu du par. 10(1) de la *Loi de l'impôt sur le revenu*. J'ai lu les motifs de mon collègue le juge Iacobucci et, en toute déférence, je ne suis pas d'accord avec sa conclusion. À mon avis, les dispositions de la *Loi de l'impôt sur le revenu* permettent d'évaluer un terrain détenu dans le cadre d'un projet comportant un risque de caractère commercial comme un bien figurant dans un inventaire en vertu du par. 10(1), et je suis donc d'avis d'accueillir le présent pourvoi.

B. *Le régime de la Loi de l'impôt sur le revenu*

Certains commentaires sur le régime de base de la *Loi de l'impôt sur le revenu* s'imposent compte tenu de l'analyse que je fais de la question soulevée dans le présent pourvoi.

L'article 3 de la *Loi de l'impôt sur le revenu* énonce les règles de base qui régissent le calcul du revenu d'un contribuable pour une année d'imposition. L'article 3 reconnaît deux catégories fondamentales de revenus: le «revenu ordinaire» tiré d'une charge, d'un emploi, d'une entreprise et d'un bien, qui sont tous visés par l'al. 3*a*), et le revenu tiré de biens en immobilisation, ou les gains en capital, qui sont visés par l'al. 3*b*). Toute la structure de la *Loi de l'impôt sur le revenu* reflète cette distinction de base, reconnue dans le régime fiscal canadien, entre le revenu et le gain en capital.

La sous-section b de la section B de la Loi, intitulée «Revenu ou perte provenant d'une entreprise ou d'un bien», énonce toutes les règles régissant le

property income. The leading section in this subdivision is s. 9 which provides that a taxpayer is taxable on the profit for a business or property for the year. Profit is not defined in the *Income Tax Act*.

7 Unlike business or property income which is fully taxable, income from capital sources was not subject to tax at all in Canada until 1972 and is still partially protected from taxation. Subdivision c of Division B of the Act entitled "Taxable Capital Gains and Allowable Capital Losses" contains all of the rules which apply to income derived from a capital source. The leading section in this subdivision is s. 38 which provides that a taxpayer is taxable on 3/4 of the capital gain from the disposition of property in the year.

8 The distinction between income from office, employment, business and property sources and that from a capital source and the preferential treatment of the latter has long been the subject of academic criticism: see B. J. Arnold, T. Edgar and J. Li, eds., *Materials on Canadian Income Tax* (10th ed. 1993), at p. 297; and *Report of the Royal Commission on Taxation* (Carter Report) (1966), vol. 3, at pp. 62-67. The distinction between amounts of an income nature and those of a capital nature was imported into the Canadian tax system from the United Kingdom where it is believed to have originated from a primarily agricultural economy whose concept of income was the fruits of productive source. In spite of the uncertainty of origins of the distinction between capital gain and other income and the criticisms of preferential tax treatment of capital gain, differential tax treatment of capital gain and income remains a fundamental feature of the Canadian taxation system.

C. *Principles of Interpretation*

9 The central question on this appeal of whether the appellant is entitled to take advantage of the

revenu tiré d'une entreprise ou d'un bien. La disposition principale de cette sous-section est l'art. 9 qui prévoit que le contribuable est assujetti à l'impôt sur le bénéfice qu'il tire d'une entreprise ou d'un bien pour l'année. Le mot «bénéfice» n'est pas défini dans la *Loi de l'impôt sur le revenu*.

Contrairement au revenu tiré d'une entreprise ou d'un bien, qui est imposable en totalité, le revenu tiré de biens en immobilisation n'était aucunement assujetti à l'impôt avant 1972, et il est encore partiellement soustrait à l'impôt. La sous-section c de la section B de la Loi, intitulée «Gains en capital imposables et pertes en capital déductibles», énonce toutes les règles qui s'appliquent au revenu tiré d'un bien en immobilisation. La disposition principale de cette sous-section est l'art. 38, qui prévoit qu'un contribuable doit payer de l'impôt sur les 3/4 du gain en capital qu'il a réalisé, durant l'année, lors de l'aliénation du bien.

La distinction entre le revenu tiré d'une charge, d'un emploi, d'une entreprise ou d'un bien, et le revenu tiré de biens en immobilisation, de même que le traitement préférentiel accordé à ce dernier revenu font depuis longtemps l'objet de critiques de la part d'auteurs: voir B. J. Arnold, T. Edgar et J. Li, dir., *Materials on Canadian Income Tax* (10e éd. 1993), à la p. 297, et le *Rapport de la Commission royale d'enquête sur la fiscalité* (rapport Carter) (1966), t. 3, aux pp. 72 à 77. La distinction en droit fiscal canadien entre les montants qui tiennent du revenu et ceux qui tiennent de l'immobilisation a été empruntée au Royaume-Uni, où l'on croit qu'elle serait née d'une économie principalement agricole dans laquelle le revenu était le fruit d'une source productive. En dépit de l'incertitude qui entoure les origines de la distinction entre le gain en capital et les autres revenus et en dépit des critiques exprimées à l'endroit du traitement fiscal préférentiel accordé au gain en capital, le traitement fiscal différentiel du gain en capital et du revenu demeure une caractéristique fondamentale du régime fiscal canadien.

C. *Principes d'interprétation*

La question principale soulevée dans le présent pourvoi, soit celle de savoir si l'appelant a le droit

inventory valuation method in s. 10 of the Act involves a careful examination of the wording of the provisions of the Act and a consideration of the proper interpretation of these sections in the light of the basic structure of the Canadian taxation scheme which is established in the *Income Tax Act*.

de se prévaloir de la méthode d'évaluation des biens figurant dans un inventaire prévue à l'art. 10 de la Loi, nécessite un examen attentif du libellé des dispositions de la Loi, de même qu'une étude de l'interprétation qu'il convient de donner à ces articles à la lumière de la structure de base du régime fiscal canadien établi dans la *Loi de l'impôt sur le revenu*.

In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

Pour interpréter les dispositions de la *Loi de l'impôt sur le revenu*, il convient, comme l'affirme le juge Estey dans l'arrêt *Stubart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, d'appliquer la règle du sens ordinaire. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé *Construction of Statutes* (2e éd. 1983), à la p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:

11

Le principe voulant que le sens ordinaire des dispositions pertinentes de la *Loi de l'impôt sur le revenu* prévale, à moins d'être en présence d'une opération simulée, a récemment été approuvé par notre Cour dans l'arrêt *Canada c. Antosko*, [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327:

While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, [1993] 4 S.C.R. 695.

Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté: *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, [1993] 4 R.C.S. 695.

I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3(c) "Strict and purposive interpretation", at pp. 453-54:

J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] «Interprétation stricte et fondée sur l'objet visé», aux pp. 453 et 454:

It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision. . . . [The *Antosko* case] is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

D. *Plain Meaning of Section 10*

12 The primary section whose interpretation is in dispute is s. 10:

10. (1) For the purpose of computing income from a business, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

The plain reading of this section is that it is a mandatory provision requiring a taxpayer who computes income from a business to value the inventory at the lower of cost or market value or as permitted by regulation. Thus, *prima facie*, the taxpayer must meet two requirements in order to use this section: the venture at issue must be a "business" and the property in question must be "inventory".

(1) Is the Appellant's Venture a Business?

13 The definition of "business" in s. 248(1) specifically includes an adventure in the nature of trade:

"business", includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(*c*), an adventure or concern in the nature of trade but does not include an office or employment; [Emphasis added.]

[TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. [. . .] [L'arrêt *Antosko*] ne fait que reconnaître que «l'objet» ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.

D. *Le sens ordinaire de l'art. 10*

La principale disposition dont l'interprétation est contestée est l'art. 10:

10. (1) Aux fins du calcul du revenu tiré d'une entreprise, les biens figurant dans un inventaire sont évalués au coût supporté par le contribuable ou à leur juste valeur marchande, le moins élevé de ces deux éléments étant à retenir, ou de toute autre façon permise par les règlements.

D'après le sens ordinaire de cet article, il s'agit d'une disposition impérative qui oblige le contribuable, lors du calcul de son retenu tiré d'une entreprise, à évaluer les biens figurant dans l'inventaire au moindre de leur coût et de leur valeur marchande, ou d'une autre façon permise par les règlements. Par conséquent, le contribuable doit, à première vue, satisfaire à deux exigences pour pouvoir recourir à cet article: le projet en cause doit être une «entreprise» et la propriété en question doit être un «bien figurant dans un inventaire».

(1) Le projet de l'appelant est-il une entreprise?

La définition du mot «entreprise» au par. 248(1) inclut expressément un projet comportant un risque de caractère commercial:

«entreprise» ou «affaire» comprend une profession, un métier, un commerce, une manufacture ou une activité de quelque genre que ce soit et, sauf aux fins de l'alinéa 18(2)*c*), comprend un projet comportant un risque ou une affaire de caractère commercial mais ne comprend pas une charge ni un emploi; [Je souligne.]

An "adventure in the nature of trade" is not defined in the Act but is a term which has a meaning established by the common law.

Both parties in this appeal accept that the appellant's real estate venture constitutes an adventure in the nature of trade. Nevertheless, it is useful to briefly examine the requirements for an adventure in the nature of trade since these requirements serve to limit the scope of ventures which are eligible to use the provisions of s. 10(1).

The concept of an adventure in the nature of trade is a judicial creation designed to determine which purchase and sale transactions are of a business nature and which are of a capital nature. This question was particularly important prior to 1972 when capital transactions were completely exempt from taxation. The question was succinctly stated by Clerk L.J. in *Californian Copper Syndicate v. Harris* (1904), 5 T.C. 159 (Ex., Scot.), at p. 166:

Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The first requirement for an adventure in the nature of trade is that it involve a "scheme for profit-making". The taxpayer must have a legitimate intention of gaining a profit from the transaction. Other requirements are conveniently summarized in Interpretation Bulletin IT-459 "Adventure or Concern in the Nature of Trade" (September 8, 1980) which references Interpretation Bulletin IT-218 "Profit from the Sale of Real Estate" (May 26, 1975) for a summary of the relevant factors when the property involved is real estate.

IT-218R, which replaced IT-218 in 1986, lists a number of factors which have been used by the courts to determine whether a transaction

L'expression «projet comportant un risque ou une affaire de caractère commercial» n'est pas définie dans la Loi, mais elle a un sens établi par la common law.

14 Les deux parties au présent pourvoi reconnaissent que le projet immobilier de l'appelant constitue un projet comportant un risque de caractère commercial. Il est néanmoins utile d'examiner brièvement les éléments constitutifs d'un tel projet puisqu'ils servent à limiter la gamme de projets susceptibles de permettre l'application des dispositions du par. 10(1).

15 La notion de projet comportant un risque de caractère commercial est une création jurisprudentielle visant à départager les opérations d'achat et de vente qui sont de nature commerciale de celles qui tiennent d'une immobilisation. Cette question revêtait une importance particulière avant 1972, puisque les opérations portant sur des immobilisations étaient alors totalement exonérées d'impôt. La question a été énoncée succinctement par le lord juge Clerk dans l'arrêt *Californian Copper Syndicate c. Harris* (1904), 5 T.C. 159 (Ex., Scot.), à la p. 166:

[TRADUCTION] Le gain est-il une simple plus-value due à la réalisation d'un titre, ou est-ce un gain fait dans le cadre d'une entreprise conformément à un plan visant la réalisation d'un bénéfice?

16 La première condition de l'existence d'un projet comportant un risque de caractère commercial est qu'il comporte un «plan visant la réalisation d'un bénéfice». Le contribuable doit avoir l'intention légitime de tirer un bénéfice de l'opération. Les autres conditions sont énoncées utilement dans le bulletin d'interprétation IT-459, intitulé «Projet comportant un risque ou une affaire de caractère commercial» (8 septembre 1980), qui fait mention du bulletin d'interprétation IT-218, intitulé «Profits sur la vente de biens immeubles» (26 mai 1975), comme document où sont résumés les facteurs pertinents dans le cas de biens immeubles.

17 Le bulletin IT-218R, qui a remplacé le bulletin IT-218 en 1986, énumère un certain nombre de facteurs dont les tribunaux se sont servis pour

involving real estate is an adventure in the nature of trade creating business income or a capital transaction involving the sale of an investment. Particular attention is paid to:

(i) The taxpayer's intention with respect to the real estate at the time of purchase and the feasibility of that intention and the extent to which it was carried out. An intention to sell the property for a profit will make it more likely to be characterized as an adventure in the nature of trade.

(ii) The nature of the business, profession, calling or trade of the taxpayer and associates. The more closely a taxpayer's business or occupation is related to real estate transactions, the more likely it is that the income will be considered business income rather than capital gain.

(iii) The nature of the property and the use made of it by the taxpayer.

(iv) The extent to which borrowed money was used to finance the transaction and the length of time that the real estate was held by the taxpayer. Transactions involving borrowed money and rapid resale are more likely to be adventures in the nature of trade.

déterminer si une opération immobilière constitue un projet comportant un risque de caractère commercial qui génère un revenu d'entreprise ou une opération portant sur une immobilisation, impliquant la vente d'un placement. Une attention particulière est accordée à:

(i) L'intention du contribuable relativement au bien immeuble au moment de l'achat, ses possibilités de réalisation et la mesure dans laquelle cette intention est réalisée. L'intention de revendre la propriété avec bénéfice la rendra plus susceptible d'être qualifiée de projet comportant un risque de caractère commercial.

(ii) La nature de l'entreprise, de la profession, du métier ou de l'occupation du contribuable et des associés. Plus l'entreprise ou la profession d'un contribuable est liée aux transactions immobilières, plus il est probable que le revenu réalisé sera considéré comme un revenu tiré d'une entreprise plutôt que comme un gain en capital.

(iii) La nature du bien et l'usage qu'en fait le contribuable.

(iv) La mesure dans laquelle l'argent emprunté a servi à financer l'acquisition du bien immeuble et la période pendant laquelle le bien immeuble a été détenu par le contribuable. Les opérations impliquant emprunt et revente rapide sont plus susceptibles d'être des projets comportant un risque de caractère commercial.

18 The factual record in this case reveals a legitimate "scheme for profit-making" with respect to the Styles Property. The appellant and his associates purchased the Styles Property with the intention of reselling it at a profit. The appellant and his associates planned to split the anticipated profit between designated charities and themselves on a *pro rata* basis. The persons involved in this venture were experienced business people who treated the transaction as a business venture. The land involved was undeveloped real estate which was suitable for resale but unsuitable as an income producing investment or for the personal enjoyment of the appellant or his associates.

Les faits consignés au dossier en l'espèce révèlent la présence d'un «plan [légitime] visant la réalisation d'un bénéfice» à l'égard du domaine Styles. L'appelant et ses associés ont acheté le domaine Styles dans l'intention de le revendre avec bénéfice. L'appelant et ses associés avaient prévu partager proportionnellement le bénéfice escompté entre certains organismes de charité et eux-mêmes. Les personnes engagées dans ce projet étaient des gens d'affaires expérimentés qui le considéraient comme une opération spéculative commerciale. Le terrain en cause était vierge et susceptible d'être revendu mais non de constituer un placement générateur de revenu ou de procurer un agrément personnel à l'appelant ou à ses associés.

I agree with Iacobucci J. that the appellant meets the tests which have been established in the common law for an adventure of trade. The speculative venture in which the appellant was involved was clearly an adventure of a business nature rather than an investment of a capital nature. Like my colleague, I respectfully disagree with the trial judge ([1992] 2 F.C. 552) and Marceau J.A. ([1993] 3 F.C. 607) that s. 10(1) does not apply to a business which is an adventure in the nature of trade: see *Bailey v. M.N.R.*, 90 D.T.C. 1321 (T.C.C.), at p. 1328. I affirm the succinct summary of the law contained in IT-218R:

The word "business" is defined in subsection 248(1) so as to include, inter alia, an adventure or concern in the nature of trade. This definition can cause an isolated transaction involving real estate to be considered a business transaction. As a business, any gain or loss which arises therefrom is, by virtue of section 9, required to be included in computing income or loss, as the case may be.

(2) Is the Styles Property "Inventory"?

In order to take advantage of the valuation method in s. 10(1), a taxpayer must also establish that the property in question is inventory. A definition of "inventory" is contained in s. 248(1) of the Act:

"inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year;

The first point to note about this definition of inventory is that property is not required to contribute directly to income in a taxation year in order to qualify as inventory. Provided that the cost or value of an item of property is relevant in computing business income in a year that property will qualify as inventory. Generally the cost or value of an item of property will appear as an

Je conviens avec le juge Iacobucci que l'appelant satisfait à tous les critères établis en common law relativement à un projet comportant un risque de caractère commercial. L'opération spéculative dans laquelle l'appelant était engagé était clairement un projet comportant un risque de caractère commercial plutôt qu'un placement tenant d'une immobilisation. À l'instar de mon collègue, je ne partage pas, en toute déférence, l'avis du juge de première instance ([1992] 2 C.F. 552) et du juge Marceau de la Cour d'appel ([1993] 3 C.F. 607), voulant que le par. 10(1) ne s'applique pas à une entreprise qui est un projet comportant un risque de caractère commercial: voir *Bailey c. M.R.N.*, 90 D.T.C. 1321 (C.C.I.), à la p. 1328. Je reprends le résumé sommaire du droit applicable, que contient le bulletin IT-218R: 19

Le terme «entreprise» est défini dans le paragraphe 248(1) et comprend entre autres choses, un projet comportant un risque ou une affaire de caractère commercial. En vertu de cette définition, une transaction isolée mettant en cause des biens immeubles peut être considérée comme une transaction d'entreprise. Comme pour toute entreprise, les gains ou les pertes qui en découlent doivent, en vertu de l'article 9, être pris en compte dans le calcul du revenu ou de la perte, selon le cas.

(2) Le domaine Styles est-il un bien figurant dans un «inventaire»?

Pour pouvoir bénéficier de la méthode d'évaluation prévue au par. 10(1), le contribuable doit aussi établir que le bien-fonds en question est un bien figurant dans un inventaire. La définition suivante du terme «inventaire» figure au par. 248(1) de la Loi: 20

«inventaire» signifie la description des biens dont le prix ou la valeur entre dans le calcul du revenu qu'un contribuable tire d'une entreprise pour une année d'imposition;

Le premier élément à noter au sujet de cette définition du terme «inventaire» est qu'il n'est pas nécessaire que ces biens contribuent directement au revenu pour une année d'imposition pour pouvoir être considérés comme des biens figurant dans un inventaire. Il suffit que le coût ou la valeur d'un bien entre dans le calcul du revenu d'entreprise pour une année, pour que ce bien fasse partie des

expense (and the sale price as revenue) in the computation of income.

21 Reduced to its simplest terms, the income or profit from the sale of a single item of inventory by a sales business is the ordinary tracing formula calculated by subtracting the purchase cost of the item from the proceeds of sale. This is the basic formula which applies to the calculation of profit before the value of inventory is taken into account, as is made clear by Abbott J. in *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662, at pp. 664-65:

> The law is clear therefore that for income tax purposes gross profit, in the case of a business which consists of acquiring property and reselling it, is the excess of sale price over cost, subject only to any modification effected by the "cost or market, whichever is lower" rule.

Thus, for any particular item:

> Income = Profit = Sale Price — Purchase Cost.

22 It is clear from the formula above that the cost of an item of property sold by a business is relevant in computing the income from the business in the taxation year in which it is sold. As discussed above, an adventure in the nature of trade constitutes a business under the Act. Therefore, an item of property sold as part of an adventure in the nature of trade is relevant to the computation of the taxpayer's income from a business in the taxation year of disposition and so is inventory according to the plain language of the definition in s. 248(1).

23 The respondent argued that even if the Styles Property were inventory in the year of disposition it would not qualify as inventory in preceding years. Specifically the respondent urged that the phrase "relevant in computing a taxpayer's income from a business for a taxation year" requires that

biens figurant dans un inventaire. En général, le coût ou la valeur d'un bien est comptabilisé comme une dépense (et le prix de vente comme un revenu) dans le calcul du revenu.

Réduit à sa plus simple expression, le revenu ou le bénéfice tiré de la vente d'un seul article d'inventaire par une entreprise commerciale est, selon la formule d'identification ordinaire, calculé en soustrayant le coût de son acquisition du produit de sa vente. C'est la formule de base qui s'applique au calcul du bénéfice avant que n'entre en ligne de compte la valeur des biens figurant dans un inventaire, comme l'a clairement affirmé le juge Abbott dans l'arrêt *Minister of National Revenue c. Irwin*, [1964] R.C.S. 662, aux pp. 664 et 665:

> [TRADUCTION] D'après la loi, il est donc clair qu'aux fins de l'impôt sur le revenu, dans le cas d'une entreprise consacrée à acquérir des biens et à les revendre, le bénéfice brut s'établit selon l'excédent du prix de vente sur le coût, sous réserve uniquement de toute modification due à la règle du «moindre du coût et de la valeur marchande».

Par conséquent, pour tout article particulier:

> Revenu = bénéfice = prix de vente — coût d'acquisition.

Il ressort clairement de cette formule que le coût d'un bien vendu par une entreprise entre dans le calcul du revenu de l'entreprise pour l'année d'imposition au cours de laquelle il est vendu. Ainsi qu'il a été mentionné plus haut, un projet comportant un risque de caractère commercial constitue une entreprise au sens de la Loi. Par conséquent, un bien vendu dans le cadre d'un tel projet entre dans le calcul du revenu tiré d'une entreprise par un contribuable durant l'année d'imposition au cours de laquelle il est aliéné, de sorte qu'il fait partie des biens figurant dans un inventaire au sens ordinaire de la définition donnée au par. 248(1).

L'intimée a fait valoir que même si le domaine Styles avait été un bien figurant dans un inventaire durant l'année de l'aliénation, il n'aurait pu être qualifié de la sorte pendant les années précédentes. Plus précisément, l'intimée a fait valoir que l'expression «entre dans le calcul du revenu qu'un

the characterization of each item of property as inventory (or not) be made on an annual basis on the basis of the relevance of the item to the computation of income for that taxation year. The respondent relied on dicta to this effect in *Canada v. Dresden Farm Equipment Ltd.*, [1989] 1 C.T.C. 99 (F.C.A.), at p. 105, a case which held that a taxpayer may not deduct an inventory allowance on goods in which the taxpayer has no property but merely holds on consignment. The respondent's argument on this point was accepted by Létourneau J.A. in the Federal Court of Appeal ([1993] 3 F.C. 607, at pp. 617-18) and is relied upon by Iacobucci J.

In my opinion, the interpretation urged by the respondent runs contrary to the natural meaning of the words used in the definition of inventory in s. 248(1) and to common sense. The plain meaning of the definition in s. 248(1) is that an item of property need only be relevant to business income in a single year to qualify as inventory: "relevant in computing a taxpayer's income from a business for a taxation year". In this respect the definition of "inventory" in the *Income Tax Act* is consistent with the ordinary meaning of the word. In the normal sense, inventory is property which a business holds for sale and this term applies to that property both in the year of sale and in years where the property remains as yet unsold by a business.

In addition to the plain meaning of the words, several other considerations militate against the respondent's interpretation of the definition of "inventory" in s. 248(1).

First, an examination of other definitions in the *Income Tax Act* reveals that there is a particular phraseology used in the definition of things, amounts or concepts which must be determined on an annual basis. The definitions of income (in s. 9)

contribuable tire d'une entreprise pour une année d'imposition» exige que la qualification de chaque bien comme faisant partie (ou non) des biens figurant dans un inventaire se fasse sur une base annuelle en fonction de la pertinence du bien relativement au calcul du revenu pour cette année d'imposition. L'intimée s'est fondée sur des opinions incidentes en ce sens dans l'arrêt *Canada c. Dresden Farm Equipment Ltd.*, [1989] 1 C.T.C. 99, à la p. 105, où la Cour d'appel fédérale a conclu qu'un contribuable ne pouvait réclamer une déduction pour inventaire à l'égard de biens dont il n'était pas propriétaire mais qu'il détenait simplement à titre de consignataire. L'argument de l'intimée sur ce point a été accepté par le juge Létourneau de la Cour d'appel fédérale ([1993] 3 C.F. 607, aux pp. 617 et 618), puis repris par le juge Iacobucci.

24 À mon avis, l'interprétation que préconise l'intimée est contraire au bon sens et au sens naturel des mots employés dans la définition du terme «inventaire», que l'on trouve au par. 248(1). Le sens ordinaire de la définition du par. 248(1) est qu'il suffit qu'un bien entre dans le calcul du revenu d'entreprise au cours d'une seule année d'imposition pour pouvoir être considéré comme un bien figurant dans un inventaire: «entre dans le calcul du revenu qu'un contribuable tire d'une entreprise pour une année d'imposition». À cet égard, la définition du mot «inventaire» donnée dans la *Loi de l'impôt sur le revenu* est conforme au sens ordinaire du terme. Pris dans leur sens normal, les biens figurant dans un inventaire sont des biens qu'une entreprise détient à des fins de vente, et ce terme s'applique à ces biens autant durant l'année de la vente que durant les années au cours desquelles le bien n'a pas encore été vendu par l'entreprise.

25 Outre le sens ordinaire des mots, plusieurs autres considérations militent contre l'interprétation que l'intimée propose pour la définition du terme «inventaire», que l'on trouve au par. 248(1).

26 En premier lieu, l'examen d'autres définitions contenues dans la *Loi de l'impôt sur le revenu* révèle l'utilisation d'une phraséologie particulière pour définir des choses, des montants ou des notions qui doivent être déterminés sur une base

and taxable capital gain (in s. 38), both of which must be determined on an annual basis, contain the characteristic phraseology which denotes that requirement:

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of his loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source *mutatis mutandis*.

38. For the purposes of this Act,

(*a*) a taxpayer's taxable capital gain for a taxation year from the disposition of any property is 3/4 of his capital gain for the year from the disposition of that property;

(*b*) a taxpayer's allowable capital loss for a taxation year from the disposition of any property is 3/4 of his capital loss for the year from the disposition of that property; [Emphasis added.]

This formulaic phraseology appears innumerable times in the definitions in the *Income Tax Act*: see for example: s. 3 "income"; s. 5 "income from office or employment" and "loss from office or employment"; s. 38(*c*) "allowable business investment loss"; s. 39 "capital gain", "capital loss" and "business investment loss"; s. 41 "taxable net gain"; s. 63(3)(*c*) "eligible child"; s. 127.2(6)(*a*) "share-purchase tax credit"; s. 127.3(2)(*a*) "scientific research and experimental development tax credit"; s. 248(1) "appropriate percentage", "balance-due day" and "gross revenue".

27 The respondent is asking this Court to interpret the definition of "inventory" as though it read:

annuelle. Les définitions des mots «revenu» (à l'art. 9) et «gain en capital imposable» (à l'art. 38), qui doivent tous deux être déterminés sur une base annuelle, contiennent la phraséologie caractéristique qui traduit cette obligation:

9. (1) Sous réserve des dispositions de la présente Partie, le revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.

(2) Sous réserve des dispositions de l'article 31, la perte subie par un contribuable dans une année d'imposition relativement à une entreprise ou à un bien est le montant de sa perte, si perte il y a, subie dans cette année d'imposition relativement à cette entreprise ou à ce bien, calculée en appliquant *mutatis mutandis* les dispositions de la présente loi afférentes au calcul du revenu tiré de cette entreprise ou de ce bien.

38. Pour l'application de la présente loi:

a) le gain en capital imposable d'un contribuable, pour une année d'imposition, tiré de la disposition d'un bien est égal aux 3/4 du gain en capital que le contribuable a réalisé, pour l'année, à la disposition du bien;

b) la perte en capital déductible d'un contribuable, pour une année d'imposition, résultant de la disposition d'un bien est égale aux 3/4 de la perte en capital que le contribuable a subie, pour l'année, à la disposition du bien; [Je souligne.]

Cette phraséologie qui fait formule se retrouve dans maintes définitions de la *Loi de l'impôt sur le revenu*: voir, par exemple: à l'art. 3, «revenu»; à l'art. 5, «revenu tiré d'une charge ou d'un emploi» et «perte résultant d'une charge ou d'un emploi»; à l'al. 38*c*), «perte déductible au titre d'un placement d'entreprise»; à l'art. 39, «gain en capital», «perte en capital» et «perte au titre d'un placement d'entreprise»; à l'art. 41, «gain net imposable»; à l'art. 63(3)*c*), «enfant admissible; à l'al. 127.2(6)*a*), «crédit d'impôt à l'achat d'actions»; à l'al. 127.3(2)*a*), «crédit d'impôt pour la recherche scientifique et le développement expérimental»; au par. 248(1), «taux de base pour l'année», «date d'exigibilité du solde» et «revenu brut».

L'intimée demande à notre Cour d'interpréter la définition du terme «inventaire» comme si elle était ainsi formulée:

"inventory" [for a taxation year] means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for [the] taxation year;

«inventaire» [pour une année d'imposition] signifie la description des biens dont le prix ou la valeur entre dans le calcul du revenu qu'un contribuable tire d'une entreprise pour [l']année d'imposition;

The principal problem with the respondent's interpretation is that the bracketed words do not appear in the definition in the *Income Tax Act*. The addition of these words to the definition effects a significant change to the sense of the definition. It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording. Reading extra words into a statutory definition is even less acceptable when the phrases which must be read in appear in several other definitions in the same statute. If Parliament had intended to require that property must be relevant to the computation of income in a particular year in order to be inventory in that year, it would have added the necessary phraseology to make that clear.

Le principal problème que pose l'interprétation préconisée par l'intimée découle du fait que les mots entre crochets ne figurent pas dans la définition de la *Loi de l'impôt sur le revenu*. L'ajout de ces mots à la définition a pour effet de changer considérablement le sens de la définition. Selon un principe fondamental en matière d'interprétation des lois, un tribunal ne devrait pas accepter une interprétation qui nécessite l'ajout de mots, lorsqu'il existe une autre interprétation acceptable qui ne requiert aucun ajout de cette nature. L'ajout de mots dans une définition qui figure dans une loi est encore moins acceptable lorsque les termes qui doivent être ajoutés figurent dans plusieurs autres définitions de cette même loi. Si le législateur avait voulu exiger que le bien entre dans le calcul du revenu au cours d'une année particulière, de manière à constituer un bien figurant dans un inventaire pour cette même année, il aurait ajouté la phraséologie nécessaire pour exprimer clairement cette volonté.

The second problem with the interpretation proposed by the respondent is that it is inconsistent with the basic division in the *Income Tax Act* between business income and capital gain. As discussed above, subdivision b of Division B of the Act deals with business and property income and subdivision c of Division B deals with capital gains. The Act defines two types of property, one of which applies to each of these sources of revenue. Capital property (as defined in s. 54(*b*)) creates a capital gain or loss upon disposition. Inventory is property the cost or value of which is relevant to the computation of business income. The Act thus creates a simple system which recognizes only two broad categories of property. The characterization of an item of property as inventory or capital property is based primarily on the type of income that the property will produce.

28 Le deuxième problème que pose l'interprétation préconisée par l'intimée tient à son incompatibilité avec la dichotomie fondamentale que la *Loi de l'impôt sur le revenu* établit entre le revenu d'entreprise et le gain en capital. Comme cela a déjà été mentionné, la sous-section b de la section B de la Loi porte sur le revenu tiré d'une entreprise ou d'un bien, tandis que la sous-section c de la section B porte sur les gains en capital. La Loi définit deux types de biens, qui correspondent respectivement à chacune de ces sources de revenu. Les biens en immobilisation (définis à l'al. 54*b*)) engendrent un gain ou une perte en capital lors de leur aliénation. Les biens figurant dans un inventaire sont des biens dont le coût ou la valeur entre dans le calcul du revenu d'entreprise. La Loi crée ainsi un système simple qui ne reconnaît que deux catégories générales de biens. La qualification d'un bien comme bien figurant dans un inventaire ou comme bien en immobilisation est fondée principalement sur le type de revenu qui sera tiré de ce bien.

29 As discussed above in the context of the definition of an adventure in the nature of trade, a comprehensive discussion of whether the sale of real estate will create income or capital gain can be found in Interpretation Bulletin IT-218R (September 16, 1986). The full title of this Interpretation Bulletin, "Profit, Capital Gains and Losses from the Sale of Real Estate, Including Farmland and Inherited Land and Conversion of Real Estate from Capital Property to Inventory and Vice Versa" emphasizes what the bulletin makes clear — real estate, like other forms of property, must fall into one of two basic categories under the *Income Tax Act*: inventory or capital property.

Comme cela a déjà été mentionné dans le cadre de la définition d'un projet comportant un risque de caractère commercial, on peut se reporter au bulletin d'interprétation IT-218R (16 septembre 1986) pour une analyse détaillée de la question de savoir si la vente d'un bien immeuble générera un revenu ou un gain en capital. Le titre au complet de ce bulletin d'interprétation, «Bénéfices, gains en capital et pertes provenant de la vente de biens immeubles, y compris les terres agricoles et les terres transmises par décès et la conversion de biens immeubles qui sont des biens en immobilisation en biens figurant dans un inventaire et vice versa», souligne ce que le bulletin exprime clairement, à savoir: les biens immeubles, à l'instar d'autres formes de biens, doivent tomber dans l'une ou l'autre des deux catégories fondamentales reconnues dans la *Loi de l'impôt sur le revenu*: les biens figurant dans un inventaire ou les biens en immobilisation.

30 IT-218R clarifies that real estate which is held by the taxpayer as capital property may be used as personal-use property or as an investment for the purpose of gaining or producing income. The sale of this kind of property creates capital gain or capital loss. On the other hand, real estate which is purchased for profitable resale value is inventory which creates business income or loss. In determining whether the gains from a sale of real estate are income or capital particular emphasis is placed on the taxpayer's intention at the time of the initial purchase of the real estate. Thus, a particular piece of real estate becomes either inventory or capital property in the hands of the taxpayer from the time of the original purchase.

Le bulletin IT-218R précise qu'un bien immeuble qui est détenu par le contribuable comme bien en immobilisation peut être utilisé comme bien à usage personnel ou comme placement dans le but de réaliser ou de produire un revenu. La vente de ce type de bien donne lieu à un gain en capital ou à une perte en capital. Par ailleurs, le bien immeuble qui est acheté afin d'être revendu avec bénéfice est un bien figurant dans un inventaire qui génère un revenu d'entreprise ou une perte d'entreprise. Lorsqu'il s'agit de déterminer si les gains tirés de la vente d'un bien immeuble constituent un revenu ou des gains en capital, l'on tient particulièrement compte de l'intention du contribuable au moment de l'achat initial du bien immeuble. Par conséquent, un bien immeuble particulier devient soit un bien figurant dans un inventaire soit un bien en immobilisation entre les mains du contribuable dès le moment de l'achat initial.

31 The basic scheme of dividing property into one of two broad classes under the *Income Tax Act* is further assisted by ss. 13(7) and 45(1). These sections make specific provision for the conversion of real estate from capital property to inventory and vice versa in particular circumstances. As IT-218R explains, these circumstances arise only

Le régime fondamental qui consiste à répartir les biens dans l'une ou l'autre des deux catégories prévues par la *Loi de l'impôt sur le revenu* est étayé davantage par les par. 13(7) et 45(1). Ces dispositions prévoient expressément la conversion de biens immeubles de la catégorie des biens en immobilisation en biens figurant dans un inven-

when the taxpayer's intention and use of the property change subsequent to the initial purchase. Sections 13(7) and 45(1) provide for the transfer to be made by means of a deemed disposition and reacquisition at fair market value. The deemed reacquisition at the time when the taxpayer's intention with respect to the property is materially changed reflects the fact that the category of the property is determined according to the taxpayer's intention at the time of acquisition.

The interpretation of "inventory" urged by the respondent is fundamentally incompatible with the statutory dichotomy between inventory and capital property in two respects. First, it would require a change in the characterization of particular items of property on the basis of annual relevance to income rather than according to the carefully tailored circumstances enumerated in ss. 13(7) and 45(1). Second, and more seriously, if an item of property is not relevant to income in a particular year, it does not convert to capital property unless it meets the requirements of ss. 13(7) and 45(1). Under the respondent's proposed interpretation, an item of property would not be inventory in a year in which it was not relevant to income and thus would cease to exist for the purposes of the *Income Tax Act* in that year. This runs contrary to the scheme of the Act which classifies every piece of property owned by a taxpayer into one of the two broad classes. It creates an absurdity for items of property held for sale by a business to simply disappear from the scheme of the Act in years prior to sale.

Thirdly, the interpretation proposed by the respondent is inconsistent with the commonly understood definition of the term. In the ordinary sense of the term, an item of property which a business keeps for the purpose of offering it for sale constitutes inventory at any time prior to the

taire, et vice versa, dans certaines circonstances. Comme l'explique le bulletin IT-218R, ces circonstances ne surviennent que lorsque le changement dans l'intention du contribuable et dans l'utilisation qu'il fait du bien survient après l'achat initial. Les paragraphes 13(7) et 45(1) prévoient que le transfert se fait au moyen d'une présomption d'aliénation et de nouvelle acquisition du bien à sa juste valeur marchande. La nouvelle acquisition présumée au moment où l'intention du contribuable quant au bien a changé sensiblement reflète le fait que la catégorie du bien est déterminée en fonction de l'intention du contribuable au moment de l'acquisition.

L'interprétation du terme «inventaire», que préconise l'intimée, est fondamentalement incompatible, à deux égards, avec la dichotomie que la Loi établit entre les biens figurant dans un inventaire et les biens en immobilisation. En premier lieu, elle nécessiterait une modification de la qualification de certains biens en fonction de leur pertinence annuelle dans le calcul du revenu plutôt que selon les circonstances précises qui sont énumérées aux par. 13(7) et 45(1). En deuxième lieu, ce qui est plus grave, si un bien n'entre pas dans le calcul du revenu pour une année donnée, cela n'en fait pas un bien en immobilisation à moins qu'il ne satisfasse aux conditions des par. 13(7) et 45(1). Selon l'interprétation proposée par l'intimée, un bien ne serait pas un bien figurant dans un inventaire pendant une année où il n'entre pas dans le calcul du revenu, et il cesserait ainsi d'exister pour cette année, aux fins de la *Loi de l'impôt sur le revenu.* Cela va à l'encontre du régime de la Loi qui classe chaque bien appartenant à un contribuable dans l'une ou l'autre des deux catégories fondamentales. Il est absurde que les biens détenus pour être vendus par une entreprise disparaissent tout simplement du régime de la Loi durant les années antérieures à la vente.

En troisième lieu, l'interprétation proposée par l'intimée est incompatible avec le sens que l'on donne habituellement à la définition du terme. Selon son sens ordinaire, un bien qu'une entreprise conserve pour le mettre en vente constitue un bien figurant dans un inventaire en tout temps avant sa

sale of that item. The ordinary sense of the word also reflects the definition of inventory which is accepted according to ordinary principles of commercial accounting and of business. The Canadian Institute of Chartered Accountants has defined "inventory" as including, *inter alia* "[i]tems of tangible property which are held for sale in the ordinary course of business": *Terminology for Accountants* (3rd ed. 1983), at p. 81. In the specific context of real estate the Canadian Institute of Public Real Estate Companies states that land held for sale and land held for future development and sale is inventory: *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies* (November 1985), at p. 204-1.

34 It was held in *Bailey*, *supra*, and is accepted by Iacobucci J., that single pieces of real estate held for sale as an adventure of the nature of trade meet the definitions of inventory accepted by the commercial and accounting worlds. These definitions are consistent with the plain meaning interpretation of the definition in the Act which would require only that the item of property be relevant to the computation of income in a single year. However, the interpretation sought by the respondent is considerably more restricted because it would require a connection to income in years prior to sale. I agree with my colleague that the express wording of the *Income Tax Act* is capable of overruling accounting and commercial principles where it is sufficiently explicit. Nevertheless, the Court should be cautious to adopt an interpretation which is clearly inconsistent with the commonly accepted usage of a technical term particularly where an interpretation consistent with common usage is more natural on a plain reading of the definition.

35 The fourth problem with the interpretation of "inventory" proposed by the respondent is that the relationship between s. 10(1) and the definition of "inventory" in s. 248 would become circular. Specifically, reading s. 10(1) and the definition of

vente. Le sens ordinaire du mot reflète aussi la définition du terme «inventaire» qui est acceptée selon les principes comptables et commerciaux ordinaires. L'Institut canadien des comptables agréés a défini le mot «inventaire» comme incluant, notamment, [TRADUCTION] «[d]es biens corporels détenus pour la vente dans le cours normal d'une entreprise»: *Terminology for Accountants* (3e éd. 1983), à la p. 81. Dans le contexte particulier des biens immeubles, l'Institut canadien des compagnies immobilières publiques affirme qu'un terrain détenu en vue d'être vendu et qu'un terrain détenu en vue d'être mis en valeur et vendu sont des biens à inscrire en inventaire: *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies* (novembre 1985), à la p. 204-1.

Une des conclusions de la décision *Bailey*, précitée, qu'accepte le juge Iacobucci, veut que des terrains individuels acquis pour être vendus dans le cadre d'un projet comportant un risque de caractère commercial soient visés par les définitions du mot «inventaire» acceptées dans les milieux commerciaux et comptables. Ces définitions s'accordent avec l'interprétation selon le sens ordinaire de la définition figurant dans la Loi, qui exigerait uniquement que le bien entre dans le calcul du revenu pour une seule année. Toutefois, l'interprétation préconisée par l'intimée est beaucoup plus restreinte puisqu'elle exigerait un lien avec le revenu durant les années antérieures à la vente. Je conviens avec mon collègue qu'une disposition expresse de la *Loi de l'impôt sur le revenu* peut l'emporter sur les principes comptables et commerciaux, si elle est suffisamment explicite. La Cour ne devrait néanmoins adopter qu'avec prudence une interprétation manifestement incompatible avec l'usage généralement accepté d'un terme technique, particulièrement lorsque, selon le sens ordinaire de la définition, l'interprétation conforme à l'usage courant est plus naturelle.

Le quatrième problème que soulève l'interprétation du terme «inventaire», proposée par l'intimée, découle du fait que le lien entre le par. 10(1) et la définition du terme «inventaire», donnée à l'art. 248, deviendrait tautologique. Plus précisément,

"inventory" proposed by the respondent in tandem would mandate the conclusion that s. 10(1) applies if the property in question is inventory and that the property in question is inventory if s. 10(1) applies. Under the respondent's interpretation, if the inventory valuation method in s. 10(1) applies then the cost or value of the property is relevant in computing income in the year in question and the property is inventory. On the other hand, if the valuation method does not apply then the cost or value of the property is not relevant to the computation of income and the property is not inventory. Interpretations which lead to circular definitions are contrary to common sense and should be avoided.

l'interprétation en parallèle du par. 10(1) et de la définition du terme «inventaire» proposée par l'intimée forcerait à conclure que le par. 10(1) s'applique si le bien en question est un bien figurant dans un inventaire, et que le bien en question est un bien figurant dans un inventaire si le par. 10(1) s'applique. Selon l'interprétation proposée par l'intimée, si la méthode d'évaluation des biens figurant dans un inventaire prévue au par. 10(1) s'applique, alors le coût ou la valeur du bien entre dans le calcul du revenu pour l'année en question et le bien est un bien figurant dans un inventaire. Par ailleurs, si la méthode d'évaluation ne s'applique pas, le coût ou la valeur du bien n'entre pas alors dans le calcul du revenu et le bien n'est pas un bien figurant dans un inventaire. Les interprétations qui donnent lieu à des définitions tautologiques sont contraires au bon sens et devraient être évitées.

For all of the reasons discussed above, I conclude that the correct interpretation of the term "inventory" in s. 248(1) is the one which appears most obvious on a literal reading of the wording that an item of property is inventory if it is relevant to the computation of business income in a year. As a general principle, items of property sold by a business venture will always be relevant to the computation of income in the year of sale.

36 Pour toutes les raisons qui viennent d'être données, je conclus que l'interprétation juste du terme «inventaire», figurant au par. 248(1), est celle qui semble la plus évidente selon une interprétation littérale du texte voulant qu'un bien soit un bien figurant dans un inventaire s'il entre dans le calcul du revenu d'entreprise pour une année. En règle générale, les biens vendus par une entreprise commerciale entrent toujours dans le calcul du revenu pour l'année de la vente.

To the extent that *Dresden Farm Equipment, supra,* relies upon an interpretation which is inconsistent with this approach, I choose not to follow it as it does not deal directly with the issue raised in this case. Instead I prefer to follow the well-established line of cases which have specifically held as part of their *rationes decidendi* that real estate held for resale in an adventure in the nature of trade constitutes "inventory" for the purposes of s. 10(1): *Bailey, supra*; *Weatherhead v. M.N.R.*, [1990] 1 C.T.C. 2579 (T.C.C.); *Van Dongen v. The Queen*, 90 D.T.C. 6633 (F.C.T.D.); *Skerrett v. M.N.R.*, 91 D.T.C. 1330 (T.C.C.); and *Cull v. The Queen*, 87 D.T.C. 5322 (F.C.T.D.). I endorse the approach taken in these cases of considering the definition of "inventory" in the context of the basic distinction between business income and

37 Dans la mesure où l'arrêt *Dresden Farm Equipment*, précité, se fonde sur une interprétation qui est incompatible avec ce point de vue, je choisis de ne pas le suivre puisqu'il ne porte pas directement sur le point soulevé en l'espèce. Je préfère plutôt suivre le courant jurisprudentiel bien établi où il a été expressément statué, dans les *rationes decidendi*, que des biens immeubles détenus pour être revendus dans le cadre d'un projet comportant un risque de caractère commercial constituent des biens figurant dans un «inventaire» aux fins du par. 10(1): *Bailey*, précité; *Weatherhead c. M.R.N.*, [1990] 1 C.T.C. 2579 (C.C.I.); *Van Dongen c. La Reine*, 90 D.T.C. 6633 (C.F. 1re inst.); *Skerrett c. M.R.N.*, 91 D.T.C. 1330 (C.C.I.), et *Cull c. La Reine*, 87 D.T.C. 5322 (C.F. 1re inst.). Je souscris à la méthode adoptée dans ces affaires, qui consiste à

capital gain. As Cullen J. stated in *Van Dongen* at p. 6634:

> The characterization of these properties as inventory is significant, because any gain or loss from the disposition of the inventory will be treated as business income or loss rather than a capital gain or loss. [Emphasis added.]

38 The Styles Property was relevant to the computation of business income in the taxation year of disposition and therefore it is correctly categorized as "inventory" for the purposes of the *Income Tax Act* both in that year and in preceding years.

(3) The Calculation of "Profit" in Section 10(1)

39 As noted earlier in these reasons, a taxpayer must establish that he or she is involved in a "business" and that the property in question is "inventory" before the valuation scheme in s. 10(1) can be invoked. Since the appellant's adventure in the nature of trade was a "business" and the Styles Property constituted "inventory", the appellant was *prima facie* entitled to make use of the valuation scheme set out in s. 10(1). However, as Iacobucci J. has pointed out, the valuation scheme in s. 10(1) does not provide an automatic deduction from income nor does it mandate that any taxpayer with inventory can deduct any loss on fair market value arising therefrom. Rather s. 10(1) mandates how the valuation procedure must take place when ordinary commercial and accounting principles establish that the value of inventory is relevant to the computation of business income in a taxation year.

40 The computation of business income is rooted in s. 9 of the *Income Tax Act*. Section 9 provides that the income from a business for a year is the profit

comprendre la définition du terme «inventaire» dans le contexte de la distinction fondamentale entre le revenu d'entreprise et le gain en capital. Comme l'a dit le juge Cullen dans la décision *Van Dongen*, à la p. 6634:

> La classification de ces propriétés comme de l'inventaire est importante, parce que le gain ou la perte découlant de l'aliénation de l'inventaire sera considéré comme un revenu ou une perte d'entreprise plutôt que comme un gain ou une perte en capital. [Je souligne.]

La valeur du domaine Styles entrait dans le calcul du revenu d'entreprise pour l'année d'imposition au cours de laquelle il était aliéné et c'est donc à juste titre qu'il est classé comme un bien figurant dans un «inventaire» aux fins de la *Loi de l'impôt sur le revenu*, à la fois pour cette année et pour les années antérieures.

(3) Le calcul du «bénéfice» au par. 10(1)

Comme je l'ai déjà mentionné, pour pouvoir invoquer la méthode d'évaluation établie au par. 10(1), le contribuable doit établir qu'il est engagé dans une «entreprise» et que le bien en question est un bien qui figure dans un «inventaire». Comme le projet comportant un risque de caractère commercial de l'appelant était une «entreprise» et que le domaine Styles était un bien figurant dans un «inventaire», l'appelant avait le droit, à première vue, de recourir à la méthode d'évaluation établie au par. 10(1). Toutefois, comme le juge Iacobucci l'a souligné, la méthode d'évaluation établie au par. 10(1) ne prévoit pas une déduction automatique du revenu, ni qu'un contribuable ayant des biens figurant dans un inventaire peut déduire toute perte de juste valeur marchande qui en découle. Le paragraphe 10(1) précise plutôt comment l'évaluation doit se faire lorsque les principes comptables et commerciaux ordinaires établissent que la valeur des biens figurant dans un inventaire entre dans le calcul du revenu d'entreprise pour une année d'imposition.

Le calcul du revenu d'entreprise est fondé sur l'art. 9 de la *Loi de l'impôt sur le revenu*. L'article 9 prévoit que le revenu tiré d'une entreprise pour

and that loss is to be calculated by applying the same provisions *mutatis mutandis*:

9. (1) [Income from business or property] Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.

(2) [Loss from business or property] Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of his loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source *mutatis mutandis*.

The Act does not define "profit" nor does it provide any specific rules for the computation of profit. Tax jurisprudence has established that the determination of profit under s. 9(1) is a question of law to be determined according to the business test of "well-accepted principles of business (or accounting) practice" or "well-accepted principles of commercial trading" except where these are inconsistent with the specific provisions of the *Income Tax Act*: see *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309 (H.L.); *Neonex International Ltd. v. The Queen*, 78 D.T.C. 6339 (F.C.A.); *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 723; *Materials on Canadian Income Tax*, *supra*, at p. 291; and R. Huot, *Understanding Income Tax for Practitioners* (1994-95 edition), at p. 299.

In calculating profit under s. 9 of the *Income Tax Act*, a business calculates its gross profit and then subtracts allowable operating and non-operating expenses. Under well-accepted principles of business and accounting practice gross profit for a business involved in sale is calculated according to the following formula:

Gross Profit = Proceeds of Sale — Cost of Sale

and:

une année est le bénéfice obtenu et que la perte doit être calculée en appliquant *mutatis mutandis* les mêmes dispositions:

9. (1) [Revenu tiré d'une entreprise ou d'un bien] Sous réserve des dispositions de la présente Partie, le revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.

(2) [Perte provenant d'une entreprise ou d'un bien] Sous réserve des dispositions de l'article 31, la perte subie par un contribuable dans une année d'imposition relativement à une entreprise ou à un bien est le montant de sa perte, si perte il y a, subie dans cette année d'imposition relativement à cette entreprise ou à ce bien, calculée en appliquant *mutatis mutandis* les dispositions de la présente loi afférentes au calcul du revenu tiré de cette entreprise ou de ce bien.

41 La Loi ne définit pas le terme «bénéfice» et n'établit pas de règles précises pour en faire le calcul. La jurisprudence en matière fiscale a établi que la détermination du bénéfice en vertu du par. 9(1) est une question de droit qui doit être tranchée selon le critère des «principes reconnus de la pratique des affaires (ou comptable)» ou des «principes reconnus des échanges commerciaux», sauf lorsque ceux-ci sont incompatibles avec les dispositions expresses de la *Loi de l'impôt sur le revenu*: voir *Gresham Life Assurance Society c. Styles*, [1892] A.C. 309 (H.L.); *Neonex International Ltd. c. La Reine*, 78 D.T.C. 6339 (C.A.F.); *Symes c. Canada*, [1993] 4 R.C.S. 695, à la p. 723; *Materials on Canadian Income Tax*, *op. cit.*, à la p. 291, et R. Huot, *Cours d'impôt* (édition 1994-95), à la p. 1-4.

42 Pour calculer son bénéfice en vertu de l'art. 9 de la *Loi de l'impôt sur le revenu*, une entreprise calcule d'abord son bénéfice brut, puis en soustrait ses frais d'exploitation et autres frais déductibles. En vertu des principes reconnus de la pratique des affaires et de la pratique comptable, le bénéfice brut d'une entreprise de vente est calculé selon la formule suivante:

bénéfice brut = produit des ventes — coût des ventes

et:

Cost of Sale = (Value of Inventory at beginning of year + Cost of Inventory acquisitions) — Value of Inventory at end of year.

Thus for a business involved in sales:

Gross Profit = Proceeds of Sale — [(Value of Inventory at beginning of year + Cost of Inventory acquisitions) — Value of Inventory at end of year].

43 This formula was originally designed for companies with significant inventories at a time when computer technology did not allow the specific cost of each item to be easily traced on an individual basis. The formula allowed a business to calculate gross profit on the basis of a single inventory valuation each year rather than keeping detailed ongoing records. It is rather an anachronism in an age where most businesses with significant inventories carefully track both the cost and sale price of each item by means of computer technology. A moment of thought, however, will lead to the conclusion that this formula is merely a convenient shorthand for a two-step process which recognizes profit as the excess of sale proceeds over value for inventory sold in the year and the change in the value of inventory still on hand at the end of the year. Thus the formula could equally be expressed as:

Gross Profit = (Proceeds of Sale — Value of Inventory Sold) + Change in Value of Unsold Inventory.

44 Thus, under well-accepted principles of commercial and accounting practice the value of unsold inventory is relevant to the computation of business income. This is based on the accounting presumption that holding onto unsold inventory represents a cost to a business. This is a principle generally applicable to the calculation of business income from businesses of any size and with inventories of any size although the popular

coût des ventes = (valeur des biens figurant dans l'inventaire au début de l'année + coût des acquisitions) — valeur des biens figurant dans l'inventaire à la fin de l'année.

Par conséquent, pour une entreprise de vente:

bénéfice brut = produit des ventes — [(valeur des biens figurant dans l'inventaire au début de l'année + coût des acquisitions) — valeur des biens figurant dans l'inventaire à la fin de l'année].

Cette formule a été conçue à l'origine pour des sociétés qui comptaient un inventaire important à une époque où l'informatique ne permettait pas d'identifier facilement le coût précis de chaque article. La formule permettait aux entreprises de calculer leur bénéfice brut en fonction d'une seule évaluation des biens figurant dans l'inventaire chaque année au lieu de tenir des registres permanents détaillés. C'est plutôt un anachronisme à une époque où la plupart des entreprises qui comptent un inventaire important suivent de près à la fois le coût et le prix de vente de chaque article grâce à l'informatique. Un moment de réflexion amène toutefois à conclure que cette formule n'est qu'un abrégé pratique d'un processus à deux étapes qui reconnaît le bénéfice comme l'excédent du produit des ventes sur la valeur des biens figurant dans l'inventaire qui ont été vendus durant l'année et la variation de la valeur des biens figurant dans l'inventaire qui sont encore détenus à la fin de l'année. Par conséquent, la formule pourrait également être la suivante:

bénéfice brut = (produit des ventes — valeur des biens figurant dans l'inventaire qui ont été vendus) + variation de la valeur des biens invendus figurant dans l'inventaire.

Ainsi, en vertu des principes reconnus de la pratique des affaires et de la pratique comptable, la valeur des biens invendus figurant dans l'inventaire entre dans le calcul du revenu d'entreprise. Cela est fondé sur la présomption, en matière de comptabilité, que le fait de conserver en inventaire des biens invendus représente des frais pour une entreprise. En outre, il s'agit là d'un principe généralement applicable au calcul du revenu d'entre-

formula was originally created as a convenient shortcut for the computation of business income for companies with large inventories.

Section 10(1) of the *Income Tax Act* recognizes the well accepted commercial and accounting principle of requiring a business to value its inventory at the lower of cost or market value. This principle is an exception to the general principle that neither profits nor losses are recognized until realized. As well, it represents a departure from the general principle that assets are valued at their historical cost. The underlying rationale for this specific exception to the general principles is usually explained as originating in the principle of conservatism. The generally accepted accounting principle applicable in this situation is explained by D. E. Kieso et al., *Intermediate Accounting* (2nd Canadian ed. 1986), at pp. 421-22, as follows:

> A major departure from adherence to the historical cost principle is made in the area of inventory valuation. Applying the constraint of conservatism in accounting means recognizing known losses in the period of occurrence. In contrast, known gains are not recognized until realized. If the inventory declines in value below its original cost for whatever reason . . . , the inventory should be written down to reflect this loss. The general rule is that the historical cost principle is abandoned when the future utility (revenue-producing ability) of the asset is no longer as great as its original cost. A departure from cost is justified on the basis that a loss of utility should be reflected as a charge against the revenues in the period in which the loss occurs. Inventories are valued, therefore, on the basis of the lower of cost and market instead of on an original cost basis. [Emphasis added.]

As the above passage makes clear, the well-accepted principle of conservatism which underlies the valuation method in s. 10(1) represents not only an exception to the realization principle (in cases of loss) but also an exception to the principle

prise pour les entreprises et les inventaires de toutes tailles, même si à l'origine la formule populaire a été conçue comme un raccourci pratique pour calculer le revenu d'entreprise des sociétés qui comptent un inventaire important.

Le paragraphe 10(1) de la *Loi de l'impôt sur le revenu* sanctionne le principe commercial et comptable reconnu, selon lequel une entreprise doit évaluer les biens figurant dans son inventaire au moindre de leur coût et de leur valeur marchande. Ce principe est une exception au principe général voulant que ni les bénéfices ni les pertes ne soient reconnus avant leur réalisation. Il représente, en outre, une dérogation au principe général voulant que les éléments d'actif soient évalués à leur coût d'origine. La raison d'être de cette exception particulière aux principes généraux est habituellement rattachée au principe de prudence. Le principe comptable généralement reconnu qui s'applique à la présente situation est expliqué par D. E. Kieso et autres, dans *Comptabilité intermédiaire* (1991), au pp. 489 et 490:

> C'est dans les évaluations de stocks que l'on peut retrouver les principales dérogations au principe du coût d'origine. En comptabilité, la mise en pratique du principe de prudence suppose que l'on constate une perte dès qu'elle s'avère probable et que l'on peut en estimer le montant avec suffisamment de précision. Par contre, selon le principe de réalisation, les gains connus ne sont pas constatés avant d'être matérialisés. Si, pour n'importe quel motif, la valeur des stocks tombe en dessous du coût d'origine [. . .], il faut diminuer la valeur des stocks pour refléter cette perte. En règle générale, lorsque la valeur utile future d'un bien, c'est-à-dire sa capacité de générer des recettes, est moins élevée que son coût d'origine, on abandonne le principe du coût d'origine. Cette dérogation se justifie par le fait qu'une perte de valeur utile doit être passée en charges dans les résultats de l'exercice au cours duquel elle survient. C'est ce qui explique que les stocks sont évalués à leur valeur minimale, c'est-à-dire à leur coût d'origine ou à leur valeur du marché, selon le moins élevé des deux. [Je souligne.]

Comme le passage précédent le montre clairement, le principe de prudence reconnu qui sous-tend la méthode d'évaluation prévue au par. 10(1) représente une exception non seulement au principe de réalisation (dans le cas de pertes), mais

of symmetry since gains are not recognized until they are realized. Thus the taxpayer who is entitled to rely on s. 10(1) is allowed to claim a business loss where the value of inventory falls but is not required to declare a business profit until the inventory is sold even if the value of the inventory rises.

47 In *Ostime v. Duple Motor Bodies, Ltd.*, [1961] 2 All E.R. 167 (H.L.), at pp. 172-73, Lord Reid discussed the fact that generally items should be valued at historical cost but that the "lower of cost or market" exception allows valuation at market value only if market value falls below cost. As Lord Reid pointed out, this lack of symmetry is not entirely logical but it represents good conservative accountancy and therefore has always been recognized as legitimate for taxation purposes:

> If market value [rather than cost] were taken [in all cases], that would generally include an element of profit, and it is a cardinal principle that profit shall not be taxed until realised; if the market value fell before the article was sold the profit might never be realised. But an exception seems to have been recognised for a very long time; if market value has already fallen before the date of valuation, so that, at that date, the market value of the article is less than it cost the taxpayer, then the taxpayer can bring the article in at market value, and in this way anticipate the loss which he will probably incur when he comes to sell it. That is no doubt good conservative accountancy, but it is quite illogical. The fact that it has always been recognised as legitimate is only one instance going to show that these matters cannot be settled by any hard and fast rule or strictly logical principle. [Emphasis added.]

48 The well-accepted business and accounting principles applicable to real estate held out as inventory are illustrated in the *Canadian Institute of Public Real Estate Companies Handbook* (September 1990), at sections 301 and 302:

aussi au principe de symétrie, puisque les gains ne sont constatés que lorsqu'ils sont matérialisés. Par conséquent, le contribuable qui est habilité à invoquer le par. 10(1) peut déclarer une perte d'entreprise en cas de baisse de la valeur des biens figurant dans son inventaire, mais il n'est pas tenu de déclarer un bénéfice d'entreprise tant que les biens figurant dans son inventaire ne sont pas vendus, même si leur valeur augmente.

Dans la décision *Ostime c. Duple Motor Bodies, Ltd.*, [1961] 2 All E.R. 167 (H.L.), aux pp. 172 et 173, lord Reid a traité du fait que les biens devraient généralement être évalués à leur coût d'origine, mais que l'exception du «moindre du coût et de la valeur marchande» permet de procéder à une évaluation selon la valeur marchande si cette dernière devient inférieure au prix coûtant. Comme l'a souligné lord Reid, cette asymétrie n'est pas entièrement logique, mais elle représente une saine pratique comptable de prudence et, partant, elle a toujours été reconnue comme légitime en matière de fiscalité:

> [TRADUCTION] Si l'on retient [dans tous les cas] la valeur marchande [plutôt que le coût], cela comporterait généralement un élément de bénéfice, et, selon un principe capital, le bénéfice ne doit être imposé que lorsqu'il est matérialisé; si la valeur marchande a baissé avant que l'article ne soit vendu, il se peut que le bénéfice ne se matérialise jamais. Mais on semble reconnaître une exception depuis très longtemps; si la valeur marchande a déjà baissé avant la date de l'évaluation, de sorte qu'à cette date la valeur marchande de l'article est moindre que son coût pour le contribuable, alors le contribuable peut déclarer l'article à sa valeur marchande et, de cette façon, anticiper la perte qu'il subira probablement lorsqu'il réussira à le vendre. Il s'agit là sans doute d'une saine pratique comptable de prudence, mais elle est tout à fait illogique. Le fait qu'elle ait toujours été reconnue comme légitime n'est qu'un exemple qui montre que ces questions ne peuvent être réglées au moyen d'une règle absolue ou d'un principe strictement logique. [Je souligne.]

Les principes commerciaux et comptables reconnus qui s'appliquent aux biens immeubles détenus à titre de biens figurant dans un inventaire sont illustrés dans le manuel de l'Institut canadien des compagnies immobilières publiques (septembre 1990), aux art. 301 et 302:

301. INTRODUCTION

301.1. Real estate property is normally carried at the lower of cost and net realizable value if it is held as inventory and at cost if it is held for investment purposes . . . .

302. PROPERTY HELD AS INVENTORY

302.1. Property held as inventory should be stated at the lower of cost and net realizable value.

302.2. Land held for sale currently and land held for future development and sale is inventory and generally accepted accounting principles require that it be stated at the lower of cost and net realizable value.

(Note that "net realizable value" is the estimated selling price plus other estimated revenue reduced by the costs to improve and sell the property — for the purposes of this analysis it is equivalent to fair market value.)

In summary, I conclude that the valuation method in s. 10(1) is available for inventory held as part of an adventure in the nature of trade. The valuation method becomes relevant in any particular taxation year through the calculation of business income. Business income is calculated according to well-accepted commercial and accounting principles. According to these principles the value of inventory is relevant to the computation of income in years prior to sale since it comprises part of the cost of sale. According to the same principles inventory is to be valued at the lower of cost or market value, a specific exception to the general principle of realization. This exception is well accepted in the specific instance relevant to this appeal: the valuation of real estate inventory. This conclusion is fully consistent with the line of cases following *Bailey*. As Cullen J. states in *Van Dongen*, *supra*, at p. 6639:

[TRADUCTION] **301. INTRODUCTION**

301.1. Un bien immeuble est habituellement comptabilisé au moindre de son coût et de sa valeur de réalisation nette s'il est détenu comme un bien figurant dans un inventaire, et au prix coûtant s'il est détenu à des fins de placement. . . .

302. BIEN DÉTENU COMME BIEN FIGURANT DANS UN INVENTAIRE

302.1. Un bien détenu comme bien figurant dans un inventaire devrait être comptabilisé au moindre de son coût et de sa valeur de réalisation nette.

302.2. Un terrain actuellement détenu pour être revendu et un terrain détenu pour être mis en valeur et vendu est un bien figurant dans un inventaire, et les principes comptables généralement reconnus exigent qu'il soit comptabilisé au moindre de son coût et de sa valeur de réalisation nette.

(À noter que la «valeur de réalisation nette» est le prix de vente estimatif plus les autres recettes estimatives, moins les coûts engagés pour améliorer et vendre le bien — pour les fins de la présente analyse, elle équivaut à la juste valeur marchande.)

49 En résumé, je conclus que la méthode d'évaluation prévue au par. 10(1) peut s'appliquer aux biens figurant dans un inventaire qui sont détenus dans le cadre d'un projet comportant un risque de caractère commercial. La méthode d'évaluation devient applicable pour calculer le revenu d'entreprise au cours de toute année d'imposition donnée. Le revenu d'entreprise est calculé conformément à des principes commerciaux et comptables reconnus. Selon ces principes, la valeur des biens figurant dans un inventaire entre dans le calcul du revenu pour les années antérieures à leur vente puisqu'elle comprend une partie du coût des ventes. Selon les mêmes principes, les biens figurant dans un inventaire doivent être évalués au moindre de leur coût et de leur valeur marchande, à titre d'exception particulière au principe général de réalisation. Cette exception est reconnue dans le cas particulier qui nous intéresse en l'espèce: l'évaluation de biens immeubles figurant dans un inventaire. Cette conclusion s'harmonise pleinement avec le courant jurisprudentiel qui a suivi la décision *Bailey*. Comme le juge Cullen le dit dans la décision *Van Dongen*, précitée, à la p. 6639:

The later *Bailey* case appears to have settled the issue that land held as an adventure in the nature of trade is eligible for inventory write-down.

See also: *Weatherhead*, *Skerrett*, and *Cull*.

(4) The Common Law Restriction to Stock-in-Traders

50 The final argument of the respondent which should be addressed is that the inventory valuation method in s. 10(1) is simply a codification of the common law and so is restricted to stock-in-traders. The respondent is correct to note that the common law recognized an exception to the realization principle by allowing inventory to be valued at the lower of cost or market value in the case of stock-in-trade. The common law in Canada is summarized in *Minister of National Revenue v. Anaconda American Brass Ltd.*, [1956] A.C. 85, a Canadian case which was appealed from this Court to the Privy Council. Viscount Simonds, speaking for the Privy Council stated (at pp. 100-101):

The income tax law of Canada, as of the United Kingdom, is built upon the foundations described by Lord Clyde in *Whimster & Co.* v. *Inland Revenue Commissioners* (1925), 12 T.C. 813, 823, in a passage cited by the Chief Justice which may be here repeated. "In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business *during such year or accounting period* and the expenditure laid out to earn *those receipts*. In the second place, the account of profit and loss to be made up for the purpose of *ascertaining that difference* must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there

Dans la cause ultérieure de *Bailey*, on semble avoir décidé de façon définitive qu'un bien-fonds détenu comme risque de caractère commercial est admissible aux fins de la réduction de la valeur de l'inventaire.

Voir aussi les décisions *Weatherhead*, *Skerrett* et *Cull*.

(4) La restriction aux marchands d'articles de commerce, reconnue en common law

Le dernier argument de l'intimée qu'il y a lieu d'examiner veut que la méthode d'évaluation des biens figurant dans un inventaire, prévue au par. 10(1), ne constitue qu'une codification de la common law et qu'elle ne s'applique ainsi qu'aux seuls marchands d'articles de commerce. L'intimée souligne avec raison que la common law a reconnu une exception au principe de réalisation en permettant d'évaluer des articles de commerce au moindre de leur coût et de leur valeur marchande. L'état de la common law au Canada est résumé dans l'arrêt *Minister of National Revenue c. Anaconda American Brass Ltd.*, [1956] A.C. 85, une affaire canadienne entendue par notre Cour et portée en appel devant le Conseil privé. Le vicomte Simonds affirme, au nom du Conseil privé (aux pp. 100 et 101):

[TRADUCTION] La loi de l'impôt sur le revenu, au Canada comme au Royaume-Uni, repose sur les bases décrites par lord Clyde dans l'affaire *Whimster & Co.* c. *Inland Revenue Commissioners* (1925), 12 T.C. 813, 823, dans un passage cité par le Juge en chef et qui vaut la peine d'être reproduit ici. «En premier lieu, les bénéfices de quelque année ou de quelque exercice comptable que ce soit doivent être considérés comme étant constitués par la différence entre les recettes du commerce ou de l'entreprise encaissées *pendant cette même année ou ce même exercice comptable* et les dépenses effectuées pour réaliser *ces recettes*. En second lieu, le compte des profits et pertes qu'il faut établir pour *constater cette différence* doit être établi conformément aux principes ordinaires de la comptabilité commerciale, dans la mesure où ils sont applicables, et, selon le cas, aux règles de la Loi de l'impôt sur le revenu ou aux modifications apportées à cette Loi par les dispositions et annexes des lois qui régissent les droits sur les surplus de bénéfices. Par exemple, les principes ordinaires de la comptabilité commerciale exigent que la valeur des articles de commerce soit inscrite dans le compte des profits et pertes d'une entreprise commerciale ou indus-

is nothing about this in the taxing statutes." [Italics in original; underlining added.]

See also: *Whimster & Co. v. Inland Revenue Commissioners* (1925), 12 T.C. 813 (Ct. Sess., Scot.), at p. 823 (*per* Lord Clyde); and *BSC Footwear Ltd. v. Ridgway*, [1971] 2 All E.R. 534 (H.L.).

Interestingly, the exception to the realization principle for stock-in-traders existed at common law without any statutory authorization and was based solely on ordinary commercial principles as they existed at that time. As discussed above, ordinary commercial principles would now suggest that all inventory be valued at the lower of cost or market value. The respondent, however, argues that s. 10(1) is merely a codification of the common law as it existed in 1948 when the provision first appeared in the *Income Tax Act*. This argument is accepted by Iacobucci J. who cites the comments of Abbott J. in *Irwin*, *supra*, as authority for this proposition.

I do not accept the argument that s. 10(1) is merely a codification of ordinary commercial principles as they existed and were recognized by the common law in 1948. The *obiter* comments by Abbott J. in *Irwin* (at p. 665) to the effect that the former version of s. 10(1), s. 14(2), was merely a codification of the common law and that s. 14(2) probably did not apply to single pieces of real estate were explicitly not made part of the *ratio* of the decision. Abbott J. did not give any consideration to the specific wording of s. 14(2) which would have been a *sine qua non* to expressing an authoritative opinion on this point.

The appropriate focus in determining whether s. 10(1) is a mere codification of the common law is upon the wording of the section itself. For ease of reference I quote that section once again:

trielle, au début et à la fin d'un exercice donné, au prix coûtant ou au prix courant, suivant le moindre de ceux-ci; la législation fiscale est cependant muette à ce sujet.» [En italique dans l'original; je souligne.]

Voir également: *Whimster & Co. c. Inland Revenue Commissioners* (1925), 12 T.C. 813 (Ct. Sess., Scot.), à la p. 823 (lord Clyde), et *BSC Footwear Ltd. c. Ridgway*, [1971] 2 All E.R. 534 (H.L.).

Fait intéressant, l'exception au principe de réalisation pour les marchands d'articles de commerce existait en common law en l'absence de toute autorisation législative et elle était fondée uniquement sur les principes commerciaux ordinaires en vigueur à l'époque. Comme je l'ai déjà mentionné, les principes commerciaux ordinaires laisseraient maintenant entendre que tous les biens figurant dans un inventaire devraient être évalués selon la méthode du moindre du coût et de la valeur marchande. L'intimée fait cependant valoir que le par. 10(1) n'est qu'une codification de la common law telle qu'elle existait en 1948 lorsque cette disposition est apparue pour la première fois dans la *Loi de l'impôt sur le revenu*. Cet argument est accepté par le juge Iacobucci qui cite, à l'appui de cette proposition, les commentaires du juge Abbott dans l'arrêt *Irwin*, précité. 51

Je n'accepte pas l'argument selon lequel le par. 10(1) n'est qu'une codification des principes commerciaux ordinaires tels qu'ils existaient et qu'ils étaient reconnus par la common law en 1948. Les commentaires incidents du juge Abbott dans l'arrêt *Irwin* (à la p. 665), selon lesquels la version antérieure du par. 10(1), à savoir le par. 14(2), n'était qu'une codification de la common law, et que le par. 14(2) ne s'appliquait probablement pas à un bien immeuble unique ont explicitement été exclus de la *ratio decidendi* de la décision. Le juge Abbott n'a aucunement pris en considération le texte précis du par. 14(2), ce qui aurait été nécessaire à une opinion faisant autorité sur ce point. 52

Pour déterminer si le par. 10(1) n'est qu'une codification de la common law, il convient de s'attarder au texte même de cette disposition. Pour en faciliter la consultation, je cite de nouveau cette disposition: 53

10. (1) For the purpose of computing income from a business, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation. [Emphasis added.]

10. (1) Aux fins du calcul du revenu tiré d'une entreprise, les biens figurant dans un inventaire sont évalués au coût supporté par le contribuable ou à leur juste valeur marchande, le moins élevé de ces deux éléments étant à retenir, ou de toute autre façon permise par les règlements. [Je souligne.]

The common law rule was restricted to stock-in-traders. Section 10(1) on the other hand explicitly states that it applies to the inventory of a business. As discussed above, the word business is defined in the Act and specifically includes adventures in the nature of trade. If Parliament had wanted to simply codify the common law it could and would have used the term "ordinary trading business" or "stock-in-trader" both of which had judicially established definitions. Since Parliament chose to use the broader term "business", there is simply no basis on which to assume that s. 10(1) was no more than a codification of a common law rule. To place such a judicial limit on the clear and unambiguous wording of the statute is a usurpation of the legislative function of Parliament.

La règle de common law ne s'appliquait qu'aux marchands d'articles de commerce. Par contre, le par. 10(1) précise qu'il s'applique aux biens figurant dans l'inventaire d'une entreprise. Tel que mentionné plus haut, le mot «entreprise» est défini dans la Loi et il désigne expressément les projets comportant un risque de caractère commercial. Si le législateur avait tout simplement voulu codifier la common law, il aurait pu employer, et il l'aurait fait, l'expression «entreprise commerciale ordinaire» ou l'expression «marchand d'articles de commerce» qui avaient toutes deux été définies par les tribunaux. Comme le législateur a choisi d'employer le terme plus large «entreprise», il n'y a aucune raison de présumer que le par. 10(1) n'est rien de plus qu'une codification d'une règle de la common law. Imposer une telle limite judiciaire au texte clair et net de la Loi, c'est en quelque sorte usurper la fonction législative du Parlement.

54 In rejecting the principal argument of the respondent that s. 10(1) is restricted to stock-in-traders, I must also, with respect, reject a number of other corollary arguments accepted by Iacobucci J.

Comme je rejette l'argument principal de l'intimée, voulant que le par. 10(1) ne s'applique qu'aux marchands d'articles de commerce, force m'est aussi de rejeter, en toute déférence, un certain nombre d'autres arguments corollaires acceptés par le juge Iacobucci.

55 First, I do not accept the argument that s. 10(1) applies only to those who "carry on a business". A specific judicial interpretation has evolved for the phrase "carry on a business". That phrase is used in the *Income Tax Act* and is useful for determining the residence of a taxpayer (see s. 253). Once again if Parliament had intended to restrict the ambit of s. 10(1) to taxpayers which carry on a business it would have done so. I can do no better on this point than to quote with approval the response of Rip T.C.J. to this argument in *Bailey*, *supra*, at p. 1330:

En premier lieu, je n'accepte pas l'argument selon lequel le par. 10(1) ne s'applique qu'aux personnes qui «exploitent une entreprise». Les tribunaux ont donné une interprétation précise à l'expression «exploiter une entreprise». Cette expression est employée dans la *Loi de l'impôt sur le revenu* et elle sert à déterminer le lieu de résidence d'un contribuable (voir l'art. 253). Encore une fois, si le législateur avait voulu restreindre la portée du par. 10(1) aux seuls contribuables qui exploitent une entreprise, il l'aurait fait. À ce sujet, je ne puis que citer avec approbation la réponse que le juge Rip de la Cour canadienne de l'impôt a donnée à cet argument dans la décision *Bailey*, précitée, à la p. 1330:

Subsection 10(1) directs a property to be valued "for the purpose of computing income from a business". The phrase does not contemplate computing income only from carrying on a business, as suggested by counsel for the respondent. The phrases "carrying on a business" and "carried on a business" are found in several provisions of the Act: see, for example, paragraph 2(3)(*b*), and subsections 115(1) and 219(1). "To carry on something," stated Jackett P. in *Tara Exploration [and Development Co. v. M.N.R.*, 70 D.T.C. 6370], page 6376, "involves continuity of time or operations such as is involved in the ordinary sense of a 'business'". When this expression "carry on" is used in the Act, Parliament describes a continuity of time or operations with respect to the factual situation contemplated by the particular provision. Such continuity is not required in subsection 10(1) and its addition to that provision would add nothing to that provision's ordinance.

Le paragraphe 10(1) signifie qu'un bien doit être évalué «aux fins du calcul du revenu tiré d'une entreprise». La locution ne propose pas que le calcul du revenu soit tiré seulement de l'exploitation d'une entreprise, tel que suggéré par l'avocat de l'intimé. Les locutions «exploitant une entreprise» et «a exploité une entreprise» se retrouvent dans plusieurs dispositions de la Loi; voir, par exemple, l'alinéa 2(3)*b*), et les paragraphes 115(1) et 219(1). «Exploiter quelque chose», a déclaré le président Jackett dans l'affaire *Tara Exploration [and Development Co. c. M.R.N.*, 70 D.T.C. 6370], page 6376, «implique une continuité dans le temps ou dans les opérations, comme celle qu'implique le sens ordinaire du mot «entreprise»». Lorsque le terme «exploiter» est utilisé dans la Loi, le Parlement décrit une continuité dans le temps ou dans les opérations relativement à une situation de faits considérée dans la disposition spécifique. Une telle continuité n'est pas requise dans le paragraphe 10(1) et son adjonction à cette disposition n'ajouterait rien à cette ordonnance de la disposition.

I am also unable to accept the argument that because s. 10(1) represents an exception to the general commercial and accounting principle of realization (see *Minister of National Revenue v. Consolidated Glass Ltd.*, [1957] S.C.R. 167, at p. 174 (*per* Rand J.)) and because this exception has been the subject of some academic criticism (see B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at pp. 332-33), therefore the exception should be read more narrowly than the express words chosen by Parliament. 56

Je ne puis accepter non plus l'argument selon lequel, parce que le par. 10(1) représente une exception au principe commercial et comptable général de la réalisation (voir l'arrêt *Minister of National Revenue c. Consolidated Glass Ltd.*, [1957] R.C.S. 167, à la p. 174 (le juge Rand)), et parce que cette exception a fait l'objet de certaines critiques de la part d'auteurs (voir B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), aux pp. 332 et 333), cette exception devrait donc être interprétée de façon plus restrictive que les mots expressément choisis par le législateur.

Although the inventory valuation scheme in s. 10(1) represents an exception to the normal principle of realization, the exception itself is also a well-accepted commercial and accounting principle. While the realization principle applies with respect to capital property, it is subject to an exception in the case of inventory as Rand J. recognized in *Consolidated Glass*, at p. 174: 57

Même si le régime d'évaluation des biens figurant dans un inventaire, prévu au par. 10(1), représente une exception au principe normal de réalisation, c'est une exception qui constitue elle-même un principe commercial et comptable reconnu. Bien que le principe de réalisation s'applique aux biens en immobilisation, il fait l'objet d'une exception dans le cas des biens figurant dans un inventaire, comme le juge Rand l'a reconnu dans l'arrêt *Consolidated Glass*, à la p. 174:

"Losses sustained" and "profits and gains made" are clearly correlatives and of the same character; but how can profits and gains be considered to have been made in any proper sense of the words otherwise than by

[TRADUCTION] Les «pertes subies» et les «bénéfices et gains réalisés» sont clairement corrélatifs et de même nature; mais comment peut-on considérer que des bénéfices et des gains ont été faits au sens propre de ces

actual realization? This [*sic*] is no inventory valuation feature in relation to capital assets. [Emphasis added.]

58 Furthermore, it is not the role of the court to restrict the interpretation of the clear statutory language because the exception created by the language has been the subject of academic criticism. Many sections of the *Income Tax Act* have been the subject of academic criticism. By way of example, the basic distinction between capital gain and income has been criticized in a tax text edited by the same Professor Arnold whose criticisms of conservative inventory valuation are relied upon by Iacobucci J.: see *Materials on Canadian Income Tax*, *supra*, at p. 297. Moreover, Professor Arnold's criticisms of conservative inventory valuation are aimed at any exception to the realization principle and have no greater force when applied to an adventure in the nature of trade seeking to apply the exception on a single item of inventory than to stock-in-trader who seeks to apply the exception to hundreds if not thousands of items of inventory.

59 My colleague Iacobucci J. accepts the fact that s. 10(1) applies to an adventure in the nature of trade. However, he would restrict the use of the valuation method in s. 10(1) to stock-in-traders and those who "carry on" a business. This effectively prevents s. 10(1) from being applied to an adventure in the nature of trade since by definition an adventurer in the nature of trade is neither a stock-in-trader nor does he "carry on" a business. The restriction placed upon this section by my colleague is based on his view that the object and purpose of the section is to provide a limited exception to the realization principle for stock-in-traders as was provided for at common law. However, as discussed at the beginning of these reasons, the clear language of the *Income Tax Act* takes precedence over a court's view of the object and purpose of a provision. As Hogg and Magee stated in

termes, si ce n'est par la réalisation effective? Il n'y a pas d'évaluation de biens figurant dans un inventaire pour des immobilisations. [Je souligne.]

En outre, il n'appartient pas aux tribunaux de restreindre l'interprétation à donner à un texte législatif clair parce que l'exception créée par ce texte a fait l'objet de critiques de la part de la doctrine. Bien des articles de la *Loi de l'impôt sur le revenu* ont fait l'objet de critiques de la part de la doctrine. Par exemple, la distinction fondamentale entre le gain en capital et le revenu a été critiquée dans un article de droit fiscal publié par le professeur Arnold, l'auteur même des critiques de l'évaluation prudente des biens figurant dans un inventaire, sur lesquelles le juge Iacobucci s'est fondé: voir *Materials on Canadian Income Tax*, *op. cit.*, à la p. 297. De plus, les critiques que le professeur Arnold a formulées au sujet de l'évaluation prudente des biens figurant dans un inventaire visent toute exception au principe de réalisation et n'ont guère plus de valeur lorsqu'on les applique à un projet comportant un risque de caractère commercial où l'on cherche à appliquer l'exception à un bien unique figurant dans un inventaire, que lorsqu'on les applique à un marchand d'articles de commerce qui cherche à appliquer cette exception à des centaines, voire à des milliers de biens figurant dans un inventaire.

Mon collègue le juge Iacobucci accepte que le par. 10(1) s'applique à un projet comportant un risque de caractère commercial. Toutefois, il limiterait l'utilisation de la méthode d'évaluation, établie au par. 10(1), aux marchands d'articles de commerce et à ceux qui «exploitent» une entreprise. Cela empêche effectivement d'appliquer le par. 10(1) à un projet comportant un risque de caractère commercial puisque, par définition, un spéculateur n'est pas un marchand d'articles de commerce et n'«exploite» pas une entreprise. La restriction que mon collègue impose à cette disposition est fondée sur son opinion que celle-ci a pour objet de prévoir une exception de portée limitée au principe de réalisation dans le cas des marchands d'articles de commerce, comme c'était le cas en common law. Cependant, comme j'en ai discuté au début des présents motifs, le texte clair de la *Loi de l'impôt*

Principles of Canadian Income Tax Law, *supra*, at p. 453:

It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.

Therefore, the object and purpose of a provision need only be resorted to when the statutory language admits of some doubt or ambiguity. In this case, there is no doubt or ambiguity in the statutory language of s. 10(1) which clearly applies to the inventory of a business including an adventure in the nature of trade. Although there is no need to resort to the object and purpose of the section in this case, I would note that the object and purpose of s. 10(1) is fully consistent with allowing the valuation method in that section to be used for adventures in the nature of trade. Section 10(1) is specifically designed as an exception to the principles of realization and matching in order to reflect the well-accepted principle of accounting conservatism. In addition to recognizing accounting conservatism, the section is designed to stop a business from accumulating pregnant losses from declines in the value of inventory. The object and purpose of the section is to prevent businesses from artificially inflating the value of inventory by continuing to hold it at cost when the market value of that inventory has already fallen below cost.

Thus, it should not be assumed that Parliament is opposed to the inventory valuation exception to the realization principle simply because this exception allows unrealized losses in certain circumstances. Although the principal goal of the *Income Tax Act* is to raise national revenue, there are many competing demands and priorities which may shape tax policy in any given circumstances. Changes to the *Income Tax Regulations*, C.R.C. 1978, c. 945, made subsequent to the years at issue

sur le revenu l'emporte sur la conception qu'un tribunal a de l'objet d'une disposition. Comme Hogg et Magee l'affirment dans *Principles of Canadian Income Tax Law*, *op. cit.*, à la p. 453:

[TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition.

Par conséquent, il n'est nécessaire de recourir à l'objet d'une disposition que si le texte législatif n'engendre aucun doute ni aucune ambiguïté. En l'espèce, aucun doute ni aucune ambiguïté ne résulte du texte du par. 10(1) qui s'applique clairement à l'inventaire d'une entreprise, y compris un projet comportant un risque de caractère commercial. Bien qu'il ne soit pas nécessaire de recourir à l'objet de la disposition en l'espèce, je soulignerais que l'objet du par. 10(1) est entièrement compatible avec le fait de permettre que la méthode d'évaluation qu'il prévoit soit utilisée relativement à des projets comportant un risque de caractère commercial. Le paragraphe 10(1) est précisément conçu comme une exception aux principes de réalisation et de rattachement, afin de refléter le principe reconnu de prudence comptable. En plus de reconnaître le principe de prudence comptable, cette disposition vise à empêcher désormais une entreprise d'accumuler des pertes en gestation dues à des baisses de valeur des biens figurant dans son inventaire. Elle a pour objet d'empêcher des entreprises d'augmenter artificiellement la valeur des biens figurant dans leur inventaire, en continuant de les détenir au prix coûtant alors que leur valeur marchande est déjà devenue inférieure au prix coûtant.

Ainsi, il ne faudrait pas présumer que le législateur s'oppose à l'exception au principe de réalisation, que constitue l'évaluation des biens figurant dans un inventaire, simplement parce que cette exception permet de déduire des pertes non réalisées dans certaines circonstances. Même si l'objet principal de la *Loi de l'impôt sur le revenu* est de garnir les coffres de l'État, il existe de nombreuses exigences et priorités qui peuvent inspirer la politique fiscale dans des circonstances données. Des

in this appeal strongly suggest that Parliament supports the principle of accounting conservatism which underlies the inclusion of inventory valuation in the determination of business income.

62 Section 10(1) provides that inventory must be valued at the lower of cost or fair market value or as otherwise permitted by regulation. The relevant regulation is Regulation 1801 which read as follows in the years in question on this appeal:

> 1801. [Valuation] Except as provided in section 1802, for the purpose of computing the income of a taxpayer from a business
>
> (*a*) all the property described in all the inventories of the business may be valued at the cost to him; or
>
> (*b*) all the property described in all the inventories of the business may be valued at the fair market value.

The combined effect of s. 10(1) and Regulation 1801 was explained in Interpretation Bulletin IT-473 "Inventory Valuation" (March 17, 1981 (as revised by Special Release dated December 5, 1986)) as follows:

> **Valuation of Inventory**
>
> 4. Except where an individual has elected under subsection 10(6) to value inventory at nil in computing income from an artistic endeavour (see IT-504), subsection 10(1) of the Act and section 1801 of the Regulations provide three alternative methods of valuing inventory. These are:
>
> (a) valuation at the lower of cost or fair market value for each item (or class of items if specific items are not readily distinguishable) in the inventory;
>
> (b) valuation of entire inventory at cost;

modifications apportées au *Règlement de l'impôt sur le revenu*, C.R.C. 1978, ch. 945, subséquemment aux années en cause dans le présent pourvoi donnent fortement à entendre que le législateur appuie le principe de prudence comptable qui sous-tend l'inclusion de l'évaluation des biens figurant dans un inventaire dans le calcul du revenu d'entreprise.

Le paragraphe 10(1) prévoit que les biens figurant dans un inventaire doivent être évalués au moindre de leur coût et de leur juste valeur marchande, ou de toute autre façon permise par les règlements. La disposition réglementaire pertinente est l'art. 1801 du Règlement qui, pendant les années en question, se lisait ainsi:

> 1801. [Évaluation] Sauf dispositions de l'article 1802, aux fins de calculer le revenu qu'un contribuable tire d'une entreprise
>
> *a*) tous les biens décrits dans tous les inventaires de l'entreprise peuvent être évalués à ce que lesdits biens lui coûtent; ou
>
> *b*) tous les biens décrits dans tous les inventaires de l'entreprise peuvent être évalués à leur juste valeur marchande.

L'effet conjugué du par. 10(1) de la Loi et de l'art. 1801 du Règlement est ainsi expliqué dans le bulletin d'interprétation IT-473 intitulé «Évaluation des biens figurant dans un inventaire» (17 mars 1981 (révisé par communiqué spécial en date du 5 décembre 1986)):

> **Évaluation des biens figurant dans l'inventaire**
>
> 4. À l'exception du cas d'un particulier qui a choisi en vertu du paragraphe 10(6) d'évaluer à zéro les biens figurant dans son inventaire, en calculant le revenu qu'il tire d'une activité artistique (voir IT-504), le paragraphe 10(1) de la Loi et l'article 1801 du Règlement prévoient trois méthodes d'évaluation des biens figurant dans un inventaire, soit:
>
> a) l'évaluation de chaque objet figurant dans l'inventaire (ou de chaque catégorie d'objets lorsqu'il est difficile de distinguer certains objets précis) au moins élevé des montants suivants: son prix coûtant ou sa juste valeur marchande;
>
> b) l'évaluation de tous les biens figurant dans l'inventaire à leur prix coûtant;

(c) valuation of the entire inventory at fair market value.

Once a taxpayer has adopted, or has been required to adopt, one of the foregoing methods of valuing inventory, the taxpayer must continue to use that method on a consistent basis in subsequent years. . . .

In 1989, Regulation 1801 was amended to read:

1801. [Valuation] Except as provided by section 1802, for the purpose of computing the income of a taxpayer from a business, all the property described an all the inventories of the business may be valued at its fair market value.

The 1989 amendment removed from the taxpayer the option of choosing to value inventory at historical cost and left only the more conservative methods of fair market value or the lower of cost or market value. The practical effect of this amendment is that in years following 1989 the taxpayer must declare a loss for taxation purposes in any year in which the fair market value of inventory falls below historical cost. The taxpayer no longer has the option of postponing this loss until the taxation year in which the loss is actually realized upon sale of the inventory. This is made clear in the "Regulatory Impact Analysis Statement" published along with the amended regulation, SOR/89-419:

This change, which is part of the measures announced by the Minister of Finance on January 15, 1987 relating to the application of losses and other deductions, will prevent a corporation from maintaining at cost inventories which have declined in value and thereby deferring the recognition of a loss by postponing the write-down to fair market value until after a change in control.

The Department of Finance release of January 15, 1987 which accompanied the introduction of this and other amendments to the *Income Tax Act* amply supports the appellant's submission that this amendment was part of a concerted effort by the Department of Finance "to prevent trafficking in

c) l'évaluation de tous les biens figurant dans l'inventaire à leur juste valeur marchande.

Une fois qu'un contribuable a adopté ou a été tenu d'adopter une de ces méthodes d'évaluation des biens de l'inventaire, le contribuable doit continuer de l'utiliser de façon uniforme dans les années suivantes. . .

En 1989, l'art. 1801 du Règlement a été modifié ainsi:

1801. [Évaluation] Sous réserve de l'article 1802 et aux fins du calcul du revenu d'un contribuable tiré d'une entreprise, tous les biens décrits dans tous les inventaires de l'entreprise peuvent être évalués à leur juste valeur marchande.

La modification de 1989 a enlevé au contribuable la possibilité de choisir d'évaluer à leur coût d'origine les biens figurant dans un inventaire et n'a conservé que les méthodes plus prudentes de la juste valeur marchande ou du moindre du coût et de la valeur marchande. La conséquence pratique de cette modification est que, depuis 1989, le contribuable est tenu de déclarer une perte aux fins de l'impôt pour toute année au cours de laquelle la juste valeur marchande des biens figurant dans un inventaire devient inférieure au coût d'origine. Le contribuable n'a plus la possibilité de reporter sa perte jusqu'à l'année d'imposition au cours de laquelle la perte est effectivement matérialisée par la vente du bien figurant dans l'inventaire. C'est ce qu'exprime clairement le «Résumé de l'étude d'impact de la réglementation», publié en même temps que la modification du Règlement, DORS/89-419:

Cette modification, qui fait partie des mesures annoncées par le ministre des Finances le 15 janvier 1987 sur l'application des pertes et autres déductions, empêchera les corporations de maintenir à leur coût les biens des inventaires dont la valeur a diminué, et ainsi de différer une perte en reportant l'évaluation des biens à leur juste valeur marchande jusqu'à ce qu'il y ait un changement de contrôle.

Le communiqué du 15 janvier 1987 du ministère des Finances, qui accompagnait le dépôt de diverses modifications, dont celle-ci, apportées à la *Loi de l'impôt sur le revenu* appuie largement la prétention de l'appelant que cette modification faisait partie d'un effort concerté du ministère des

loss companies, that is, the acquisition by a profitable company of a 'pregnant loss' company". Thus the Department had a valid policy reason to change the exception to the realization principle recognized by accounting conservatism from an optional to a mandatory requirement.

Finances [TRADUCTION] «pour empêcher le trafic de sociétés déficitaires, c'est-à-dire l'acquisition par une société rentable d'une compagnie ayant des «pertes en gestation»». Le Ministère avait ainsi une raison de principe valable pour transformer en condition obligatoire l'exception au principe de réalisation reconnue par le principe de prudence comptable, qui était auparavant une condition facultative.

(5) Policy Considerations

(5) Considérations de politique générale

64 Finally, I wish to address some of the policy concerns raised by counsel for the respondent.

Enfin, je tiens à examiner certaines des questions de politique générale soulevées par l'avocat de l'intimée.

65 The respondent has raised the concern that if s. 10(1) inventory valuation applies to adventures in the nature of trade then the realization principle will only apply to capital property. The respondent also argued that the inventory valuation scheme in s. 10(1) undermines the matching principle and gives rise to asymmetry since it allows for business losses when inventory declines in value but does not create taxable income where there has been an unrealized gain created by a rise in fair market value. All of these are valid criticisms of the inventory valuation scheme in s. 10(1) but they cannot serve to thwart the intention of Parliament as expressed in the plain wording of the statute. Furthermore these criticisms are relevant to s. 10(1) as a whole and have no particular application to adventures in the nature of trade. I cannot accept that applying s. 10(1) to adventures in the nature of trade in accordance with the wording of that provision will cause significant harm especially when the respondent admits that the same section should be applied to all the inventory of all businesses with significant quantities of inventory.

L'intimée a fait valoir que si l'évaluation des biens figurant dans un inventaire, prévue au par. 10(1), s'applique aux projets comportant un risque de caractère commercial, le principe de réalisation ne s'appliquera plus alors qu'aux seuls biens en immobilisation. L'intimée a également soutenu que le régime d'évaluation des biens figurant dans un inventaire, prévu au par. 10(1), mine le principe de rattachement et engendre une asymétrie, puisqu'il permet de déclarer des pertes d'entreprise en cas de baisse de valeur des biens figurant dans l'inventaire, sans toutefois créer un revenu imposable en cas de gain non réalisé dû à une hausse de la juste valeur marchande. Ces critiques du régime d'évaluation des biens figurant dans un inventaire, prévu au par. 10(1), sont toutes valables, mais elles ne peuvent servir à contrecarrer l'intention du législateur exprimée dans le texte clair de la Loi. En outre, ces critiques sont pertinentes relativement à l'ensemble du par. 10(1) et ne s'appliquent pas de façon particulière aux projets comportant un risque de caractère commercial. Je ne puis accepter que le fait d'appliquer le par. 10(1) à des projets comportant un risque de caractère commercial, conformément au libellé de cette disposition, causera un préjudice important, tout particulièrement lorsque l'intimée admet que la même disposition devrait s'appliquer à tous les biens figurant dans l'inventaire de toutes les entreprises qui comptent un inventaire important.

66 Of greater concern is the interpretation proposed by the respondent which would create a whole new

L'interprétation que propose l'intimée est source d'une plus grande inquiétude encore puisqu'elle

category of property unrecognized in the Act. This new class of property would attract the higher tax rate applicable to business income upon disposition but in years prior to disposition would be subject to the strictures which the realization, matching and symmetry principles impose upon the disposition of capital property. The *Income Tax Act* has established a system with two distinct categories of property — inventory, which creates business income or loss, and capital property, which creates capital gain or loss. There are separate rules for each of these two categories of property and the taxpayer should be entitled to take the benefit as well as bear the burden applicable to the category into which the property falls. As Reed J. stated in *Cull*, *supra*, at pp. 5325-26:

Had the partnership realized a profit from the venture, there can be no question that, on the basis of the *Fraser* line of cases, it would have been business income, and not a capital gain. Thus, the taxpayer should be allowed to treat the losses according to the same principle.

It is true that an annual appraisal of the property which constitutes inventory is required in order for the taxpayer to comply with the requirements of s. 10(1). This, however, is simply a cost of doing business which must be borne by the taxpayer and it is no more burdensome than the same requirement which is imposed upon companies with far larger inventories to value that inventory each year. It should be remembered that the categorization of inventory (and hence s. 10(1)) will only apply to those who meet the judicially established test for an adventure in the nature of trade, namely that the taxpayer has a trading or business intention with respect to the property. This categorization will not apply to taxpayers who own personal-use property or who hold property for the purpose

créerait une toute nouvelle catégorie de biens non reconnue dans la Loi. Non seulement cette nouvelle catégorie de biens serait-elle assujettie au taux d'imposition plus élevé qui s'applique au revenu d'entreprise lors de l'aliénation des biens, mais encore, pendant les années antérieures à l'aliénation, elle serait soumise aux restrictions que les principes de réalisation, de rattachement et de symétrie imposent à l'égard de l'aliénation de biens en immobilisation. La *Loi de l'impôt sur le revenu* a établi un régime reconnaissant deux catégories distinctes de biens — les biens figurant dans un inventaire, qui génèrent un revenu ou une perte d'entreprise, et les biens en immobilisation, qui génèrent un gain ou une perte en capital. Des règles distinctes s'appliquent à chacune de ces deux catégories de biens et le contribuable devrait avoir le droit tout autant de profiter des avantages liés à la catégorie à laquelle son bien appartient, que d'assumer le fardeau qui s'y rattache. Comme l'affirme le juge Reed dans la décision *Cull*, précitée, aux pp. 5325 et 5326:

Il ne fait pas de doute que si la société avait tiré un profit de l'entreprise, ce profit aurait été considéré comme un revenu commercial et non comme un gain en capital, en application de la jurisprudence qui a suivi l'arrêt *Fraser*. Il faut donc permettre au contribuable d'appliquer le même principe aux pertes qu'il a subies.

Il est vrai que le contribuable doit procéder à 67
une évaluation annuelle du bien figurant dans l'inventaire pour satisfaire aux exigences du par. 10(1). Toutefois, ce n'est là que le prix que le contribuable doit normalement payer pour faire des affaires, et il n'est pas plus lourd que l'obligation que les sociétés qui comptent un inventaire beaucoup plus important ont d'évaluer cet inventaire chaque année. Il faut se rappeler que la qualification de biens figurant dans un inventaire (et, partant, le par. 10(1)) ne s'appliquera qu'aux contribuables qui satisfont au critère établi par les tribunaux pour déterminer s'il s'agit d'un projet comportant un risque de caractère commercial, à savoir que le contribuable a une intention commerciale à l'égard du bien. Cette qualification ne s'appliquera pas aux contribuables qui possèdent des biens pour leur usage personnel ou qui possèdent

of long-term investment since this is categorized as capital property.

68 The fear that allowing adventures in the nature of trade to take advantage of the inventory valuation in s. 10(1) will lead to tax avoidance is unfounded. It is the rare taxpayer who will be faced with the situation of this appellant. In order to meet the test for an adventure in the nature of trade the taxpayer must have an intention to enter into a "scheme of profit-making". It is only where that scheme goes awry contrary to the intentions of the taxpayer that the taxpayer will be entitled to take advantage of the inventory valuation scheme in s. 10(1) in order to recognize a business loss. Schemes entered into with the intention of creating a business loss would not qualify as adventures in the nature of trade and would be tantamount to a sham. Further, any loss claimed by a taxpayer when the fair market value falls below cost is subject to recapture by the Minister in the year of disposition if the fair market value rises again. For greater clarity, in the year of disposition the taxpayer is subject to taxation on the difference between the proceeds of sale and the lowest value ascribed to the inventory in the years prior to sale.

69 It is true that the application of the formula Gross Profit = Proceeds of Sale — Cost of Sale [(Value of Inventory at beginning of year + Cost of Inventory acquisitions) — Value of Inventory at end of year] could lead to a negative cost of sale if the taxpayer chose to value inventory at fair market value as permitted by the current Regulation 1801. This problem can be obviated if the taxpayer chooses to value according to the lower of cost or fair market value method set out in s. 10(1). This method only recognizes unrealized losses and never recognizes unrealized gains. It is only unrealized gains which could give rise to a negative cost of sale. A negative cost of sale is not, however, a problem confined to single items of

un bien à titre de placement à long terme, car le bien est alors qualifié d'immobilisation.

La crainte qu'un évitement fiscal ne résulte du fait de permettre que l'évaluation des biens figurant dans un inventaire, prévue au par. 10(1), s'applique à des projets comportant un risque de caractère commercial, est sans fondement. Il arrive rarement que des contribuables se trouvent dans la situation de l'appelant. Pour satisfaire au critère du projet comportant un risque de caractère commercial, le contribuable doit avoir l'intention de mettre à exécution un «plan visant la réalisation d'un bénéfice». Ce n'est que si ce plan tourne mal contrairement aux intentions du contribuable que ce dernier aura le droit de profiter du régime d'évaluation des biens figurant dans un inventaire, prévu au par. 10(1), pour déclarer une perte d'entreprise. Les plans mis à exécution dans l'intention de créer une perte d'entreprise ne seraient pas reconnus comme des projets comportant un risque de caractère commercial et constitueraient des opérations simulées. De plus, toute perte qu'un contribuable réclame lorsque la juste valeur marchande devient inférieure au prix coûtant peut être récupérée par le Ministre durant l'année de l'aliénation, si la juste valeur marchande augmente de nouveau. Pour plus de clarté, durant l'année de l'aliénation, le contribuable est assujetti à l'impôt relativement à la différence entre le produit de la vente et la valeur la plus faible attribuée au bien figurant dans l'inventaire pendant les années antérieures à sa vente.

Il est vrai que l'application de la formule bénéfice brut = produit des ventes — coût des ventes [(valeur des biens figurant dans l'inventaire au début de l'année + coût des acquisitions) — valeur des biens figurant dans l'inventaire à la fin de l'année] pourrait donner lieu à un coût des ventes négatif si le contribuable décidait d'évaluer les biens figurant dans l'inventaire à leur juste valeur marchande comme le permet l'art. 1801 actuel du Règlement. Ce problème peut être évité si le contribuable choisit de procéder à l'évaluation au moindre du coût et de la juste valeur marchande prévue au par. 10(1). Cette méthode ne reconnaît que les pertes non réalisées, mais jamais les gains non réalisés. Seuls des gains non réalisés pour-

inventory used in an adventure in the nature of trade where the fair market value method is chosen. Trading companies with larger inventories would face the same problem on a larger scale in any year where the increase in the market value of inventory on hand exceeds the value of new inventory purchased in a year.

Further, the fact that proceeds of sale may be zero in a given year does not cast any doubt on the applicability of the formula. In any year in which there is a loss under this formula, the proceeds of sale will be less than the cost of sale and the fact that proceeds of sale are zero simply reflects this general truth on a smaller scale. A taxpayer is statutorily entitled by s. 9(2) to calculate loss using the same formula as would apply for the calculation of profit. Moreover, it is conceivable that a company with a large inventory could generate no sales in a year. It would be far more anomalous if the ability of such a company to recognize declines in the value of its inventory in a year were dependent on the existence of a single sale.

III. Conclusions

In summary I arrive at the following conclusions:

1. The appellant's venture is a business pursuant to the definition in s. 248(1) of the Act since it meets the test for an adventure in the nature of trade.

2. The Styles Property is inventory pursuant to the definition in s. 248(1) because its cost or value is relevant to the computation of business

raient donner lieu à un coût des ventes négatif. La possibilité d'un coût des ventes négatif n'est toutefois pas un problème qui se limite au cas du bien unique figurant dans un inventaire qui est utilisé dans le cadre d'un projet comportant un risque de caractère commercial lorsqu'on choisit la méthode de la juste valeur marchande. Les sociétés commerciales qui comptent un inventaire plus important seraient confrontées au même problème sur une plus grande échelle au cours de toute année où l'augmentation de la juste valeur marchande des biens figurant déjà dans leur inventaire excéderait la valeur des nouveaux biens figurant dans l'inventaire qui ont été acquis durant l'année.

En outre, le fait que le produit des ventes puisse être nul au cours d'une année donnée ne met aucunement en doute l'applicabilité de la formule. Pour toute année au cours de laquelle il y aura perte selon cette formule, le produit des ventes sera moindre que le coût des ventes et le fait que le produit des ventes soit nul traduit simplement cette vérité générale sur une plus petite échelle. Le paragraphe 9(2) habilite le contribuable à calculer une perte au moyen de la même formule qui servirait au calcul d'un bénéfice. De plus, il est concevable qu'une société qui compte un inventaire important ne puisse réaliser aucune vente durant une année. Il serait beaucoup plus anormal que la capacité d'une telle société de reconnaître des baisses de valeur des biens figurant dans son inventaire, au cours d'une année, dépende de l'existence d'une seule vente.

III. Conclusions

En résumé, j'arrive aux conclusions suivantes:

1. Le projet de l'appelant est une entreprise au sens de la définition donnée au par. 248(1) de la Loi puisqu'il satisfait au critère applicable aux projets comportant un risque de caractère commercial.

2. Le domaine Styles est un bien figurant dans un inventaire au sens de la définition donnée au par. 248(1) parce que son coût ou sa valeur

income in a taxation year, namely the year of disposition.

3. The use of the valuation system established in s. 10(1) and Regulation 1801 is governed by the application of well-recognized commercial and accounting principles. These principles establish that the value of inventory is relevant to the calculation of business income because it contributes to the cost of sale.

4. The valuation system established in s. 10(1) and Regulation 1801 is a specific legislated exception to the principles of matching, realization and symmetry and reflects well-recognized commercial and accounting principles which aim to achieve a conservative picture of business income.

5. Neither the common law restriction to stock-in-traders nor other policy considerations can serve to override the explicit wording of s. 10(1) which makes the valuation system therein applicable to all inventory used in the computation of business income.

6. The plain reading of s. 10(1) would allow single items of inventory held as part of an adventure in the nature of trade to utilize the inventory valuation method contained therein. This conclusion is consistent with the basic dichotomy in the Act between income and capital and the different schemes for taxing each of these.

7. For all of the above reasons, the appellant was entitled to make use of the inventory valuation method in s. 10(1) in order to recognize a business loss on the Styles Property in the taxation years in question, namely 1983 and 1984.

IV. Disposition

72 I would allow the appeal with costs in this Court and in the courts below and would direct that the

entre dans le calcul du revenu d'entreprise pour une année d'imposition, à savoir l'année de l'aliénation.

3. Le recours au système d'évaluation établi au par. 10(1) de la Loi et à l'art. 1801 du Règlement est régi par l'application de principes commerciaux et comptables reconnus. Ces principes établissent que la valeur des biens figurant dans un inventaire entre dans le calcul du revenu d'entreprise parce qu'elle contribue au coût des ventes.

4. Le système d'évaluation établi au par. 10(1) de la Loi et à l'art. 1801 du Règlement est une exception particulière, d'origine législative, aux principes de rattachement, de réalisation et de symétrie, et il reflète des principes commerciaux et comptables reconnus qui visent à donner une image prudente du revenu d'entreprise.

5. Ni la restriction aux seuls marchands d'articles de commerce, reconnue en common law, ni d'autres considérations de politique générale ne peuvent servir à annuler le libellé explicite du par. 10(1) qui rend le système d'évaluation qui y est prévu applicable à tous les biens figurant dans un inventaire qui servent au calcul du revenu d'entreprise.

6. Selon son sens ordinaire, le par. 10(1) permettrait qu'on emploie à l'égard d'un bien unique figurant dans un inventaire, qui est détenu dans le cadre d'un projet comportant un risque de caractère commercial, la méthode d'évaluation des biens figurant dans un inventaire qui y est prévue. Cette conclusion est compatible avec la dichotomie fondamentale que la Loi établit entre le revenu et le capital, et avec leurs régimes d'imposition respectifs.

7. Pour tous ces motifs, l'appelant avait le droit de recourir à la méthode d'évaluation des biens figurant dans un inventaire, prévue au par. 10(1), pour déclarer une perte d'entreprise à l'égard du domaine Styles durant les années d'imposition pertinentes, à savoir 1983 et 1984.

IV. Dispositif

Je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours et d'ordonner que les

Minister's assessment for the taxation years 1983 and 1984 be set aside and that the appellant's tax liability for the years in question be redetermined in a manner consistent with these reasons.

The reasons of Gonthier and Iacobucci JJ. were delivered by

IACOBUCCI J. (dissenting) — This appeal involves a technical question of income taxation the disposition of which will have an important impact on the collection of tax revenues in Canada. It also has implications for many businesses because this Court is being asked to clarify how general commercial principles affect the determination of profit under income tax legislation.

The specific issue in this appeal is whether the vacant land purchased by the appellant, who is not engaged in an ordinary trading business but, instead, in an adventure in the nature of trade, is "inventory" in a "business" pursuant to s. 10(1) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, and, hence, the land's decline in value is deductible from profit as a business expense. The determination of this issue must, however, be made with an eye to the legal nature of "profit": in other words, whether it is consonant with income taxation principles and jurisprudence to permit a taxpayer to claim the fair market depreciation in the value of a piece of property as a business loss in taxation years in which the property was neither disposed of nor generated any income.

I conclude that the appellant fails to qualify for the valuation scheme established by s. 10(1) and, therefore, cannot deduct the claimed expenses in the 1983 and 1984 taxation years.

cotisations établies par le Ministre pour les années d'imposition 1983 et 1984 soient annulées, et que l'assujettissement à l'impôt de l'appelant pour les années en question soit réexaminé d'une manière conforme aux présents motifs.

Version française des motifs des juges Gonthier et Iacobucci rendus par

LE JUGE IACOBUCCI (dissident) — Le présent pourvoi porte sur une question technique d'impôt sur le revenu, dont la résolution aura une incidence importante sur la perception des recettes fiscales au Canada. Il aura aussi une incidence sur de nombreuses entreprises du fait qu'on demande à notre Cour de préciser l'incidence des principes commerciaux ordinaires sur la détermination des profits en vertu de la législation en matière d'impôt sur le revenu.

En l'espèce, il s'agit plus précisément de savoir si le terrain vacant acheté par l'appelant, qui n'exploite pas une entreprise commerciale ordinaire, mais qui s'est plutôt engagé dans un projet comportant un risque de caractère commercial, figure ou non dans l'«inventaire» d'une «entreprise» conformément au par. 10(1) de la *Loi de l'impôt sur le revenu*, S.C. 1970-71-72, ch. 63, et si, par conséquent, la diminution de la valeur du terrain est déductible du bénéfice à titre de dépense d'entreprise. Pour trancher cette question, il faut toutefois garder à l'esprit la nature juridique du «bénéfice»; autrement dit, il faut se demander s'il est conforme aux principes et à la jurisprudence en matière d'impôt sur le revenu de permettre à un contribuable de déduire la dépréciation de la juste valeur marchande d'un bien à titre de perte d'entreprise pour des années d'imposition au cours desquelles le terrain n'a ni été aliéné ni généré un revenu.

Je conclus que l'appelant ne satisfait pas aux conditions requises pour se prévaloir du régime d'évaluation établi par le par. 10(1), et que, par conséquent, il ne peut déduire les dépenses inscrites pour les années d'imposition 1983 et 1984.

I. Background

76 In January 1982, the appellant and several others bought a parcel of land (the "Styles Property") in the city of Calgary. The land was registered in the name of Trinity Western College. The College held the property as nominee for the group of investors. The property was acquired for the purpose of reselling it at a profit. Part of the anticipated profit was to be paid to the College and to other organizations as charitable donations and the balance of the profit was to be divided on a *pro rata* basis among the members of the investor group.

77 In the years immediately following its acquisition, the property substantially decreased in value and the mortgage thereon was eventually foreclosed in 1986. The appellant, relying on ss. 248(1), 10(1), 9 and Regulation 1801 (as it then read) of the *Income Tax Act*, sought to deduct the decline in the fair market value of the land as a business loss in his 1983 and 1984 tax returns. The amounts claimed as business losses specifically relating to the Styles Property were $252,954 in 1983 and $25,800 in 1984. It should be noted that the amount claimed for 1983 was found to be incorrect and it was subsequently agreed by all parties that the correct sum should be $197,690. The appellant argued that he was entitled to make such fair market deductions because s. 10(1) of the Act permits the use of such a valuation scheme should the initiative to purchase the land be deemed a "business" and should the land be defined as "inventory". I underscore that there was no disposition of the Styles Property in the 1983 or 1984 taxation years; in fact, the land remained completely undeveloped.

78 The Minister of National Revenue disallowed these business losses on the basis that the property was not "inventory in a business" within the meaning of ss. 10(1) and 248(1) of the *Income Tax Act*. The taxpayer appealed and both the Federal Court, Trial Division, [1992] 2 F.C. 552, 92 D.T.C. 6248, [1992] 1 C.T.C. 296, 53 F.T.R. 49, and the Federal

I. Les faits

En janvier 1982, l'appelant a acheté avec plusieurs autres personnes un terrain (le «domaine Styles») dans la ville de Calgary. Le terrain a été enregistré au nom du Trinity Western College, qui le détenait à titre de mandataire du groupe d'investisseurs. Le terrain a été acheté dans le but d'être revendu avec bénéfice. Une partie du bénéfice anticipé devait être versée au collège et à d'autres organismes sous forme de dons de charité; le reste devait être réparti au prorata entre les membres du groupe d'investisseurs.

Pendant les années qui ont suivi immédiatement son acquisition, le terrain a subi une perte de valeur importante, et a été repris par le créancier hypothécaire en 1986. Invoquant les par. 248(1) et 10(1) et l'art. 9 de la *Loi de l'impôt sur le revenu*, ainsi que l'art. 1801 (tel qu'il se lisait alors) du *Règlement de l'impôt sur le revenu*, l'appelant a demandé la déduction de la diminution de la juste valeur marchande du terrain à titre de perte d'entreprise dans ses déclarations de revenus de 1983 et 1984. Les montants réclamés à titre de perte d'entreprise se rapportant directement au domaine Styles étaient de 252 954 $ en 1983, et de 25 800 $ en 1984. Il y a lieu de souligner que le montant réclamé pour 1983 a été jugé erroné, et que toutes les parties ont subséquemment convenu que le montant exact devrait s'élever à 197 690 $. L'appelant a soutenu qu'il avait le droit de faire ces déductions fondées sur la juste valeur marchande parce que le par. 10(1) de la Loi permet de recourir à ce régime d'évaluation dans le cas où l'achat du terrain est réputé être une «entreprise» et où le terrain est défini comme un bien figurant dans un «inventaire». Je souligne qu'il n'y a eu aucune aliénation du domaine Styles au cours des années d'imposition 1983 et 1984; en fait, le terrain est resté complètement vierge.

Le ministre du Revenu national a refusé d'admettre ces pertes d'entreprise pour le motif que le bien ne figurait pas dans «l'inventaire d'une entreprise» au sens des par. 10(1) et 248(1) de la *Loi de l'impôt sur le revenu*. Le contribuable a interjeté appel, et tant la Cour fédérale, Section de première instance, [1992] 2 C.F. 552, 92 D.T.C. 6248,

Court of Appeal, [1993] 3 F.C. 607, 93 D.T.C. 5313, [1993] 2 C.T.C. 113, 156 N.R. 199, upheld the Minister's disallowance of the losses. Leave to appeal was granted by this Court on April 28, 1994, [1994] 1 S.C.R. vii.

II. Relevant Statutory Provisions

Income Tax Act, S.C. 1970-71-72, c. 63

9. (1) [Income from business or property] Subject to this Part, a taxpayer's income for a taxation year from a business or property is his profit therefrom for the year.

(2) [Loss from business or property] Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of his loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source *mutatis mutandis*.

10. (1) [Valuation of inventory property] For the purpose of computing income from a business, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

(2) [Idem] Notwithstanding subsection (1), for the purpose of computing income for a taxation year from a business, the property described in an inventory at the commencement of the year shall be valued at the same amount as the amount at which it was valued at the end of the immediately preceding year for the purpose of computing income for that preceding year.

248. (1) [Definitions] In this Act,

. . .

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(*c*), an

[1992] 1 C.T.C. 296, 53 F.T.R. 49, que la Cour d'appel fédérale, [1993] 3 C.F. 607, 93 D.T.C. 5313, [1993] 2 C.T.C. 113, 156 N.R. 199, ont maintenu le refus du Ministre d'admettre ces pertes. L'autorisation de pourvoi a été accordée par notre Cour le 28 avril 1994, [1994] 1 R.C.S. vii.

II. Les dispositions législatives et réglementaires pertinentes

Loi de l'impôt sur le revenu, S.C. 1970-71-72, ch. 63

9. (1) [Revenu tiré d'une entreprise ou d'un bien] Sous réserve des dispositions de la présente Partie, le revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.

(2) [Perte provenant d'une entreprise ou d'un bien] Sous réserve des dispositions de l'article 31, la perte subie par un contribuable dans une année d'imposition relativement à une entreprise ou à un bien est le montant de sa perte, si perte il y a, subie dans cette année d'imposition relativement à cette entreprise ou à ce bien, calculée en appliquant *mutatis mutandis* les dispositions de la présente loi afférentes au calcul du revenu tiré de cette entreprise ou de ce bien.

10. (1) [Évaluation des biens figurant dans un inventaire] Aux fins du calcul du revenu tiré d'une entreprise, les biens figurant dans un inventaire sont évalués au coût supporté par le contribuable ou à leur juste valeur marchande, le moins élevé de ces deux éléments étant à retenir, ou de toute autre façon permise par les règlements.

(2) [Idem] Nonobstant le paragraphe (1), aux fins du calcul du revenu tiré d'une entreprise au cours d'une année d'imposition, les biens figurant dans un inventaire au début de l'année sont évalués au même montant que celui auquel ils ont été évalués à la fin de l'année précédente aux fins du calcul du revenu de cette année précédente.

248. (1) [Définitions] Dans la présente loi,

. . .

«entreprise» ou «affaire» comprend une profession, un métier, un commerce, une manufacture ou une activité de quelque genre que ce soit et, sauf aux fins de

adventure or concern in the nature of trade but does not include an office or employment;

. . .

"inventory" means a description of property the cost or value of which is relevant in computing a taxpayer's income from a business for a taxation year;

Income Tax Regulations, C.R.C. 1978, c. 945

1801. [Valuation] Except as provided in section 1802, for the purpose of computing the income of a taxpayer from a business

(*a*) all the property described in all the inventories of the business may be valued at the cost to him; or

(*b*) all the property described in all the inventories of the business may be valued at the fair market value.

III. Judgments Below

Federal Court, Trial Division, [1992] 2 F.C. 552

79 Rouleau J. dismissed the appellant's appeal from the Minister's reassessment. He first reviewed the case law which considered the definition of "business" and "adventure or concern in the nature of trade". In *Bailey v. M.N.R.*, 90 D.T.C. 1321, the Tax Court of Canada concluded that, for the purpose of s. 10(1), "business" included "an adventure or concern in the nature of trade". As well, it was held that an isolated transaction may fall within the meaning of the word "business" in s. 10(1). In *Bailey* it was also held that land acquired for resale in an adventure in the nature of trade could be classified as inventory for the purposes of s. 10(1) and the land was eligible for an inventory "write down". This reasoning was also followed in *Van Dongen v. The Queen*, 90 D.T.C. 6633 (F.C.T.D.), and *Weatherhead v. M.N.R.*, [1990] 1 C.T.C. 2579 (T.C.C.).

l'alinéa 18(2)*c*), comprend un projet comportant un risque ou une affaire de caractère commercial mais ne comprend pas une charge ni un emploi;

. . .

«inventaire» signifie la description des biens dont le prix ou la valeur entre dans le calcul du revenu qu'un contribuable tire d'une entreprise pour une année d'imposition;

Règlement de l'impôt sur le revenu, C.R.C. 1978, ch. 945

1801. [Évaluation] Sauf dispositions de l'article 1802, aux fins de calculer le revenu qu'un contribuable tire d'une entreprise

a) tous les biens décrits dans tous les inventaires de l'entreprise peuvent être évalués à ce que lesdits biens lui coûtent; ou

b) tous les biens décrits dans tous les inventaires de l'entreprise peuvent être évalués à leur juste valeur marchande.

III. Juridictions inférieures

Cour fédérale, Section de première instance, [1992] 2 C.F. 552

Le juge Rouleau a rejeté l'appel interjeté par l'appelant contre la nouvelle cotisation fixée par le Ministre. Il a d'abord examiné la jurisprudence portant sur la définition du terme «entreprise» et de l'expression «projet comportant un risque ou une affaire de caractère commercial». Dans la décision *Bailey c. M.R.N.*, 90 D.T.C. 1321, la Cour canadienne de l'impôt a conclu que, par les fins du par. 10(1), le mot «entreprise» comprend un «projet comportant un risque ou une affaire de caractère commercial». Elle a aussi statué qu'une opération isolée peut être une «entreprise» au sens du par. 10(1). De même, la cour, dans *Bailey*, a jugé que le terrain acquis pour être revendu dans le cadre d'un projet comportant un risque de caractère commercial pouvait être considéré comme un bien figurant dans un inventaire aux fins du par. 10(1), et qu'il pouvait faire l'objet d'une «réduction de valeur». Le même raisonnement a été suivi dans les décisions *Van Dongen c. La Reine*, 90 D.T.C. 6633 (C.F. 1re inst.), et *Weatherhead c. M.R.N.*, [1990] 1 C.T.C. 2579 (C.C.I.).

Rouleau J. noted that both parties conceded that the property in issue was an adventure in the nature of trade. However, he held that s. 10(1) should not be interpreted in the manner suggested by the appellant. He emphasized that the *Income Tax Act* must be read as a whole. Thus, one must also consider other relevant provisions such as s. 9 (meaning of income and loss) and s. 248(1) (definition of inventory and business). Rouleau J. observed that a taxpayer's profit must be determined in accordance with ordinary commercial and accounting principles and practices. It was held that these ordinary commercial principles and practices dictated that in any business the revenues should be matched against the expenses before any loss or profit is recognized. Generally, in the case of a trading business the profit (loss) equals the proceeds of sales less the cost of sales. The cost of sales is calculated by adding the value of the inventory at the beginning of the year to the cost of acquisitions during the year and subtracting the value of inventory at the end of the year. Rouleau J. then stated (at p. 558):

Adopting this formula, a trading business can determine its cost of sales by calculating the change in the value of its inventory from the beginning to the end of a given period. The valuation of inventory can therefore affect the business' gross profit. It is only to this extent that the inventory value becomes relevant. It is not by itself deductible from the taxpayer's income.

Rouleau J. then referred to the decision in *Minister of National Revenue v. Shofar Investment Corp.*, [1980] 1 S.C.R. 350, for approval of this approach. It was emphasized that the computation of profit must be different for a business with relatively few transactions from that of a business engaged in continuous trading (at p. 559):

For example, when there is but one item in inventory, profit or loss cannot be ascertained until the disposition

Le juge Rouleau a fait remarquer que les deux parties avaient convenu que le bien en litige avait été acquis dans le cadre d'un projet comportant un risque de caractère commercial. Toutefois, il a jugé que le par. 10(1) ne devait pas être interprété de la façon proposée par l'appelant. Il a insisté sur le fait que la *Loi de l'impôt sur le revenu* doit être interprétée dans son ensemble. Par conséquent, il faut aussi prendre en considération d'autres dispositions pertinentes, telles que l'art. 9 (sens des mots «revenu» et «perte») et le par. 248(1) (définition des mots «inventaire» et «entreprise»). Le juge Rouleau a fait remarquer que le calcul du bénéfice d'un contribuable doit se faire conformément aux pratiques et aux principes comptables et commerciaux ordinaires. Il a statué que ces pratiques et principes commerciaux ordinaires prescrivent que l'on rattache les recettes et les dépenses d'une entreprise pour voir s'il y a une perte ou un bénéfice. Généralement, dans le cas d'une entreprise commerciale, le bénéfice (perte) est égal au produit des ventes, moins le coût des ventes. On calcule le coût des ventes en additionnant la valeur des biens figurant dans l'inventaire au début de l'année et le coût des acquisitions pendant l'année, et en soustrayant la valeur des biens figurant dans l'inventaire à la fin de l'année. Le juge Rouleau affirme alors, à la p. 558:

Cette formule permet à une entreprise commerciale d'établir le coût des ventes en calculant le changement dans la valeur de ses stocks du début à la fin d'une période donnée. L'évaluation des stocks peut donc influer sur le bénéfice brut de l'entreprise. C'est seulement dans cette mesure que la valeur des stocks devient pertinente. Elle n'est pas en soi déductible du revenu du contribuable.

Le juge Rouleau a ensuite dit que ce point de vue était appuyé par l'arrêt *Ministre du Revenu national c. Shofar Investment Corp.*, [1980] 1 R.C.S. 350. Il a souligné que le calcul du bénéfice d'une entreprise qui fait relativement peu d'opérations doit être différent du calcul du bénéfice d'une entreprise commerciale dont l'exploitation est continue (à la p. 559):

Ainsi, lorsqu'il n'y a qu'un bien en stock, c'est uniquement au moment où le bien est cédé qu'on peut cal-

of that particular item since before disposition, there would be no revenues upon which to set off costs.

82 Rouleau J. held that in a business of few transactions the value of the inventory is not relevant in computing income until disposition. Thus, in a year when the property is not sold, it would not be included in the computation of income for tax purposes and s. 10(1) would not apply. In the case at bar, the trial judge expressed the opinion that applying s. 10(1) to an adventure in the nature of trade would lead to an absurdity since the Act does not tax unrealized profits and, accordingly, should not recognize unrealized losses. If the property had increased in value during the time it was held, there would be no taxation of the increased value until the moment of disposition. When considering s. 9(1), Rouleau J. stated that it becomes apparent that an inventory "write down" of the property would not reflect the truest picture of the appellant's income position.

Federal Court of Appeal, [1993] 3 F.C. 607

(i) *per* Létourneau J.A. (majority)

83 The first issue discussed by Létourneau J.A. (writing for himself and Linden J.A.) was whether s. 10(1) of the *Income Tax Act* applied to property held in an adventure in the nature of trade (at pp. 614-15):

It is true that the inventory rule makes more sense in the context of an ordinary trading business where goods are regularly bought and sold, making it difficult to keep track of the actual cost and sale price of each piece of property. The rule becomes then the only sound basis for computing the profits from the sales made in the year. Like Martland J. in *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662, at pp. 664-665, I doubt that there is a need for the rule to apply in a case like the present one when there is only one item and its actual costs and eventual sale price can easily be established. But I cannot conclude that its application to an adventure in the nature of trade necessarily leads to an absurd-

culer le bénéfice ou la perte puisqu'avant la disposition, il n'y a pas de recettes desquelles on peut déduire les coûts.

Le juge Rouleau a conclu que dans une entreprise qui fait peu d'opérations, la valeur de l'inventaire n'entre dans le calcul du revenu qu'au moment de l'aliénation. Ainsi, au cours d'une année où il n'y a pas d'aliénation, le bien n'entrerait pas dans le calcul du revenu aux fins de l'impôt et, partant, le par. 10(1) ne s'appliquerait pas. En l'espèce, le juge de première instance a exprimé l'avis qu'il serait absurde d'appliquer le par. 10(1) à un projet comportant un risque de caractère commercial, puisque la Loi n'assujettit pas à l'impôt des bénéfices non réalisés et que, par conséquent, elle ne devrait pas reconnaître des pertes non réalisées. Si la valeur du bien avait augmenté pendant la période où il était détenu, la valeur majorée ne serait assujettie à l'impôt qu'au moment de l'aliénation. Le juge Rouleau a affirmé qu'à la lecture du par. 9(1) on peut constater qu'une «réduction de valeur» du bien ne refléterait pas la situation véritable de l'appelant au chapitre du revenu.

Cour d'appel fédérale, [1993] 3 C.F. 607

(i) le juge Létourneau (au nom de la cour à la majorité)

La première question que le juge Létourneau a analysée dans ses motifs (auxquels le juge Linden a souscrit) était de savoir si le par. 10(1) de la *Loi de l'impôt sur le revenu* s'appliquait à un bien détenu dans le cadre d'un projet comportant un risque de caractère commercial (aux pp. 614 et 615):

Il est vrai que la règle ayant trait à l'inventaire s'explique mieux dans le contexte d'une entreprise commerciale ordinaire se livrant régulièrement à l'achat et à la vente de biens, ce qui rend plus difficile le calcul du coût réel et du prix de vente de chaque bien. La règle se révèle alors la seule méthode valable de calcul des profits tirés des ventes faites au cours de l'année. Tout comme le juge Martland dans l'arrêt *Ministre du Revenu national c. Irwin*, [1964] R.C.S. 662, aux pp. 664 et 665, je doute que l'on ait besoin d'appliquer la règle en question à une affaire comme la présente dans laquelle il n'existe qu'un bien unique, dont le coût réel et le prix de vente éventuel peuvent être facilement établis. Mais je

ity. The fact that there are fewer transactions when it is a mere adventure in the nature of trade than there would be if it were an ordinary trading business does not render section 10 nugatory with respect to adventures in the nature of trade.

Thus, a property held for resale as an adventure in the nature of trade can be inventory under s. 10(1) and is eventually eligible for inventory write-down. The only question is when this eligibility arises.

The issue, then, is whether the appellant could apply s. 10(1) to the taxation years 1983 and 1984. It was noted that s. 10(1) is not a specific provision overriding s. 9 which establishes the basic rules for determining business income. Thus, s. 10 becomes relevant only when it comes to computing business income; under s. 9 such computation must relate to the actual taxation year. As well, the definition of "inventory" in s. 248(1) is also linked to a taxpayer's income from a business for a taxation year. Létourneau J.A. held (at pp. 617-18):

As it appears from this decision of our Court [*Canada v. Dresden Farm Equipment Ltd.*, [1989] 1 C.T.C. 99], a property is inventory in a taxation year because its cost or value is relevant in the computation of the business income in that year. This is so in the year in which the property is sold. A property can be designated as inventory in a taxation year in which it is not sold if that property is included in the computation of the income produced by that business in that year. However, there has to be a computation of income, i.e., profit or loss, from the business.

In cases where the business itself consists in the buying and reselling of a parcel of land as in the present case, there are no business receipts or proceeds, and therefore no possible determination of a business profit or loss within the terms of subsection 9(1), unless and until the land bought is disposed of. The valuation of inventory property according to subsection 10(1) then becomes relevant in assessing the profit, i.e., the business puis conclure que l'application de la règle à un risque de caractère commercial mènerait nécessairement à une absurdité. Le fait que le risque de caractère commercial donne lieu à un moins grand nombre d'opérations que ne le fait une entreprise commerciale ordinaire ne rend pas l'article 10 inopérant à l'égard du premier.

Ainsi, un bien détenu en vue d'être revendu dans le contexte d'un projet comportant un risque de caractère commercial peut figurer dans un inventaire au sens du par. 10(1) et peut éventuellement faire l'objet d'une réduction de valeur. La seule question qui se pose est de savoir quand cette réduction de valeur est permise.

Il s'agit donc de déterminer si l'appelant pouvait appliquer le par. 10(1) aux années d'imposition 1983 et 1984. On a souligné que le par. 10(1) n'est pas une disposition particulière qui l'emporte sur l'art. 9, qui établit les règles générales applicables à la détermination du revenu d'entreprise. Par conséquent, l'art. 10 n'est pertinent qu'à l'égard du calcul du revenu d'entreprise; en vertu de l'art. 9, ce calcul doit se rapporter à l'année d'imposition véritable. De même, la définition d'«inventaire», au par. 248(1), est aussi rattachée au revenu qu'un contribuable tire d'une entreprise pour une année d'imposition. Le juge Létourneau conclut, aux pp. 617 et 618:

Comme il appert de cette décision de notre Cour [*Canada c. Dresden Farm Equipment Ltd.*, [1989] 1 C.T.C. 99] un bien constitue un élément d'inventaire au cours d'une année d'imposition parce que son coût ou sa valeur sont pertinents au calcul du revenu d'entreprise pendant cette année-là. Il en est ainsi dans l'année au cours de laquelle le bien est vendu. Un bien peut être qualifié d'élément d'inventaire au cours d'une année d'imposition pendant laquelle il n'est pas vendu s'il entre dans le calcul du revenu tiré de cette entreprise dans l'année en question. Il doit toutefois y avoir calcul du revenu, c'est-à-dire des bénéfices ou des pertes, provenant de l'entreprise.

Dans les affaires où l'entreprise elle-même consiste à acheter et à revendre un terrain comme c'est le cas en l'espèce, il n'y a pas de recettes ou produits, et donc aucune détermination possible de bénéfices ou pertes d'entreprise au sens du paragraphe 9(1), tant et aussi longtemps que le terrain acheté n'a pas été vendu. L'évaluation d'un bien figurant dans un inventaire selon le paragraphe 10(1) devient alors pertinente au calcul

ness income, for that year because it determines the cost of sale. When there is more than one sale and more than one property held in inventory, the cost of sales is "computed by adding the value placed on inventory at the beginning of the year to the cost of acquisitions to inventory during the year, less the value of inventory at the end of the year". As can be seen from these provisions, the value of inventory is relevant in determining the profit of a business, and the cost of an inventory item, as the Supreme Court of Canada ruled, "can affect the ascertainment of the gross profit of the business, but it is not, in itself, deductible from the taxpayer's income". [Emphasis in original.]

85 Létourneau J.A. concluded that, in the case at bar, the losses could not be claimed in 1983 and 1984 since there was no disposition of the property. As has been noted by the trial judge, this was consistent with the matching principle which requires the determination of income revenues to be paired with the expenditures made to earn them. Simply put, there was no business income in 1983 or 1984 to be matched with the losses claimed.

(ii) Marceau J.A. (concurring in the result)

86 Marceau J.A. shared his colleague's view that the appeal should be dismissed but expressed reasons similar to those of the trial judge that the wording of s. 10(1) does not apply to the case at bar. Otherwise, an application of the disposition would lead to an absurdity, this being a finding not arrived at by Létourneau J.A.

87 As to the wording of the provisions, Marceau J.A. stated that there is no calculation of income when no transaction that could lead to a receipt or expense is performed throughout the year. As well, the definition of "inventory" in s. 248 as applied in s. 10 makes no sense when the whole business is itself composed of the one property alleged to be inventory.

88 The absurdity would result from the fact that the Act does not require a taxpayer who has claimed a loss for a decrease in the market value of a property acquired as an adventure in the nature of trade to pay tax in subsequent years where there are

des bénéfices, c'est-à-dire du revenu d'entreprise, pour cette année parce qu'elle détermine le coût de la vente. Lorsqu'il y a plus d'une vente et plus d'un bien figurant à l'inventaire, le coût des ventes est «calculé en ajoutant la valeur attribuée aux stocks au début de l'année au coût des acquisitions durant l'année, moins la valeur de l'inventaire à la fin de l'année». Comme le montrent ces dispositions, la valeur de l'inventaire importe au calcul des bénéfices tirés d'une entreprise, et le coût d'un élément d'inventaire, comme l'a statué la Cour suprême, «peut [. . .] modifier le calcul du profit brut de l'entreprise, mais il n'est pas, en soi, déductible du revenu du contribuable». [Souligné dans l'original.]

Le juge Létourneau a conclu qu'en l'espèce les pertes ne pouvaient être déclarées ni en 1983 ni en 1984, étant donné qu'il n'y avait eu aucune aliénation du bien. Comme l'avait fait remarquer le juge de première instance, cela était conforme au principe de rattachement qui exige que, dans le calcul du revenu, il y ait rattachement du revenu et des dépenses faites pour le gagner. Tout simplement, il n'y avait, en 1983 et 1984, aucun revenu d'entreprise auquel rattacher les pertes déclarées.

(ii) le juge Marceau (souscrivant au résultat)

Le juge Marceau était d'accord avec son collègue pour rejeter l'appel, mais il a formulé des motifs analogues à ceux du juge de première instance, pour qui le par. 10(1) ne s'applique pas en l'espèce étant donné que son application entraînerait une absurdité, conclusion à laquelle le juge Létourneau n'était pas arrivé.

En ce qui concerne le libellé des dispositions, le juge Marceau a affirmé qu'il n'y a aucun calcul du revenu quand aucune opération pouvant produire une recette ou occasionner une dépense n'a lieu pendant l'année. De même, la définition que l'art. 248 donne du mot «inventaire», qui est appliquée à l'art. 10, n'a aucun sens lorsque la totalité de l'entreprise consiste dans le seul bien qui, allègue-t-on, figure dans l'inventaire.

L'absurdité découlerait du fait que la Loi n'exige pas que le contribuable, qui a déclaré une perte en raison de la diminution de la valeur marchande d'un bien acquis dans le cadre d'un projet comportant un risque de caractère commercial,

increases in the market value beyond original cost. Such increases are only taxable when the property is disposed of. Section 9 could hardly be construed as requiring the taxpayer to report income on his "continuing adventure" by apprising the property in each subsequent year. This would create obvious practical problems.

It was also held that the valuation of inventories flows from the carrying on of a business. The same cannot be said for an adventure in the nature of trade involving a single property. In closing, Marceau J.A. held (at p. 611) that:

> [S]ection 10, in the case of a trade, necessarily implies writing up and writing down inventory values, where the market value of the inventories are used in computing the cost of goods sold year after year, but not so in the case of a so-called adventure in the nature of trade, involving a sole property.

IV. Issue on Appeal

Can the appellant benefit from the valuation scheme established by s. 10(1) and Regulation 1801 of the *Income Tax Act* with regard to the Styles Property and, if so, can the decline in the fair market value of that property be claimed as a business loss in each of the 1983 and 1984 taxation years?

V. Analysis

A. *Introduction*

In order for the appellant to prevail, he must satisfy this Court that the following two requirements are met:

1. He must demonstrate the he is eligible for the valuation scheme proposed by s. 10(1) of the Act. In order to prove such eligibility, the appellant must show that his real estate transac-

paie des impôts au cours des années subséquentes où il y a des augmentations de la valeur marchande au-delà du coût initial. Cette augmentation n'est imposable qu'au moment de l'aliénation du bien. On ne pourrait guère interpréter l'art. 9 comme obligeant le contribuable à déclarer un revenu à l'égard de son «risque qui se continue dans le temps», en évaluant le bien chaque année subséquente. Cela créerait des problèmes pratiques évidents.

Il a aussi été jugé que l'évaluation des inventaires découle de l'exploitation d'une entreprise. On ne peut pas en dire autant d'un projet comportant un risque de caractère commercial qui ne concerne qu'un seul bien. Le juge Marceau conclut en affirmant (à la p. 611):

> [L]'article 10, dans le cas d'une entreprise, implique nécessairement la réévaluation et la réduction de la valeur de l'inventaire, lorsque l'on se sert de la valeur marchande des biens figurant à l'inventaire dans le calcul du coût des biens vendus année après année, ce qui n'est pas le cas pour un prétendu risque de caractère commercial mettant en cause un bien unique.

IV. La question en litige dans le présent pourvoi

L'appelant peut-il se prévaloir du régime d'évaluation établi par le par. 10(1) de la *Loi de l'impôt sur le revenu* et par l'art. 1801 du *Règlement de l'impôt sur le revenu* relativement au domaine Styles et, dans l'affirmative, la diminution de la juste valeur marchande de ce bien peut-elle être déclarée à titre de perte d'entreprise pour chacune des années d'imposition 1983 et 1984?

V. Analyse

A. *Introduction*

Pour avoir gain de cause, l'appelant doit convaincre notre Cour qu'il satisfait aux deux exigences suivantes:

1. Il doit démontrer qu'il peut se prévaloir du régime d'évaluation prévu par le par. 10(1) de la Loi. À cette fin, l'appelant doit établir que son opération immobilière relative au domaine

tion regarding the Styles Property was a "business" pursuant to the definition set out in s. 248(1) of the Act.

and

2. Given that s. 10(1) and Regulation 1801 simply create a valuation scheme and not an automatic taxation deduction, the appellant must show that he can, under the applicable principles and provisions of the *Income Tax Act*, utilize the s. 10(1) valuation scheme in order to calculate and claim a business loss under s. 9 of the Act. This involves an inquiry into whether the appellant is the kind of businessperson intended to be covered by s. 10(1) and, furthermore, whether a single piece of property that realizes no income or loss can, pursuant to s. 248(1) of the Act, be properly considered to be "inventory" for the taxation years in question.

92 Although the appellant's initiative is in fact a "business", in my opinion the Styles Property is not "inventory" under s. 248(1) for the taxation years in question. Persons in the position of the appellant cannot utilize the s. 10(1) valuation scheme to deduct fair market depreciations in their "inventory" as business losses in years in which that "inventory" is not sold. I shall focus much of my attention on this latter consideration given that it raises important issues touching upon the interpretation of taxation legislation generally.

B. *Are the Losses Deductible under Section 9 in the Years in Question?*

93 As I have already outlined, the appellant must first satisfy this Court that (a) his speculative land deal constituted a "business", namely an adventure or concern in the nature of trade; and (b) that, under the governing principles and provisions of the *Income Tax Act*, the raw land constituted

Styles est une «entreprise» au sens de la définition donnée au par. 248(1) de la Loi.

et

2. Puisque le par. 10(1) de la Loi et l'art. 1801 du Règlement ne font que créer un régime d'évaluation et non une déduction automatique, l'appelant doit établir qu'il peut, en vertu des dispositions et des principes applicables de la *Loi de l'impôt sur le revenu*, recourir au régime d'évaluation du par. 10(1) pour calculer et déclarer une perte d'entreprise au sens de l'art. 9 de la Loi. Cela implique qu'il faut se demander si l'appelant est le genre d'homme d'affaires que le par. 10(1) est destiné à viser et, de plus, si un bien unique qui ne génère aucun revenu ni aucune perte peut, en vertu du par. 248(1) de la Loi, être considéré à bon droit comme figurant dans un «inventaire» pour les années d'imposition en question.

Bien que l'opération de l'appelant soit en fait une «entreprise», j'estime que le domaine Styles n'est pas un bien figurant dans un «inventaire», au sens du par. 248(1), pour les années d'imposition en question. Les personnes dans la situation de l'appelant ne peuvent pas recourir au régime d'évaluation du par. 10(1) pour déduire les diminutions de la juste valeur marchande du bien figurant dans leur «inventaire», à titre de pertes d'entreprise pour les années où le bien figurant dans l'«inventaire» n'a pas été vendu. Je vais me concentrer dans une large mesure sur ce dernier point, étant donné qu'il soulève des questions importantes quant à l'interprétation de la législation fiscale en général.

B. *Les pertes sont-elles déductibles en vertu de l'art. 9 pour les années en cause?*

Comme je l'ai déjà indiqué, l'appelant doit d'abord convaincre notre Cour a) que son opération immobilière spéculative est une «entreprise», notamment un projet comportant un risque ou une affaire de caractère commercial, et b) que, selon les dispositions et principes applicables de la *Loi de l'impôt sur le revenu*, le terrain vierge constituait un bien figurant dans un «inventaire», au sens

"inventory" under s. 248(1) for the taxation years in question, namely 1983 and 1984.

(i) Is the Appellant's Venture a Business?

The relevant definition of "business" is found in s. 248(1):

"business" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(*c*), an adventure or concern in the nature of trade but does not include an office or employment; [Emphasis added.]

Of all of the items included in the definition of "business", the one bearing the closest relationship with the appellant's initiative is the "adventure in the nature of trade". The question that must now be answered is whether the appellant's real estate venture in fact meets the judicial interpretation on what constitutes an "adventure in the nature of trade". Since this point is not seriously challenged by the respondent, I shall very quickly review the authorities on this point.

Perhaps the best place to start is Interpretation Bulletin IT-459 (September 8, 1980), which synthesizes the Canadian and U.K. jurisprudence on the definition of an "adventure or concern in the nature of trade" (such as, for example, *Californian Copper Syndicate v. Harris* (1904), 5 T.C. 159 (Ex., Scot.); *Edwards v. Bairstow*, [1956] A.C. 14 (H.L.); *Irrigation Industries Ltd. v. Minister of National Revenue*, [1962] S.C.R. 346; and *Regal Heights Ltd. v. Minister of National Revenue*, [1960] S.C.R. 902). There are several elements used to determine an "adventure in the nature of trade". These include:

(i) The taxpayer's conduct: the consideration here is whether the taxpayer's actions in regard to the property in question were essentially what would be expected of a dealer in such a property.

du par. 248(1), pour les années d'imposition en cause, soit 1983 et 1984.

(i) L'opération spéculative de l'appelant est-elle une entreprise?

Le paragraphe 248(1) donne la définition pertinente du mot «entreprise»: 94

«entreprise» ou «affaire» comprend une profession, un métier, un commerce, une manufacture ou une activité de quelque genre que ce soit et, sauf aux fins de l'alinéa 18(2)*c*), comprend un projet comportant un risque ou une affaire de caractère commercial mais ne comprend pas une charge ni un emploi; [Je souligne.]

Parmi tous les éléments de la définition du mot «entreprise», celui qui correspond davantage à l'opération de l'appelant est le «projet comportant un risque de caractère commercial». La question à laquelle il faut maintenant répondre est de savoir si l'opération immobilière spéculative de l'appelant correspond à ce que les tribunaux considèrent comme un «projet comportant un risque de caractère commercial». Étant donné que l'intimée ne conteste pas sérieusement ce point, je vais examiner très rapidement la jurisprudence et la doctrine pertinentes. 95

Le meilleur point de départ est peut-être le bulletin d'interprétation IT-459 (8 septembre 1980), qui fait la synthèse de la jurisprudence canadienne et britannique sur la définition d'un «projet comportant un risque ou une affaire de caractère commercial» (comme, par exemple, les arrêts *Californian Copper Syndicate c. Harris* (1904), 5 T.C. 159 (Ex., Scot.); *Edwards c. Bairstow*, [1956] A.C. 14 (H.L.); *Irrigation Industries Ltd. c. Minister of National Revenue*, [1962] R.C.S. 346, et *Regal Heights Ltd. c. Minister of National Revenue*, [1960] R.C.S. 902). Il y a plusieurs éléments qui servent à déterminer ce qui constitue un «projet comportant un risque de caractère commercial», dont: 96

(i) La conduite du contribuable: il faut ici se demander si les actes du contribuable se rapportant au bien en cause sont essentiellement ceux auxquels on s'attendrait de la part d'une personne qui fait le commerce de ce type de biens.

(ii) The nature of the property: sometimes an inference of "trading" will emerge from the type of property and whether it appears that its purchase cannot be justified by reasons that the property would procure personal enjoyment or a return to the purchaser other than arising from its disposition.

(iii) The intention of the taxpayer and the manner in which the property was purchased. Evidence that an attempt was made to sell the property shortly after its acquisition reveals such a trading intention.

(iv) It is clear that the mere fact that the transaction was a single or isolated one is neither determinative nor prohibitive of a finding that the initiative was in fact an adventure in the nature of trade.

See also E. C. Harris, *Canadian Income Taxation* (1979), at p. 170; and B. J. Arnold, T. Edgar and J. Li, eds., *Materials on Canadian Income Tax* (10th ed. 1993), at pp. 303 *et seq.*

97 In the case at bar, the factual record reveals that the Styles Property was acquired for the purpose of reselling it for financial gain. There was a purchase and an intention to derive a profit therefrom. This anticipated profit was planned to be given partly to charity and partly divided on a *pro rata* basis among the investors, including the appellant. The type of property in question was a parcel of raw land, often the subject matter of real estate trading ventures. Although the actual transaction was a single one, it does not appear that the individuals involved, at least certainly not the appellant, were inexperienced; quite the contrary: the evidentiary record reveals a sophisticated level of business correspondence among the parties to the arrangement in which it was obvious that they were treating it as a trading adventure. For these reasons, I find that the real estate deal was an adventure in the nature of trade and, consequently, a "business" under s. 248(1) of the *Income Tax Act*.

98 However, on another note, I, with respect, disagree with the trial judge (and Marceau J.A.) that

(ii) La nature du bien: il arrive parfois qu'il se dégage du genre de bien en cause une connotation de «commerce»; il faut aussi se demander si l'acquisition du bien ne peut pas être motivée par le fait qu'il procurerait à l'acquéreur un agrément personnel ou un revenu autre que celui découlant de son aliénation.

(iii) L'intention du contribuable et la façon dont le bien a été acquis. La preuve d'une tentative de revendre le bien peu après son acquisition révèle l'existence d'une telle intention commerciale.

(iv) Il est clair que le simple fait qu'il se soit agi d'une opération unique ou isolée n'est pas déterminant et n'empêche pas de conclure qu'elle constituait effectivement un projet comportant un risque de caractère commercial.

Voir aussi E. C. Harris, *Canadian Income Taxation* (1979), à la p. 170; et B. J. Arnold, T. Edgar et J. Li, dir., *Materials on Canadian Income Tax* (10e éd. 1993), aux pp. 303 et suiv.

En l'espèce, les faits révèlent que l'on a acquis le domaine Styles dans le but de le revendre en réalisant un gain financier. Il y a eu acquisition et intention d'en tirer un bénéfice. Ce bénéfice anticipé devait être en partie versé à des œuvres de charité et en partie divisé au prorata entre les investisseurs, dont l'appelant. Le bien en question était un terrain vierge, les biens de ce type faisant souvent l'objet d'opérations immobilières spéculatives. Même s'il s'agissait d'une opération unique, il ne semble pas que les personnes qui y ont pris part, certainement pas l'appelant en tout cas, aient été inexpérimentées; au contraire, la preuve révèle l'existence d'une correspondance commerciale complexe entre les parties à l'opération qu'elles considéraient, à l'évidence, comme étant une opération spéculative commerciale. Pour ces motifs, je conclus que l'opération immobilière était un projet comportant un risque de caractère commercial et, par conséquent, une «entreprise» au sens du par. 248(1) de la *Loi de l'impôt sur le revenu*.

Par ailleurs, je dois dire, en toute déférence, que je ne partage pas l'opinion du juge de première

s. 10(1) of the Act does not apply to a business such as the appellant's which is an adventure in the nature of trade. Nowhere in s. 248(1) is it indicated that something determined to be a "business" because it is an "adventure" is exempt from the definition of "business" for any provisions of the Act other than ss. 18(2)(*c*), 54.2, 95(1) and 110.6(4)(*f*). (Sections 54.2 and 110.6(4)(*f*) were added to the definition in 1988 and s. 95(1) in 1995.) As noted by the Tax Court of Canada in *Bailey*, *supra*, at p. 1328:

> The definition of "business" in subsection 248(1) includes "an adventure or concern in the nature of trade". It is the word "business" so defined that is used in subsection 10(1). When Parliament does not intend an adventure or concern in the nature of trade to be included in the word "business" it provides for the exception in the substantive definition of business; for example, the word "business" used in paragraph 18(2)(*c*) does not include an adventure or concern in the nature of trade . . . .

Having found that the appellant's undertaking comes within the definition of "business", the next question to decide is whether the appellant is entitled to claim the decline in his land value under s. 9. This brings us to the principles and jurisprudence regarding that section of the Act.

(ii) The Governing Principles of Profit and Loss under Section 9 of the Act: Can the Appellant Use the Section 10(1) Valuation Scheme to Deduct as a Business Loss the Decline in the Fair Market Value of the Property?

At the outset, I underscore (as did Rouleau J. at trial) that neither s. 10(1) nor Regulation 1801 provides a deduction from income nor do they mandate that any person with inventory can deduct any loss (on fair market value) arising therefrom. They simply give some direction as to how the valuation

instance (et du juge Marceau de la Cour d'appel), selon laquelle le par. 10(1) de la Loi ne s'applique pas à une entreprise comme celle de l'appelant, qui est un projet comportant un risque de caractère commercial. Nulle part dans le par. 248(1) n'est-il indiqué que quelque chose considéré comme étant une «entreprise», parce que c'est un «projet comportant un risque», échappe à la définition du mot «entreprise» en raison de quelque disposition de la Loi, autre que l'al. 18(2)*c*), l'art. 54.2, le par. 95(1) et l'al. 110.6(4)*f*). (L'article 54.2 et l'al. 110.6(4)*f*) ont été ajoutés à la définition en 1988, et le par. 95(1), en 1995.) Comme le fait remarquer la Cour canadienne de l'impôt dans la décision *Bailey*, précitée, à la p. 1328:

> La définition d'«entreprise» ou «affaire» au paragraphe 248(1) comprend «un projet comportant un risque ou une affaire de caractère commercial». C'est cette définition du mot «entreprise» qui est utilisée au paragraphe 10(1). Lorsque le Parlement ne désire pas inclure un projet comportant un risque ou une affaire de caractère commercial dans le mot «entreprise», il en indique l'exception dans la définition substantive d'entreprise; par exemple, le mot «entreprise» utilisé à l'alinéa 18(2)*c*) ne comprend pas un projet comportant un risque ou une affaire de caractère commercial . . .

99 Après avoir conclu que l'opération de l'appelant est visée par la définition du mot «entreprise», la prochaine question que nous devons trancher est celle de savoir si l'appelant a le droit de réclamer la diminution de la valeur de son terrain en vertu de l'art. 9. Il nous faut donc examiner les principes et la jurisprudence qui se rapportent à cet article de la Loi.

(ii) Les principes régissant les bénéfices et pertes en vertu de l'art. 9 de la Loi: l'appelant peut-il recourir au régime d'évaluation du par. 10(1) pour déduire à titre de perte d'entreprise la diminution de la juste valeur marchande du bien?

100 Au départ, je souligne (comme l'a fait le juge Rouleau en première instance) que ni le par. 10(1) de la Loi ni l'art. 1801 du Règlement ne prévoient de déduction du revenu, ni n'édictent qu'une personne ayant un inventaire peut déduire une perte (relative à la juste valeur marchande) en découlant.

procedure should take place once ordinary commercial principles establish whether a business loss should be claimed under s. 9.

Ces dispositions ne font que donner des indications sur la façon dont l'évaluation devrait être faite, une fois qu'il a été établi en vertu des principes commerciaux ordinaires qu'une perte d'entreprise devrait être déclarée en vertu de l'art. 9.

101 As noted by Urie J.A. in *The Queen v. Cyprus Anvil Mining Corp.*, 90 D.T.C. 6063 (F.C.A.), at p. 6067:

> Subsection 10(1), and Regulation 1801 . . . [are] . . . provision[s] of general application conferring the possibility for a taxpayer to make a choice of his method of inventory valuation . . . . Computation of income, on the other hand, must relate to the taxpayer's taxation year. I do not think, therefore, that it can be said that subsection 10(1) is a specific provision overriding the general one, subsection 9.
>
> . . . [Section 10(1)] must be construed within the context of the Act and be harmonious with its scheme and with the object and intention of Parliament.

Comme le fait remarquer le juge Urie de la Cour d'appel fédérale dans l'arrêt *La Reine c. Cyprus Anvil Mining Corp.*, 90 D.T.C. 6063, à la p. 6067:

> [L]e paragraphe 10(1) et l'article 1801 du Règlement [. . .] [sont des] disposition[s] d'application générale qui accorde[nt] au contribuable la possibilité de choisir sa méthode d'évaluation de son stock [. . .]. En revanche, le revenu doit être calculé en fonction de l'année d'imposition du contribuable. Je ne crois donc pas que l'on puisse prétendre que le paragraphe 10(1) est une disposition précise qui l'emporte sur la disposition générale, l'article 9.
>
> . . . [Le paragraphe 10(1)] doit être interprété dans le contexte de la loi en harmonie avec l'économie générale de celle-ci et avec l'objet et l'intention du législateur.

102 Under s. 9 of the Act, a taxpayer is required to recognize profit from a business in a particular year as income. Profit (or loss) normally equals the proceeds of sales less the cost of those sales. I underscore that computation of profit and loss under s. 9 runs independently from the determination whether a taxpayer is eligible for the s. 10(1) valuation procedure. Inventory valuation is not an expense and is not in itself deductible as such: *Shofar*, *supra*, at p. 355. Consequently, this Court must thus determine whether, in this case, the appellant is entitled to use the s. 10(1) procedure to compute his losses for the 1983 and 1984 taxation years and, then, whether he can deduct these from his proceeds from the same source, which were nil in both years.

L'article 9 de la Loi exige que, au cours d'une année donnée, le contribuable déclare comme revenu le bénéfice qu'il a tiré d'une entreprise. Le bénéfice (ou la perte) est normalement égal au produit des ventes moins le coût de ces ventes. Je souligne que le calcul des bénéfices et des pertes en vertu de l'art. 9 s'effectue indépendamment de la question de savoir si le contribuable peut se prévaloir du régime d'évaluation du par. 10(1). L'évaluation des biens figurant dans l'inventaire ne constitue pas une dépense et n'est pas déductible comme telle: *Shofar*, précité, à la p. 355. Par conséquent, notre Cour doit décider si, en l'espèce, l'appelant peut recourir au régime du par. 10(1) pour calculer ses pertes pour les années d'imposition 1983 et 1984, et ensuite, s'il peut les déduire de ses recettes provenant de la même source, qui étaient inexistantes pendant ces deux années.

103 This determination must be made with an eye to the principles that govern the computation of profit; in fact, I find these principles are largely dispositive of the instant appeal. As held by Thorson P. in *Daley v. M.N.R.*, [1950] C.T.C. 254 (Ex. Ct.), at p. 260:

En prenant cette décision, il faut garder à l'esprit les principes qui régissent le calcul d'un bénéfice. En fait, je considère que ces principes sont fort déterminants en l'espèce. Comme l'a affirmé le président Thorson dans *Daley c. M.N.R.*, [1950] C.T.C. 254 (C. de l'É.), à la p. 260:

[T]he first enquiry whether a particular disbursement or expense is deductible . . . [is] whether its deduction is permissible by the ordinary principles of commercial, trading or accepted business and accounting practice.

Cartwright J., in *Dominion Taxicab Association v. Minister of National Revenue*, [1954] S.C.R. 82, was even less equivocal on this matter. He held (at p. 85):

The expression "profit" is not defined in the *Act*. It has not a technical meaning and whether or not the sum in question constitutes profit must be determined on ordinary commercial principles unless the provisions of the *Income Tax Act* require a departure from such principles. [Emphasis added.]

See also V. Krishna, *The Fundamentals of Canadian Income Tax* (4th ed. 1993), at pp. 275 *et seq.*; R. Huot, *Understanding Income Tax for Practitioners* (1994-95 edition), at p. 299; and *Materials on Canadian Income Tax*, *supra*, at pp. 336 *et seq.*

Probably the key taxation principle relevant to the case at bar is the realization principle, which provides that, in the computation of income from an adventure in the nature of trade, gains or losses must be realized in order for them to be included in the computation of income for tax purposes: *Friedberg v. Canada*, [1993] 4 S.C.R. 285. In *Minister of National Revenue v. Consolidated Glass Ltd.*, [1957] S.C.R. 167, Rand J. held at p. 174:

[H]ow can profits and gains be considered to have been made in any proper sense of the words otherwise than by actual realization? This [*sic*] is no inventory valuation feature in relation to capital assets . . . . The word "loss" in the context means absolute and irrevocable, finality. That state of things is realized upon a sale; . . .

In the case at bar, it is obvious that the "loss" that the appellant seeks to deduct in computing his 1983 and 1984 income had not been realized at that time since the properties had not been disposed of. In fact, no revenues were generated from the Styles Property in either 1983 or 1984. In a sense, in the applicable taxation years the "adven-

[TRADUCTION] [L]a première question de savoir si un débours ou une dépense particulière est déductible [. . .] [consiste] à déterminer si sa déduction est permise selon les principes ordinaires du commerce ou les pratiques commerciales et comptables admises.

Dans l'arrêt *Dominion Taxicab Association c. Minister of National Revenue*, [1954] R.C.S. 82, le juge Cartwright tient des propos encore moins équivoques sur cette question. Voici ce qu'il affirme (à la p. 85): 104

[TRADUCTION] L'expression «bénéfice» n'est pas définie dans la *Loi*. Elle n'a pas de sens technique et la question de savoir si la somme en cause constitue ou non un bénéfice doit être tranchée d'après les principes commerciaux ordinaires à moins que les dispositions de la *Loi de l'impôt sur le revenu* n'exigent qu'on s'écarte de ces principes. [Je souligne.]

Voir aussi V. Krishna, *The Fundamentals of Canadian Income Tax* (4e éd. 1993), aux pp. 275 et suiv.; R. Huot, *Cours d'impôt* (édition 1994-95), à la p. 1-4, et *Materials on Canadian Income Tax*, *op. cit.*, aux pp. 336 et suiv.

Le principe fiscal clé qui s'applique en l'espèce est probablement le principe de réalisation qui prévoit que, dans le calcul du revenu d'un projet comportant un risque de caractère commercial, les gains et les pertes doivent être réalisés pour pouvoir être inclus dans le calcul du revenu aux fins de l'impôt: *Friedberg c. Canada*, [1993] 4 R.C.S. 285. Dans l'arrêt *Minister of National Revenue c. Consolidated Glass Ltd.*, [1957] R.C.S. 167, le juge Rand affirme, à la p. 174: 105

[TRADUCTION] [C]omment peut-on considérer que des bénéfices et des gains ont été faits au sens propre de ces termes, si ce n'est par la réalisation effective? Il n'y a pas d'évaluation de biens figurant dans un inventaire pour des immobilisations [. . .] Le mot «perte» dans ce contexte, signifie un état final, absolu et irrévocable. Cet état de fait se réalise lors d'une vente . . .

En l'espèce, il est évident que la «perte» que l'appelant veut déduire dans le calcul de son revenu pour les années 1983 et 1984 n'avait pas été réalisée à l'époque, puisqu'il n'y avait pas eu aliénation du bien. En fait, aucune recette n'a été tirée du domaine Styles au cours des années 1983 et 1984. En un sens, pendant les années d'imposi- 106

ture" consisted only of a purchase. It was therefore not fully completed. Although insufficient to extract it from the definition of "business" under s. 248(1), the fact that the adventure was only half-completed in 1983 and 1984 strikes at the heart of the computation of any business losses arising therefrom during those years.

107 Professor B. J. Arnold, in *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), remarks at p. 333:

> One of the basic principles of income taxation is that appreciation or depreciation in the value of property is not taken into account in the computation of income until such appreciation or depreciation has been realized, usually by means of a sale.

108 The importance of this principle is reflected in the fact that, whenever the *Income Tax Act* permits deemed dispositions at fair market value without actual realizations, it does so narrowly and in a highly circumscribed manner: for example, when a taxpayer ceases to be a Canadian resident (s. 48 (now repealed)), or upon death (s. 70), or upon change of control (s. 111). Exceptions from the realization principle are thus clearly stipulated and explicitly codified, unlike the exception upon which the appellant seeks to rely. For the most part, the Act does not recognize "unrealized" or "paper" gains or losses: Krishna, *supra*, at pp. 278-79.

109 The respondent correctly notes, however, that the principle of realization in the computation of profit and loss is subject to an exception in the case of stock-in-trade: *Whimster & Co. v. Inland Revenue Commissioners* (1925), 12 T.C. 813 (Ct. Sess., Scot.), at p. 823, *per* Lord Clyde; and *BSC Footwear Ltd. v. Ridgway*, [1971] 2 All E.R. 534 (H.L.). In Canada, this exception is presently codified in s. 10(1) of the *Income Tax Act*: *Minister of National Revenue v. Irwin*, [1964] S.C.R. 662 (referring to the former version of s. 10(1), s. 14(2)). Such stock-in-trade can be valuated at the lower of cost and fair market value and, conse-

tion en cause, le «projet» n'a consisté qu'en un achat. Il n'était donc pas entièrement achevé. Bien qu'insuffisant pour le soustraire à l'application de la définition du mot «entreprise» que donne le par. 248(1), le fait que le projet n'était qu'à demi achevé en 1983 et 1984 frappe au cœur même du calcul de toute perte d'entreprise en découlant au cours de ces années.

Dans *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), le professeur B. J. Arnold fait la remarque suivante, à la p. 333:

> [TRADUCTION] L'un des principes de base de l'impôt sur le revenu est que l'augmentation ou la diminution de la valeur d'un bien n'entre dans le calcul du revenu que lorsque cette augmentation ou diminution a été réalisée, habituellement au moyen d'une vente.

L'importance de ce principe ressort du fait que, toutes les fois que la *Loi de l'impôt sur le revenu* permet des aliénations réputées avoir été faites à la juste valeur marchande sans réalisation véritable, elle le fait de façon stricte et très limitée: par exemple, lorsqu'un contribuable cesse de résider au Canada (art. 48 (maintenant abrogé)), à la suite de son décès (art. 70), ou à la suite d'un changement de contrôle (art. 111). Des exceptions au principe de réalisation sont donc clairement prévues et explicitement codifiées, contrairement à l'exception qu'invoque l'appelant. En général, la Loi ne reconnaît pas les gains ou les pertes «non réalisées» ou qui n'existent que «sur papier»: Krishna, *op. cit.*, aux pp. 278 et 279.

L'intimée fait cependant remarquer, à juste titre, que le principe de réalisation dans le calcul des bénéfices et des pertes souffre une exception dans le cas des articles de commerce: *Whimster & Co. c. Inland Revenue Commissioners* (1925), 12 T.C. 813 (Ct. Sess., Scot.), à la p. 823, lord Clyde; et *BSC Footwear Ltd. c. Ridgway*, [1971] 2 All E.R. 534 (H.L.). Au Canada, cette exception est actuellement codifiée au par. 10(1) de la *Loi de l'impôt sur le revenu*: *Minister of National Revenue c. Irwin*, [1964] R.C.S. 662 (qui renvoie à l'ancienne version du par. 10(1), le par. 14(2)). Ces articles de commerce peuvent être évalués selon la méthode

quently, can permit a dealer therein to deduct unrealized losses through the cost of goods sold formula. The result of this principle is effectively to enable a business to increase its cost of goods sold and thus reduce its profits (or increase its losses) in a given year by the amount by which the market value of its inventory at the end of the year falls below the cost of that inventory. The effect of this is to permit a business to recognize as a loss the decline in the value of its inventory in the year in which this decline occurs as opposed to the year in which the inventory is actually sold. However, the commercial principles and jurisprudential authority underpinning the *Income Tax Act* do not recognize that this exception to the realization principle should operate for unsold single pieces of land that are held by adventurers in trade and alleged to be inventory.

d'évaluation au moindre du coût et de la juste valeur marchande et, par conséquent, ils peuvent permettre à la personne qui en fait le commerce de déduire des pertes non réalisées, au moyen de la formule du coût des marchandises vendues. Ce principe a effectivement pour résultat de permettre à une entreprise d'accroître le coût de ses marchandises vendues et de réduire ainsi ses bénéfices (ou d'augmenter ses pertes), pour une année donnée, du montant par lequel la valeur marchande des biens figurant dans son inventaire à la fin de l'exercice est inférieure à leur coût. Cela a pour effet de permettre à une entreprise de reconnaître comme perte la diminution de la valeur des biens figurant dans son inventaire, pendant l'année où cette diminution a lieu, par opposition à l'année au cours de laquelle les biens figurant dans l'inventaire sont réellement vendus. Toutefois, les principes commerciaux et la jurisprudence qui sous-tendent la *Loi de l'impôt sur le revenu* ne reconnaissent pas que cette exception au principe de réalisation devrait s'appliquer dans le cas de terrains uniques non vendus, qui sont détenus par des spéculateurs et qui, allègue-t-on, constituent des biens figurant dans un inventaire.

The situation of dealers in stock-in-trade is markedly different from that faced by a business adventurer such as the appellant. Whereas these dealers are engaged in the "carrying on of a business", the appellant has launched a single adventure. These dealers regularly purchase hundreds of goods which are quickly sold. Since there are many sales, over which it is impossible to keep track on an individual basis, an averaging formula is used and discrepancies are, over time, evened out: *BSC*, *supra*, at p. 536. Such an averaging formula is required since it is not practicable for such dealers to determine their profit by looking at each individual item sold. In fact, in businesses where it is neither possible nor desirable to keep a running total of the cost of the goods being sold on a daily basis, the only feasible way to determine the cost of all the goods sold in an accounting period is to add the value of the inventory on hand at the beginning of the period to the cost of the inventory purchased during the period and then

La situation du marchand d'articles de commerce est nettement différente de celle d'un spéculateur comme l'appelant. Alors que ces marchands «exploitent une entreprise», l'appelant ne s'est engagé que dans un seul projet. Ces marchands achètent régulièrement des centaines de biens qui sont rapidement vendus. En raison du grand nombre de ventes qu'il est impossible de suivre à la trace individuellement, une formule d'étalement est utilisée, et, avec le temps, les écarts sont comblés: *BSC*, précité, à la p. 536. Cette formule est nécessaire parce qu'il n'est pas possible pour ces marchands de calculer leur bénéfice à partir de chaque article vendu. En fait, dans une entreprise où il n'est ni possible ni souhaitable de recalculer quotidiennement le coût des biens vendus, la seule façon de déterminer le coût de tous les biens vendus au cours d'une période comptable est d'ajouter la valeur des biens figurant dans l'inventaire au début de cette période au coût des biens figurant dans l'inventaire acquis au cours de la période,

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subtract the value of the inventory on hand at the end of the period: Krishna, *supra*, at p. 324.

111 This situation must be contrasted with that in which the appellant finds himself. The profit/loss from the Styles Property is readily ascertainable in the year of disposition. The piece of inventory is easily traceable. The importance of these considerations was underscored by Jackett C.J. in his decision in *Oryx Realty Corp. v. Minister of National Revenue*, [1974] 2 F.C. 44 (C.A.). Although the facts of *Oryx* are different from those in the appeal at bar, I find the following passage (at p. 48) to be helpful to the present analysis:

> Gross trading profit for a taxation year may be obtained by adding together the profits of the various transactions completed in the year or by adding together the prices at which sales were effected in the year and deducting the aggregate of the costs of the various things sold. Either of such methods would be suitable for a business consisting of relatively few transactions. In the ordinary trading business, however, the practice, which has hardened into a rule of law, is that profit for a year must be computed by deducting from the aggregate "proceeds" of all sales the "cost of sales" [involving inventory].

112 Drawing from this decision, the respondent makes the following submission, which I fully endorse:

> The introduction of section 10 in the Act was intended only to recognize statutorily the rule that only "ordinary trading businesses" [not the appellant] could properly use the lower of cost or market rule. The section was not intended to extend the use of that rule to cases such as the present one where there is only a single transaction.

113 This legal interpretation has even woven its way into the prior jurisprudence of this Court. In effect, in *Irwin*, *supra*, Abbott J. remarked, in passing at p. 665, that he was "doubtful whether . . . the inventory provisions [presently s. 10(1) and Regulation 1801] . . . are applicable in the circumstances of a case . . . where the actual cost and sale price of each particular piece of property are well

puis de soustraire la valeur des biens figurant dans l'inventaire qui restent à la fin de la période: Krishna, *op. cit.*, à la p. 324.

Cette situation doit être comparée à celle dans laquelle se trouve l'appelant. Le bénéfice ou la perte se rapportant au domaine Styles est facilement vérifiable pendant l'année où il est aliéné. Le bien figurant dans l'inventaire est facilement identifiable. L'importance de ces facteurs a été soulignée par le juge en chef Jackett dans l'arrêt *Oryx Realty Corp. c. Ministre du Revenu national*, [1974] 2 C.F. 44 (C.A.). Bien que les faits de l'arrêt *Oryx* soient différents de ceux du présent pourvoi, je considère que le passage suivant (à la p. 48) est utile à la présente analyse:

> On peut obtenir le profit brut d'exploitation pour une année d'imposition en additionnant les bénéfices tirés de différentes opérations, effectuées durant l'année ou en additionnant les montants des ventes de l'année et en en déduisant le coût total des différentes marchandises vendues. L'une ou l'autre de ces méthodes convient à une entreprise qui effectue relativement peu d'opérations. Dans l'entreprise commerciale ordinaire, cependant, l'usage, qui est devenu un principe de droit, veut qu'on calcule le profit d'une année en déduisant du «produit» total des ventes le «coût des ventes» [mettant en cause l'inventaire].

Se fondant sur cet arrêt, l'intimée avance l'argument suivant, avec lequel je suis tout à fait d'accord:

> [TRADUCTION] L'article 10 n'a été introduit dans la Loi que pour codifier la règle voulant que seules les «entreprises commerciales ordinaires» [et non l'appelant] puissent à bon droit invoquer la règle d'évaluation au moindre du coût et de la valeur marchande. L'article n'a pas été conçu pour que cette règle s'applique aux affaires comme la présente où il n'y a qu'une seule opération.

Cette interprétation juridique a même fait son chemin dans la jurisprudence antérieure de notre Cour. En effet, dans l'arrêt *Irwin*, précité, le juge Abbott a fait remarquer en passant, à la p. 665, qu'il était [TRADUCTION] «douteux que [. . .] les dispositions se rapportant à l'inventaire [actuellement le par. 10(1) de la Loi et l'art. 1801 du Règlement] [. . .] s'appliquent dans un cas [. . .] où le

established". At the time these comments were *obiter dicta*, but I now treat them as an important part of the *ratio decidendi* of the instant appeal.

It is well accepted that adventurers do not "carry on" a business. As remarked by Jackett P. in *Tara Exploration and Development Co. v. M.N.R.*, 70 D.T.C. 6370 (Ex. Ct.), at p. 6376, aff'd [1974] S.C.R. 1057:

> I have concluded that the better view is that the words "carried on" are not words that can aptly be used with the word "adventure". To carry on something involves continuity of time or operations such as is involved in the ordinary sense of a "business". An adventure is an isolated happening. One *has* an adventure as opposed to *carrying on* a business. [Emphasis in original.]

Although an adventure in the nature of trade (just as a stock-in-trade retail establishment and other examples of "carried on" enterprises) are "businesses" under s. 248(1), I conclude that it is only persons who carry on a business who ought to be entitled to benefit from s. 10. This position is echoed in previous decisions of this Court: *Irwin*, *supra*, and *Shofar*, *supra*. In fact, in *Shofar*, Martland J., writing for a unanimous Court, held at p. 354:

> [T]he practice, "hardened into a rule of law" in the computation of the profit of a trading business is to deduct from the aggregate proceeds of all sales the cost of sales computed by adding the value placed on inventory at the beginning of the year to the cost of acquisitions to inventory during the year, less the value of inventory at the end of the year. [Emphasis added.]

For his part, Harris, *supra*, remarks at p. 170 that, if the taxpayer had "a trading motivation, his gain or loss on the transaction would be a business gain or loss". I highlight his use of the words "on the transaction": implicit in this terminology is the recognition that there be a purchase and a sale and that the proceeds arising therefrom be used to calculate the profit or loss flowing from that source

coût et le prix de vente réels de chaque bien sont clairement établis». À l'époque, ces commentaires constituaient une opinion incidente, mais, maintenant, j'en fais une partie importante de la *ratio decidendi* du présent arrêt.

114 Il est reconnu que les spéculateurs n'«exploitent» pas une entreprise. Comme l'a fait remarquer le président Jackett dans l'arrêt *Tara Exploration and Development Co. c. M.R.N.*, 70 D.T.C. 6370 (C. de l'É.), à la p. 6376, conf. par [1974] R.C.S. 1057:

> J'ai conclu [. . .] que la meilleure interprétation est que l'expression «a exercé» n'est pas une expression que l'on peut utiliser convenablement avec le terme «initiative». Exercer quelque chose implique une continuité dans le temps ou dans les opérations, comme celle qu'implique le sens ordinaire du mot «entreprise». Une initiative est un événement isolé. On *prend* une initiative et on *exerce* une entreprise. [En italique dans l'original.]

115 Bien qu'un projet comportant un risque de caractère commercial (tout comme les établissements de vente au détail d'articles de commerce et d'autres exemples d'exploitations commerciales) soit une «entreprise» au sens du par. 248(1), je conclus que seules les personnes qui exploitent une entreprise devraient pouvoir se prévaloir de l'art. 10. Ce point de vue est exprimé dans des arrêts antérieurs de notre Cour: *Irwin* et *Shofar*, précités. En fait, dans l'arrêt *Shofar*, le juge Martland conclut, au nom de la Cour à l'unanimité, à la p. 354:

> [L]'usage «qui est devenu un principe de droit» dans le calcul du profit d'une entreprise commerciale, veut qu'on déduise du produit total des ventes le coût des ventes, calculé en ajoutant la valeur attribuée aux stocks au début de l'année au coût des acquisitions durant l'année, moins la valeur de l'inventaire à la fin de l'année. [Je souligne.]

Quant à Harris, *op. cit.*, il fait remarquer, à la p. 170, que, si le contribuable avait [TRADUCTION] «une motivation commerciale, son gain ou sa perte découlant de l'opération formerait un gain ou une perte d'entreprise». Je souligne qu'il utilise les mots [TRADUCTION] «de l'opération», qui signifient implicitement que l'on reconnaît qu'il doit y avoir un achat et une vente, et que le produit qui en est

and, in turn, be entered under s. 9 in the year in which the trading venture is completed.

116 The appellant is concerned with the alleged unfairness resulting from the adoption of the respondent's interpretation. According to the appellant, the respondent's methodology would result in an inequitable situation in which a business, if it were to own 100 lots and sell one of these, would be eligible for the inventory "write down" and if it were to sell none it would not be so eligible. I do not see how the decision in the instant appeal would lead to such a result. It is clear that any profits or losses arising from that sale of the one piece of property actually sold could be included under s. 9. However, the ability to deduct the fair market depreciation of the 99 unsold lots hinges not upon whether or not one lot is sold but, rather, upon the determination whether "ordinary commercial principles" would recognize the holding of 100 lots (in which only one was sold) as tantamount to "stock-in-trade". If so, then such a fictional taxpayer might very well be entitled to claim any decline in fair market value as a business loss. But this is a hypothetical question for a future court to decide. It does not arise upon the facts of this case. This appeal only involves one transaction, this being very far removed from the level of continuous activity at which the cost of goods sold formula is geared to operate.

117 What does arise in this case is my observation that, if adopted, the appellant's argument would have a wide range of undesirable ramifications from a policy standpoint. It would create a situation in which any property acquired for the purpose of resale at a profit (that is as part of an adventure in the nature of trade), outside of the normal carrying on of a business (shares, art, stamps, gold, land, antiques), would constitute a source of income in each year, thus requiring, in the absence of the sale of the property, an annual

tiré doit servir à calculer le bénéfice ou la perte qui en découle et, ensuite, être inscrit en vertu de l'art. 9 pour l'année durant laquelle l'opération spéculative commerciale est complétée.

L'appelant prétend que l'adoption de l'interprétation de l'intimée entraînerait un résultat injuste. Selon lui, la méthode de l'intimée engendrerait une situation inéquitable dans laquelle une entreprise, si elle possédait 100 terrains et en vendait un, pourrait se prévaloir d'une réduction de valeur de l'inventaire, alors qu'elle ne le pourrait pas si elle n'en vendait aucun. Je ne vois pas comment l'arrêt prononcé dans le présent pourvoi pourrait produire ce résultat. Il est clair que tous les bénéfices ou toutes les pertes qui proviendraient de la vente effective de ce terrain particulier pourraient être inclus en vertu de l'art. 9. Toutefois, la possibilité de déduire la diminution de la juste valeur marchande des 99 terrains non vendus repose non pas sur le fait qu'un terrain soit vendu ou non, mais, plutôt, sur la question de savoir si les «principes commerciaux ordinaires» considéreraient les 100 terrains détenus (dont un seul a été vendu) comme équivalant à des «articles de commerce». Dans l'affirmative, le contribuable de cet exemple pourrait très bien inscrire une déduction, à titre de perte d'entreprise, pour toute diminution de la juste valeur marchande. Mais c'est là une question hypothétique que les faits de la présente affaire ne soulèvent pas et dont la résolution est laissée au tribunal qui, éventuellement, en sera saisi. Le présent pourvoi ne concerne qu'une seule opération, ce qui est bien loin de l'activité commerciale continue à l'égard de laquelle la formule du coût des biens vendus est destinée à s'appliquer.

Ce que je crois discerner en l'espèce, c'est que si l'argument de l'appelant devait être adopté, cela aurait de nombreuses conséquences indésirables sur le plan des principes. Cela créerait une situation dans laquelle tout bien acquis en vue d'être revendu avec bénéfice (c.-à-d. dans le cadre d'un projet comportant un risque de caractère commercial), en dehors de l'exploitation normale d'une entreprise (actions, œuvres d'art, timbres, lingots d'or, terrains, antiquités), constituerait une source de revenu pour chaque année, nécessitant par con-

computation of profit or loss in which, necessarily, a valuation of the fair market value of the property would have to be undertaken. Moreover, this loss could be carried over to offset any actual business profits regardless whether the loss was actually realized during the year. It would thus only be in cases of capital property that the realization principle would continue to operate. I have serious doubts that this was the intent of the drafters of the exception to the realization principle contained in s. 10(1) and Regulation 1801. I also doubt that it was their intention to oblige the owners of such a vast array of property to make yearly appraisals of the worth of that property for taxation purposes; moreover, given that these calculations would merely be appraisals, significant uncertainty and unreliability in the computation of tax liability might very well arise.

séquent, si le bien n'est pas vendu, un calcul annuel du bénéfice ou de la perte, pour lesquels une évaluation de la juste valeur marchande devrait nécessairement être faite. De plus, cette perte pourrait être reportée pour compenser tout profit d'entreprise réel, peu importe que la perte ait été effectivement réalisée au cours de l'année ou non. Par conséquent, le principe de réalisation ne continuerait alors de s'appliquer qu'aux biens en immobilisation. Je doute sérieusement que ce fût là l'intention des rédacteurs de l'exception au principe de réalisation, contenue au par. 10(1) de la Loi et à l'art. 1801 du Règlement. Je doute aussi qu'ils aient voulu de forcer les propriétaires d'un ensemble de biens aussi impressionnant à faire des estimations annuelles de la valeur de ces biens aux fins de l'impôt; de plus, étant donné que ces calculs ne seraient que des estimations, ils pourraient très bien entraîner de l'incertitude et de l'imprécision relativement à l'assujettissement à l'impôt.

The appellant's interpretation would also undermine the matching principle underpinning s. 9 of the Act: *Neonex International Ltd. v. The Queen*, 78 D.T.C. 6339 (F.C.A.) (for an affirmation of the importance of this principle and an invalidation of an attempt to claim expenses in a year in which they were not incurred); see also *West Kootenay Power and Light Co. v. Canada*, [1992] 1 F.C. 732 (C.A.). This principle emphasizes that receipts and expenditures which produce the net income are to be properly "matched" in the same time period: Krishna, *supra*, at p. 279. The importance of the "match" flows from the critical role timing considerations play in taxation matters. In the case of an adventure in the nature of trade, the profit or loss from the transaction is computed at the time the adventure is effected, not in any year prior to the settlement: see *Tobias v. The Queen*, 78 D.T.C. 6028 (F.C.T.D.). Instead, the adoption of the appellant's interpretation would permit a wide array of these "adventures in the nature of trade" to expense the costs (or a portion thereof) in one taxation year while recognizing the revenues in another year.

L'interprétation de l'appelant minerait aussi le principe de rattachement qui sous-tend l'art. 9 de la Loi: *Neonex International Ltd. c. La Reine*, 78 D.T.C. 6339 (C.A.F.) (pour une affirmation de l'importance de ce principe et un rejet d'une tentative de déduire des dépenses pour une année où elles n'avaient pas été engagées); voir aussi *West Kootenay Power and Light Co. c. Canada*, [1992] 1 C.F. 732 (C.A.). Selon ce principe, les recettes et les dépenses qui produisent le revenu net doivent être correctement «rattachées» au cours du même exercice: Krishna, *op. cit.*, à la p. 279. L'importance de ce «rattachement» découle du rôle crucial que joue le temps en matière de fiscalité. Dans le cas d'un projet comportant un risque de caractère commercial, le bénéfice ou la perte de l'opération est calculé au moment où le projet est réalisé, et non durant une année antérieure à sa réalisation: voir *Tobias c. La Reine*, 78 D.T.C. 6028 (C.F. 1re inst.). Adopter l'interprétation de l'appelant permettrait, au contraire, dans un grand nombre de ces projets comportant un «risque de caractère commercial» d'imputer les coûts (ou une partie des coûts) durant une année d'imposition tout en inscrivant les recettes pendant une autre année.

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119 As was proposed by the respondent before this Court:

> It is submitted that it is settled law that in the case of an adventure in the nature of trade, the profit or loss from the transaction is computed at the time the adventure is settled and no computation of profit or loss is necessary or appropriate in any year prior to the settlement. . . .
>
> In the case of isolated transactions, the use of the lower of cost or market method typically would significantly distort the profit from such transactions. For example, where the sale of a particular piece of property does not occur for several years, the taxpayer would be permitted to deduct over the several years losses in respect of unrealized depreciations in value of the property. By contrast, with ordinary trading businesses, the stock-in-trade of the particular business typically turns over in the next fiscal period and, hence, the anticipated losses deducted at the end of any one year are more likely (because of the continuing sales activity of the trading business) to be in fact realized in the next year. The distortion of profit in such cases is therefore likely to be substantially less than in the case of an adventure in the nature of trade where the realization of the profit or loss may not take place for a number of years.

This distortion can, for those with profits and losses emanating from other non-related sources, effectively permit individuals to avoid tax through a careful balancing of their varied isolated investments. I cannot accept that this is conduct Parliament intended to encourage.

120 I also find that the appellant's interpretation undermines broad principles of symmetry. If we permit the appellant to deduct the losses he claims he is entitled to, then, if the taxation system is to remain symmetrical, business gains on unrealized "inventory" would also have to be filed. This is not the case. I am aware of the fact that the appellant points out that, if in a year subsequent to acquisition but prior to disposition, a property which in a previous year fell in value then increases in value, any increase up to original cost will have to be taken into account in the income calculation. However, I observe that no unrealized increase beyond original cost is ever taxed, thereby giving rise to an

L'intimée a soutenu la thèse suivante devant notre Cour:

> [TRADUCTION] On fait valoir qu'il est bien établi en droit que, dans le cas d'un projet comportant un risque de caractère commercial, le bénéfice ou la perte découlant de l'opération est calculé au moment où le projet est réalisé, et aucun calcul du bénéfice ou de la perte n'est nécessaire ou approprié pour toute année précédant la réalisation . . .
>
> Dans le cas d'opérations isolées, l'utilisation de la méthode d'évaluation au moindre du coût et de la juste valeur marchande entraînerait normalement des distorsions importantes de la valeur des bénéfices tirés de ces opérations. Par exemple, si un certain bien reste invendu pendant plusieurs années, le contribuable pourrait déduire, pour ces années, des pertes pour les dévaluations non réalisées du bien. Par contre, dans le cas d'entreprises commerciales ordinaires, les articles de commerce de l'entreprise sont normalement remplacés au cours de l'exercice suivant, et, par conséquent, les pertes anticipées déduites à la fin de chaque année sont plus susceptibles (en raison de la continuité des opérations de vente de l'entreprise commerciale) d'être réalisées au cours de l'année suivante. La distorsion des bénéfices dans cette situation risque donc d'être beaucoup moins importante que dans le cas d'un projet comportant un risque de caractère commercial, où la réalisation du bénéfice ou de la perte peut prendre des années.

Cette distorsion peut effectivement permettre à des contribuables qui ont des bénéfices et des pertes provenant d'autres sources indépendantes d'éluder l'impôt grâce à une répartition judicieuse de leurs divers placements isolés. Je ne puis accepter que le législateur a voulu encourager une telle conduite.

Je trouve aussi que l'interprétation de l'appelant mine des principes généraux de symétrie. Si nous permettons à l'appelant de déduire les pertes qu'il prétend pouvoir déduire, alors, pour que le système fiscal demeure équilibré, les gains d'entreprise portant sur des biens non réalisés figurant dans un «inventaire» devraient aussi être déclarés. Ce n'est pas le cas. Je suis conscient du fait que l'appelant souligne que, si durant une année suivant l'acquisition, mais avant l'aliénation, le bien, qui, au cours d'une année antérieure a perdu de la valeur, reprend de la valeur, toute augmentation de valeur, jusqu'à concurrence du coût original, devra être prise en considération dans le calcul du revenu.

asymmetry since any drop below cost would, on the appellant's interpretation, immediately give rise to a business loss.

Toutefois, je remarque qu'une augmentation non réalisée dépassant le coût original n'est jamais imposée, ce qui engendre une asymétrie, étant donné que toute diminution de valeur par rapport au coût original entraînerait immédiatement, selon l'interprétation de l'appelant, une perte d'entreprise.

It was submitted before this Court that denying the appellant the benefit of s. 10 impinges upon the principle of conservatism which constitutes a principal element of the generally accepted accounting procedures used to calculate profit/loss under s. 9. In response, I note that this Court, in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 723, held that it is more appropriate in the taxation context to rely upon well-accepted commercial principles given that strict adherence to accounting conservatism might not be consonant with the purposes of the taxation system. This conclusion is echoed in the academic context. Arnold, *supra*, at pp. 332-33, concludes:

[T]he lower of cost and fair market value rule . . . is a product of the conservatism of accounting practice, which finds an understatement of income preferable to an overstatement. There is some justification for this conservatism for purposes of financial accounting; however, substantial doubt has been raised as to the validity of the lower of cost and fair market value rule even for financial accounting purposes. For tax purposes, there is no justification for either the lower of cost and fair market value rule or the "all fair market value" rule for the valuation of inventory.

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On a fait valoir, devant notre Cour, que nier à l'appelant le droit de se prévaloir de l'art. 10 empiète sur le principe de prudence qui est un élément principal des procédures comptables généralement reconnues, qui servent à calculer les bénéfices et les pertes au sens de l'art. 9. Je réponds que notre Cour, dans l'arrêt *Symes c. Canada*, [1993] 4 R.C.S. 695, à la p. 723, a jugé qu'il convient davantage, dans le contexte fiscal, de suivre les principes commerciaux reconnus, étant donné qu'une observation stricte du principe comptable de prudence pourrait entrer en conflit avec les fins du régime fiscal. La doctrine reprend cette conclusion: Arnold, *op. cit.*, aux pp. 332 et 333:

[TRADUCTION] [L]a règle de l'évaluation au moindre du coût et de la valeur marchande [. . .] est un produit de la prudence de la pratique comptable, où l'on considère une sous-évaluation du revenu préférable à une surévaluation. Cette prudence peut se justifier en comptabilité financière; toutefois, on a soulevé des doutes sérieux quant à la validité de la règle de l'évaluation au moindre du coût et de la valeur marchande, même à des fins de comptabilité financière. Pour l'évaluation à des fins fiscales des biens figurant dans un inventaire, rien ne justifie d'appliquer la règle de l'évaluation au moindre du coût et de la juste valeur marchande, ou celle de la «juste valeur marchande intégrale».

It is for this reason that the lower of cost and market method of inventory valuation contained in s. 10(1) and Regulation 1801 is recognized as an exception limited only to stock-in-traders. I see no reason to extend its reach beyond this group, and certainly not to adventures in the nature of trade. The applicable method of accounting within the taxation context should be that which best reflects the taxpayer's true income position: *Ken Steeves Sales Ltd. v. M.N.R.*, 55 D.T.C. 1044 (Ex. Ct.); *M.N.R. v. Publishers Guild of Canada Ltd.*, 57 D.T.C. 1017 (Ex. Ct.), at pp. 1026 and 1030; *Associated Investors of Canada Ltd. v. M.N.R.*, 67

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C'est pour cette raison que la méthode d'évaluation au moindre du coût et de la valeur marchande des biens figurant dans un inventaire, que contiennent le par. 10(1) de la Loi et l'art. 1801 du Règlement, est reconnue comme une exception ne s'appliquant qu'aux marchands d'articles de commerce. Je ne vois aucune raison d'en étendre la portée, et certainement pas aux projets comportant un risque de caractère commercial. Aux fins de l'impôt, la méthode comptable applicable devrait être celle qui reflète le mieux la situation véritable du contribuable sur le plan de ses revenus: *Ken Steeves Sales Ltd. c. M.N.R.*, 55 D.T.C.

D.T.C. 5096 (Ex. Ct.), at pp. 5098-99; and *Maritime Telegraph and Telephone Co. v. The Queen*, 91 D.T.C. 5038 (F.C.T.D.). In the case at bar, the appellant's income position is best reflected by not declaring the decline in the fair market value of the Styles Property as a business loss in 1983 and 1984, but instead waiting until the year of disposition to enter any such losses, this being 1986.

123 The appellant further alleges that the respondent's interpretation of the expense scheme for inventory would lead to a mathematical absurdity. It is submitted that in determining the raw land to be inventory yet in insisting that the inventory valuation can only be done in the year of disposition, the Federal Court of Appeal has created a situation in which the real loss suffered by the taxpayer can never be realized. I have two responses to this line of argument.

124 First, the problem is entirely obviated if the land is not held to be "inventory" or the taxpayer is precluded from utilizing the inventory valuation scheme for the purposes of s. 9; in such a scenario, the loss in the year of disposition is simply calculated by subtracting the proceeds of the disposition from the original amount disbursed to purchase the property (and *vice versa* for profits). Second, upon closer scrutiny, it is the appellant's interpretation which yields mathematical improbabilities: it would recognize a negative cost of goods sold, something of a surprise, in a year in which there were in fact no sales, an even greater surprise. Furthermore, it would seem that a negative cost of goods sold would render askew the entire deemed realization formula contained within s. 10(1).

125 In closing, I emphasize my discomfort with a ruling that would permit speculative investments constituting "adventures in the nature of trade" to

1044 (C. de l'É.); *M.N.R. c. Publishers Guild of Canada Ltd.*, 57 D.T.C. 1017 (C. de l'É.), aux pp. 1026 et 1030; *Associated Investors of Canada Ltd. c. M.N.R.*, 67 D.T.C. 5096 (C. de l'É.), aux pp. 5098 et 5099, et *Maritime Telegraph and Telephone Co. c. La Reine*, 91 D.T.C. 5038 (C.F. 1re inst.). En l'espèce, la meilleure façon de présenter la situation de l'appelant quant à ses revenus consiste non pas à déduire la diminution de la juste valeur marchande du domaine Styles à titre de perte d'entreprise en 1983 et 1984, mais plutôt à attendre l'année de l'aliénation, soit 1986, pour inscrire toute perte de cette nature.

L'appelant allègue de plus que l'interprétation que l'intimée donne au régime d'imputation relatif à l'inventaire aboutirait à une absurdité mathématique. Il soutient qu'en statuant que le terrain vierge figure dans un inventaire, tout en insistant sur le fait que l'évaluation des biens qui figure dans l'inventaire ne peut se faire que durant l'année de son aliénation, la Cour d'appel fédérale a créé une situation dans laquelle la perte réelle subie par le contribuable ne pourra jamais être réalisée. J'ai deux réponses à cet argument.

Premièrement, on prévient tout problème si l'on ne considère pas le terrain comme un bien figurant dans un «inventaire», ou s'il est interdit au contribuable de se prévaloir, aux fins de l'art. 9, du régime d'évaluation des biens figurant dans un inventaire; dans un tel cas, on calcule la perte durant l'année de l'aliénation simplement en soustrayant le produit de l'aliénation du montant original déboursé pour acquérir le bien (et vice-versa pour les bénéfices). Deuxièmement, à y regarder de plus près, c'est l'interprétation de l'appelant qui mène à des invraisemblances mathématiques: elle reconnaîtrait l'existence d'un coût négatif des biens vendus, quelque chose d'assez étonnant, durant une année où il n'y a eu aucune vente, quelque chose d'encore plus étonnant. De plus, il semblerait qu'un coût négatif des biens vendus aurait pour effet de fausser toute la formule de réalisation réputée que renferme le par. 10(1).

Pour terminer, je souligne que je serais ennuyé par une décision qui permettrait que des placements spéculatifs qui constituent des «projets com-

be written down to the lower of cost and market value in years in which their value declines yet they are not sold. This discomfort appears to be shared by the drafters of the Act as well as the authors of much of the jurisprudence and academic commentaries dealing with the computation of profit under s. 9 of the Act. Both the application of s. 10(1) as well as the definition of "inventory" must be very sensitive to these considerations.

(iii) Is the Land "Inventory"?

With an eye to the aforementioned principles of profit and loss within the context of income taxation, I turn to the question whether the Styles Property could be considered to be "inventory". Section 248(1) defines "inventory" as follows:

"inventory" means a description of property the *cost or value of which* is *relevant* in computing a taxpayer's income from a business for a taxation year; [Italics and underlining added.]

In my mind the key element of this definition is that the property, in order to be properly classified as "inventory", must have a cost or value which, in the particular taxation year in question, bears some relevance to the amount of the taxpayer's income (profit or loss) for that particular year. Under the principles of tax accounting, the value of inventory bears no direct relationship with profit/loss. Rather, profit or loss is calculated by subtracting the cost of sales (the value of the inventory at the beginning of the year plus the cost of acquisitions, less the value of the inventory at the end of the year) from the proceeds of sale: *Shofar*, *supra*. Thus, the value of inventory (which, according to s. 10(1), can be based on cost or fair market value) only plays a part in calculating the cost of sales. Ostensibly, in order for there to be "costs of sales", there must have been a sale in the first place. Once again, the realization principle is triggered.

portant un risque de caractère commercial» soient évalués au moindre du coût et de la valeur marchande durant les années où leur valeur diminue, bien qu'ils ne soient pas vendus. Cet ennui semble être partagé par les rédacteurs de la Loi, ainsi que par les juges et les auteurs de doctrine qui ont traité du calcul des bénéfices en vertu de l'art. 9 de la Loi. Tant l'application du par. 10(1) que la définition du mot «inventaire» nécessitent que l'on garde bien à l'esprit ces considérations.

(iii) Le terrain constitue-t-il un bien figurant dans un «inventaire»?

Gardant à l'esprit les principes susmentionnés quant aux bénéfices et aux pertes dans le contexte de l'impôt sur le revenu, j'examine maintenant la question de savoir si le domaine Styles peut être considéré comme un bien figurant dans un «inventaire». Le paragraphe 248(1) définit le mot «inventaire» de la façon suivante:

«inventaire» signifie la description des biens *dont le prix ou la valeur entre* dans le calcul du revenu qu'un contribuable tire d'une entreprise pour une année d'imposition; [Italiques et soulignement ajoutés.]

À mon avis, l'élément clé de cette définition est que le bien, pour pouvoir être qualifié à bon droit de bien figurant dans un «inventaire», doit avoir un coût ou une valeur qui, durant l'année d'imposition en cause, a une incidence sur le revenu du contribuable (bénéfice ou perte) pour cette année. Selon les principes de la comptabilité fiscale, la valeur des biens figurant dans un inventaire n'a aucun lien direct avec le bénéfice ou la perte. Au contraire, on calcule le bénéfice ou la perte en soustrayant du produit de la vente le coût des ventes (la valeur des biens figurant dans l'inventaire au début de l'année, plus le coût des acquisitions, moins la valeur des biens figurant dans l'inventaire à la fin de l'année): *Shofar*, précité. Ainsi, la valeur des biens figurant dans un inventaire (qui, selon le par. 10(1), peut reposer soit sur le coût soit sur la juste valeur marchande) ne joue un rôle que dans le calcul du coût des ventes. Il est évident que pour qu'il y ait «coût des ventes», il faut d'abord qu'il y ait eu vente. Encore là, l'application du principe de réalisation est déclenchée.

128 In 1983 and 1984 there was no sale of the land. Nor was there a purchase. The land was not involved in any transaction whatsoever. To this end, the drop in the fair market value of the land had no effect whatsoever on the income of the appellant. It may have affected the appellant's wealth or the size of his asset portfolio, but neither of these constitute his "income" for the taxation years in question. In a sense, I find that the appellant has neglected the importance of the phrase "for a taxation year" inserted in the definition in s. 248(1).

129 In fact, at para. 7(d) of his factum, the appellant submits that his "interest in the Styles Property was inventory because the cost or value of that property is relevant in determining his income from a business". Of course, over the lifetime of the business, the purchase of that property might very well have a significant impact on that business's income. But the *Income Tax Act* does not levy funds based upon the lifetime of a business. Rather, taxation is organized in discrete yearly units; the ability to carry over deductions/inclusions from one year to the other is highly circumscribed. This rationale appears to have infused the definition of "inventory" since, in order to fit within this definition, there must be relevance to the income for that taxation year. This is plainly not the case in the appeal at bar. In short, the appellant should be able to claim, under the ordinary tracing formula (proceeds less the purchase cost), the drop in the value of the land in the year in which the property is disposed of, but not in years where the property remains dormant.

130 At this juncture, it must be remembered that the Act's definition of "inventory" is not identical to the definition proposed for accounting or real estate purposes. After all, as this Court concluded in *Symes*, *supra*, at p. 723, the *Income Tax Act* is motivated by the purpose of raising public revenues and, as such, differs from the goals of the accounting world. I note in this regard that the Canadian Institute of Chartered Accountants has

Le terrain n'a été vendu ni en 1983 ni en 1984. Il n'y a pas eu d'acquisition non plus. Le terrain n'a fait l'objet d'aucune opération quelle qu'elle soit. À cet égard, la diminution de la juste valeur marchande du terrain n'a pas eu la moindre incidence sur le revenu de l'appelant. Elle peut avoir affecté la richesse de l'appelant ou l'importance de son actif, mais rien de cela ne constitue son «revenu» pour les années d'imposition en question. En un sens, je conclus que l'appelant n'a pas apprécié l'importance des termes «pour une année d'imposition», contenus dans la définition du par. 248(1).

En fait, à l'al. 7d) de son mémoire, l'appelant soutient que sa [TRADUCTION] «part du domaine Styles figure dans un inventaire parce que le coût ou la valeur de ce bien est pertinent pour déterminer son revenu d'entreprise». Il est évident que, pendant toute la durée de l'entreprise, l'acquisition de ce bien pourrait très bien avoir une grande incidence sur ce revenu de l'entreprise. Mais la *Loi de l'impôt sur le revenu* ne perçoit pas des impôts en fonction de la durée d'une entreprise. L'imposition est plutôt organisée en unités annuelles distinctes; la possibilité de reporter des déductions ou des inclusions d'une année à l'autre est fort limitée. Ce raisonnement semble avoir inspiré la définition du mot «inventaire» étant donné que, selon cette définition, les éléments en cause doivent entrer dans le calcul du revenu de l'année d'imposition en cause. Ce n'est absolument pas le cas en l'espèce. Bref, l'appelant devrait être capable de réclamer, en vertu de la formule d'identification ordinaire (produit moins coût d'acquisition), la diminution de la valeur du terrain pendant l'année de l'aliénation du bien, mais pas durant les années où le bien ne fait l'objet d'aucune opération.

Il faut se rappeler à ce stade-ci que la définition que la Loi donne du mot «inventaire» n'est pas identique à celle proposée pour la comptabilité ou le commerce immobilier. Après tout, comme notre Cour l'a conclu dans l'arrêt *Symes*, précité, à la p. 723, le but de la *Loi de l'impôt sur le revenu* est de percevoir des revenus publics et, comme tel, il diffère de celui du milieu de la comptabilité. Je constate, à cet égard, que l'Institut canadien des

defined "inventory" as including, *inter alia*, "[i]tems of tangible property which are held for sale in the ordinary course of business": *Terminology for Accountants* (3rd ed. 1983), at p. 81. Similarly, a publication entitled *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies* (November 1985) states that land currently held for sale and land held for future development and sale is inventory. Under both of these definitions, the appellant's land would likely be included as "inventory". But the *Income Tax Act* has taken a very different approach. It has expressly codified (and hence, in cases of conflict, overruled the principles that underlie the accounting or commercial worlds) a definition that clearly connects the property to the yearly income and, in the appellant's case, this link is missing for the taxation years 1983 and 1984. So, too, is the principal condition precedent to the applicability of the inventory valuation scheme, namely that the taxpayer be a stock-in-trader.

comptables agréés a défini le mot «inventaire» comme incluant, notamment, [TRADUCTION] «[d]es biens corporels détenus pour la vente dans le cours normal d'une entreprise»: *Terminology for Accountants* (3e éd. 1983), à la p. 81. De même, dans une publication intitulée *Canadian Institute of Public Real Estate Companies Recommended Accounting Practices for Real Estate Companies* (novembre 1985), on affirme qu'un terrain actuellement détenu en vue d'être vendu et un terrain détenu en vue d'être mis en valeur et vendu sont des biens figurant dans un inventaire. Selon ces deux définitions, le terrain de l'appelant serait vraisemblablement un bien figurant dans un «inventaire». Mais la *Loi de l'impôt sur le revenu* adopte un tout autre point de vue. Elle a expressément codifié (et, par conséquent, en cas de conflit, écarté les principes qui sous-tendent la comptabilité et le commerce) une définition qui lie clairement le bien au revenu annuel, et, dans le cas de l'appelant, ce lien manque pour les années d'imposition 1983 et 1984. C'est aussi la principale condition préalable de l'applicabilité du régime d'évaluation des biens figurant dans un inventaire, soit que le contribuable soit un marchand d'articles de commerce.

The appellant relies on a series of cases in support of the proposition that even undisposed property which is the subject matter of an adventure in the nature of trade can constitute inventory and, thus, should its fair market value drop, the taxpayer is entitled to register that unrealized decline in value as a business loss for that year: *Bailey*, *supra*; *Weatherhead*, *supra*; *Van Dongen*, *supra*; and *Skerrett v. M.N.R.*, 91 D.T.C. 1330 (T.C.C.). I note in passing that the Federal Court of Appeal has never heard any of these cases; in fact, the only Federal Court of Appeal authority in this area of the law is its decision in the case at bar. With respect, I choose not to follow this line of authority. I note that in none of these decisions was the meaning of "inventory" under s. 248(1) properly placed within the context of the principles of profit and loss (developed under s. 9 and the predecessor

131 L'appelant s'appuie sur une série de décisions pour affirmer que même un bien non aliéné qui fait l'objet d'un projet comportant un risque de caractère commercial peut être un bien figurant dans un inventaire et que, s'il arrivait que sa juste valeur marchande diminue, le contribuable pourrait inscrire cette diminution de valeur non réalisée à titre de perte d'entreprise pour l'année en cause: *Bailey*, *Weatherhead* et *Van Dongen*, précités, de même que *Skerrett c. M.R.N.*, 91 D.T.C. 1330 (C.C.I.). Je souligne, en passant, que la Cour d'appel fédérale n'a entendu aucun de ces litiges; en fait, le seul arrêt de la Cour d'appel fédérale dans ce domaine du droit est celui qu'elle a rendu en l'espèce. En toute déférence, je choisis de ne pas suivre ce courant de jurisprudence. Je constate qu'en aucun cas le sens du mot «inventaire», au par. 248(1), n'a été correctement situé dans le contexte des principes du bénéfice et de la perte (établis en vertu de l'art. 9 ou des dispositions qui l'ont précédé) analysés

sections thereto) discussed *supra* which I have found to be of crucial importance.

132 For the reasons discussed above, I find the distinction drawn by Rouleau J. in the instant appeal between taxpayers holding one or a few items of inventory (such as the appellant) and those with thousands of items (a retail store) to be instructive. Retail companies do not purchase items and then retain them for years should the market turn against them. Items are generally purchased in bulk and then sold with quick turnaround. To this end, in such a situation it can be safely assumed that there is a relation between the value of the goods claimed to be inventory and the overall income of the taxpayer for the year in question (thus the definition of "inventory" would be met and s. 10(1) would be applicable), even though in each individual case it might be impossible to trace the actual moment when the item in question was sold. It is consequently appropriate to rely upon averaging calculations. Thus, the "cost of sales" formula yields constructive and practical results; on the other hand, in a business with relatively few transactions such as the appellant's, the cost of sales formula "does not reflect the true picture of [the] business' income position" (*per* Rouleau J., at p. 559).

VI. Conclusions and Disposition

133 To summarize, I arrive at the following conclusions:

1. The appellant's initiative is a "business" pursuant to the definition thereof in s. 248(1) of the Act since it amounts to an adventure in the nature of trade.

2. The exception to the realization principle carved out by s. 10(1) and Regulation 1801 is not a method of valuation the benefit of which should accrue to adventurers such as the appellant. Instead, this exception is to permit cost of sale inventory valuations only for dealers in

ci-dessus et que j'ai considérés comme ayant une importance cruciale.

Pour les motifs qui précèdent, je trouve intéressante la distinction que le juge Rouleau a établie, en l'espèce, entre des contribuables qui détiennent un seul ou quelques biens (comme l'appelant) et ceux qui en détiennent des milliers (comme un magasin de détail). Les compagnies de détail ne font pas l'acquisition de biens pour les détenir pendant des années, au cas où le marché leur deviendrait défavorable. Les articles sont généralement achetés en vrac et vendus, d'où une rotation rapide des stocks. À cet égard, dans un tel cas, on peut sans risque supposer qu'il y a un lien entre la valeur des biens inscrits comme figurant dans un inventaire et le revenu global du contribuable pour l'année en question (la définition d'«inventaire» serait ainsi respectée et le par. 10(1) s'appliquerait), même s'il pouvait se révéler impossible de déterminer à quel moment précis l'article en cause a été vendu. Il convient donc de se fonder sur des calculs d'étalement. Ainsi, la formule du «coût des ventes» entraîne des résultats constructifs et pratiques; par contre, dans le cas d'une entreprise, comme celle de l'appelant, qui fait très peu d'opérations, la formule du coût des ventes «ne reflète pas la position véritable de l'entreprise au chapitre du revenu» (le juge Rouleau, à la p. 559).

VI. Conclusions et dispositif

En résumé, j'en arrive aux conclusions suivantes:

1. Le projet de l'appelant est une «entreprise» au sens de la définition qui en est donnée au par. 248(1) de la Loi, étant donné qu'il équivaut à un projet comportant un risque de caractère commercial.

2. L'exception au principe de réalisation dégagée par le par. 10(1) de la Loi et par l'art. 1801 du Règlement n'est pas une méthode d'évaluation qui devrait profiter à des spéculateurs comme l'appelant. Cette exception vise plutôt à permettre exclusivement aux marchands d'articles de commerce de faire des évaluations du coût de vente des biens figurant dans leur inventaire,

stock-in-trade, these persons necessarily being engaged in the "carrying on of a business".

3. The land is not inventory for the taxation years in question under the *Income Tax Act*'s definition (s. 248(1)) since it bears no relation whatsoever to the appellant's "business income" for tax purposes in those years. This conclusion is mandated by the principles underlying s. 9. Consequently, the appellant cannot benefit from the application of the valuation system established by s. 10(1).

I would therefore dismiss the appeal with costs. It should, however, be noted that, by rejecting this taxpayer's appeal, this Court is not denying him the right to claim any losses (that are otherwise available) on the Styles Property as business losses. Rather, this Court is simply ensuring that these losses can only be recorded on his 1986 tax return, the only year in which they actually relate to his income.

Finally, with respect to my colleague Major J.'s reasons, I have the following comments. First, I do not dispute that the *Income Tax Act* is based on a system that recognizes only two broad categories of property, inventory or capital property. In my opinion, the analysis I have set out above is not inconsistent with this basic division. I agree that the Styles Property could be viewed as inventory in the year of disposition. In fact, I would note my disagreement with the trial judge and Marceau J.A. about the applicability of the inventory valuation method embodied in s. 10(1) to an adventure in the nature of trade. Section 10(1) applies to a business which includes an adventure in the nature of trade. However, the real question is not whether the Styles Property is inventory, or whether s. 10(1) is applicable, but whether the appellant is entitled to claim the decline in value under s. 9, the defining section on business income. The analysis turns not upon whether the property is inventory, but upon determining the most appropriate method for determining a taxpayer's profit. In the case of an adventurer in the nature of trade, who is not carrying on business, and who has made no disposition,

ces personnes se livrant nécessairement à l'«exploitation d'une entreprise».

3. Le terrain n'est pas, pour les années d'imposition en cause, un bien figurant dans un inventaire, au sens de la définition de la *Loi de l'impôt sur le revenu* (par. 248(1)), étant donné qu'il n'a aucun lien avec le «revenu d'entreprise» de l'appelant pour fins d'impôt durant ces années. Cette conclusion est dictée par les principes qui sous-tendent l'art. 9. Par conséquent, l'appelant ne saurait bénéficier du régime d'évaluation établi par le par. 10(1).

Je suis donc d'avis de rejeter le pourvoi avec dépens. Il y a lieu, cependant, de souligner que le rejet par notre Cour du pourvoi du contribuable ne signifie pas qu'il ne peut pas déduire les pertes (qui peuvent par ailleurs être déduites) relatives au domaine Styles à titre de pertes d'entreprise. Notre Cour ne fait plutôt que s'assurer que ces pertes ne puissent être inscrites que dans sa déclaration de 1986, la seule année où elles sont réellement liées à son revenu.

Enfin, en ce qui concerne les motifs de mon collègue le juge Major, je tiens à faire les commentaires suivants. Premièrement, je ne conteste pas que la *Loi de l'impôt sur le revenu* repose sur un régime qui ne reconnaît que deux grandes catégories de biens: les biens figurant dans un inventaire et les biens en immobilisation. À mon avis, l'analyse que je viens de faire n'est pas incompatible avec cette division fondamentale. Je conviens que le domaine Styles pourrait être considéré comme un bien figurant dans un inventaire durant l'année de son aliénation. En fait, je soulignerais mon désaccord avec le juge de première instance et le juge Marceau de la Cour d'appel fédérale, quant à la possibilité d'appliquer à un projet comportant un risque de caractère commercial la méthode d'évaluation des biens figurant dans un inventaire, contenue au par. 10(1). Le paragraphe 10(1) s'applique à une entreprise qui inclut un projet comportant un risque de caractère commercial. Cependant, la véritable question n'est pas de savoir si le domaine Styles est un bien figurant dans un inventaire, ni de savoir si le par. 10(1) s'applique, mais plutôt de savoir si l'appelant a le droit de

it is not appropriate to determine profit using the inventory valuation method, for the reasons I have outlined above.

136 Second, I have difficulty with my colleague's reasoning with respect to the difference between the phrasing "for the taxation year", and "for a taxation year". Income is determined under the Act each year, and the characterization of property can change from year to year. I fail to understand how property that has received a particular characterization in one year *ipso facto* receives that characterization in another, or all other, years.

137 Third, I disagree with my colleague that the inventory valuation method is an anachronism in this age of computer technology; rather, it is my view that the method is still a vital tool for businesses with significant and complex inventories.

Appeal allowed with costs, GONTHIER *and* IACOBUCCI JJ. *dissenting.*

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Solicitor for the respondent: George Thomson, Ottawa.

déduire la diminution de valeur en vertu de l'art. 9, la disposition qui définit le revenu d'entreprise. L'analyse porte non pas sur la question de savoir si le bien-fonds est un bien figurant dans un inventaire, mais sur la détermination de la façon la plus adéquate de calculer le bénéfice de l'appelant. Dans le cas d'un spéculateur, qui n'exploite pas une entreprise et qui n'a fait aucune aliénation, il ne convient pas, pour les motifs susmentionnés, de calculer le bénéfice au moyen de la méthode d'évaluation des biens figurant dans un inventaire.

Deuxièmement, j'ai de la difficulté à accepter le raisonnement de mon collègue, en ce qui concerne la différence entre les formulations «pour l'année d'imposition» et «pour une année d'imposition». Le revenu se détermine chaque année en vertu de la Loi, alors que la qualification d'un bien peut changer d'une année à l'autre. Je ne comprends pas comment un bien qui a été qualifié d'une façon au cours d'une année est, par le fait même, qualifié pareillement pendant une autre année ou toutes les autres années.

Troisièmement, je ne suis pas d'accord avec mon collègue pour dire que la méthode d'évaluation des biens figurant dans un inventaire est un anachronisme à l'époque de l'informatique; j'estime plutôt que cette méthode est un outil indispensable pour les entreprises qui ont des inventaires importants et complexes.

Pourvoi accueilli avec dépens, les juges GONTHIER *et* IACOBUCCI *sont dissidents.*

Procureurs de l'appelant: Thorsteinssons, Vancouver.

Procureur de l'intimée: George Thomson, Ottawa.

TAB 6

Paras. 23 and 33

2020 QCCS 3086
Quebec Superior Court

Groupe Dynamite inc. c. Deloitte Restructuring inc.

2020 CarswellQue 10166, 2020 QCCS 3086, 325 A.C.W.S. (3d) 163, EYB 2020-364187

GROUPE DYNAMITE INC., GRG USA HOLDINGS INC. Absentes ET GRG USA LLC (Partie demanderesse) v. DELOITTE RESTRUCTURING INC. (Partie défenderesse)

Kalichman J.C.S.

Judgment: September 18, 2020
Docket: C.S. Montréal 500-11-058763-208

Counsel: Mtre Alain N. Tardif, Mtre Jocelyn T. Perreault, Mtre Miguel Bourbonnais, Mtre Gabriel Faure, Mtre François Alexandre Toupin, Mtre Sarah-Maude Demers, Mtre Pascale Klees-Themens, for Groupe Dynamite Inc., GRG USA Holdings Inc. and GRG USA LLC
Mtre Jean-Yves Simard, Mtre Karine Landry, for Groupe Dynamite Inc., GRG USA Holdings Inc. and GRG USA LLC
Mtre Patrick J. Nash, Mtre AnnElyse Scarlett Gains, for Groupe Dynamite Inc., GRG USA Holdings Inc. and GRG USA LLC
Mtre Luc Morin, Mtre Guillaume Michaud, Mtre Arad Mojtahedi, for the Monitor Deloitte Restructuring Inc.
Mtre Roger P. Simard, Mtre Ari Y. Sorek, Mtre Charlotte Dion, for National Bank of Canada, Bank of Montreal, The Toronto-Dominion Bank and Fédération des Caisses Desjardins du Québec
Mtre François Viau, Mtre Alexandre Forest, for Cadillac Fairview, Oxford Properties, Cominar and Ivanhoé Cambridge
Mtre Michael Citak, for Crombie REIT
Mtre Linda Galessiere, Mtre Jessica Wuthmann, for Cushman & Wakefield Asset Services ULC, Morguard lnvestments Limited and RioCan Real Estate lnvestment Trust
Mtre Michael J. Gardella, Mtre Jennifer D. Raviele, Mtre Robert L. LeHane, Mtre James S. Carr, Mtre Mark Levine, Mtre Julie Bowden, for Brookfield
Mtre Bernard Boucher, Mtre Matthew Millman-Pilon, for Brookfield Properties Retail Inc.
Mtre Daniel Cantin, for Revenu Québec
Mtre Maude Lemay-Brisebois, for Canada Revenue Agency
Pierre Laporte, Jean-François Nadon, Jacob Dube-Dupuis, Marc-Alexandre Cormier, Jean-François Boucher, for Monitor Deloitte Restructuring Inc.

***Kalichman J.C.S.*:**

1 *The Court's decisions on (A) Broookfield's contestation of the Debtors' Application for an Amended and Restated Initial Order; (B) Oxford's representations regarding confidentiality; and (C) the Debtors' Application for an Amended and Restated Initial Order, are attached as a schedule to this procès-verbal.*

2 *SUSPENSION DE L'AUDIENCE*

3 *REPRISE DE L'AUDIENCE*

4 Échange entre le Tribunal et les procureurs

5 *FIN DE L'AUDIENCE*

Annex — TO THE MINUTES OF THE HEARING OF SEPTEMBER 18, 2020

FILE NO 500-11-058763-208

JUDGMENT ON (A) BROOOKFI ELD'S CONTESTATION OF THE DEBTORS' APPLICATI ON FOR AN AMENDED AND RESTATED INITIAL OROER; (B) OXFORD'S REPRESENTATIONS REGARDING CONFIDENTIALITY; AND (C) THE DEBTORS' APPLICATION FOR AN AMENDED AND RESTATED INITIAL OROER

(A) Brookfield's Contestation

[1] Brookfield Properties Retail Inc. (Brookfield) is one of the Debtors' landlords. lt leases approximately 27 stores, all of which are located in the United States.

[2] Brookfield opposes certain of the orders that the Debtors have included in their proposed Amended and Restated Initial Order.

[3] Several of the concerns raised by Brookfield have now been resolved. The remaining issues will be examined in turn by reference to the paragraph in the proposed Order.

Paragraph 53

[53] DECLARES that any payment of Post-Filing Rent made, whether prior to or after this Order, is made without any admission by the Debtors that they are required to pay any amount of Post-Filing Rent and such payment is made under reserve of any right or defense that the Debtors may have under the applicable lease, at law or otherwise not to pay, or to withhold or defer, any amount of Post-Filing Rent.

[4] Brookfield submits that the manner in which this order is drafted will create unnecessary confusion. More specifically, it argues that if a Debtor intends to protest a payment of Post-Filing Rent, it should be required not only to inform the landlord of this prior to or at the time of making its payment but should also be required to indicate the basis for the protest. Accordingly, it asks that this order be removed.

[5] The Court does not agree.

[6] If the Debtors exercise the right to protest a payment of Post-Filing Rent, they should do so in a timely and transparent manner. However, that does not mean that they should be required in all cases to be able to fully explain their position at the time of payment. It is conceivable that such a right might be exercised in a situation that is evolving, in which case a Debtor's right of protest might be compromised merely because it did not have complete information at its disposai.

[7] As far as the landlords are concerned, the Court accepts that they would prefer to know immediately if a payment of Post-Filing Rent were being made under protest. However, from their perspective, the issue is primarily one of convenience and bookkeeping. There is no suggestion that their rights will be compromised.

Paragraph 55

[55] DECLARES that, subject to the terms of this paragraph, where GRG USA LLC cannot operate a store in leased premises as a result of a federal, state or county decree, regulation or order (a "Lockdown Order"), GRG USA LLC does not use such leased premises from the time such Lockdown Order enters into force until the time such Lockdown Order is no longer in force (the "Lockdown Period") such that no Post-Filing Rent shall be due or

payable by GRG USA LLC with respect to those leased premises for the Lockdown Period. This paragraph only applies in respect of Post-Filing Rent payable for leased premises located in the following locations:

(a) Canoga Park, California, USA;

(b) Torrance, California, USA;

(c) Cerritos, California, USA; and

(d) Glendale, California, USA.

[8] Brookfield argues that the order set out in paragraph 55 would amount to the Court "solely and specifically targeting" relationships between foreign entities, which it does not have the jurisdiction to do. According to Brookfield, only a U.S. court can issue an order such as the one sought here.

[9] Brookfield adds that if the Court does have jurisdiction to issue such an order, it should refuse to exercise it since the order sought takes no account of the terms of the leases or the applicable law.

[10] With respect to the issue of jurisdiction, the Court disagrees with Brookfield. If the Court were to follow this argument, it would have jurisdiction to render a general order that impacted landlords on both sides of the border but not a specific order targeting only certain landlords that happen to be located in the U.S. Brookfield provided no support for this distinction and the Court is not swayed by its arguments.

[11] With respect to the issue of whether or not the Debtors should be required to pay Post-Filing Rent, the Court recognizes that under the applicable leases, which have not been filed into evidence, the parties may have agreed to language that would require the Debtor to pay rent even if it does not have peaceable enjoyment of the leased premises. In this sense, it is conceivable that under the terms of those leases, rent may still be owing.

[12] However, the issue before the Court is narrower than that. Based on s. 11.01 (a) of the CCAA, the question is whether or not the Debtor can be required to make immediate payment for the "use of leased...property".

[13] The evidence discloses that the four leased premises at issue are all located in shopping malls that are shuttered as a result of government decrees. Consequently, the Debtors have no access to the premises during the lockdown period.

[14] Given the policy objectives of the CCAA and given that exceptions to a stay order are to be narrowly interpreted, the Court agrees that the Debtors are not currently using these particular leased premises. However, this determination is made for a relatively brief period and nothing precludes Brookfield or any of the other landlords at issue, from contesting a request for renewal and from bringing evidence that is not currently before the Court.

The Sale Guidelines

[15] Brookfield argues that the Debtors are seeking to impose guidelines that would govern the "going-out-of-business" sales to take place in locations that are to be closed, without having given Brookfield a meaningful opportunity to negotiate its terms. Even though Brookfield recognizes that the guidelines are the same or similar to those that have been used in other CCAA proceedings, it argues that it is premature for the Court to impose such guidelines under the circumstances.

[16] If the guidelines are imposed, Brookfield asks that the two days' written notice to schedule a "status hearing" be extended to account for delays in cross-border communications.

[17] The Court disagrees.

[18] The Debtors have already sent 78 notices to disclaim leases so it is imperative that guidelines be put in place. The Debtors' request is not premature.

[19] The guidelines do incorporate a degree of flexibility. Nothing precludes Brookfield from raising specific concerns with the Debtors and from possibly agreeing to modify the guidelines. Furthermore, if a dispute does arise concerning the conduct of the sale, either party can initiate a dispute settlement process and schedule a "status hearing" before the Court within a very short delay.

[20] Finally, as regards the scheduling of the status hearing, the Court does not agree that two days is too short. The Court can appreciate the complexities involved in responding on such short notice but since the sales will be ongoing, it is imperative that any dispute be resolved in the quickest possible delay.

(B) Confidentiality

[21] While they do not contest the sealing order sought by the Debtors, several landlords, including Oxford Properties, Cadillac Fairview, Cominar and Ivanhoé Cambridge (collectively *Oxford*), object to the Debtors' refusal to communicate the confidential information to them upon signature of a non-disclosure agreement. Their arguments are supported by three other landlords, namely: Cushman & Wakefield Asset Services ULC, Morguard lnvestments Limited and RioCan Real Estate Investment Trust.

[22] The order that the Debtors seek in regards to confidentiality, reads as follows:

[84] ORDERS that Exhibit P-2, Appendices B, C and D to Exhibit P-6, and the Appendices to the Second Report of the Monitor dated September 16, 2020 in support of the Application are confidential and are filed under seal, and PRAYS ACT of the Debtors' undertaking to communicate any of those exhibits to certain creditors following an undertaking of confidentiality.

[23] Even though the order is not contested *per se*, the Court must still be satisfied that that such an order should be issued. ln this regard, it is the Debtors' burden to establish that:

- That the sealing order is necessary to prevent a real and substantial serious risk to an important commercial interest. The risk must be well-grounded in the evidence and pose a serious threat to the commercial interest in question;

- There must be no other reasonable alternative to the sealing order and the order, if granted, must be restricted as muchas reasonably possible; and

- The salutary effects of the sealing order must outweigh its deleterious effects including its effect on the open-court principle. [1]

[24] The information that the Debtors wish to keep confidential, can be divided into two groups:

- The list of landlords who have been sent notices of disclaimer (Schedule A to the Monitor's Second Report);

- The schedule of amounts paid to critical suppliers and the weekly cash flow statements (Schedules B, C and D to Monitor's First Report and Schedules C and D to the Monitor's Second Report).

[25] With respect to the list of disclaimed leases, the Debtors argue that if it were to be made public or, at the very least, shared amongst the landlords, it would reduce the Debtors' leverage in their ongoing negotiations with the landlords.

[26] The Debtors argue that they should be able to conduct these negotiations on a one-on-one basis. If the list of disclaimed leases were to be shared, they fear that the landlords would raise issues and arguments that might hamper the negotiations.

[27] The Court is not convinced that the disclosure of the list of disclaimed leases would cause a real and substantial serious risk to an important commercial interest.

[28] First, it is not clear how the list could be used to the Debtors' detriment. lt is conceivable that a landlord armed with this information may feel that its leases have been disproportionately targeted but the Court does not agree that this diminishes the leverage the Debtors may have in their negotiations.

[29] Second, the mere fact that keeping this information out of the hands of the landlords might give the Debtors an advantage in their negotiations, does not constitute an important commercial interest. In this regard, it must be emphasized that in order to qualify as an "important commercial interest", the interest in question:

> cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. [2]

[30] Based on the evidence before the Court, the concern over disclosure cannot be expressed in terms of a public interest. At best, it is particular to the Debtors.

[31] Furthermore, it is worth noting that there is nothing preventing landlords who have received disclaimer notices from sharing that information. The sealing order would not prevent this from happening; it would merely make it more difficult.

[32] In regards to the list of disclaimed leases, the Court is not satisfied that it should derogate from the general rule of publicity and public access to all evidentiary material in CCAA proceedings. Accordingly, Appendix A to the Monitor's Second Report will not be sealed.

[33] With respect to the other aspects of the requested sealing order, primarily the Debtors' cash flow statements, the Court is satisfied, at this early stage in the process, that the concerns expressed in the Application (paragraphs 106-110) and the testimony of Mr. Petraglia (COQ and lnterim CFO), although they are somewhat general in nature, are sufficient, to warrant a ban on publication as contemplated in s. 10(3) of the CCAA.

[34] However, the Court does not agree with the Debtors that this information should be kept from landlords who are prepared to sign an undertaking of confidentiality.

[35] Parties seeking a sealing order, in this case, the Debtors, bear the burden of establishing that the order is necessary. [3] The parties objecting to such an order, in this case, the landlords, are not required to prove that the information they seek access to is necessary or even helpful to them at this stage.

[36] Based on the evidence before the Court, the only potential risk to the Debtors' commercial interests would be from competitors. Since there is nothing in the evidence to suggest that any of the landlords, including those making representations on this issue, are competitors of the Debtors, the Court considers that an undertaking of confidentiality is appropriate and will therefore direct the Debtors to communicate the sealed exhibits to any of its landlords upon signature of an undertaking of confidentiality.

[37] Since the Court is not aware which of the Debtors' creditors might also be competitors, its direction, at this point intime, will be limited to landlords.

(C) The Debtors' Application for an Amended and Restated Initial Order

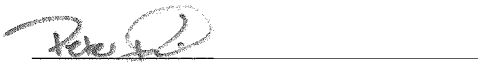
[38] Subject to the modification in regards to paragraph 84 of the proposed Amended and Restated Initial Order, the Debtors' Application for an Amended and Restated Initial Order will be granted.

FOR THESE REASONS, THE COURT:

[39] *DISMISSES* Brookfield's Contestation of the Debtors' Application for Amended and Restated Initial Order;

[40] *DIRECTS* the Debtors to communicate the exhibits sealed by virtue of the Amended and Restated Initial Order signed this day, to any of its landlords upon signature of an undertaking of confidentiality; and

[41] Subject to modification to paragraph 84 of the draft order *GRANTS* the Debtors' Application for Amended and Restated Initial Order as per the order signed this day;



Graphic 1

SUPERIOR COURT (COMMERCIAL DIVISION)

Canada

Province of Québec

District of Montréal

No: 500-11-058763-208

Date: September 17, 2020

Presiding: The Honourable Peter Kalichman, J.S.C.

In the matter of the *Companies' Creditors Arrangement Act*, ASC 1985, c C-36 of: *Groupe Dynamite Inc. GRG USA Holdings Inc. GRG USA LLC* Debtors and *Deloitte Restructuring Inc.* Monitor

AMENDED AND RESTATED INITIAL OROER

[1] CONSIDEAING the *Application for an Initial Order and an Amended and Restated Initial Order* dated September 8, 2020 (the *"Application")* of Groupe Dynamite Inc., GAG USA Holdings Inc. and GAG USA LLC (collectively, the *"Debtors")* pursuant to the *Companies' Creditors Arrangement Act*, ASC 1985, c C-36 (the *"CCAA")*, the affidavit, and the exhibits, including the report of the Monitor;

[2] CONSIDEAING the notification of the Application;

[3] CONSIDEAING the representations of the lawyers present;

[4] CONSIDEAING the provisions of the CCAA;

THE COURT:

[5] GRANTS the Application.

[6] ISSUES an order pursuant to the CCAA (the *"Order")*, divided under the following headings:

- Service
- Application of the CCAA
- Effective Time
- Plan of Arrangement
- Administrative Consolidation
- Stay of Proceedings against the Debtors and the Property
- Stay of Proceedings against the Directors and Officers
- Possession of Property and Operations
- No Exercise of Rights or Remedies
- No Interference with Rights
- Continuation of Services
- Non-Derogation of Rights
- Interim Financing
- Directors' and Officers' Indemnification and Charge
- Restructuring
- Powers of the Monitor
- Specific Measures with Respect to the Leases
- Gift Cards and Loyalty Programs
- Priorities and General Provisions Relating to CCAA Charges
- Hearing scheduling and details
- General

Service

[7] ORDERS that any prior delay for the presentation of the Application is hereby abridged and validated so that the Application is properly returnable today and hereby dispenses with further service thereof.

[8] DECLARES that sufficient prior notice of the presentation of this Application has been given by the Debtors to interested parties, including the secured creditors which are likely to be affected by the charges created herein.

Application of the CCAA

[9] DECLARES that the Debtors are debtor companies to which the CCAA applies.

Effective Time

[10] DECLARES that this Orcier and all of its provisions are effective as of 12:01 a.m. Montréal time, province of Québec, on September 8, 2020, or, where applicable, on the date of this Orcier (the *"Effective Time")*.

Plan of Arrangement

[11] DECLARES that the Debtors shall have the authority to file with this Court and to submit to their creditors one or more plans of compromise or arrangement (collectively, the *"Plan")* in accordance with the CCAA.

Administrative Consolidation

[12] ORDERS the consolidation of the CCAA proceedings of the Debtors under one single Court file, in file number 500-11-058763-208.

[13] ORDERS that ail proceedings, filings, and other matters in the CCAA proceedings be filed jointly and together by the Debtors under file number 500-11-058763-208.

[14] DECLARES that the consolidation of these CCAA proceedings in respect of the Debtors shall be for administrative purposes only and shall not effect a consolidation of the assets and property or of the debts and obligations of each of the Debtors including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

Stay of Proceedings against the Debtors and the Property

[15] ORDERS that, until and including October 19, 2020, or such later date as the Court may order (the *"Stay Period")*, no proceeding or enforcement process in any court or tribunal (each, a *"Proceeding")*, including but not limited to seizures, right to distrain, executions, writs of seizure or execution, any and ail actions, applications, arbitration proceedings and other lawsuits existing at the time of this Order in which any of the Debtors is a defendant, party or respondent (either individually or with other Persans (as defined below)) shall be commenced or continued against or in respect of the Debtors, or affecting the Debtors' business operations and activities (the *"Business")* or the Property (as defined herein below), including as provided in paragraph [23] herein except with leave of this Court. Any and ail Proceedings currently under way against or in respect of the Debtors or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to section 11.1 CCAA.

[16] ORDERS that the rights of Her Majesty in right of Canada and Her Majesty in right of a Province are suspended in accordance with the terms and conditions of section 11.09 CCAA.

Stay of Proceedings against Directors and Officers

[17] ORDERS that during the Stay Period and except as permitted under subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Debtors nor against any persan deemed to be a director or an officer of any of the Debtors under subsection 11.03(3) of the CCAA (each, a *"Director"*, and collectively the *"Directors")* in respect of any claim against such Director which arase prior to the Effective Time and which relates to any obligation of the Debtors where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation.

Possession of Property and Operations

[18] ORDERS that, subject to this Order, the Debtors shall remarn rn possession and contrai of their present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including ail proceeds thereof and ail bank accounts (collectively the *"Property")* notwithstanding any enforcement

process, including but not limited to seizures, right to distrain, executions, writs of seizure or execution, the whole in accordance with the terms and conditions of this Order.

[19] ORDERS that, subject to this Orcier, each of the Debtors are authorized to complete outstanding transactions and engage in new transactions with other Debtors, and to continue, on and after the date of this Orcier, to buy and sell goods and services, and allocate, collect and pay costs, expenses and other amounts from and to the other Debtors, or any of them (collectively, the *"Intercompany Transactions")* in the ordinary course of business. Ali ordinary course Intercompany Transactions among the Debtors shall continue on terms consistent with existing arrangements or past practice, subject to such changes thereto, or to such governing principles, policies or procedures as the Monitor may require, or subject to this Orcier or further Orcier of this Court.

[20] ORDERS that the Debtors shall be entitled to continue to utilize the central cash management system currently in place as described in the Application (the *"Cash Management System").*

[21] ORDERS that the Debtors shall be entitled but not required to pay the following expenses whether incurred prior to or after this Orcier:

(a) all outstanding and future wages, salaries, bonuses, expenses, benefits and vacation pay payable on or after the date of this Orcier, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any agent, advisor or counsel retained or employed by the Debtors or by the Agent on behalf of the Secured Lenders in respect of these proceedings, at their standard rates and charges; and

(c) with the consent of the Monitor, and only after the Interim Facility has been advanced to the Debtors for an amount of $10,000,000, amounts owing for goods or services actually supplied to the Debtors prior to the date of this Orcier by third party suppliers up to a maximum aggregate amount of $5,000,000, if, in the opinion of the Debtors, the supplier is critical to the business and ongoing operations of the Debtors.

[22] ORDERS that the Debtors shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in faveur of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) incarne taxes; and

(b) all goods and services, harmonized sales or other applicable sales taxes (collectively, *"Sales Taxes")* required to be remitted by the Debtors and in connection with the sale of goods and services by the Debtors, but only where such Sales Taxes are accrued or collected after the date of this Orcier, or where such Sales Taxes were accrued or collected prior to the date of this Orcier but not required to be remitted until on or after the date of this Order.

No Exercise of Rights or Remedies

[23] ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, including, but not limited to modifications of existing rights and events deemed to occur pursuant ta any agreement to which any of the Debtors is a party as a result of the insolvency of the Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural persan, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being *"Persons"* and each being a *"Person")* against or in respect of the Debtors, or

affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court.

[24] DECLARES that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating ta the Debtors or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation ta the foregoing, in the event that the Debtors, or any of them, become(s) bankrupt or a receiver as defined in subsection 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the *"BIA")* is appointed in respect of any of the Debtors, the period between the date of this Orcier and the day on which the Stay Period ends shall not be calculated in respect of the Debtors in determining the 30 day periods referred ta in Sections 81.1 and 81.2 of the BIA.

No Interference with Rights

[25] ORDERS that during the Stay Period, no Persan shall discontinue, fail to renew per the same terms and conditions, honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court.

Continuation of Services

[26] ORDERS that during the Stay Period and subject to paragraph [28] hereof and subsection 11.01 CCAA, all Persans having verbal or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Debtors, are hereby restrained until further order of this Court from discontinuing, failing ta renew per the same terms and conditions, altering, interfering with, terminating the supply or, where the case may be, interrupting, delaying or stopping the transit of such goods or services as may be required by the Debtors, and that the Debtors shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, 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 Debtors, without having ta provide any security deposit or any other security, in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Debtors, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

[27] ORDERS that, subject ta subsection 11.01 CCAA and paragraph [55] hereof, no Persan shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided ta the Debtors on or after the date of this Order, nor shall any Persan be under any obligation on or after the date of this Order ta make further advance of money or otherwise extend any credit ta the Debtors.

[28] ORDERS that, without limiting the generality of the foregoing and subject ta Section 21 of the CCAA, if applicable, and the following paragraphs, cash or cash equivalents placed on deposit by any Debtor with any Persan during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Persan in reduction or repayment of amounts owing ta such Persan or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by an Debtor and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into an Debtor's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

[28A] PRAYS ACT of the consent of each of the Secured Lenders ta suspend, until October 19, 2020, and without prejudice or waiver of such right, and subject ta the Interim Facility being advanced to the Debtors for an amount of $10,000,000, its right ta effect set-off between:

(a) the amount of $13,205,000 cash in the Secured Lenders' bank accounts (the *"Cash in the Bank Accounts");* and

(b) the Secured Lenders' total advances ta the Debtors.

[288] ORDERS that the Cash in the Bank Accounts shall be maintained and kept in a segregated account until October 19, 2020, unless otherwise agreed between the Agent and the Debtors.

[28C] ORDERS the Debtors ta pay ta each of the Secured Lenders, when due, all amounts owing (including principal, interest, fees and expenses), including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers ta or agents of the Secured Lenders on a full indemnity basis under the loan documents and to perform all of their other obligations ta the Secured Lenders pursuant ta the loan documents and this Order.

Non-Derogation of Rights

[29] ORDERS that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the *"lssuing Party")* at the request of any of the Debtors shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the date of this Orcier, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Orcier; however, the lssuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

Interim Financing

[30] ORDERS that the Debtors are authorized to borrow, repay and reborrow from 10644579 Canada Inc. (the *"Interim Lender")* such amounts from time to time as they may consider necessary or desirable, up to a maximum principal amount of $20,000,000 outstanding at any time, on the terms and conditions as set forth in the Amended Interim Financing Term Sheet, Exhibit P-1O (the *"Interim Financing Term Sheet")* and in the Interim Financing Documents (as defined hereinafter), to fund the ongoing expenditures of the Debtors and to pay such other amounts as are permitted by the terms of this Orcier and the Interim Financing Documents (as defined hereinafter) (the *"Interim Facility").*

[31] ORDERS that the Debtors are authorized to execute and deliver such credit agreements, security documents and other definitive documents (collectively the *"Interim Financing Documents")* as may be required by the Interim Lender in connection with the Interim Facility and the Interim Financing Term Sheet, and the Debtors are authorized to perform all of its obligations under the Interim Financing Documents.

[32] ORDERS that the Debtors shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all reasonable fees and disbursements of counsel and all other reasonably required advisers to or agents of the Interim Lender on a full indemnity basis (the *"Interim Lender Expenses"))* under the Interim Financing Documents and shall perform all of its other obligations to the Interim Lender pursuant to the Interim Financing Term Sheet, the Interim Financing Documents and this Orcier.

[33] DECLARES that all of the Property of the Debtors is subject to a charge, hypothec and security for an aggregate amount of $24,000,000 (the *"Interim Lender Charge")* in favour of the Interim Lender as security for all obligations of the Debtors to the Interim Lender with respect to all amounts owing (including principal, interest and the Interim Lender Expenses) under or in connection with the Interim Financing Term Sheet and the Interim

Financing Documents. The Interim Lender Charge shall have the priority established by paragraphs [62] to [63] of this Orcier.

[34] ORDERS that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan.

[35] ORDERS that the Interim Lender may:

> (a) notwithstanding any other provision of this Orcier, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and
>
> (b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to the Debtors if they fail to meet the provisions of the Interim Financing Term Sheet and the Interim Financing Documents.

[36] ORDERS that the Interim Lender shall not take any enforcement steps under the Interim Financing Documents or the Interim Lender Charge without providing at least 5 business days written notice (the *"Notice Period")* of a default thereunder to the Debtors, the Monitor, the Agent and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period, the Interim Lender shall be entitled to take any and all steps under the Interim Financing Documents and the Interim Lender Charge and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA and upon the Interim Lender taking such steps, the Agent and the Secured Lenders shall be entitled to take any and all steps under the loan documents and otherwise permitted at law, but without having to send any demands under Section 244 of the BIA.

[37] ORDERS that, subject to further order of this court, no order shall be made varying, rescinding, or otherwise affecting paragraphs [30] to [36] hereof unless either (a) notice of a motion for such order is served on the interim lender by the moving party within seven (7) days after that party was served with the order or (b) the Interim Lender applies for or consents to such order.

Directors' and Officers' Indemnification and Charge

[38] ORDERS that the Debtors shall indemnify their Directors from all claims relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as directors or officers of the Debtors after the Effective Time, except where such obligations or liabilities were incurred as a result of such Director's gross negligence, willful misconduct or gross or intentional fault as further detailed in Section 11.51 CCAA.

[39] ORDERS that the Directors of the Debtors shall be entitled to the benefit of and are hereby granted a charge, security and hypothec in the Property to the extent of the aggregate amount of $6,950,000 (the *"Directors' Charge")*, as security for the indemnity provided in paragraph [38] hereof as it relates to obligations and liabilities that the Directors may incur in such capacity after the Effective Time, having the priority established by paragraphs [62] and [63] of this Orcier.

[40] ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Directors shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the Directors are entitled to be indemnified in accordance with paragraph [38) of this Order.

Restructuring

[41] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (the *"Restructuring")* but subject to such requirements as are imposed by the CCAA, the Debtors shall have the right, subject to approval of the Monitor or further order of the Court, to:

(a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to finance or refinance, market, convey, transfer, assign or in any other manner dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 CCAA, and under reserve of subparagraph (c);

(c) convey, transfer, assign, lease, or in any other manner dispose of the Property, outside the ordinary course of business, in whole or in part, provided that the price in each case does not exceed $250,000 or $1,000,000 in the aggregate;

(d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Debtors, as applicable, and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Debtors may determine;

(e) disclaim or resiliate agreements, subject to the provisions of section 32 CCAA which are as follows:

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor-disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor. and

(f) subject to section 11.3 CCAA, assign any rights and obligations of Debtors.

[42] DECLARES that, if a notice of disclaimer or resiliation is given to a landlord of any of the Debtors pursuant to section 32 of the CCAA and subsection [41](e) of this Orcier, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving such Debtor and the Monitor 24 hours' prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Debtors, provided nothing herein shall relieve such landlord of their obligation to mitigate any damages claimed in connection therewith.

[43] DECLARES that, in order to facilitate the Restructuring, the Debtors may, subject to the approval of the Monitor, or further order of the Court, settle daims of customers and suppliers that are in dispute.

[44] DECLARES that, pursuant to sub-paragraph 7(3)(c) of the Personal Information Protection and Electronic Documents Act, SC 2000, c 5, the Debtors are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or contrai to stakeholders or prospective investors, financiers, buyers or strateg ic partners and to their advisers (individually, a *"Third Party")*, but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persans to whom such personal information is disclosed enter into confidentiality agreements with the Debtors binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction

or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Debtors or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Debtors.

Powers of the Monitor

[45] ORDERS that Deloitte Restructuring Inc. is hereby appointed to monitor the business and financial affairs of the Debtors as an officer of this Court (the *"Monitor")* and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall, as soon as practicable, (i) publish once a week for two (2) consecutive weeks or as otherwise directed by the Court, in La Presse+ and the Globe & Mail National Edition and (ii) within five (5) business days after the date of this Orcier (A) post on the Monitor's website (the *"Website")* a notice containing the information prescribed under the CCAA, (8) make this Orcier publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against the Debtors of more than $1,000, advising them that this Orcier is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

(b) shall monitor the Debtors' receipts and disbursements;

(c) shall assist the Debtors, to the extent required by the Debtors, in dealing with their creditors and other interested Persons during the Stay Period;

(d) notwithstanding subparagraphs (a) to (c) above, with respect to any real property or immovable leased premises, the Debtors may, subject to the requirement of the CCAA, vacate, abandon or quit the whole, but not part of any leased premises and may permanently, but not temporally ceases, downsize or shut down its operations in such leased premises;

(e) shall assist the Debtors, to the extent required by the Debtors, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(f) shall advise and assist the Debtors, to the extent required by the Debtors, to review the Debtors' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(g) shall assist the Debtors, to the extent required by the Debtors, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(h) shall report to the Court on the state of the business and financial affairs of the Debtors or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order and may file consolidated reports for the Debtors;

(i) shall report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(j) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(k) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under this Orcier or under the CCAA;

(l) may act as a "foreign representative" of any of the Debtors or in any other similar capacity in any insolvency, bankruptcy or reorganisation proceedings outside of Canada or the United States;

(m) may hold and administer funds in connection with arrangements made among the Debtors, any counterparties and the Monitor, or by Orcier of this Court; and

(n) may perform such other duties as are required by this Orcier or the CCAA or by this Court from time to time.

Unless expressly author ized to do so by this Court, the Monitor shall not otherwise interfere with the business and financial affairs carried on by the Debtors, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Debtors nor shall the Monitor be deemed to have done so.

[46] ORDERS that the Debtors and their Directors, officers, employees and agents, accountants, auditors and all other Persans having notice of this Orcier shall forthwith provide the Monitor with unrestricted access to all of the Business and Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Debtors in connection with the Monitor's duties and responsibilities hereunder.

[47] DECLARES that the Monitor may provide creditors and other relevant stakeholders of the Debtors with information in response to requests made by them in writing addressed to the Monitor and copied to the counsel for the Debtors. In the case of information that the Monitor has been advised by the Debtors is confidential, proprietary or competitive, the Monitor shall not provide such information to any Persan without the consent of the Debtors unless otherwise directed by this Court.

[48] DECLARES that if the Monitor, in its capacity as Monitor, carries on the business of the Debtors or continues the employment of the Debtors' employees, the Monitor shall benefit from the provisions of section 11.8 of the CCAA.

[49] DECLARES that no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out of the provisions of any order of this Court, except with prior leave of this Court, on at least seven days' notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[50] ORDERS that the Debtors shall pay the reasonable tees and disbursements of the Monitor, the Monitor's legal counsel, the legal counsel for the Debtors and other advisers, directly related to these proceedings, the Plan and the Restructuring, whether incurred before or after this Order, and shall be authorized to provide each with a reasonable retainer in advance on account of such tees and disbursements, if so requested.

[51] DECLARES that the Monitor as well as the Monitor's legal counsel (Norton Rose Fulbright Canada LLP) and the legal counsel for the Debtors (McCarthy Tétrault LLP), as security for the professional tees and disbursements incurred both before and after the making of this Order and directly related to these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge, hypothec and security in the Property

to the extent of the aggregate amount of $750,000 (the *"Administration Charge")*, having the priority established by paragraphs [62] and [63] of this Order.

Specific Measures with Respect to the Leases

[52] ORDERS that, for the use of each leased premises, the Debtors shall pay ail amounts constituting rent or payable as rent under real property or immovable leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under its lease, but for greater certainty, excluding accelerated rent or penalties, tees, interests or other charges arising as a result of the insolvency of the Debtors or the making of this Order) or as otherwise may be negotiated between the Debtors and the landlord from time to time *("Post-Filing Rent")*, for the period commencing on the Effective Time, twice-monthly in equal payments on the first and fifteenth day of each month, or the immediately following business day if that day is not a business day, in advance (but not in arrears). On the date of the first of such payments, any Post-Filing Rent relating to the period from the Effective Time to such date shall also be paid.

[53] DECLARES that any payment of Post-Filing Rent made, whether prior to or after this Order, is made without any admission by the Debtors that they are required to pay any amount of Post-Filing Rent and such payment is made under reserve of any right or defense that the Debtors may have under the applicable lease, at law or otherwise not to pay, or to withhold or defer, any amount of Post-Filing Rent.

[54] ORDERS that in the event the Debtors disclaim or resiliate the lease in respect of any leased premises in accordance with the CCAA, the Debtors shall not be required to pay Post-Filing Rent under such lease pending resolution of any dispute concerning furnishings, fixtures, equipment or a combination thereof located in the premises under lease (other than Post-Filing Rent payable for the notice period provided for in Section 32(5) of the CCAA}, and the disclaimer of the lease shall be without prejudice to the Debtors' claim to the fixtures in dispute. Furthermore, in the event that any landlord for the said leased premises for which a notice of disclaimer or resiliation has been sent contests the disclaimer or resiliation, Post-Filing Rent shall not be payable upon the expiry of the notice period provided for in Section 32(5) of the CCAA until the matter is determined by the Court.

[55] DECLARES that, subject to the terms of this paragraph, where GRG USA LLC cannot operate a store in leased premises as a result of a federal, state or county decree, regulation or order (a *"Lockdown Order")*, GRG USA LLC does not use such leased premises from the time such Lockdown Orcier enters into force until the time such Lockdown Orcier is no longer in force (the *"Lockdown Period")* such that no Post-Filing Rent shall be due or payable by GRG USA LLC with respect to those leased premises for the Lockdown Period. This paragraph only applies in respect of Post-Filing Rent payable for leased premises located in the following locations:

(a) Canoga Park, California, USA;

(b) Torrance, California, USA;

(c) Cerritos, California, USA; and

(d) Glendale, California, USA.

[56] APPROVES the Sale Guidelines attached hereto as Schedule A (the *"Sale Guidelines")*, and DECLARES that if there is a conflict between this Orcier and the Sale Guidelines, the former shall govern.

[57] ORDERS that each of the Debtors is authorized to conduct, market and sell (the *"Sale")* the retail inventory located in certain stores {the *"Merchandise")* and of all of the furnishings, fixtures and equipment located therein (the *"FF&E")* in accordance with this Orcier and the Sale Guidelines and to advertise and promote the Sale within the stores in accordance with the Sale Guidelines.

[58] ORDERS that each of the Debtors is authorized to conduct the Sale of the Merchandise and of the FF&E in accordance with the Sale Guidelines, and all rights, title and interest in and to the Merchandise and FF&E shall vest absolutely and exclusively in and with their respective purchaser(s), free and clear of and from any and all claims, liabilities (direct, indirect, absolute or contingent), obligations, interests, prier claims, taxes, security interests (whether contractual, statutory or otherwise), liens, charges (including any charges hereafter granted by this Court in these proceedings), hypothecs, mortgages, pledges, deemed trusts, assignments, judgments, executions, writs of seizure or execution, notices of sale, options, adverse claims, levies, rights of first refusai or other pre-emptive rights in favor of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise, whenever and howsoever arising, and whether such claims arose or came into existence prier to or following the date of this Orcier (collectively, the *"Encumbrances")*, including, without limiting the generality of the foregoing, all charges, security interests or hypothecs evidenced by registration, publication or filing pursuant to the *Civil Code of Québec*, or any other applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, ORDERS that all of the Encumbrances affecting or relating to the Merchandise and FF&E, be expunged and discharged as against the Merchandise and FF&E, in each case effective as of the sale of the Merchandise and FF&E.

[59] DECLARES that, to the extent that the terms of the applicable leases are in conflict with any term of this Order or the Sale Guidelines, the terms of this Order and the Sale Guidelines shall govern.

[60] DECLARES that nothing contained in this Order or the Sale Guidelines shall be construed to create or impose upon the Debtors any additional restrictions not contained in the Leases.

Gift Cards and Loyalty Programs

[61] AUTHORIZES, notwithstanding anything to the contrary in this Order, the Debtors to continue to honour or comply with any customer deposits, pre-payments, gift cards, store credits, loyalty program and any similar programs offered by the Debtors.

Priorities and General Provisions Relating to CCAA Charges

[62] DECLARES that each of the CCAA Charges shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the *"Encumbrances")* affecting the Property whether or not charged by such Encumbrances, except that the Interim Lender Charge shall rank after the Encumbrances securing any obligation, liability or indebtedness pursuant to the credit agreement dated February 28, 2020 entered into amongst GDI, as borrower, National Bank of Canada, as administrative agent (the *"Agent")*, and National Bank of Canada, Bank of Montreal, The Toronto-Dominion Bank and Fédération des Caisses Desjardins du Québec, as lenders (the *"Secured Lenders")*, as amended pursuant to a First Amending Agreement to the Credit Agreement dated as of April 30, 2020 and a Second Amending Agreement to the Credit Agreement dated as of July 3, 2020 (the *"Secured Lenders' Existing Security").*

[63] DECLARES that the priorities of the Administration Charge and the Directors' Charge (collectively, the *"CCAA Charges")*, as well as the Secured Lenders' Existing Security, as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge; and

(b) second, the Directors' Charge;

(c) third, the Secured Lenders' Existing Security; and

(d) fourth, the Interim Lender Charge.

[64] ORDERS that, except as otherwise expressly provided for herein, the Debtors shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Debtors, as applicable, obtain the prier written consent of the Monitor and the Debtors, and the prier approval of the Court.

[65] DECLARES that each of the CCAA Charges shall attach, as of the Effective Time, to all present and future Property of the Debtors, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[66] DECLARES that the CCAA Charges and the rights and remedies of the beneficiaries of the CCAA Charges, as applicable, shall be valid and enforceable and not otherwise be limited or impaired in any way by: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Debtors (a *"Third Party Agreement")*, and notwithstanding any provision to the contrary in any Third Party Agreement:

> (a) the creation of any of the CCAA Charges shall not create nor be deemed to constitute a breach by the Debtors of any Third Party Agreement to which any of the Debtor is a party; and
>
> (b) the beneficiaries of the CCAA Charges shall not have any liability to any Debtors whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[67] DECLARES that notwithstanding: (i) these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such application(s) or any assignment(s) in bankruptcy made or deemed to be made in respect of any of the Debtor; and (iii) the provisions of any federal or provincial statute, the payments or disposition of Property made by any of the Debtor pursuant to this Orcier and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[68] DECLARES that the CCAA Charges shall be valid and enforceable as against ail Property of the Debtors and against ail Persans, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Debtors.

Hearing scheduling and details

[69] ORDERS that, subject to further Orcier of this Court, ail applications in these CCAA proceedings are to be brought on not less than 5 business days' notice to ail Persans on the service list. Each application shall specify a date (the *"Initial Hearing Date")* and time (the *"Initial Hearing Time")* for the hearing and must be communicated along with ail materials that are required for a full comprehension of the application, including, if necessary, a report of the Monitor.

[70] ORDERS that any Persan wishing to abject to the relief sought on an application in these CCAA proceedings must serve a detailed written contestation stating the objection to the application and the grounds for such objection (a *"Contestation")* in writing to the moving party, the Debtors and the Monitor, with a copy to all Persans on the service list, no later than 5 p.m. Montréal Time on the date that is three business days prior to the Initial Hearing Date (the *"Objection Deadline")*.

[71] ORDERS that, if no Contestation is served by the Objection Deadline, the Judge having carriage of the application (the *"Presiding Judge")* may determine: (a) whether a hearing is necessary; (b) whether such hearing will be in persan, by telephone or by written submissions only; and (c) the parties from whom submissions are required (collectively, the *"Hearing Details").* In the absence of any such determination, a hearing will be held in the ordinary course.

[72] ORDERS that, if no Contestation is served by the Objection Deadline, the Debtors shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Debtors shall thereafter advise the service list of the Hearing Details and the Debtors shall report upon its dissemination of the Hearing Details to the Court in a timely manner.

[73] ORDERS that, if a Contestation is served by the Objection Deadline, the interested parties shall appear before the Presiding Judge on the Initial Hearing Date at the Initial Hearing Time, or such earlier or later time as may be directed by the Court, to, as the Court may direct: (a) proceed with the hearing on the Initial Hearing Date and at the Initial Hearing Time; or (b) establish a schedule for the delivery of materials and the hearing of the contested application and such other matters, including interim relief, as the Court may direct.

General

[74] ORDERS that no Persan shall commence, proceed with or enforce any Proceedings against any of the Directors, employees, legal counsel or financial advisors of the Debtors or of the Monitor in relation to the Business or Property of the Debtors, without first obtaining leave of this Court, upon ten (10) days' written notice to the Debtors counsel, the Monitor's counsel, and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[75] DECLARES that this Order and any proceeding or affidavit leading to this Order, shall not, in and of themselves, constitute a default or failure to comply by the Debtors under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[76] DECLARES that, except as otherwise specified herein, the Debtors and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persans or other appropriate parties at their respective given addresses as last shown on the records of the Debtors and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

[77] DECLARES that the Debtors and any party to these proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing an electronic copy of such materials to counsels' email addresses.

[78] DECLARES that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Persan in respect of these proceedings, unless such Persan has served a Notice of Appearance on counsel for the Debtors and counsel for the Monitor and has filed such notice with this Court, or appears on the service list prepared by counsel for the Monitor, save and except when an order is sought against a Persan not previously involved in these proceedings.

[79] DECLARES that the Debtors or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Orcier on notice only to each other.

[80] DECLARES that this Orcier and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[81] AUTHORIZES Groupe Dynamite Inc. to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America, or elsewhere, for orders which aid and complement this Orcier and any subsequent orders of this Court and, without limitation to the foregoing, any orders under Chapter 15 of the U.S. Bankruptcy Code, including an order for recognition of these CCAA proceedings as "Foreign Main Proceedings" in the United States of America pursuant to Chapter 15 of the U.S. Bankruptcy Code, and for which Groupe Dynamite Inc. shall be the foreign representative of the Debtors (the *"Foreign Representative").* Ali courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Debtors and the Foreign Representative as may be deemed necessary or appropriate for that purpose.

[82] REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative body in Canada, the United States of America or elsewhere, to give effect to this Orcier and to assist the Debtors, the Monitor and their respective agents in carrying out the terms of this Orcier. Ali Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, and the Monitor as may be necessary or desirable to give effect to this Orcier, to grant representative status to the Monitor or the authorized representative of the Debtors in any foreign proceeding, to assist the Debtors, and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Orcier.

[83] DECLARES that, for the purposes of any applications authorized by paragraphs [81] and [82], Debtors' centre of main interest is located in the province of Québec, Canada.

[84] ORDERS that Exhibit P-2, Appendices B, C and D to Exhibit P-6, and the Appendices to the Second Report of the Monitor dated September 16, 2020 in support of the Application are confidential and are filed under seal, and PRAYS ACT of the Debtors' undertaking to communicate any of those exhibits to certain creditors following an undertaking of confidentiality.

[85] ORDERS the provisional execution of this Orcier notwithstanding any appeal.

The Honourable Peter Kalichman, J.S.C.

ScheduleA

SALE GUIDELINES

The following procedures shall apply to any sales to be held by either Groupe Dynamite Inc., GRG USA Holdings Inc., and GRG USA LLC, (each, *"Groupe Dynamite")* at stores for which Groupe Dynamite sent a notice pursuant to section 32 of the *Companies' Creditors Arrangement Act* (respectively the *"Stores"* and the *"CCAA").* Terms capitalized but not defined in these Sale Guidelines have the meanings ascribed to them in the order rendered by the Superior Court of Québec (Commercial Division) (the *"Court")* in the file bearing number 500-11-058763-208 on September 8, 2020 (the *"Canadian Order"),* which Canadian Order was approved by the United States Bankruptcy Court for the District of Delaware on September 9, 2020, under Chapter 15 of the US Bankruptcy Code (the *"US Order").* In the Sale Guidelines below, the term *"Order"* means either the Canadian Order if the Store is located in Canada or the Canadian Order as approved by the US Order if the Store is located in the United States,

1. Except as otherwise expressly set out herein, and subject to: (i) the Order; or (ii) the provisions of the CCAA and any further Order of the Court; or (iii) any subsequent written agreement between Groupe Dynamite and its applicable landlord(s) (individually, a *"Landlord"* and, collectively, the *"Landlords"),* the Sale shall be conducted in accordance with the terms of the applicable leases and other occupancy agreements for each

of the Stores (individually, a *"Lease"* and, collectively, the *"Leases").* However, nothing contained herein shall be construed to create or impose upon Groupe Dynamite any additional restrictions not contained in the applicable Lease or other occupancy agreement.

2. The Sale shall be conducted so that each of the Stores remain open during their normal hours of operation provided for in the respective Lease for the Stores until Groupe Dynamite vacates the leased premises, it being understood that Groupe Dynamite shall have vacated the Stores no later than the earliest of: (i) the expiry of the notice period provided for in the notice to disclaim or resiliate the respective Lease and (ii) 90 days following the date of the notice to disclaim or resiliate the respective Lease, unless otherwise agreed between Groupe Dynamite and the applicable Landlord or ordered by the Court (the *"Vacate Date").* Groupe Dynamite will be entitled to start the liquidation on the day a termination or disclaimer notice is sent for a specific Store.

3. he Sale shall be conducted in accordance with applicable federal, provincial, state and unicipal laws, unless otherwise ordered by the Court.

4. Il display and hanging signs used in connection with the Sale shall be professionally produced and all hanging signs shall be hung in a professional manner. Notwithstanding anything to the contrary contained in the Leases, Groupe Dynamite may advertise the Sale at the Stores as a "everything on sale", "everything must go", "store closing" or similar theme sale at the Stores provided however that no signs shall advertise the Sale as a "bankruptcy", a "liquidation" or a "going out of business" sale, it being understood that the French equivalent of "clearance" is liquidation" and that "liquidation" is permitted to be used in French language signs). Forthwith pan request, Groupe Dynamite shall provide the proposed signage packages along with proposed dimensions by e-mail or facsimile to the applicable Landlords or to their counsel of record and the applicable Landlord shall notify Groupe Dynamite of any requirement for such signage to otherwise comply with the terms of the Lease and/or the Sale Guidelines and where the provisions of the Lease conflicts with these Sale Guidelines, these Sale Guidelines shall govern. Groupe Dynamite shall not use neon or day-glow signs or any handwritten signage save that handwritten "you pay" or "topper" signs may be used). If a Landlord is concerned with "Store Closing" signs being placed in the front window of a Store or with the number or size of the signs in the front window, Groupe Dynamite and the Landlord will work together to resolve the dispute. Nothing contained herein shall be construed to create or impose upon Groupe Dynamite any additional restrictions not contained in the applicable Leases. In addition, Groupe Dynamite shall be permitted to utilize exterior banners/signs at stand alone or strip mall Stores or enclosed mall Store locations with a separate entrance from the exterior of the enclosed mall; provided, however, that: (i) no signage in any other common areas of a mall shall be used; and (ii) where such banners are not explicitly permitted by the applicable Lease and the Landlord requests in writing that banners are not to be used, then no banners shall be used absent further order of the Court, which may be sought on an expedited basis on notice to the Service List. Any banners used shall be located or hung so as to make clear that the Sale is being conducted only at the affected Store and shall not be wider than the premises occupied by the affected Store. All exterior banners shall be professionally hung and to the extent that there is any damage to the facade of the premises of a Store as a result of the hanging or removal of the exterior banner, such damage shall be professionally repaired at the expense of Groupe Dynamite. Groupe Dynamite shall not utilize any commercial trucks to advertise the Sale on Landlord's property or mall ring roads.

5. Groupe Dynamite shall be permitted to utilize sign walkers and street signage; provided, however, such sign walkers and street signage shall not be located on the shopping centre or mall premises.

6. Groupe Dynamite shall be entitled to include additional merchandise in the Sale; provided that (a) the additional merchandise is currently in the possession of Groupe Dynamite or any of its affiliates (including in their warehouses) or has previously been ordered by or on behalf of Groupe Dynamite or its affiliates;

and (b) the additional merchandise is of like kind and category and no lesser quality to Groupe Dynamite merchandise, and consistent with any restriction on usage of the Stores set out in applicable Leases.

7. Conspicuous signs shall be posted in the cash register areas of each Store to the effect that all sales are "final" and customers with any questions or complaints are to contact Groupe Dynamite.

8. Groupe Dynamite shall not distribute handbills, leaflets or other written materials to customers outside of any of the Stores on Landlord's property, unless explicitly permitted by the applicable Lease or, if distribution is customary in the shopping centre in which the Store is located. Otherwise, Groupe Dynamite may solicit customers in the Stores themselves. Groupe Dynamite shall not use any giant balloons, flashing lights or amplified sound to advertise the Sale or solicit customers, except as explicitly permitted under the applicable Lease or agreed to by the Landlord.

9. At the conclusion of the Sale in each Store, Groupe Dynamite shall arrange that the premises for each Store are in "broom-swept" and clean condition, and shall arrange that the Stores are in the same condition as on the commencement of the Sale, ordinary wear and tear excepted. No property of any Landlord of a Store shall be removed or sold during the Sale. No permanent fixtures (other than Groupe Dynamite FF&E (as defined below) for clarity) may be removed without the Landlord's written consent unless otherwise provided by the applicable Lease and in accordance with the Order. Any trade fixtures or personal property left in a Store after the applicable Vacate Date in respect of which the applicable Lease has been disclaimed by Group Dynamite shall be deemed abandoned, with the applicable Landlord having the right to dispose of the same as the Landlord chooses, without any liability whatsoever on the part of the Groupe Dynamite.

10. Subject to the terms of paragraph 8 above, Groupe Dynamite may sell its furniture, fixtures and equipment *("FF&E")* located in the Stores during the Sale. For greater certainty, FF&E does not include any portion of the Stores' HVAC, sprinkler, fire suppression and fire alarm systems. Groupe Dynamite may advertise the sale of FF&E consistent with these Sale Guidelines on the understanding that the Landlord may require such signs to be placed in discreet locations within the Stores reasonably acceptable to the Landlord. Additionally, the purchasers of any FF&E sold during the Sale shall only be permitted to remove the FF&E either through the back shipping areas designated by the Landlord or through other areas after regular Store business hours or, through the front door of the Store during Store business hours if the FF&E can fit in a shopping bag, with Landlord's supervision as required by the Landlord and in accordance with the Order. Groupe Dynamite shall repair any damage to the Stores resulting from the removal of any FF&E by third party purchasers of FF&E. Any FF&E not sold as at the Vacate Date shall be deemed abandoned.

11. Groupe Dynamite shall not make any alterations to interior or exterior Store lighting, except in respect of the movable track light system or as authorized pursuant to the affected Lease. The hanging of exterior banners or other signage, where permitted in accordance with the terms of these Sale Guidelines, shall not constitute an alteration to a Store.

12. Groupe Dynamite hereby provides notice to the Landlords of its intention to sell and remove FF&E from the Stores. Groupe Dynamite shall make commercially reasonable efforts to arrange with each Landlord that so requests, a walk-through to identify the FF&E subject to the Sale. The relevant Landlord shall be entitled upon request to have a representative present in the applicable Stores to observe such removal. If the Landlord disputes Groupe Dynamite's entitlement to sell or remove any FF&E under the provisions of the Lease, such FF&E shall remain on the premises and shall be dealt with as agreed between Groupe Dynamite and such Landlord, or by further order of the Court upon application by Groupe Dynamite on at least two (2) days' notice to such Landlord and the Monitor.

13. hen a notice of disclaimer or resiliation is delivered pursuant to the CCAA to a Landlord and he Store in question has not yet been vacated, then: (a) during the notice period prior to the effective time of the

disclaimer or resiliation, the Landlord may show the affected leased premises to prospective tenants during normal business hours, on giving Groupe Dynamite and the Monitor 24 hours' prior written notice; and (b) at the effective time of the disclaimer or resiliation, the relevant Landlord shall be entitled to take possession of any such Store without faiver of or prejudice to any claims or rights such Landlord may have against Groupe Dynamite in respect of such Lease or Store, provided that nothing herein shall relieve such Landlord of any obligation to mitigate any damages claimed in connection therewith.

14. Groupe Dynamite and the Landlords shall have the rights of access to the Stores during the Sale provided for in the applicable Lease (subject, for greater certainty, to any applicable stay of proceedings).

15. Groupe Dynamite shall not conduct any auctions of Merchandise or FF&E at any of the Stores.

16. Groupe Dynamite shall designate a party to be contacted by the Landlords should a dispute arise concerning the conduct of the Sale. The initial contact shall be Ciro Falluh who may be reached by phone at +1 514-733-3962 ext.: 684 or email at *cfalluh@dynamite.ca*. If the parties are unable to resolve the dispute between themselves, the Landlord or Groupe Dynamite shall have the right to schedule a "status hearing" before the Court on no less than two (2) days written notice to the other party or parties, subject to the availability of the Court, during which time Groupe Dynamite shall cease all activity in dispute other than activity expressly permitted herein, pending determination of the matter by the Court; provided, however, subject to paragraph 4 of these Sale Guidelines, if a banner has been hung in accordance with these Sale Guidelines and is the subject of a dispute, Groupe Dynamite shall not be required to take any such banner down pending determination of any dispute.

17. Nothing herein is or shall be deemed to be a consent by any Landlord to the sale, assignment or transfer of any Lease, or shall, or shall be deemed to, or grant to the Landlord any greater rights than already exist under the terms of any applicable Lease.

18. These Sale Guidelines may be amended by written agreement between Groupe Dynamite and the applicable Landlord.

Footnotes

1 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

2 *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, par. 55.

3 *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, par. 25.

TAB 7

See paras. 68 and 78.

1997 NSCA 153
Nova Scotia Court of Appeal

Hoque v. Montreal Trust Co. of Canada

1997 CarswellNS 427, 1997 NSCA 153, [1997] N.S.J. No. 430,
162 N.S.R. (2d) 321, 485 A.P.R. 321, 75 A.C.W.S. (3d) 541

Montreal Trust Company of Canada and Gary Graham, Appellants and Khandker Shamsul Hoque, Respondent

Freeman, Roscoe, Cromwell JJ.A.

Judgment: October 27, 1997
Heard: October 2, 1997
Docket: C.A. 137284

Proceedings: reversing in part (January 20, 1997), Doc. S. H. 108806/94 (N.S.S.C.)

Counsel: *Alan V. Parish, Q.C.* and *Peter Doig*, for the Appellant.
Raymond F. Wagner, for the Respondent.

***Cromwell, J.A.*:**

I. Overview:

1 Dr. Hoque and companies controlled by him granted mortgages and entered into related agreements with Montreal Trust. After Dr. Hoque made an assignment in bankruptcy, Montreal Trust commenced action on the mortgages. These actions were not defended and final orders of foreclosure were issued by the Supreme Court.

2 After his discharge from bankruptcy, Dr. Hoque commenced the present action against Montreal Trust and its employee Gary Graham (hereafter referred to collectively as "Montreal Trust") for breach of fiduciary duty, breach of contract, tortious interference with business relations, trespass and conversion. The allegations in this action concern Montreal Trust's dealings with Dr. Hoque in relation to the mortgages and related agreements. In response, Montreal Trust brought an application to dismiss Dr. Hoque's action on the basis that the issues raised in it could have been dealt with in the foreclosure actions. Saunders, J. refused to dismiss Dr. Hoque's action.

3 Montreal Trust now applies for leave to appeal from that decision and, if leave is granted, seeks on appeal an order dismissing Dr. Hoque's action as *res judicata*. The issue in the appeal is whether the final orders of foreclosure bar Dr. Hoque's action.

II. The Facts:

4 The main argument by Montreal Trust is that all of the issues raised in Dr. Hoque's action could have been determined in the foreclosure actions. It is therefore necessary to review the facts and allegations in detail.

5 Throughout the 1980's, Montreal Trust had various mortgage loans outstanding with Dr. Hoque and companies controlled by him including Nelson's Landing Developments Limited. In 1992, Dr. Hoque experienced difficulties in servicing the mortgages. An agreement was reached to capitalize outstanding arrears, reduce the interest rate under the mortgages and otherwise to vary the previous legal obligations of the parties. This amending agreement, (hereafter "the agreement") was executed on August 4, 1992. Dr. Hoque was represented in the negotiations leading up to this amending agreement by a major Toronto law firm.

6 The terms of this agreement are significant for the legal issues raised on appeal. The most relevant terms may be summarized as follows:

a. The agreement recites a number of mortgages between Montreal Trust and Dr. Hoque or his companies, assignments of leases and rents as collateral security and personal guarantees by Dr. Hoque of the corporate mortgages. It further recites that the parties (including Dr. Hoque and Montreal Trust) have agreed to restructure the loans extended by the Mortgages and to amend the security held by the Montreal Trust.

b. With respect to the several mortgages, the agreement provides for the capitalization of arrears and amendment of the interest rate, maturity date and amortization period.

c. The agreement provides for 6 payments of $150,000 on a series of dates beginning October 1, 1992 to be applied to outstanding loans.

d. The agreement provides that "the properties subject to the mortgages shall continue to be maintained, leased and managed in a manner which in the sole opinion of the Mortgagee is consistent with good sound and proper maintenance and management standards..."

e. Montreal Trust agrees to provide partial releases of the Nelson's Landing Mortgages on certain conditions, one of which is that 50% of the units were presold.

7 Clauses 31 and 32 provide as follows:

31. This Agreement may be cancelled by the Mortgagee without liability to the Mortgagee. This Agreement shall not be interpreted or construed in any manner so as to prejudice any of the rights, powers or remedies of the Mortgagee pursuant to the Mortgages and the Mortgagee reserves the right to cancel this Agreement without liability to the Mortgagee if at any time, in the sole discretion of the Mortgagee, there is any material change with respect to Hoque. Nelsons Landing, Properties, Hoque Management or any of the properties which are subject to the Mortgages, or in the event that any of the conditions set forth in this Agreement or the Commitment Letter have not been satisfied or adhered to or in the event of any default on the part of Hoque or Nelsons Landing under the Mortgages amended hereby.

32. The parties hereto specifically acknowledge and agree that if Hoque and/or Nelsons Landing default in the observance or performance of any of the covenants, terms, provisos or conditions contained in any of the Mortgages, then the full amount of the principal and interest secured by each of the Mortgages herein, with the exception of the Herring Cove Mortgage, shall, at the option of the Mortgagee, forthwith become due and payable and all of the powers of the Mortgagee under each and every one of the Mortgages in the event of default may be exercised. (Emphasis added)

8 In January 1993, Montreal Trust alleged default under this agreement. Dr. Hoque's then counsel responded at length on his behalf. Certain passages of his letter (dated January 12, 1993) are particularly pertinent:

..... Your letter indicates that there has been a default under the Amending Agreement, without providing particulars as to the nature of the default. Based upon our review of the matter with Dr.. Hoque, we think it unlikely that MT could establish a default entitling it to move under its security. .....

Boiling the overall situation down to basics, the issue is really in MT's court. Is MT prepared to allow the fracturing of the mortgage at twenty to twenty-five units sold, so that Dr. Hoque can achieve a paydown of MT and so that the issues with Imperial Oil can be resolved, or not? In the alternative, is MT prepared to waive the extraordinary principal repayment requirements? Obviously, our client requires a clear answer from MT.

9 There was further correspondence later in January and in February, with Montreal Trust specifying the alleged defaults, including failure to make the $150,000 payment due under the amending agreement on October 1, 1992. Dr. Hoque's then counsel acknowledged at one point that "there may have been technical default" with respect to the October payment but asserted

that there were "collateral agreements as to the fracturing of the mortgage on Nelson's Landing and that ... Montreal Trust was intending to forebear with respect to this amount..." In a subsequent letter, Dr. Hoque's then counsel stated that there had been no default and that Montreal Trust's "interference with [Dr. Hoque's] business ... has already and is continuing to cause very substantial damage not only to his reputation as a landlord and as a businessman but also to his ability to recover on his investments."

10 On February 11, 1993, Montreal Trust demanded payment of all outstanding amounts (roughly $20,000,000) by March 15. In early March, Dr. Hoque made a voluntary assignment under s. 49 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and Coopers & Lybrand Limited was appointed trustee.

11 Montreal Trust commenced foreclosure proceedings in April, 1993. The following is an excerpt from one of the Statements of Claim (that relating to the Oak Street Mortgage) which is typical of the others:

> (j) The Mortgagor, Dr. Khandker Shamsul Hoque, Nelson's Landing Developments Limited, the Mortgagee, Montreal Trust Company of Canada, and Nina Naseema Hoque executed an Amending Agreement dated August 4, 1992 and registered at the Registry on August 4, 1992 in Book 4270 at Page 1198 and re-registered at the Registry on September 3, 1992 in Book 5289 at Page 99 (hereinafter referred to as the "Amending Agreement"), under the terms of which the parties thereto agreed inter alia, as follows:
>
> 1. To pay to the Mortgagee a minimum of $150,000.00 no later than on each of the following dates:
>
> October 1, 1992
>
> February 1, 1993
>
> June 1, 1993
>
> October 1, 1993
>
> February 1, 1994
>
> June 5, 1994
>
> which payments would be applied by the Mortgagee against outstanding loans to the Mortgagor and Nelson's Landing Developments Limited;
>
> 2. That the principal amount outstanding on the Mortgage be increased to $5,865,815.34, that the maturity date of the Mortgage be extended to June 5, 1994, that the interest rate be changed to 9.5% per annum calculated half-yearly not in advance, and that the mortgage loan be repaid by blended monthly payments of principal and interest in the sum of $48,523.00 each commencing July 5, 1992;
>
> 3. That if the Mortgagor or Nelson's Landing Developments Limited defaulted in the observance or performance of any of the covenants, terms, provisos or conditions contained in any of the following Mortgages:
>
> (a) a Mortgage from Dr. Khandker Shamsul Hoque in favour of the Plaintiff dated February 24, 1987 and registered at the Registry on February 25, 1987 in Book 4336 at Page 752 (the "Sylvia Avenue Mortgage"); .....
>
> 5. Default has been made in the payment of amounts due under the Mortgage .....
>
> 7. Default has also been made in the payments due under the terms of the Amending Agreement in that the payments of $150,000.00 each due on October 1, 1992 and February 1, 1993 were not made when due and remain in arrears as of March 19, 1993.

> 8. Under the terms of the Mortgage payments being in arrears the whole principal and interest due under the Mortgage has become due and payable. Also, under the terms of the Amending Agreement, default having been made under the Regent Drive Mortgage, Sylvia Avenue Mortgage, 91 Nelson's Mortgage, 61 Nelson's Mortgage and Nelson's Landing Second Mortgage and default having been made in the payments required under the terms of the Amending Agreement the whole principal and interest due under the Mortgage has become due and payable. .....
>
> 10. The Plaintiff claims payment of the sum of $5,914,975.43 with interest at the rate of 9.5% on the sum of $5,914,975.43 together with interest on arrears at the said rate, from March 19, 1993, until payment together with costs to be taxed, or in default, foreclosure and sale and possession. The Plaintiff also claims all reasonable costs it has incurred or may incur in repairing, maintaining, managing, protecting, securing, appraising, inspecting, leasing and/or insuring the said property subject to the Mortgage from time to time up to and including the date of payment, or foreclosure and sale and possession.
>
> 11. The Plaintiff further claims the right to prove its claim in the bankruptcy of Dr. Khandker Shamsul Hoque and to claim against the Defendant, Nelson's Landing Developments Limited under the covenants contained in the Mortgage and in the Amending Agreement for the deficiency in case the sum realized at the sale pursuant to a foreclosure order herein be not sufficient to satisfy the amount due and for such further and other relief as the nature of the case may require and also taxes and taxes costs herein.

12 The trustee was served with notice of these foreclosure actions but did not defend. On May 19, 1993, Goodfellow, J. granted an order for foreclosure, sale and possession in favour of Montreal Trust in each of the foreclosure actions. It is worth noting that Dr. Hoque's possible causes of action against Montreal Trust are not referred to in his statement of affairs as assets of the estate and that, so far as the record discloses, there was no detailed consideration given to them until after the final orders of foreclosure had issued.

13 The matter was discussed by creditors after the foreclosure orders were made. Advice was obtained to the effect that the estate could move to stay the sale under foreclosure or alternatively sue Montreal Trust independently. Advice was also given to the effect that the rights of parties to pursue actions independently continued to exist notwithstanding that an order of foreclosure had already been granted.

14 Subsequent to his discharge, Dr. Hoque sought and received from the inspectors an agreement to assign to Dr. Hoque the estate's rights to all causes of action against secured creditors, including the claim against Montreal Trust. Montreal Trust objected to this agreement and brought an application pursuant to s. 37 of the *Bankruptcy and Insolvency Act* for a declaration that there had been no valid assignment. MacDonald, J. dismissed the application, holding that there was a binding agreement to transfer the causes of action. His decision was upheld on appeal to this Court: (1996), 148 N.S.R. (2d) 142 (N.S. C.A.).

15 In September of 1994, Dr. Hoque commenced action against Montreal Trust. His Statement of Claim was substantially amended in February of 1996 and that is the Statement of Claim before us. It alleges that:

> a. "Montreal Trust and Gary Graham commenced in a malicious and calculating manner, a course of action designed to destroy Dr. Hoque and his business empire." (Para 6)
>
> b. the refinancing arrangements set out in the amending agreement were unconscionable and they "radically altered the relationship between Montreal trust and Dr. Hoque from Mortgagee/Mortgagor or Lender/Borrower to a relationship that by its nature created a host of fiduciary relationships." (Paragraph 18) Alternatively, it is alleged that "Montreal Trust became a business partner with Dr. Hoque which raised similar fiduciary duties imposed upon Montreal Trust as a business owner." (Paragraph 18)

c. There were collateral agreements concerning the $150,000 payments and the partial releases provided for under the Amending Agreement and that these collateral agreements were relied on by Dr. Hoque "such as to create a default when no default in law existed." (Paragraph 22-25)

d. The January 25, 1993 demand was "unconscionable" (paragraph 29-33) and that Montreal Trust's attornment of rent was "unlawful and unconscionable" and "for no lawful purpose or right": paragraph (34-35)

e. Montreal Trust improperly disclosed confidential information to third party lenders "which was calculated to cause and did cause others to act precipitously (paragraph 36 and 39(j)

f. Montreal Trust acted in an abusive and disrespectful manner causing financial loss, embarrassment and mental distress. (Paragraphs 39(c) and 44)

g. Montreal Trust acted "in a calculating and conspicuous manner ... so as to intentionally and tortiously interfere with the economic and business relations of Dr. Hoque."(paragraph 42)

h. Montreal Trust's illegal acts caused Dr. Hoque's bankruptcy and loss of everything he had owned apart from a few personal effects (Paragraph 37) and further caused Dr. Hoque to suffer from depression and mental distress (paragraph 38)

i. Montreal Trust committed acts of trespass and conversion in relation to Dr. Hoque's property. (Paragraph 45)

16 Montreal Trust filed a defence and then brought an application before the Chambers judge pursuant to *Civil Procedure Rules 14.25(1)(b)* and *(d)* and *25.01* for an order dismissing the action on the grounds that it is barred by cause of action estoppel or, in the alternative, issue estoppel. The matter was heard over 3 days. The Chambers judge, in a reserved decision of 31 pages, dismissed Montreal Trust's application. Montreal Trust now seeks to appeal to this Court.

III. The Decision of the Chambers Judge:

17 The Chambers judge had to resolve a number of procedural and evidentiary matters which are no longer in issue. On the question of whether Dr. Hoque's action is barred by *res judicata*, the Chambers judge held that the matters now raised by Dr. Hoque's action constitute defences or a basis for set-off and counterclaim against Montreal Trust in the foreclosure actions and could have been raised therein. However, the learned judge was of the view that the application of *res judicata* is grounded on principles of fairness and public policy and that in the circumstances of the present action, it would be unfair for Dr. Hoque to be denied the opportunity to have his allegations determined on their merits. The Chambers judge put it this way:

> The carriage and control of the law suit in the hands of Dr. Hoque was interrupted by the bankruptcy. Mr. Parish emphasizes that the Trustee was very familiar with the matters now raised by Dr. Hoque in his present litigation. But this cuts both ways. Dr. Hoque fulfilled his obligation to be candid with the Trustee. He declared the intended action against his secured creditor(s). The minutes confirm that the Montreal Trust "situation" was reviewed at some length by the Trustee and inspectors. The estate's solicitor Mr. Victor Goldberg was engaged to search the law and prepare an opinion. Based on his assessment Mr. Goldberg opined that any cause of action against Montreal Trust would survive the foreclosure proceeding. .....
>
> Whether Mr. Goldberg was right or wrong in arriving at that conclusion is not for me to decide. The fact is that such an opinion was sought, received and considered. Ultimately the Trustee determined, likely on the basis of simple economics, that it did not wish to become embroiled in litigation between Dr. Hoque and Montreal Trust and chose not to defend the foreclosure actions. However, I conclude that Dr. Hoque always intended to proceed against Montreal Trust insofar as the law and his circumstances would permit. He says that his impecuniosity prevented him from doing anything about the defendants' actions until bringing his own litigation in September, 1994. ..... A real question - which can only be decided after a full trial on the merits - is whether the conduct and actions attributed to Montreal Trust led to or aggravated

> Dr. Hoque's precarious financial situation which then in turn prevented or hampered his mounting a full defence of the applicants' suit against him. .....
>
> It would seem to me to be grossly unfair and unjust if Dr. Hoque were barred from seeking to prove his allegations against Montreal Trust because - as it turned out - he did not have sufficient resources to fully defend the foreclosure actions launched against him, all of that a consequence of the conduct of the same financial institution whose actions he now seeks to challenge.

IV. Issue:

18 There is one fundamental issue on this appeal: whether the Chambers judge erred in law in refusing to dismiss Dr. Hoque's action as *res judicata*.

V. Analysis:

19 This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.

20 *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 555:

> .... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ..... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-1:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

22 It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which *could* have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.

23 *Res judicata* requires that the previous court decision be final and between the same parties or their privies. Both of these requirements are met here. The final orders of foreclosure were not appealed or otherwise challenged. As to privity, it is not argued that there was no privity as between Dr. Hoque and his trustee in bankruptcy who was the named defendant in the foreclosure actions. It is not disputed that all of the claims now asserted by Dr. Hoque vested in his trustee at the time of his assignment in bankruptcy.

24 There are some very wide statements about the scope of cause of action of estoppel. For example, in the seminal case of *Henderson v. Henderson* [1843-60] All E.R. Rep. 378 (Eng. V.-C.), Vice-Chancellor Wigram stated that the plea of *res judicata*

... "applies ... not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to *every point which properly belonged to the subject litigation and which the parties exercising reasonable diligence might have brought forward at the time*." (at 381-2), (emphasis added). Similarly in *Fenerty v. Halifax (City)* (1920), 50 D.L.R. 435 (N.S. C.A.) Ritchie, J. for the Court said that the plea applies "... not only as to the matter dealt with, *but also as to questions which the parties had an opportunity of raising*." (at 437), (emphasis added) There are several similarly broad statements in *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488 (Alta. C.A.) especially at 499-502.

25 The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.

26 I note, for example, that the very broad language of Vice-Chancellor Wigram in *Henderson*, *supra*, was considered by Lord Devlin in *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 (U.K. H.L.). At 445:

> Res judicata imposes a rigid bar and Wigram, V-C's, principle a flexible one. I prefer the modern development of this principle which justifies it by the power to stop vexatious process. This in my mind is the true principle ... and the one that I think should be applied in the criminal law as it is in the civil. (Emphasis added)

27 The relatively recent decision of the House of Lords in *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 (U.K. H.L.) supports a more flexible approach. In that case, Lord Keith noted that the often quoted passage from *Henderson v. Henderson, supra*, specifically referred to exceptional "special circumstances" noting that this passage "... appears to have opened the door towards the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action" (at p. 46). The learned Law Lord also cited, with approval, the following passage from the speech of Lord Kilbrandon in *Yat Tung Investment Co. v. Dao Heng Bank Ltd.*, [1975] A.C. 581 (Hong Kong P.C.) at p. 590:

> The shutting out of a "subject of litigation" - a power which no Court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.

28 Moreover, Lord Keith indicated that cause of action estoppel and issue estoppel are both essentially concerned with preventing abuse of process: at 51-52.

29 I also note that the approach to cause of action estoppel referred to in *Arnold* was cited with apparent approval by this Court in *Brown v. Marwieh* (1995), 145 N.S.R. (2d) 220 (N.S. C.A.) per Bateman J.A. at p. 222.

30 The submission that all claims that *could* have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and decided, the test appears to me to be that the party *should* have raised the matter and, in deciding whether the party *should* have done so, a number of factors are considered.

31 Some of the cases involve attempts to rely on new evidence to support a claim previously litigated. In such cases, the courts are concerned whether the new evidence could have been available in the first action with reasonable diligence. A leading example is *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.). The plaintiff sued unsuccessfully for damages resulting from flooding of his land and crops in the years 1967 and 1968. He then commenced a new action relating to the years 1969-72, alleging that the defendant town had acted to cause the water behind a dam to rise to such high levels that it saturated the plaintiff's land. The differences between the first unsuccessful action and the second were the years complained of and that the second action alleged saturation as a result of water entering an aquifer as opposed to the surface flooding alleged in the first action. Ritchie, J., for 5 members of the Court, held that the second action was barred by the principle of cause of action estoppel. He said: "Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory." (At 638) He went on:

It is obvious here that the question of whether or not the water entered the aquifer and thus saturated the respondent's soil was not determined in the 1969 action because it was not raised and it would therefore not be strictly accurate to classify the present case as one of issue estoppel, but I am of the view that it is certainly a case within the principle established in *Henderson v. Henderson, supra*, and the *Phosphate Sewage Co.* case, and it is to be noted that the respondent has not alleged either in his pleadings or his affidavit that he could not by reasonable diligence, have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor can it be said that his failure to raise that particular point did not arise "through negligence, inadvertence or even accident." (emphasis added)

32 Some of the cases are concerned with whether the second action alleges a cause of action which is distinct from that asserted in the first action. For example, in *Grandview, supra*, Ritchie J appears to have accepted the general proposition that the principle of cause of action estoppel applies only to matters that arise within one cause of action, but holds that the two actions before him did not give rise to causes of action that were separate and distinct.

33 Another group of cases holds that cause of action estoppel applies where the second action alleges a new legal basis for claims arising out of facts and relationships that have been the subject of the earlier litigation. This is the approach taken by the British Columbia Court of Appeal in *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C. C.A.) in which the Court found that the dismissal on consent of the first action for damages for breach of contract barred the subsequent action pleaded in breach of fiduciary duty arising out of the same relationship. Davey, CJBC for the Court said:

... it seems to me that the second action involves nothing more than a claim for the same sum of money and arising out of the same relationship and for the same services, but based upon a different legal conception of the relationship between the parties. (at 251) (emphasis added)

34 There are other cases which turn on that principle that all of the matters necessary to the making of a final order may not be challenged except by appeal or other direct review.

35 This principle was stated in *420093 B.C. Ltd. v. Bank of Montreal, supra* at p. 503:

A valid and subsisting order made by a competent court cannot be attacked collaterally. This well-established principle was restated by McIntyre J. In *R. v. Wilson* (1983), 4 D.L.R. (4th) 577, 9 C.C.C. (3d) 97, [1983] 2 S.C.R. 594. After reviewing a number of authorities, he said at p. 597:

> It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the high court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence. (emphasis added)

36 In the same case, Dickson, J.,(as he then was) said at p. 584:

I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs.

37 Other cases turn on abuse of process, which Lord Keith in *Arnold* thought to be the true basis of the rule. These decisions are founded on the conclusion, in light of all the circumstances, that the subsequent litigation is an attempt to use the Court's process "to delay and frustrate the course of justice": *Bank of Montreal v. Prescott* (1994), 1 B.C.L.R. (3d) 304 (B.C. C.A.) .

38 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is

somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, *should* have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

39 In the present case, the foreclosure proceedings resulted in a default judgment. It is that default judgment which Montreal Trust submits bars Dr. Hoque's action. There is authority for the view that *res judicata* should be applied in a more limited way when the judgment giving rise to the plea was obtained on default.

40 As Cross and Tapper, *Evidence* (8th, 1995) put it:

> Obviously it is desirable to protect defendants from plaintiffs who unnecessarily split up their claims against them; but a rigid application of the words of Wigram V-C [in **Henderson**] could work great hardship on defendants who let judgment go against them by default, and the statement has been held to have no application to those judgments, rules of cause of action estoppel being very narrowly applied in such cases. (At p. 84)

41 For example, in *New Brunswick Railway v. British & French Trust Corp.* (1938), [1939] A.C. 1 (U.K. H.L.), The Lord Chancellor said:

> In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense. (emphasis added)

42 Although Mr. Parish submitted that this principle applies only to issue estoppel, I do not, with respect, think that it is limited in that way.

43 The appellants rely on several authorities which must be analyzed in detail. In my view, they do not support the broad statement in *Henderson*, *supra*. Neither do they require an inflexible approach to issues that could have been but were not raised.

44 In *Bayhold Financial Corp. v. Clarkson Co.* (1990), 99 N.S.R. (2d) 91 (N.S. T.D.), Bayhold brought a foreclosure action which was not defended by the receiver. Bayhold then brought an action against the receiver for, among other things, breach of fiduciary duty and negligent management, to the detriment of Bayhold's security. The receiver defended the second action, in part, by alleging that Bayhold's security was invalid. Kelly, J. held that the receiver was prevented by the default judgment from raising the issue of the validity of Bayhold's security. He noted at p. 121 that the receiver had been aware that it had a possible defence to the foreclosure action based on the validity of the security and made a deliberate decision not to raise it at that time.

45 This case deals with issue estoppel rather than the broad application of cause of action estoppel and, in any event, it is not inconsistent with the principle stated in the *New Brunswick Railway Company* case.

46 The default judgment obtained by Bayhold necessarily and with complete precision decided the issue of the validity of its security. It is also consistent with the principle barring collateral attack, given that the validity of the security was an essential element of the default judgment.

47 In *Malik v. Principal Savings & Trust Co.* (1985), 63 A.R. 109 (Alta. Q.B.), the mortgagee obtained an order of foreclosure by default. After sale of the property, the mortgagor commenced a new action alleging that the mortgagee, prior to the granting of the mortgage, had breached its fiduciary duty to the mortgagor causing the mortgagor's financial ruin. The Alberta Court of Queen's Bench struck out the mortgagor's action. In the course of her careful reasons, McFadyen, J. (as she then was), cites some of the broad statements as to the scope of cause of action estoppel which have been referred to earlier, including *Henderson v.*

Henderson, supra. and *Fenerty v. Halifax (City)*, *supra*. However, the learned judge also cited, with approval, a statement of Ford C.J.A. in *Hall v. Hall* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.) as follows:

> This doctrine [res judicata] has not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct. (emphasis added)

48 McFadyen, J. then held that the final order for sale, vesting order and the final deficiency judgment in the foreclosure action could only have been granted upon a judicial determination that the mortgage and the guarantee were valid. She further held that the only issues raised by the mortgagor in the second action were inextricably related to the granting and execution of the mortgage and the guarantee and that they did not constitute a separate cause of action. The learned judge also noted that while the judgment was, in form, a default judgment, the mortgagor had fully participated in the foreclosure proceedings and did not, at any time, seek to raise the issues now raised in the action. There was, in the view of the learned judge, a decision not to raise those issues.

49 I conclude that while the broad statements of *Henderson* and *Fenerty* were cited with approval, the case in fact turns on the finding that the second action was a collateral attack on the earlier judgment and that it did not allege a new cause of action.

50 In *Ranch des Prairies Ltée (Prairie Ranch Ltd.) v. Bank of Montreal* (February 3, 1987), Kroft J. (Man. Q.B.), (affirmed (1988), 69 C.B.R. (N.S.) 180 (Man. C.A.)), the issue was whether consent orders relating to the actions of a receiver/manager and a default judgment against guarantors barred an action by the debtors against the lender and the receiver. The second action was brought by shareholders of the bankrupt company, three of whom were guarantors and by the company itself. The action challenged the conduct of the receiver and lender throughout. The Court of Appeal held that to allow the action to proceed constituted an abuse of process. Huband J.A., with whom Monnin C.J.M. concurred, stated as follows:

> ..... It is contended that the issues are not res judicata, because the claim of the Bank of Montreal against the members of the Denis family was a claim for a sum certain, while their claim against the bank and the receiver is for unliquidated damages. Moreover, one of the plaintiffs, Marie-Claude Denis, was not involved in the litigation initiated by the Bank of Montreal.
>
> But res judicata is not the only basis which can be raised to strike out the claims of the members of the Denis family against the Bank of Montreal and the receiver. The claims which they advance are of a kind which should have been raised on a timely basis when the receiver was appointed, when the sale of assets was approved, and when default judgment under the personal guarantees was obtained.
>
> As against the receiver, MacGillivray and Co. Ltd., the plaintiffs claim damages for negligence in disposing of the assets in a manner contrary to professional advice and below market value. Damages are also claimed for breach of an alleged undertaking by the receiver to dispose of the assets as a going concern. While technically these matters might not fall within the category of res judicata, it is obvious that it was open to the members of the Denis family to raise these complaints at the time court approval was being sought for the disposition of assets. Instead of raising complaint, the court was led to believe that there was assent. The trustee in bankruptcy of the company consented to the various orders disposing of the company assets. The same solicitor who was representing the bankrupt company was representing the members of the Denis family, but no complaint was raised on their behalf. In my view it would be an abuse of process to allow the claim by members of the Denis family as against the receiver at this stage.

51 This case turns on the finding that the action constituted an abuse of process.

52 The appellants also cite *Adams-Mood v. Toronto Dominion Bank* December 12, 1996, S.H. 126043 [reported (1996), 159 N.S.R. (2d) 150 (N.S. S.C.)]. In that case, the Bank commenced a foreclosure action and Ms. Adams-Mood and her husband filed a defence admitting indebtedness but seeking a delay in the foreclosure to enable them to pursue their accountant, whom they blamed for their financial troubles. An order for foreclosure and sale was made and Ms. Adams-Mood filed an assignment in bankruptcy. She then commenced an action in negligence against the Bank for not advising her to seek independent legal

advice and other alleged breaches of duty. Goodfellow J. granted the Bank's application to strike the statement of claim. He held that the negligence alleged by the plaintiff directly attacked the validity of the mortgage which had been finally determined in the foreclosure action. While Justice Goodfellow repeats the wide language of Justice Ritchie in *Fenerty*, *supra*, the basis of his decision is that the negligence action brought by the plaintiff necessarily involves a challenge to the validity of the mortgage which was finally determined in the foreclosure proceedings; in other words, the principle barring collateral attack.

53 Also cited is the decision of MacDonald C.J.T.D. of the Prince Edward Island Supreme Court in *Miscouche Sales & Service Ltd. v. Massey Ferguson Industries Ltd.* (1992), 105 Nfld. & P.E.I.R. 91 (P.E.I. T.D.). Miscouche defaulted on a debt to its supplier. Its assets were seized and sold and an action was brought by the finance corporation against Miscouche, its directors and shareholders in relation to certain guarantees and agreements that they had signed. Default judgments were obtained with the exception of one shareholder who defended. With respect to him, summary judgment was granted.

54 The shareholders then brought an action against the supplier, the finance corporation and the receiver for damages arising out of the allegedly improper disposition of Miscouche's assets. MacDonald C.J.T.D. struck out the statement of claim. While quoting with approval some of the wide statements of the principle of *res judicata*, he appears to have rested his judgment on the *Malik*, *supra*, case and, in particular, its holding that the final order for sale finally determined the issue of the validity of the mortgage and that the second action did not raise a distinct cause of action. He stated:

> The same can be said for the actions taken by the respondents. Insofar as Miscouche is concerned, the basis of its claim against Barclays is as a result of Barclays action in allegedly improvidently selling the assets of Miscouche without proper notice. This was a matter that should have been raised by Miscouche in the action taken against it by Barclays rather than permit default judgment to be taken. Everything is tied in together, the guarantee, the seizure, the notice, the sale and the deficiency. As to the individual respondents, it is much more difficult to see what areas their claims against Barclays might lie. However, assuming there might be liability, they are in no better position than Miscouche. Their claims also arise from the giving of the guarantees and what subsequently occurred.
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> . . . . .
>
> The respondents are correct when they say a litigant can raise a separate and distinct cause of action in a later action. But a separate and distinct cause of action is one which can stand on its own set of acts and can be brought at any time without reference to the issues raised in the earlier action: **Greymac Properties Inc. v. Feldman** (1991), 46 C.P.C. (2d) 125, 1 O.R. (3d) 686 (Gen. Div.). Without reference to the action taken by Barclays on the guarantees, the respondents would have no cause of action.

55 In *Bank of British Columbia v. Singh* (1987), 17 B.C.L.R. (2d) 256 (B.C. S.C.); reversed on other grounds (1990), 51 B.C.L.R. (2d) 273 (B.C. C.A.), foreclosure orders had been obtained and the mortgagee sought approval of sale. The mortgagors opposed the application but the Court approved the sale over their objections. Subsequently, the property was resold at a higher price and the mortgagors defended the mortgagee's action against them on their personal covenant on the basis that the mortgagee and its agents had been negligent and in breach of fiduciary duty in submitting the first sale to the court for approval. The mortgagor also brought action against the mortgagee, one of its employers and the appraiser whose report had been relied upon in seeking court approval.

56 Hardinge L.J.S.C. granted the mortgagee's application to strike out the relevant parts of the mortgagor's statement of defence and dismissed the mortgagor's action, both on the grounds of *res judicata* and abuse of process. In essence the judge decided that the new cause of action could not be used to attack a final judgment that was fully argued, not appealed and never set aside. While relying on a number of the broader statements relating to cause of action estoppel, the learned judge based his decision on the proposition that the mortgagors were attacking the validity of the order for sale which had not been contested at the time, and which had never been set aside; in short, the mortgagors' action was a collateral attack on the earlier orders.

57 Then comes *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488 (Alta. C.A.). In the first action, the Bank sued its debtor First Canadian and Mr. and Mrs. Prescott as guarantors. Judgment was recovered against the Prescotts but not against First Canadian. The appellant obtained an assignment from the trustee in bankruptcy of First Canadian of any claim which First Canadian might have against the Bank. The appellant then commenced the second action. The Bank moved

to strike out the action on the ground that the claims were *res judicata* or an abuse of process or constituted a collateral attack on valid and subsisting orders of the Court.

58 In the first action, First Canadian and the Prescotts were represented by the same solicitor. The Prescotts pleaded that the guarantees were invalid for technical reasons, that they were executed as a result of economic duress and that the Bank had represented to them that they would not be pursued on the guarantees except for the purpose of recovering any deficiency remaining after realization of the mortgage security. The Bank moved successfully for summary judgment based on the holding that the Prescotts had failed to establish that there was a triable issue.

59 In the second action, the plaintiff alleged that the Bank was in breach of its obligations to First Canadian by failing to make advances as required, by breaching a fiduciary duty owed to First Canadian, that it had induced First Canadian to enter into the loan agreement by fraudulent misrepresentations and, finally, that it had wrongfully enforced its security. Every sale or disposition of the Bank's mortgage security had been made pursuant to court order.

60 The Alberta Court of Appeal struck the action in its entirety on the basis of cause of action estoppel. In the Court's view, the matters raised in the second action were matters of equitable set-off which could have been raised in defence by First Canadian in the first action. As the court put it (at p. 502):

> ... the principle of issue estoppel bars the appellant from relitigating the issue of whether the bank was in breach of the loan agreement. That issue is addressed directly in the debt action and decided contrary to the position now taken by the appellant.
>
> Similarly, cause of action estoppel precludes the appellant from asserting in this action that the bank was in breach of a fiduciary duty owed to First Canadian and that the bank made fraudulent misrepresentations to First Canadian. Both of those claims could have been set up by the Prescotts in defence of the bank's claim against them in the debt action.

61 In conclusion, the Court found that the claims based on the Bank's alleged breach of the loan agreement, breach of fiduciary duty and fraudulent misrepresentations were barred by *res judicata* and that the remaining complaints involved an indirect attack on valid orders made in a debt action and, therefore, constituted an improper collateral attack on those orders. Finally, the Court held that the action in total was an abuse of process and was justifiably dismissed on that basis.

62 To the extent that this decision deals with cause of action estoppel, it proceeds on the grounds that the alleged breach of fiduciary duty and fraudulent misrepresentations relate to the formation and nature of the agreement and to performance of it by the Bank. As the Court stated at p. 501, these claims

> ... were directly related to the very substance of the bank's claim against First Canadian under the loan agreement. Had they been raised in defence in the same form as the appellant has pleaded them in this action, they would have gone to the root of the bank's claim and put in issue the full amount alleged to be owed.

63 Putting aside the aspects of this decision which turned on issue estoppel and abuse of process, the holding with respect to cause of action estoppel is consistent with the narrower view of *res judicata* set out above, i.e., that the allegations in the second action were inconsistent with and, therefore, constituted a collateral attack on the decision reached in the first action.

64 The appellants in this appeal rely principally on the broad formulation of cause of action estoppel. There is, of course, no suggestion that the issues of breach of fiduciary duty, breach of collateral contract, tortious interference with business relations or trespass and conversion were actually raised and adjudicated in the final orders of foreclosure which were issued by default. The appellants' submission is that all of these matters could have been raised by the trustee in bankruptcy and were not. Therefore, according to the appellants, Dr. Hoque is foreclosed from raising them in this action.

65 My review of these authorities shows that while there are some very broad statements that all matters which *could* have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party *should* have raised the point now asserted in the second action. That

turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

66 In light of this understanding of the principle of cause of action estoppel, did the Chambers judge err in law in deciding that Dr. Hoque's action was not barred?

67 In my respectful view, the Chambers judge did err in law in this regard. However, I base my conclusion on a narrower ground than that argued by the appellants.

68 Finality of court orders is an important value. As Fleming James, Hazard and Leubsdorf put it:

> ... the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined.
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> Fleming James, Jr., Geoffrey C. Hayward, Jr. and John Leubsdorf, **Civil Procedure** (4th, 1992) at 581.

69 At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. This is seen in the cases concerned with collateral attack, *supra*, and is reflected in the restrictive approach to *res judicata* founded on default judgments.

70 In my respectful view, Dr. Hoque cannot be permitted to allege in this action anything which is inconsistent with the final orders of foreclosure. In other words, all of the matters essential to the granting of the final orders of foreclosure are not now open to be relitigated in these proceedings. This is not a mere technical rule but an application of a fundamental principle of justice: once a matter has been finally decided, it is not open to reconsideration other than by appeal or other proceedings challenging the initial finding.

71 Dr. Hoque's action makes several claims that are inconsistent with the findings essential to the validity of the foreclosure orders.

72 Dr. Hoque alleges in his statement of claim (paragraph 18) that the refinancing arrangements in the amending agreement were unconscionable. However, the amending agreement was specifically pleaded in the foreclosure actions and the final orders of foreclosure were predicated on its validity and enforceability. Therefore, the allegation of unconscionability in Dr. Hoque's action is inconsistent with the final orders of foreclosure.

73 Dr. Hoque alleges that there were collateral agreements, in essence waiving or delaying Montreal Trust's right to the $150,000 payments provided for in the amending agreement. In addition, there are alleged to be collateral agreements relating to the partial discharge provisions in the amending agreement to the effect that something less than the presale of 50% of the units would be sufficient (paragraphs 22-25). These allegations are inconsistent with the enforceability of the amending agreement. However, its enforceability is an essential basis of the final orders of foreclosure.

74 Dr. Hoque's statement of claim further alleges that the course of dealing by Montreal Trust in entering into the amending agreement and enforcing it according to its terms was "a course of action designed to destroy Dr. Hoque", and was conduct designed to "intentionally and tortiously interfere with [his] economic and business relations". Once again, these allegations go to the root of the legality and enforceability of the amending agreement and the mortgages.

75 Although the pleading is not specific with respect to the acts of trespass and conversion relied on, it appears that these allegations relate to the exercise by Montreal Trust of its remedies as mortgagee and under related agreements. They are, therefore, inconsistent with the validity and enforceability of the mortgages and the amending agreement.

76 I conclude, therefore, that Dr. Hoque is precluded from asserting any of these claims in this action and that the learned Chambers judge erred in law in failing to strike them out.

77 I would not go so far as to hold that the application of *res judicata* in a case like this one is completely inflexible. There may be, to use the words of Vice-Chancellor Wigram, special circumstances in which some flexibility may be required to prevent a serious injustice. To the extent that the learned Chambers judge relied on this flexibility in this case, I think, with great respect, that he erred in principle by failing to give sufficient weight to two considerations which, in this case, are of fundamental and overriding importance.

78 First, there is the strong policy in favour of the finality of court orders. As set out above, this is important not only for the certainty of transactions between the parties, but to the integrity of the judicial process. This consideration is fundamental to the administration of justice and I think, with respect, that it was not given sufficient weight by the Chambers judge.

79 Second, there are the underlying objectives of the *Bankruptcy and Insolvency Act*. These include the provision of a scheme for the orderly and fair distribution of the property of the bankrupt among his or her creditors while permitting the debtor to obtain a discharge from his or her debts on reasonable conditions: see L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3d, revised) at 1-3. To permit Dr. Hoque, after his discharge and after the entry of final orders of foreclosure to assert that the mortgages and amending agreement were invalid or unenforceable seems to me to undercut these objectives very considerably. In short, having been discharged from unpaid personal debts arising from these transactions, Dr. Hoque now claims damages for alleged illegal conduct in relation to those very transactions. In considering what the interests of justice required in this case, I am respectfully of the view that the learned Chambers judge gave insufficient weight to the underlying scheme and objectives of the

Bankruptcy and Insolvency Act.

80 Dr. Hoque relies on Hallett, J.A.'s decision in *ABN Bank Canada v. NsC Diesel Power Inc.* (1992), 112 N.S.R. (2d) 289 (N.S. C.A.) in support of his position. In that proceeding a trial judge had set aside a foreclosure order granted by Goodfellow, J. The Bank appealed; this Court allowed the appeal and reinstated Goodfellow, J.'s order.

81 Subsequent to both the Sheriff's sale of the property and the confirmation of the sale by the Supreme Court, the Bank applied to a member of the panel that heard the appeal for an order:

> specifying that the order of This Honourable Court dated March 12th, 1991, reinstating the foreclosure order granted by Goodfellow, J., dated October 23, 1990, issued upon the respondent's default in the filing of a defence sets aside any defences, counterclaims and amendments thereto which may be filed by the respondent subsequent to October 23, 1990, together with the costs of this application. (emphasis added)

82 Hallett, J.A. refused to grant the order on the ground that there were no errors or omission in the order of the Court dated March 12th, 1991. Nor did the order fail to express the intent of the Court. Therefore, there was no basis under *Rule 62.26(2)* to grant the order.

83 Hallett, J.A. went on to state that the order did not prevent NsC Diesel from making a claim against the Bank, but that it could not be asserted in the foreclosure proceedings. The issue of *res judicata* was not raised in the Bank's application and there certainly is no holding in that decision in relation to the *res judicata* issues argued in this case.

84 There is one, and possibly two elements, in Dr. Hoque's statement of claim which are not inconsistent with the final orders of foreclosure. These are, first, the allegation that Montreal Trust improperly disclosed confidential information to third party lenders in a way that was "calculated to cause and did cause others to act precipitously" and second, that Montreal Trust acted "in an abusive and disrespectful manner". This second allegation is not pleaded with particularity so it is difficult to assess it. If this refers to a cause of action separate from and not inconsistent with the validity and enforceability of the mortgages and the amending agreement, it is not barred by *res judicata*.

85 Neither of these allegations is inconsistent with the validity of the mortgages or amending agreement. Nor do they fall into any of the categories of claims that *should* have been advanced. They are not simply an attempt to put a new legal conception upon settled facts or to raise facts which, with reasonable diligence, ought to have been placed before the court in the foreclosure actions. They are separate and distinct causes of action. It is not argued that asserting them now, in all of the circumstances, constitutes an abuse of process.

86 It was conceded by the appellants in argument that the allegations relating to breach of duty to maintain confidential information was not barred by issue estoppel. I am also of the view, for the reasons which I have given, that it is not barred by cause of action estoppel. Although there was no concession by the appellants in respect of the allegation relating to abusive and disrespectful treatment, this was clearly not a matter covered by issue estoppel and, for the reasons I have given above, I am of the view that it is not barred by cause of action estoppel.

87 In summary, I am of the view that all of the allegations in Dr. Hoque's statement of claim are barred by the principle of cause of action estoppel with the exception of the claim relating to the breach of duty to keep information confidential and the allegation that Montreal Trust acted in an abusive and disrespectful manner. The Chambers judge, with great respect, erred in law in failing to so decide. To the extent that there may exist some measure of judicial discretion to apply *res judicata* with some flexibility, I think, with respect, that the learned Chambers judge erred in principle in exercising it in this case.

88 I would, therefore, grant leave to appeal, allow the appeal, set aside the order of the learned Chambers judge and strike out Dr. Hoque's statement of claim. However, in light of my finding that two aspects of the statement of claim are not barred by *res judicata* or issue estoppel, I would not dismiss the action, but grant leave to Dr. Hoque to amend his statement of claim, if so advised, in accordance with these reasons. This is an order which was open to the Chambers judge to make under *Rule 14.25(1)* and is, therefore, open to the Court of Appeal pursuant to *Rule 62.23(1)(b)*. The amended allegations, if any, must not be inconsistent with the validity or enforceability of the mortgages or the amending agreement. Given that this action is now more than three years old and relates to events considerably older than that, I would also order that any amended pleading must be filed within 30 days of the release of these reasons and in default thereof Dr. Hoque's action will stand dismissed.

89 Montreal Trust has been substantially successful and should receive its costs here and before the Chambers judge. Costs before the Chambers judge were fixed at $1,500.00. I would, therefore, order Dr. Hoque to pay the appellants' costs both here and below, fixed at $1,500.00 before the Chambers judge and at $1,000.00 in this Court.

***Freeman, J.A.*, *Roscoe, J.A.*:**

90 Concurred in.

Appeal allowed in part.

1998 CarswellNS 653
Supreme Court of Canada

Hoque v. Montreal Trust Co. of Canada

1998 CarswellNS 653, 1998 CarswellNS 654, [1997] S.C.C.A. No. 656, [1998] 1 S.C.R. x (note), 167 N.S.R. (2d) 400 (note), 227 N.R. 288 (note), 502 A.P.R. 400 (note)

Khandker Shamsul Hoque v. Montreal Trust Company of Canada, a body corporate and Gary Graham

L'Heureux-Dubé J., Gonthier J., Bastarache J.

Judgment: March 26, 1998
Docket: 26393

Proceedings: Leave to appeal refused, 1997 CarswellNS 427, 75 A.C.W.S. (3d) 541, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, [1997] N.S.J. No. 430, 1997 NSCA 153 (N.S. C.A.)Reversed in part, 1997 CarswellNS 84, 68 A.C.W.S. (3d) 1025, [1997] N.S.J. No. 37 (N.S. S.C. [In Chambers])

Counsel: Counsel — not provided

Per curiam:

1 The application for leave to appeal is dismissed with costs.

TAB 8

In the Court of Appeal of Alberta

Citation: Jackson v Canadian National Railway, 2013 ABCA 440

Date: 20131220
Docket: 1201-0323-AC
Registry: Calgary

Between:

Thomas Richard Jackson

Appellant (Plaintiff)

- and -

Canadian National Railway and Canadian Pacific Railway

Respondents (Defendants)

The Court:

The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice S.L. Martin
Dated the 23rd day of October, 2012
Filed on the 29th day of November, 2012
(2012 ABQB 652, Docket: 100105744)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant, Thomas Richard Jackson, is an Alberta grain farmer. In 2010, he sued the respondent railways seeking restitution for what he claimed were excessive freight rates. Specifically, he claimed that the rate the railways charged to move grain, from 1995 to 2007, included a cost for hopper car maintenance that the railways had not actually incurred. He sought a restitutionary award for the amount of the overstated maintenance costs, and sought to certify the action as a class action to benefit other grain farmers in his position.

[2] When the appellant filed his certification application, the respondents applied for summary judgment dismissing the claim. The case management judge heard both applications at the same time. She denied certification and granted the summary dismissal application.

[3] Jackson now appeals both findings. For the reasons that follow, we dismiss his appeal.

II. Background

[4] The background facts, including a brief history of regulated grain freight rates, are set out in the chambers judge's thorough and careful reasons, and we will not repeat them all here (see: *Jackson v Canadian National Railway*, 2012 ABQB 652). The following précis is sufficient for purposes of this appeal.

A. The rate-making structure

[5] Freight rates for the movement of western Canadian grain have been a contentious matter for more than a century. They have been subject to an evolving system of freight rate regulation since 1897.

[6] Throughout this time, Parliament has provided various statutory formulas for developing rates, and has delegated rate making, and other ancillary matters, to a specified administrative body, known by a variety of names but now called the Canadian Transportation Agency (Agency). Historically, the courts have not played a role in adjudicating the reasonableness of freight rates in western Canada.

[7] Prior to 1983, ratemaking was dealt with through the "Crow Rate" and related subsidies. On November 23, 1983, however, Parliament passed the *Western Grain Transportation Act*, RSC 1985, c W-8. Under this legislation the determination of the annual rate scale became subject to a complex formula pursuant to section 36 of that Act. This determination involved a consideration of

eligible costs and included quadrennial costing reviews which required the Agency to "take into account all costs actually incurred" relating to the movement of regulated grain.

[8] The ratemaking process changed in 1995 when Parliament introduced a system of "Maximum Rate Scales" (MRS). The calculation of the MRS involved a freight rate multiplier which adjusted rates for inflation. The freight rate multiplier incorporated a volume-related composite price index (VRCPI) which was used to forecast changes in the railroads' expenses associated with the transportation of regulated grain, including, among other components, leased hopper cars. Under this new regime, the quadrennial costing reviews were eliminated, with the consequence that operating efficiencies accrued to the benefit of the railway companies. Subsequently, the Agency set the MRS over the period from 1997 to 2001.

[9] Parliament changed the system, yet again, on August 1, 2000, introducing a regime that allowed the railways to set their own rates, subject to a Maximum Revenue Entitlement (MRE). Under this system the railways were entitled to negotiate and set rates for transporting regulated grain. They were subject to penalty if their revenues from the shipment of that grain exceeded the MRE established by the Agency for that year. The formula for determining a railway's MRE was, and is, set out in section 151(1) of the *Canadian Transportation Act* (*CTA*) which provides:

> 151. (1) A prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the Agency in accordance with the formula
>
> $$[A/B + ((C - D) \times \$0.022)] \times E \times F$$
>
> where
>
> A is the company's revenues for the movement of grain in the base year;
>
> B is the number of tonnes of grain involved in the company's movement of grain in the base year;
>
> C is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;
>
> D is the number of miles of the company's average length of haul for the movement of grain in the base year;
>
> E is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency; and
>
> F is the volume-related composite price index as determined by the Agency.

[10] The VRCPI ("F" in the above formula) is essentially an inflation index set by the Agency. It is important to observe that the formula does not contemplate the Agency embarking upon an examination of actual costs for any component of service. Rather, an inflation allowance is applied

to certain historical costs, which essentially yields the benefit of operating efficiencies to the railway companies. It follows that the railways bore the risk if costs exceeded the projected inflation.

[11] The current MRE regime was described by Rothstein J.A. (as he then was) in *Canadian Pacific Railway v Canada Transportation Agency*, 2003 FCA 271, at para 2:

> Under this new form of regulation, the Canadian Transportation Agency (Agency) determines the maximum revenue entitlement (revenue cap) for each railway company for each year ending July 31 (crop year) according to a formula set out in the *Canada Transportation Act*, S.C. 1996, c. 10 (as amended by S.C. 2000, c. 16). If a railway company's revenues for the movement of western grain for the crop year exceed the company's revenue cap for that year, the company is required to pay out the excess together with applicable penalties pursuant to the *Railway Company Pay Out of Excess Revenue for the Movement of Grain Regulations*, SOR/2001-207 of June 7, 2001.

[12] Rothstein J.A. observed further, at para 27:

> Determining whether demurrage revenues are reasonable is an entirely different function. That function would require the Agency to engage in a broad assessment of whether demurrage charges or increases in demurrage charges can be justified by market and/or railway cost considerations and the effect on shippers and consignees. That type of intensive freight rate regulation is no longer applicable under current railway legislation. Even in the case of the movement of western grain by rail, where regulation is more pervasive than for other commodities or regions, *the regulation of a railway company's revenues is not based on reasonableness but rather on application of a formula taking into account changes from base year figures in volume, length of haul and relevant inflation*.
>
> [emphasis added]

B. The hopper cars

[13] As mentioned above, one of the costs that became embedded in the determinations applicable under both the MRS and the MRE regimes was the cost of hopper car maintenance. As early as 1972 the Canadian Government had been acquiring hopper cars and supplying them to the railways under a variety of agreements for use in transporting grain. Under these agreements, the railways had assumed responsibility for maintaining the hopper cars. When the Canadian Government developed the MRS and MRE regimes, these maintenance costs became a fixed cost that was subject to adjustment for inflation under the VRCPI.

[14] These fixed costs for hopper car maintenance became a subject of some debate and speculation in the late 1990's, but it was not until the Canadian Government proposed disposing of

its hopper car fleet to the Farmer Rail Car Coalition in 2004 that steps were taken to ascertain the actual cost of maintaining the hopper cars. Studies by the Agency in 2004 and 2005 indicated that the embedded cost, as annually adjusted, substantially exceeded the actual cost.

[15] In 2006, the Canadian Government decided not to sell the hopper car fleet. However, in recognition the disparity between the embedded and actual maintenance costs, the Government determined that an adjustment was required. In 2007 Parliament passed Bill C-11, entitled *An Act to Amend the Canada Transportation Act and the Railways Safety Act and to Make Consequential Amendments to Other Acts*, 1st Sess, 29th Parl, assented to 22 June, 2007. Clause 57 of the Bill provided:

> Despite subsection 151(5) of the *Canada Transportation Act*, the Canadian Transportation Agency shall, once only, on request of the Minister of Transport and on the date set by the Agency, adjust the volume-related composite price index to reflect the costs incurred by the prescribed railway companies, as defined in section 147 of the Act, for the maintenance of hopper cars used for the movement of grain, as defined in section 147 of that Act.

[16] The Agency subsequently carried out an investigation, which involved consulting with many organizations, and on February 19, 2009 released Decision No. 67-R-2008 (the "Hopper Car Decision"). The Agency estimated that during the first seven years under the MRE regime, starting with the 2000-2001 crop year, the legislative formula set out in section 151(1) permitted the railway companies to recover at least $300 million more than they had actually spent on hopper car maintenance. The Agency confirmed that this difference arose because the statutory formula for calculating the MRE embedded historical maintenance costs at a time when the railways were experiencing substantial cost reductions in hopper car maintenance due to operating efficiencies.

[17] As the Agency was empowered to make a one-time only adjustment to the VRCPI, it did so, providing a reduction, on average, of $2.59 per tonne of grain shipped in the 2007-2008 class year. The Hopper Car Decision was upheld by the Federal Court of Appeal: *Canadian National Railway v Canadian Transportation Agency*, 2008 FCA 363. Ryer J.A., on behalf of the Court, summarized the purpose and effect of clause 57, as follows, at para 3:

> Clause 57 provides for an adjustment to the volume-related composite price index (the "VRCPI"), an important component of the formula that provides a "revenue cap" *on the revenues that Canadian National Railway Company ("CN") and Canadian Pacific Railway Company ("CP") are permitted to earn from the transportation of western grain*. The mandated adjustment is narrowly focused on a single component of the VRCPI, costs incurred by CN and CP for the maintenance of hopper cars used in the transportation of western grain.
>
> [emphasis added]

[18] This adjustment did not claw back any amounts which the statutory formula had allowed the railway companies to recover, based upon the historic embedded costs which were derived in the quadrennial costing review that occurred in 1992 when the *Western Grain Transportation Act* had been in effect.

[19] The Agency's conclusions about the fixed and actual costs of hopper car maintenance, found in the Hopper Car Decision, are the basis of the appellant's proposed class action. But the appellant is seeking, through the remedy of unjust enrichment, to do what the legislation did not do, which is to recover on behalf of western grain producers the differential, arising in the years before the adjustment, between the actual costs of hopper car maintenance and the rates charged for that purpose, based upon the application of the statutory formula embedding historic costs.

III. Chambers Judge's Decision

A. Certification

[20] The chambers judge started her analysis by dealing with the appellant's certification application. The first issue was whether the pleadings disclosed a cause of action within the meaning of section 5 of the *Class Proceedings Act*, SA 2003, c C-16.5. It was the appellant's submission that section 5 of the *CTA* created a duty to transport grain at the lowest possible cost so that the railways were obliged to charge rates based upon the actual cost of service.

[21] The judge did not accept this argument. She pointed out that section 5 was a "purpose statement" setting out the objectives of Canada's National Transportation Policy. As such, the section did "not establish a specific duty on the part of the Railways to charge rates below those mandated by the Agency to reflect decreasing HCMC" (hopper car maintenance costs) (para 63). Rather, in her view, the freight rates were wholly governed by the legislative provisions. She stated, at para 66:

> The *CTA* is a comprehensive legislative regime under which the Agency is empowered to make certain determinations in regard to freight rates in accordance with the broad objectives set out in the National Transportation Policy. The regulatory regime effectively supplants any common law obligation on the part of Railways with regard to freight rates, and replaces it with an arrangement whereby the determination of appropriate maximum rates and railway revenues has been made by Parliament and the Agency.

[22] She concluded that "the rates charged and revenues earned by the Railways were specifically allowed by Parliament and the Agency" (para 67), which provided a juristic reason barring any claim for restitution for unjust enrichment. Thus, it was plain and obvious the appellant had not pleaded a viable cause of action. The chambers judge found, as well, that if the appellant's action became a class action, individual considerations would overwhelm common ones, and that certification should also be denied on this basis.

B. Summary judgment dismissing the claim

[23] The chambers judge turned to the respondents' claim for summary dismissal. She found there were no material facts in dispute requiring a trial. She also found that the legal issue raised by the claim involved the interpretation of the legislative scheme set out in the *CTA*, and that no additional evidence was needed to evaluate the merits of the claim: *Tottrup v Clearwater (Municipal District No. 99)*, 2006 ABCA 380 at para 11. When she turned to the statute, she found that the "legislated arithmetic" underlying the maximum rate scales, and subsequently the maximum revenue requirements, as well as the legislation allowing a one-time adjustment to the VRCPI, would largely be rendered "meaningless" if the interpretation put forward by the appellant were adopted (paras 123-4). Thus, she found there was no merit to the claim within the meaning of *Rule* 7.3(1)(b) of the *Alberta Rules of Court*.

[24] Additionally, the chambers judge held that the appellant's individual claim was statute barred pursuant to section 3 of the Alberta *Limitations Act*, RSA 2000, c L-12.

IV. Analysis

[25] The appellant advances three grounds of appeal which challenge the chambers judge's conclusions on certification and summary dismissal. In our view, however, while the tests for determining whether there is a cause of action for purposes of certification and summary judgment dismissing a claim are somewhat different, both tests require the court in this case to interpret the same sections of the *CTA*. As the reasons which the chambers judge gave for denying certification, and granting summary dismissal, are based upon this statutory interpretation, the result is the same applying either test.

[26] The test of whether the pleadings disclose a cause of action to meet the certification requirement is not stringent. This requirement will be met, unless it is plain and obvious, assuming the truth of the facts as pleaded, that the plaintiff's claim cannot succeed: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 63. This was the test applied by the chambers judge (para 56).

[27] The test for summary judgment was stated by the Supreme Court of Canada in *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 SCR 423 at para 27, 178 DLR (4th) 1:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court.

[28] In *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372, it was observed that the summary judgment rule serves an important purpose in the civil litigation system by preventing claims which have no chance of success from proceeding to trial.

[29] The appellant submits that "evidentiary controversy" precludes summary dismissal at this stage of the proceedings because there are material facts in dispute. We agree with the chambers judge, however, that the central controversy is with respect to the interpretation of the *CTA*, and not with respect to any contested material facts. The process of discovery is not of assistance in determining the meaning and intent of the statutory provisions. Thus, there are no genuine issues of material fact which require trial. In such a case, the question becomes whether the issue can fairly be decided on the record before the court. In *Tottrup*, this Court stated, at para 11:

> There are, however, other types of summary judgment applications. In some cases the facts are clear and undisputed. The ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full trial to provide a proper foundation for the decision. In other case it is possible to decide the question of law summarily...

[30] We agree with the chambers judge that the *CTA* can be interpreted, to the extent necessary, on the record before the Court, so that summary dismissal is available and appropriate to grant if it is determined that the plaintiff has no chance of success. We turn, therefore, to whether she correctly interpreted the *CTA*.

[31] The appellant argued in the court below that the railways had an obligation to charge reasonable rates, based upon actual costs, and that this duty could be found in section 5 of the *CTA*. The appellant's proposed amended claim states that "Parliament intended" that the railway companies "would pass on or share" the reductions in hopper car maintenance costs "to or with the class members", and that the respondents had a statutory duty to do so. The chambers judge rejected this argument, however, finding that the *CTA* constitutes a complete code with respect to the transportation of regulated grain. As a consequence, she held that "the regulatory regime effectively supplants any common law obligation on the part of Railways with regard to freight rates" (para 66).

[32] Having encountered this roadblock in the court below, the appellant took a different approach before us, arguing that the duty to charge reasonable rates is a common law duty that coexists with the legislation. He cited the judgment of the Supreme Court in *Ottawa Electric Railway v Nepean (Township)* (1920), 60 SCR 16, for the proposition that the common law imposes a duty to charge fair and reasonable rates, and further, that such a duty can exist alongside a regulatory regime which prescribes either maximum rates or maximum revenues. The appellant also cited *Canadian National Railway v Neptune Bulk Terminals (Canada) Ltd.*, 2006 BCSC 1073, [2007] 2 WWR 623, which recognizes that the legislation governing railways is not a complete codification of the law, as many common law rules remain applicable. Specifically,

Wedge J. stated in that case that "the CTA continues to impose on railway companies such as CN certain duties often referred to as 'common carrier obligations'" (para 92).

[33] The railways replied to this argument by pointing out that it was not made before the chambers judge, with the result that the appellant is precluded from advancing this new argument on appeal. We note that the Statement of Claim has already been amended a number of times and that the further Amended Proposed Statement of Claim before the chambers judge (ARD, 74-78) does not refer to a common law duty. It appears, therefore, that a further amendment may be required if the action is permitted to continue. Nevertheless, we have chosen to deal with the appellant's most recent submission on its merits.

[34] *Ottawa Electric* dealt with statutory powers to control and disallow any proposed tariff of rates under section 323 of the then *Railway Act* (para 19). However, it appears that at least some of the judges accepted that there was also power in the common law courts over rates charged by a common carrier (para 20 per Sir Louis Davies, C.J., and para 69 per Idington J.). It was held by a majority in that case that the statutory power could be exercised to control rates, notwithstanding that a tariff maximum existed in that instance.

[35] The appellant contends, therefore, that Parliament, in enacting legislation which imposed maximum rate scales, and subsequently maximum revenue entitlements, did not intend to thwart the common law requirement that the rates set by a common carrier be fair and reasonable. He acknowledges that maximum rate scales and maximum revenue requirements provide customers with a measure of protection, but argues that such protection is not exhaustive. He submits, in other words, that even if the rates charged by the railroads did not exceed the maximum rate scales, nor yield the maximum revenue requirement, the rates still remained subject to the requirement that they be fair and reasonable. He submits, further, that the hopper car decision established that the railways collected hundreds of millions of dollars for hopper car maintenance beyond their actual expenditures, which demonstrates that the rates throughout the period were unjust and unreasonable.

[36] There are two difficulties with this argument. The first is that it appears to be founded on the proposition that a single component of costs, namely the cost of hopper car maintenance, will define whether freight rates were fair and reasonable. Any number of factors, however, could go into such a determination, and much more would be required to demonstrate that the rates were unfair or unreasonable. Furthermore, there is no direct correlation between the claim for the "overstated" maintenance costs and any amount of excessive earnings due to rates being determined to be unfair and unreasonable. It would seem that something in the nature of a rate hearing, which would examine the costs, as well as other determinations of fair and reasonable rates, would be required. It also seems unlikely that Parliament intended that such a task would be left to the courts where freight rate regulation has for many decades been delegated to a specialized body.

[37] The second difficulty with the appellant's argument is more profound and relates to the far-reaching nature of the statutory scheme set out in the *CTA*. We note, in starting our analysis of

this issue, that the class period described in the appellant's claim is August 1, 1995 to July 31, 2007. However, it appears to be accepted by the appellant that limitations legislation precludes asserting a claim for any period beyond 10 years from the date of issuance of the Statement of Claim. Thus, for all practical purposes, the relevant time frame for examining whether the legislation constitutes a complete code is during the regime when the maximum revenue requirement was in force, which commenced as of August 1, 2000.

[38] As the issue of whether the *CTA* has ousted any common law in relation to freight rates is one of statutory interpretation, it is useful to begin by referring to the governing principles in this area. The first is that legislation is paramount, so that if it clearly expresses an intention to override or displace the common law, this effect must be given to the statute. The following passages from Ruth Sullivan's *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) are apposite:

> **Adequacy of the legislation.** Arguably the most important factor in determining the relationship between legislation and the common law is the court's sense of what is needed to ensure a coherent and effective operation of the law. (at 433)
>
> In interpreting a code, concern for the internal coherence of the statute takes precedence over the presumption against changing the common law. (at 439)
>
> **Legislation offers comprehensive scheme.** Resort to the common law is considered inappropriate when the legislation to be applied is broad and detailed enough to offer a comprehensive regulation of the mater in question. This is not to say that the Act as a whole necessarily amounts to a comprehensive code, but rather that the matter in question is dealt with by the legislature in a comprehensive fashion. It could be dealt with in part of a statute, in more than one statute, or in statute law supplemented by regulation. In so far as the legislation is comprehensive, it displaces the common law. (at 442)

[39] The chambers judge considered the relevant provisions of the *CTA* in the context of the history of regulated grain freight rates at paras 7 – 30 of her Reasons. We note that no issue is taken on this appeal with her historical analysis. Interpreting the *CTA* in the context of this history, she found that the legislation underlying the maximum rate scales, the maximum revenue "entitlements," as well as the legislation allowing a one-time adjustment to the VRCPI, would largely be rendered "meaningless" (para 123) if the construction put forward by the appellant were adopted.

[40] We agree. In our view, there would be no reason to set maximum rate scales, and later maximum revenue entitlements, if the railway companies were not entitled to charge the maximum rates, or recover the maximum revenue entitlement, as calculated and administered by the Agency in accordance with the provisions of the *CTA*. Furthermore, calculating both the MRS and the MRE involved, and continues to involve, the application of complex statutory formulas which depart from the cost based measurements under the *Western Grain Transportation Act*.

Finally, there would have been no need to make a one-time adjustment to the VRCPI in which the hopper car maintenance costs were imbedded, if the railways were already obliged to "pass on the share" of the reduction in maintenance costs, achieved by operating efficiencies, to shippers by reason of common law obligations.

[41] In our view, therefore, it is implicit in the legislated formulas set out in the *CTA* that the railways were entitled to set maximum rate scales, and later to recover maximum revenue entitlement, in accordance with the formulas monitored and enforced by the Agency, without having to determine whether the rates were fair and reasonable at common law, assuming, but without deciding, that such common law obligation existed and generally applied to freight rates in Canada. The internal coherence of the governing statute requires no less. We find it inconceivable that Parliament enacted legislation containing complex formulas for calculating rates and revenues, and then delegated authority for enforcement to a specialized body with expertise in matters of transportation, with the parallel intention that the common law courts would also be left with the task of determining whether the rates charged by the railways under that regulatory scheme were ultimately fair and reasonable. The role of the Agency would be undermined and the courts would be left with a task for which they are ill equipped.

[42] Nor is this an instance where the common law can comfortably exist to supplement and support the statutory regime. Here, where the regulation is with respect to freight rates, it is comprehensive and exhaustive. In *Gladstone v Canada (Attorney General)*, 2005 SCC 21, [2005] 1 SCR 325, the Supreme Court dealt with an analogous situation. The *Fisheries Act*, under the heading "Disposition of Things Seized" set out provisions with respect to the disposition and return of seized goods. The sections did no provide for the payment of interest on proceeds held by the court. The respondent sought to rely on the doctrine of unjust enrichment to supplement the statute. Major J. on behalf of the court stated in disposing of the appeal, at para 12:

> ... I agree with the trial judge's conclusion that the *Fisheries Act* creates a complete code dealing with the disposition and return of seized property. This code imposes no obligation on the Crown to pay interest or any other amount in addition to what is set out in s. 73.1. The plain meaning of this statutory provision is clear. This may seem unfair given that the proceeds in the case at bar were held for a number of years. If so, it is for Parliament to correct it. The circumstances outlined above occurred simply through the operation of the Act. The comprehensive nature of this statutory regime is not diminished by the fact that the proceeds are to be paid to the Receiver General. This simply directs where the funds are to be paid. It does not add to nor detract from s. 73.1 which governs what is to be returned if not properly forfeited.

[43] In this case we are dealing with hopper car maintenance costs. For better or for worse, Parliament dealt with these costs by imbedding them in a legislative formula. When it became apparent that the embedded costs in the statutory formula did not reflect the railways' actual costs, because of increased operational efficiencies, Parliament addressed the issue by legislating a

one-time adjustment to the VRCPI. It did not legislate a claw-back. To suggest that a claim for unjust enrichment exists on these facts, due to an un-extinguished common law right, would run contrary to the obvious intention of Parliament.

[44] It must be remembered that the appellant does not allege that the railroad companies broke the law, or that the rates they set did not comply with the legislation. Indeed, section 119(2) of the *Act* states specifically that if a railway company issues and publishes a tariff of rates in compliance with Division VI (Transportation of Western Grain) "the rates are the lawful rates of the railway company." Thus, when read in the context of the whole of the legislation, a lawful rate fixed in accordance with the legislation precludes a finding of unjust enrichment. The lawful rates are a juristic reason to allow the alleged enrichment.

[45] In reaching our conclusion, we have not overlooked the appellant's submission that the tariffs set by the railway companies pursuant to Division VI (Transportation of Western Grain) are subject to Division IV (Rates, Tariffs and Services). In this regard, section 148 of the *Act* states: "The provisions of Division IV apply, with such modifications as the circumstances require, to tariffs and rates under this Division to the extent that those provisions are not inconsistent with this Division."

[46] The appellant points to section 112, which provides that a rate "established by the Agency under this Division must be commercially fair and reasonable to all parties." Here, the rates are neither established by the Agency, nor under Division VI. The railroad companies have freedom to set their own rates, subject to the maximum revenue requirements, including the right to negotiate rates with shippers. If a shipper and a railroad cannot agree on rates, they may ask the Agency to mediate their disagreement or submit the matter to the Agency for final offer arbitration.

[47] In summary, we agree with the chambers judge's conclusion that the governing regulatory regimes, during the proposed class period, constitute a comprehensive code of regulation which displaces any common law obligations that might have existed previously. This means that the railways were not subject to a common law duty to charge fair and reasonable rates, and that a juristic reason exists to justify the retention of the disputed maintenance costs which form the basis of the appellant's claim in unjust enrichment. It follows that the plaintiff's claim cannot succeed and that the chambers judge's decision granting summary judgment dismissing the claim must be upheld. Although perhaps redundant, we also agree with her decision to deny certification on the basis that it was plain and obvious that the Statement of Claim did not disclose a cause of action within the meaning of section 5 of the *Class Proceedings Act*.

[48] These conclusions are dispositive of the appeal. We therefore do not need to deal with any remaining collateral issues.

V. Conclusion

[49] The appeal is dismissed.

Appeal heard on September 10, 2013

Memorandum filed at Calgary, Alberta
this 20th day of December, 2013

O'Brien J.A.

Martin J.A.

O'Ferrall J.A.

Appearances:

E.F. Anthony Merchant, Q.C.
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for the Appellant

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V. Monar-Enweani
for the Respondents

TAB 9

See paras. 32-33.

2011 SCC 64
Supreme Court of Canada

Droit de la famille - 091889

2011 CarswellQue 13698, 2011 CarswellQue 13699, 2011 SCC 64, [2011] 3 S.C.R. 775, [2011] A.C.S. No. 64, [2011] S.C.J. No. 64, [2012] W.D.F.L. 610, 208 A.C.W.S. (3d) 561, 339 D.L.R. (4th) 624, 424 N.R. 341, 6 R.F.L. (7th) 1

L.M.P. (Appellant) and L.S. (Respondent) and Women's Legal Education and Action Fund and DisAbled Women's Network Canada (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Abella, Rothstein, Cromwell JJ.

Heard: April 20, 2011
Judgment: December 21, 2011 *
Docket: 33749

Proceedings: reversed *Droit de la famille - 10897* (2010), 2010 CarswellQue 3636, 2010 QCCA 793, 2010 CarswellQue 15612, [2010] R.D.F. 235, Hilton J.C.A., Morissette J.C.A., Rochon J.C.A. (C.A. Que.); varied *Droit de la famille - 091889* (2009), 2009 QCCS 3389, 2009 CarswellQue 7646, Courteau J.C.S. (C.S. Que.)

Counsel: Miriam Grassby, Sylvie Leduc, for Appellant
Donald Devine, Tamar Ajamian, for Respondent
Anne-France Goldwater, Robert Leckey, for Interveners

***Abella, Rothstein JJ.*:**

Introduction

1 This appeal concerns a cross-application by L.S. to vary a court order dated May 13, 2003 requiring him to pay spousal support to his former wife, L.M.P. The question before us is how to approach an application for variation of a spousal support order under s. 17(4.1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), where the support terms of an agreement have been incorporated into the order. It also requires us to consider if the approach differs from initial applications for spousal support under s. 15.2.

2 The wife asks this Court to overturn the decision of the trial court and Quebec Court of Appeal, which had varied the amount of support in the original 2003 order and held that the husband's support obligations would cease as of August 31, 2010. The trial and appeal courts accepted the husband's argument that spousal support should be terminated because the wife is capable of working and has an obligation to become self-sufficient.

3 For the reasons that follow, we would allow the appeal. We agree with the wife that there has been no material change of circumstance since the order was made and that there was therefore no basis on which to vary it under s. 17(4.1) of the *Divorce Act*.

Background

4 Shortly after the parties married in 1988, the wife learned that she had multiple sclerosis. The husband was at all times aware of her condition, both during and after their marriage. The wife has not worked since her diagnosis, and has been receiving permanent disability benefits from her former employer's health insurance plan. Throughout the marriage the husband pursued his career outside the home, while the wife looked after the household and children. The parties separated in April 2002 and were divorced on May 13, 2003.

5 On April 30, 2003, the parties entered into a "Consent to Judgment on Provisional Measures and Accessory Measures". Each was represented by counsel when they entered into this comprehensive agreement dealing with the issues arising from their separation. The order dated May 13, 2003 incorporated the agreement. Among its terms, the order included a provision for indexed spousal support payable by the husband to the wife in the initial amount of $3,688 per month.

6 The preamble to the order states that the parties took into account the criteria set out in s. 15.2(4) of the *Divorce Act* and those set out in s. 15.2(6). The order does not specify a termination date for the payment of spousal support, nor does it make any reference to the wife seeking employment.

Judicial History

7 The present dispute arose in 2007 when the wife applied under s. 17 of the *Divorce Act* to vary the order, seeking a retroactive and prospective increase of child support in accordance with the Quebec Child Support Guidelines. In response, the husband brought a motion to vary, also under s. 17 of the *Divorce Act*, seeking both a reduction and, ultimately, a cancellation of spousal support on the grounds that there was a change in his own financial circumstances. This argument was rejected by the trial judge. The husband also argued that the wife was able to work outside the home and ought to make efforts to find employment. He did not argue that this was a change since the time of the original order, but rather appears to have argued that the wife was always capable of working outside the home, even during the marriage.

8 The trial judge, Courteau J., stated that the task before her was to "determine if [the wife] is able to work outside the home and if she should attempt to do so". Both parties led expert evidence with respect to the wife's ability to work. The wife's expert was of the view that she was unable to work; the husband's expert came to the opposite conclusion. The trial judge found that the experts agreed that "there has been little or no progression of the illness since the initial episodes, 19 years ago". She also concluded that the wife's condition was not as serious as she made it out to be. She was therefore able to work outside the home. The trial judge made no finding about whether this represented a material change of circumstance.

9 Despite the absence of such a finding, the trial judge reduced spousal support from $4,294.48 per month to $3,000 per month from July 23, 2009, until February 28, 2010. A further reduction to $2,000 per month was ordered from March 1, 2010, until August 31, 2010. No spousal support was ordered after that date. The trial judge ordered that if the wife wanted spousal support after that date, she would have the burden of showing the court what efforts she had made to seek employment.

10 The wife appealed, arguing that the trial judge erred in varying spousal support without having found a material change of circumstance as required by s. 17 of the *Divorce Act*. Writing for a unanimous court, Rochon J.A. rejected the wife's appeal and ruled that even if the trial judge had not explicitly mentioned the existence of a material change, her approach respected the requirements of s. 17. He accepted the trial judge's finding that the wife was able to work and concluded that there was no basis for interfering with it.

11 Rochon J.A. also held that the passage of time, accompanied by a failure to become (or to attempt to become) self-sufficient can give rise to a material change of circumstances. The absence of a time limitation in the support agreement incorporated into the order could not relieve the payee of her obligation to become self-sufficient.

12 As a result, a material change of circumstance could be inferred and the trial judge had made no error when she reduced and terminated the spousal support.

13 Even though he dismissed the wife's appeal, Rochon J.A. nonetheless concluded that the trial judge's second reduction in support (to $2,000 per month) should not have been ordered. In his view, a reduction to $3,000 per month until the termination of support on August 31, 2010, was appropriate.

Analysis

14 For sound policy reasons, family law permits and encourages separating spouses to work out their own arrangements through the use of separation agreements (Berend Hovius and Mary-Jo Maur, *Hovius on Family Law: Cases, Notes and*

Materials (7th ed. 2009), at p. 783). Agreements are desirable because individuals should largely be free to order their lives as they wish; because "the parties themselves are in the best position to evaluate the comparative advantages of alternative arrangements"; and because a negotiated settlement avoids the significant personal and financial costs of litigation (Robert H. Mnookin, "Divorce Bargaining: The Limits on Private Ordering" (1985), 18 *U. Mich. J. L. Ref.* 1015, at pp. 1018-19).

15 At the same time, contract law principles are not rigidly applied in the family law context. Because a separation may result in dramatic life changes and emotional stress, Parliament has decided through the *Divorce Act* that these circumstances give rise to the possibility that the ability of separating spouses to realistically and objectively assess their current and future needs and preferences can be impaired. It also goes without saying that the economic terms of spousal support agreements can affect third parties, such as the children of the relationship. For these reasons, the *Divorce Act* authorizes courts to vary the spousal support terms, either on an initial application for support under s. 15.2, or on an application to vary an existing court order under s. 17, whether or not that order incorporates a spousal support agreement.

16 Under the 1968 *Divorce Act*, spousal support agreements, while not immune from variation by the courts, were not easily disturbed. This limited approach found expression in the *Pelech* trilogy which reflected the self-sufficiency and "clean break" theories of spousal support then prevailing, emphasized finality and certainty, and required that there be a radical change in circumstances that is causally connected to the marriage before the terms of an agreement could be varied (*Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), *Richardson v. Richardson*, [1987] 1 S.C.R. 857 (S.C.C.) and *Caron v. Caron*, [1987] 1 S.C.R. 892 (S.C.C.)).

17 The replacement of the 1968 legislation with the 1985 *Divorce Act* led this Court in *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), to reject the clean break theory of support that underlay the decisions in the *Pelech* trilogy. This revised conceptual framework for support led this Court in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303 (S.C.C.), to reject the narrow *Pelech* standard of allowing a variation from a spousal support agreement only in circumstances where a radical change connected to the marriage could be shown.

18 Bastarache and Arbour JJ., for the majority in *Miglin*, acknowledged the importance of taking a fairly negotiated agreement into account:

> ...we believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the *Divorce Act* as a whole should receive considerable weight. [para. 4]

But they adopted a less exacting threshold for when courts could vary spousal support agreements in an initial application for support under s. 15.2 than had prevailed under the *Pelech* trilogy, concluding that its strict standard was no longer applicable and was "not appropriate in the current statutory context" (paras. 47 and 89). The new test they delineated required instead that the applicant "clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act" (para. 88).

19 Significantly, the Court also concluded that "the importance given to selfsufficiency and a 'clean break' in the jurisprudence relying on the [*Pelech*] trilogy is not only incompatible with the new Act, but too often fails to accord with the realities faced by many divorcing couples" (para. 39). The *Divorce Act*, they therefore concluded, creates a statutory override in s. 15.2 which authorizes courts to make an initial order which may be at odds with the terms of the agreement if those terms do not comply with the objectives of the Act.

20 In order to balance the parties' intentions with the objectives of the *Divorce Act*, the Court in *Miglin* outlined a two-stage test for initial support orders under s. 15.2. The first step examines the process leading to and the substance of the agreement. The second requires a determination of "the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act" (para. 87). This addresses the direction in s. 15.2(4)(*c*) of the *Divorce Act* that on an *initial* application for support, among other factors, a court shall consider "any order, agreement or arrangement relating to support of either spouse".

Section 17 Variation

21 This brings us to the role of such agreements under s. 17 of the Act. Unlike the question that confronted the Court in *Miglin*, this appeal concerns an application under s. 17 of the *Divorce Act* to vary an existing spousal support order where there had been a spousal support agreement prior to the section 15.2 order. Section 17 authorizes a court to vary, rescind or suspend prior orders (s. 17(1)), defines the factors allowing for variation (s. 17(4.1)) and sets out the objectives such a variation should serve (s. 17(7)). These provisions state:

> **17.** (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> . . . . .
>
> (4.1) [Factors for spousal support order] Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.
>
> . . . . .
>
> (7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic selfsufficiency of each former spouse within a reasonable period of time.

22 While the *objectives* of the variation order are virtually identical in s. 17 to those in s. 15.2 dealing with an initial support order, the *factors* to be considered in ss. 17(4.1) and 15.2(4) are significantly different. Section 17(4.1) sets out "a change in the ... circumstances" of the parties as the sole factor. On initial support orders, on the other hand, the factors are as follows:

> **15.2** ... (4) In making an order under subsection (1) [for spousal support] or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

23 In other words, there are differences between what a court is directed to consider in making an initial support order and on a variation of that order. Notably, unlike on an initial application for spousal support under s. 15.2(4)(*c*), which specifically directs that a court consider "any order, agreement or arrangement relating to support of either spouse", s. 17(4.1) makes no reference to agreements and simply requires that a court be satisfied "that a change in the condition, means, needs or other circumstances of either former spouse has occurred" since the making of the prior order or the last variation of that order. Because of these differences in language, it is important to keep the s. 15.2 and s. 17 analyses distinct.

24 On an application under section 15.2, the court is expressly concerned with the extent to which the terms of an existing agreement should be incorporated into a first court order for support. On an application under s. 17, on the other hand, the court must determine whether to vary or rescind that support order because of a change in the parties' circumstances.

25 Contrary to what our colleague Cromwell J. suggests, the majority in *Miglin* recognized that the different language employed by Parliament in ss. 15.2 and 17 required a different approach to initial and variation applications. At para. 61 Bastarache and Arbour JJ. state:

> We disagree... with [the] importation of the "material change" test developed for s. 17 of the Act (see *Willick*, *supra*) into s. 15.2 in respect of pre-existing agreements. As we noted earlier, the statutory language simply does not support this. Whereas s. 17 of the Act directs the court to satisfy itself that a change has occurred, s. 15.2 respecting initial support applications does not. Rather, s. 15.2(4) requires the court to consider the length of cohabitation, the roles of the parties during the marriage, and any orders, agreements or arrangements. This explicit direction cannot be avoided, cast, as it is, in mandatory language.

26 We recognize that some confusion has arisen with respect to the treatment of support agreements under s. 17 based on the majority's suggestion at para. 91 of *Miglin* in *obiter* that

> it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17.

27 In our respectful view, the reference to consistency between orders under ss. 15.2 and 17 referred to at para. 91 of *Miglin* is best understood by the explanation given at para. 62 of *Miglin*:

> As we shall explain below, consistency between treatment of consensual agreements incorporated into orders and those that are not is achieved another way. It is achieved when judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order.

Where the parties entered into a mutually acceptable agreement, the agreement is not ignored under either s. 15.2 or s. 17. However, its treatment will be different because of the different purposes of each provision.

28 The approach developed in *Miglin*, then, was responsive to the specific statutory directions of s. 15.2 of the *Divorce Act* and should not be imported into the analysis under s. 17.

A. The Threshold for Variation

29 In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1). A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse *since the making of the spousal support order*.

30 In our view, the proper approach under s. 17 to the variation of existing orders is found in *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), and *B. (G.) c. G. (L.)*, [1995] 3 S.C.R. 370 (S.C.C.). Like the order at issue in this case, *Willick* (dealing with child support) and *G. (L.)* (dealing with spousal support) involved court orders which had incorporated provisions of separation agreements. Both cases were decided under s. 17(4) of the *Divorce Act*, the predecessor provision to s. 17(4.1).

31 *Willick* described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.

32 That "change of circumstances", the majority of the Court concluded in *Willick*, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). *G. (L.)* confirmed that this threshold also applied to spousal support variations.

33 The focus of the analysis is on the prior order and the circumstances in which it was made. *Willick* clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the *Willick* approach to variation applications requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement.

34 The decisions in *Willick* and *G. (L.)* also make it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.

35 In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40 (Ont. C.A.), at para. 49). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see MacPherson J.A., dissenting in part, in *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385 (Ont. C.A.), at paras. 54 and 63).

36 The threshold variation question is the same whether or not a spousal support order incorporates an agreement: Has a material change of circumstances occurred since the making of the order? (See *Willick*; *G. (L.)*; *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 (S.C.C.).)

37 This does not mean that the incorporated agreement is irrelevant. As Sopinka J. observed in *Willick*, "[W]here... the agreement is embodied in the judgment of the court, it is necessary to consider what additional effect is to be accorded to this fact" (p. 687).

38 The agreement may address future circumstances and predetermine who will bear the risk of any changes that might occur. And it may well specifically provide that a contemplated future event will or will not amount to a material change.

39 Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the *Willick* question may well be found in the terms of the order itself. That is, the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the *Willick* inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the *Divorce Act* when the order was made.

40 Alternatively, an agreement incorporated into an order may include a general provision stating that it is subject to variation upon a material change of circumstances, such as the agreement and subsequent order in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.). In such a case, the agreement incorporated into the s. 15.2 order does not expressly give the court any additional information as to whether a particular change would have resulted in different terms if known at the time of that order. The presence of such a provision will require a court to examine the terms of the s. 15.2 order and the circumstances of the parties at the time that order was entered into to determine what amounts to a material change.

41 Finally, an agreement incorporated into a s. 15.2 order may simply include a general term providing that it is final, or finality may be necessarily implied. But even where an agreement incorporated into an order includes a term providing that it is final, the court's jurisdiction under s. 17 cannot be ousted (*Miglin*; *G. (L.)*; *Leskun*). A provision indicating that the order is final merely states the obvious: the order of the court is final *subject to* s. 17 of the *Divorce Act*. Courts will always apply the *Willick* inquiry to determine if a material change of circumstances exists.

42 Ultimately, courts are tasked with determining if a material change of circumstances has occurred so as to justify a variation of a s. 15.2 order under s. 17. The analysis is always grounded in the actual circumstances of the parties and the terms of the s. 15.2 order; what meaning a court will give any general statement of finality found in an order will be a question to be resolved on that basis. As we have explained, in some situations, the agreement incorporated into the order may help shape what is meant by a "material change of circumstances". Where a s. 15.2 order deals with a specific change, it assists courts by answering the *Willick* inquiry through its terms. Conversely, when the order is general, or simply purports to be final, these less specific terms provide less assistance to courts in answering the *Willick* inquiry. Sometimes, in such cases, the circumstances of the parties may be such that courts will give little weight to a general statement of finality and conclude that a material change exists. However, at other times, in such cases, the circumstances of the parties may also be such that the courts will give effect to a general statement of finality and conclude that a material change does not exist.

43 An example is the simple case of a young couple who were only married a few months and who ended their marriage on essentially equal terms. A general statement of finality in an agreement incorporated into an order, coupled with these circumstances, should be given weight by a court conducting the *Willick* inquiry.

44 In sum, it bears repeating that the threshold question under s. 17, whether or not there is an agreement, is the one Sopinka J. described in *Willick*, namely:

> In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation. [p. 688]

45 In Justice Cromwell's opinion, however, "the parties' agreement must be accorded significant weight at the variation stage" because it "is critical evidence of what they actually or ought reasonably to be taken to have contemplated at the time" paras. 76 and 83). With respect, the general proposition that spousal support agreements should be accorded "significant weight" in the search for a material change under s. 17 is problematic. As explained earlier, while a term stating that a specific type of change will — or will not — give rise to variation will constitute such "evidence" and will inform the court's application of the *Willick* test, an agreement containing only general terms, such as a general statement of finality, provides little guidance in practice on whether or not a particular event or circumstance was contemplated by the parties or on the consequences the parties would have ascribed to it. The court will of necessity interpret any such general provision by reference to the parties' circumstances at the time of the s. 15.2 order. These circumstances may or may not lead the court to conclude that the parties have contemplated the event and, consequently, whether a material change warranting a variation has occurred: the court must find a "change, such that, if known at the time, would likely have resulted in different terms" (*Willick*, at p. 688).

46 The examination of the change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement as for one that does. A general statement that the agreement must be accorded "significant weight", even though its implications in a concrete case are unclear, in effect raises the threshold necessary to establish a "material change" under s. 17 when there is an agreement, and emphasizes legal certainty and finality at the expense of the statutory requirements of s. 17. Such a result is reminiscent of the "clean break" approach of the *Pelech* trilogy, rejected in *Moge* and *Miglin* because it was held to be inappropriate in the context of the current *Divorce Act*.

B. The Appropriate Variation

47 If the s. 17 threshold for variation of a spousal support order has been met, a court must determine what variation to the order needs to be made in light of the change in circumstances. The court then takes into account the material change, and should limit itself to making only the variation justified by that change. As Justice L'Heureux-Dubé, concurring in *Willick*, observed: "A variation under the Act is neither an appeal of the original order nor a *de novo* hearing" (p. 739). As earlier stated, as Bastarache and Arbour JJ. said in *Miglin*, "judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order" (para. 62).

48 Variation involves the application of both s. 17(4.1) and s. 17(7) of the *Divorce Act*. In *Hickey*, L'Heureux-Dubé J. described the interplay between them as follows:

> On an application for variation of an award of spousal support, the court must first find, under s. 17(4), that there has been a material change in the conditions, means, needs, or circumstances of either spouse (see *Moge*, *supra*, at pp. 875-76, and *Walker v. Walker* (1992), 12 B.C.A.C. 137, at pp. 141-42) and in making the order, the court must take into consideration that change. As with the variation of child support orders, this change must be material, and cannot be trivial or insignificant. The factors enumerated give the court considerable discretion in determining whether a variation order is justified: see J. Payne, *Payne on Divorce* (4th ed. 1996), at p. 321. Once this threshold is passed, the court must consider the four objectives of spousal support enumerated in s. 17(7) of the *Divorce Act*. [para. 20]

49 Julien D. Payne and Marilyn A. Payne observed that "[t]here is nothing in the *Divorce Act* to suggest that any one of the objectives [in s. 17(7)] has greater weight or importance than any other objective" (*Canadian Family Law* (3rd ed. 2008), at p. 253). Rather, the objectives "operate in the context of a wide judicial discretion" and "provide opportunities for a more equitable distribution of the economic consequence of divorce between the spouses".

50 In short, once a material change in circumstances has been established, the variation order should "properly reflect[] the objectives set out in s. 17(7),... [take] account of the material changes in circumstances, [and] consider[] the existence of the separation agreement and its terms as a relevant factor" (*Hickey*, at para. 27). A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the *Divorce Act*.

Application to This Case

51 The issue in this case is whether the spousal support order should have been varied under s. 17. In our view, it should not have been.

52 The trial judge conducted a *de novo* hearing on the issue of the wife's ability to work and concluded that the wife was "capable of working outside the home and that she should seek to become economically self-sufficient". She made no finding about whether there had been a material change in the wife's circumstances since the 2003 order was made. The Court of Appeal concluded that the trial judge's factual determination of the wife's capacity to work, coupled with the passage of time, amounted to a material change of circumstances.

53 In light of the circumstances at the time the original order was made, these findings are, with respect, unsustainable. When the order was made, the wife had been living with multiple sclerosis for 14 years. She was receiving disability payments because she was found to be unable to work by the insurance company. Except for the brief period before her diagnosis, she did not work outside the home during the marriage.

54 Not only was the husband fully aware of her medical condition, he made representations, before and after the separation, to her disability insurer, to pension personnel, and to tax authorities that she was unable to work. His explanation for these representations was that he had "embellished" his wife's health problems to the authorities to help ease his financial situation. His changed position at trial, that she can now work, is both unpalatable and unworthy of serious consideration.

55 The expert evidence was that there has been little or no change in the wife's medical condition in 19 years. That means that there has been no improvement. It is, in short, the same as when the order was made. And that in turn means that there has been *no* change, let alone a material one, since the order. This ought to have been dispositive of the husband's application to vary.

56 However, instead of determining whether there had been a material change of circumstances, the trial judge conducted a *de novo* assessment of the wife's ability to work as if this were an original application for support under s. 15.2. In relying on this assessment to infer a material change of circumstances, the Court of Appeal fell into the same error.

57 The husband argued that the wife had a duty to seek employment based on the factors in s. 15.2(6) of the *Divorce Act* which were included in the agreement incorporated in the order. In particular, he relied on the objective that "insofar as practical" there should be "economic self-sufficiency of Plaintiff and Defendant". Her failure to seek employment, he therefore argued, was a material change of circumstances.

58 We do not accept the husband's submissions. There is nothing in the order suggesting that the wife was expected to seek employment. The order recognized that the wife was in receipt of disability payments. It provided for spousal support and included no term or provision for review. Its terms indicate that spousal support was intended to be for an indeterminate period. The order expressly acknowledged that the objectives of s. 15.2(6) of the *Divorce Act* were taken into consideration by the parties.

59 Neither does the *Divorce Act* impose a duty upon ex-spouses to become self-sufficient. As this Court affirmed in *Leskun*, the "[f]ailure to achieve selfsufficiency is not breach of 'a duty' and is simply one factor amongst others to be taken into account" (para. 27). Section 15.2(6)(*d*) of the *Divorce Act* simply states that the order should "in so far as practicable, promote the economic self-sufficiency" of the parties.

60 In sum, upon examination of the actual circumstances of the parties at the time the order was made, and the terms of the order, it is apparent that there has been no material change of circumstances since the making of the order. It cannot be said that the wife's failure to seek employment is something that "if known at the time, would likely have resulted in different terms" to the order. Simply put, at the time of the order, the wife had multiple sclerosis and was not expected to seek employment outside the home; nothing has changed with respect to her medical condition since that time. As a result, the husband's application for variation cannot succeed as he has failed to meet the threshold required by s. 17(4.1).

61 We would therefore allow the appeal with costs throughout. The indexed spousal support in the original order is to continue, effective retroactively to the date it was varied by the trial court.

***Cromwell J.*:**

I. Introduction

62 When the parties have reached a comprehensive, final agreement relating to their separation and its provisions are incorporated into a court order, what weight should be given to their agreement when one of them seeks to vary that order? As I see it, the principles established by the Court in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303 (S.C.C.), require that the agreement be given considerable weight. While I agree with my colleagues Abella and Rothstein JJ. that the appeal should be allowed, I respectfully disagree with their analysis of this question.

63 My colleagues Abella and Rothstein JJ. are of the view that *Miglin* has nothing to do with variation applications, that the analysis of what weight to give the parties' agreement on an initial support application is completely distinct from the analysis of the same issue in relation to a variation application and that, on a variation application, the parties' agreement should be given no special weight unless it specifically addresses the matter relied on as the basis of the change. My view is that the agreement plays a central role in the context of variation of the order and that the principles established in *Miglin* are highly relevant to this exercise.

64 In *Miglin*, the Court set out the proper approach to determining an initial application for spousal support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support. *Miglin*'s central teaching is that "assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular": para. 67. In my view, this same balancing of these values, as assessed in accordance with all the objectives of the Act, lies at the core of the court's task when dealing with an application to vary a support order that incorporates the support provisions of the parties' comprehensive agreement.

II. Analysis

65 It is useful to approach the case by answering the following three questions:

1. What is the threshold for variation under s. 17 of the *Divorce Act*?

2. What is the effect of incorporating the support provisions of a separation agreement into a court order?

3. What is the effect of a separation agreement on an application to vary a spousal support order incorporating its terms?

A. The Threshold for Variation Under Section 17

66 This, I think, is not a controversial matter. Section 17(4.1) of the Act directs that "[b]efore the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order". The Court in *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), which concerned child support, held that what is required is a "material change" of these circumstances. This means "a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter that is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation": *Willick*, at p. 688. This threshold also applies to applications to vary spousal support: *B. (G.) c. G. (L.)*, [1995] 3 S.C.R. 370 (S.C.C.), at p. 403, *per* Sopinka J., and pp. 394-96, *per* L'Heureux-Dubé J.

67 It is thus clear from *Willick* that a matter known at the time of the original order cannot provide the basis of a material change in circumstances. But what about matters that were simply foreseeable at that time? According to L'Heureux-Dubé J. in *G. (L.)*., the question is whether the parties must be taken to have actually contemplated the matter in question; as she put it at para. 51, simple foreseeability does not bar a variation finding under s. 17 because "the fact that a change was *objectively foreseeable* does not necessarily mean that it *was contemplated* by the parties": citing *Willick*, at p. 734 (emphasis added). Thus, changes which the parties actually contemplated or that must have been in the parties' contemplation cannot constitute material changes.

68 There is, in my opinion, no inconsistency between *Miglin* and *Willick*. *Miglin* did not suggest that the "material change" threshold for variation as set out in *Willick* does not apply. *Willick* did not discuss the weight that the parties' agreement should be given on a variation application other than, as we shall see in the next section, by setting out the effect on the variation application of the fact that the parties' agreement had been incorporated into a court order.

B. The Effect of Incorporating the Agreement Into a Court Order

69 Once again, this is not a controversial issue. In *Willick*, the Court addressed this question in relation to a child support order. Once the terms of an agreement are incorporated into a court order, the provision must be assumed to have met the statutory requirements at the time and the correctness of that order is not reviewed during the variation proceeding: p. 687. Thus, the court asked to vary the order assumes that it was an appropriate order at the time it was made and applies the material change threshold on that basis. The same approach is used with respect to variation of spousal support orders: *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C. C.A.), at p. 313; J. D. Payne and M. A. Payne, *Canadian Family Law* (3rd ed. 2008), at p. 298.

C. The Effect of a Comprehensive Agreement Which Has Been Incorporated Into an Order on an Application to Vary the Order

(1) Background: From the Trilogy to Miglin

70 At the time of the *Willick* and *G. (L.)* decisions, the relevant law about how much weight to give to the parties' agreement was set out in a trilogy of cases: *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), *Richardson v. Richardson*, [1987] 1 S.C.R. 857 (S.C.C.) and *Caron v. Caron*, [1987] 1 S.C.R. 892 (S.C.C.). The party wishing to depart from the agreement's terms had to establish that there had been a radical change causally connected to the marriage. This test applied both to initial applications for support (as in *Richardson*) and to variation of court orders incorporating agreements (as in *Pelech* and *Caron*). Neither in *Willick* nor in *G. (L.)*, which came after the triology, did a majority of the Court directly address how agreements affected an application by one of the former spouses to vary a support order incorporating its terms. However, these judgments contain two comments that are particularly relevant here:

> (i) The court has discretion with respect to variation and is not strictly bound by the terms of the parties' agreement: *Willick*, at p. 686, and *G. (L.)*, at para. 58, *per* concurring reasons of L'Heureux-Dubé J.
>
> (ii) However, the agreement is an "important" factor in exercising the discretionary power to vary: *G. (L.)*, at para. 56. This is so even though agreements are expressly included in the factors to be considered on an initial support application (s. 15(5)(*c*) of the *Divorce Act* (now s. 15.2(4)(*c*), S.C. 1997, c. 1, s. 2)) and are not so expressly mentioned in relation to variation applications (s. 17): *G. (L.)*, at paras. 53-55.

71 Since these pronouncements, the legal landscape in relation to initial support applications in the presence of an agreement has changed as a result of the Court's judgment in *Miglin*. The Court held that the narrow test enunciated in the *Pelech* trilogy for interfering with a pre-existing agreement was no longer appropriate in the new statutory context of the provisions of the 1985 Act: para. 47. Nonetheless, *Miglin* affirmed that unimpeachably negotiated agreements should receive considerable weight provided that they represent the intentions and expectations of the parties and substantially comply with the objectives of the *Divorce Act* as a whole. Thus, while the Court concluded that the very stringent test set out in the trilogy was no longer apt under the new statutory provisions, a comprehensive, final agreement was still to be given considerable weight.

72 As held in *Miglin*, an initial application for spousal support inconsistent with a pre-existing agreement requires a two-stage investigation into all the circumstances, first at the time of the agreement's formation and second at the time of the application. At the first stage, the court determines whether the agreement was negotiated under satisfactory conditions and whether its terms, when negotiated, were in substantial compliance with the general objectives of the Act: paras. 80-86. At the second stage, the court assesses whether the agreement continues to reflect the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act. The party seeking an order different than the terms of the agreement must show that there are new circumstances which were not reasonably anticipated by the parties; the test is not "strict foreseeability" but whether the agreement "can be said to have contemplated the situation before the court at the time of the application": para. 89. The alleged change is also measured against the objectives of the Act to ensure that the agreement's provisions continue to be in substantial compliance with those objectives: para. 87.

(2) Miglin and Variation Applications

73 As noted, *Miglin* was an initial application case. The Court recognized that in deciding what weight to give to the parties' agreement on an initial application, the material change threshold does not apply: para. 61. However, the Court's reasons make clear that the parties' agreement is an important consideration on a variation application.

74 The Court outlined how to strike the balance between preserving reasonable certainty in legal relations and recognizing the distinctions between separation agreements and commercial contracts. This balance, *Miglin* held, is struck by ensuring that separation agreements have been fairly negotiated and comply substantially with the statutory objectives. As the Court put it: "... a *fairly negotiated agreement* that represents the intentions and expectations of the parties and *that complies substantially*

with the objectives of the Divorce Act as a whole should receive considerable weight": para. 4 (emphasis added). The Court emphasized that this principle applies equally to a variation application as to an initial application. While my colleagues dismiss these comments in *Miglin* as an *obiter* suggestion, Bastarache and Arbour JJ. for the majority of the Court could not have been clearer:

> It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight. As was noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17. ... The objectives of finality and certainty noted above caution against too broad a discretion in varying an order that the parties have been relying on in arranging their affairs. ... Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties' understanding of what constituted an equitable sharing of the economic consequences of the marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration.
>
> [Emphasis added; para. 91.]

75 This is the considered opinion of a majority of the Court. Moreover, *Miglin* provided considerable assistance in deciding how the passage of time affects the weight to be given to the parties' agreement. The court must assess "the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act": para. 87.

76 In my respectful view, while the two-step *Miglin* analysis cannot simply be imported into variation applications, *Miglin* stands for the proposition that the parties' comprehensive, final agreement must be accorded significant weight at the variation stage, as it is at the initial application stage. In addition, *Miglin* provides considerable guidance about how this ought to be done.

77 I part company with my colleagues Abella and Rothstein JJ. when they state that "it is important to keep the s. 15.2 [initial application] and s. 17 [variation] analyses distinct" and that the approach developed in *Miglin* "should not be imported into the analysis under s. 17": paras. 23 and 28. This leads them, in my view, to give the parties' comprehensive, final agreement far too limited a role on a variation application. That role, in my respectful view, is not properly characterized by saying simply, as my colleagues do, that the agreement is not "irrelevant": para. 37.

78 They base this conclusion on two points: first, the difference in the statutory language between s. 15.2(4)(*c*), which applies to initial applications, and s. 17(4.1), which applies to variations, and second, a close reading of the majority judgment in *Miglin*. I respectfully disagree with both of these points.

79 I turn first to the difference in the statutory language. As my colleagues note, s. 15.2(4)(*c*) (initial applications) requires a court to consider an agreement between the parties but s. 17(4.1) (variation applications) has no express direction to consider agreements. For several reasons, my view is that the absence of an express direction in s. 17(4.1) does not support giving different weight to the parties' agreement in these two situations.

80 The Court's decisions have never attached great importance to the differences between initial applications and variation applications in relation to the role of the parties' agreement in determining support. The approach of the trilogy, we should remember, applied to both situations: see *Richardson*, at pp. 866-67. In *G. (L.)*, L'Heureux-Dubé J. did not attribute any significance to the difference between the language in ss. 15 and 17 in relation to the importance of the parties' agreement with respect to an initial and a variation application:

> Section 17, which governs variation orders, restates for its part the general provisions applicable to a support order without specifically mentioning the obligation to take into account agreements concluded between the parties. One should not conclude, however, that such agreements should be ignored when applications to vary support orders are made, especially when they were intended to be a final settlement, and were ratified by the original support order, an order which must be taken into account. [para. 55]

81 As I have noted earlier, the Court in *Miglin* specifically addressed the issue of whether the difference in statutory language should result in a significantly different weight being given to the agreement on a variation application. The Court concluded that it should not: para. 91, cited above at para. 74. I conclude that consistent and recent authority from this Court is against inferring, as my colleagues do, that the difference in the statutory language supports giving the parties' agreement different weight on an initial application and on a variation application.

82 My colleagues write that the factors to be considered on a variation application and an initial application are "significantly different" (para. 22) and that the differences in language require that the s. 15.2 and the s. 17 analyses be kept distinct. Respectfully, the statutory text does not bear this out.

83 In order to have the authority to vary the earlier order, the "court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order": s. 17(4.1). Section 15.2(4) provides that the "condition, means, needs and other circumstances of each spouse" *includes*, by virtue of s. 15.2(4)(*c*), any agreement or arrangement relating to support of either spouse. But even without that express inclusion, the parties' agreement must fall within the "condition, means, needs or other circumstances" for the purposes of s. 17(4.1). I do not understand how s. 15.2(4)(*c*), by specifically *including* the parties' agreement as one aspect of their "condition, means, needs and other circumstances", can be understood to limit consideration of that agreement as an aspect of their "condition, means, needs or other circumstances" under s. 17(4.1). Moreover, the statutory objectives of the initial and the varied order are virtually identical, as a comparison of s. 15.2(6) and s. 17(7) shows. Respectfully, the "differences in language" between ss. 15.2 and 17 on close examination are very minor and provide no foundation for keeping the analyses under these two provisions "distinct" in relation to the weight to be given to the parties' agreement.

84 Similarly, I do not understand how, as a matter of logic, the parties' comprehensive and final agreement could not be central to considering whether there had been a material change. The *Willick* test is applied on the basis that a change is not material if it was known to the parties or must reasonably be taken as having been contemplated by them. The parties' agreement is critical evidence of what they actually or ought reasonably to be taken to have contemplated at the time.

85 My colleagues further conclude that the majority judgment in *Miglin* was responsive to the specific statutory directions in s. 15.2 and should not be imported into variation analysis under s. 17. I agree that the Court in *Miglin* was clear that the "material change" threshold applicable on a variation does not apply on an initial application. However, as I have set out earlier, the Court was also clear that important weight is to be given to the parties' agreement in *both* situations. The Court noted that it would be inconsistent to do otherwise: para. 91. In any event, I do not understand how in logic the Court's analysis in *Miglin* could *not* be applicable to a s. 17 variation. The very issue discussed in *Miglin*'s second step is how change over time affects the weight to be given to an agreement: paras. 88 and 90. That same consideration is an important issue facing a court on a variation application in relation to an initial order that was the product of an agreement.

86 My colleagues take quite a different approach, proposing that only where an agreement specifically provides for a particular matter will it be of much help in answering the "*Willick* question": para. 39. As for types of changes other than those specifically addressed in the agreement, the fact of the agreement is likely not to be of much assistance on the material change question. To me, this approach is at odds not only with *Miglin*, but also with one of the basic purposes of agreements, namely to apportion the risks of future uncertain events in order to achieve finality and certainty. Giving considerable weight to the parties' comprehensive, final agreement does not, as my colleagues suggest, bring back the "clean break" approach rejected in *Miglin*; it applies the express holding and underlying principles of *Miglin*.

87 The "change" threshold specified in s. 17 does not apply to initial orders; there is no reference to any "change" requirement in s. 15.2. However, this difference in the statutory language provides no basis for my colleagues' conclusion that the weight to be given to the parties' agreements is different on variation applications than on initial applications. My colleagues rely on para. 61 of *Miglin* to support their contention that there must be a "different approach". However, when the whole of para. 61 is considered, it is in my view clear that this paragraph simply rejects the importation of a material change threshold into s. 15.2. Para. 61 of *Miglin* reads:

> We disagree, however, with [the] importation of the "material change" test developed for s. 17 of the Act (see *Willick*, *supra*) into s. 15.2 in respect of pre-existing agreements. As we noted earlier, the statutory language simply does not support this. Whereas s. 17 of the Act directs the court to satisfy itself that a change has occurred, s. 15.2 respecting initial support applications does not. Rather, s. 15.2(4) requires the court to consider the length of cohabitation, the roles of the parties during the marriage, and any orders, agreements or arrangements. This explicit direction cannot be avoided, cast, as it is, in mandatory language.

88 This paragraph, respectfully, has nothing to do with the weight to be given to the parties' agreement when one of them seeks to vary an initial order incorporating that agreement.

89 My colleagues also refer to para. 62 of *Miglin*. But as that paragraph makes explicit, it deals with consistency of treatment as between "consensual agreements incorporated into orders and those that are not". We are here concerned with variation of an order which incorporates an agreement. Paras. 60-62 of *Miglin* have nothing to do with the weight to be given to the parties' agreement in that situation.

(3) Post-Miglin

(a) Brief Overview of the Jurisprudence

90 I turn to the question of how the principles from *Miglin* apply to variation applications. Before setting out what in my opinion is the correct answer to this question, it will be useful to canvass briefly the range of views that have emerged on this issue. Even the brief survey that follows shows that clarification is required.

91 Most courts have concluded that *Miglin* is relevant to applications to vary support orders which incorporate the parties' comprehensive separation agreement. However, the courts have taken different approaches to *how* the *Miglin* analysis is relevant. Some courts have been uncertain as to whether both steps of *Miglin*'s analysis are applicable: see, e.g., *Kehler v. Kehler*, 2003 MBCA 88, 177 Man. R. (2d) 135 (Man. C.A.), at paras. 23-24; *L. (H.) v. L. (M.H.)*, 2003 BCCA 484, 19 B.C.L.R. (4th) 327 (B.C. C.A.), at paras. 19-23. Others have taken the view that *Miglin*'s two-step analysis applies to a variation order, without referring to *Willick*: *Ambler v. Ambler* (2004), 2004 BCCA 492, 5 R.F.L. (6th) 229 (B.C. C.A.), at para. 11; *Spencer v. Spencer*, 2005 SKQB 116, 261 Sask. R. 150 (Sask. Q.B.), at paras. 9-10. Still others have said that both *Willick* and *Miglin*'s two-step analyses apply: *Turpin v. Clark*, 2009 BCCA 530, 4 B.C.L.R. (5th) 48 (B.C. C.A.), at paras. 57-62; *Droit de la famille - 103038*, 2010 QCCA 2074, [2010] R.D.F. 647 (C.A. Que.), at para. 49; see also M. D.-Castelli and D. Goubau, *Le droit de la famille au Québec* (5th ed. 2005), at p. 485; J. Pineau and M. Pratte, *La famille* (2006), at p. 463. Other courts have decided that the approach depends on whether the agreement is a final settlement. If the agreement is a final settlement, both *Miglin* steps apply. If it is not a final settlement, the *Willick* material change test applies: see, e.g., *Templeton v. Templeton*, 2005 ABCA 133, 363 A.R. 392 (Alta. C.A.), at paras. 6-10. Others take the view that the party seeking variation must satisfy both the *Willick* "material change" threshold and the second step in the *Miglin* test: see, e.g., *Kemp v. Kemp*, [2007] O.J. No. 1131 (Ont. S.C.J.), at paras. 61-76. Two prominent commentators have also essentially adopted this view: J. G. McLeod, Annotation to *Dolson v. Dolson* (2004) (Ont. S.C.J.), at pp. 29-30; Payne and Payne, at pp. 284-86.

(b) The Correct Analytical Approach

92 In my view, when faced with an application to vary a support order under s. 17, courts should refer to the following approach. I address here only variation applications that are subject to the material change threshold under s. 17. I am not intending to address variation applications that are subject to the limitation provided for in s. 17(10).

> 1. The core of the court's task when dealing with an application to vary a support order which incorporates the support provisions of the parties' comprehensive, final separation agreement is to balance the goal of preserving autonomy and certainty with ensuring the support arrangements are in substantial compliance with the overall objectives of the Act.

2. *Willick* establishes the principle that the order for which variation is sought, unless set aside, is assumed to have been correct when made and is not challenged on the variation application. This means that the first step of *Miglin* is generally not relevant on the variation application because those issues are taken to have been decided when the agreement was incorporated into the order: J. G. McLeod, Annotation to *Ambler v. Ambler* (2004), 5 R.F.L. (6th) 229 (B.C. C.A.); McLeod, Annotation to *Dolson*, at pp. 29-30; Payne and Payne, at 285-86.

3. The threshold under s. 17 is that set out in *Willick*, that is, "a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation": p. 688. In the context of an application to vary a support order that incorporates the parties' comprehensive final agreement, a change, in order to be "material", must be a change that (1) relates to something that was not either expressly addressed by the parties in the agreement or that cannot be taken as having been in their contemplation; and (2) results in the support provision, considered in the context of the entire agreement, no longer being in substantial compliance with the objectives of the Act as a whole.

4. With respect to point (1), the analysis at step two of *Miglin* should inform the inquiry. A comprehensive and final agreement which contains no review or variation mechanism must be taken to have been entered into in contemplation of the matters expressly dealt with as well as of the sorts of changes in circumstances that were or must have been in the parties' contemplation at the time of the order: *Miglin*, at para. 89. The test, however, is not simple foreseeability in its broadest sense as virtually any change is foreseeable: see *Miglin*, at para. 89; *G. (L.)*, at para. 51; *Stones v. Stones*, 2004 BCCA 99, 195 B.C.A.C. 41 (B.C. C.A.), at paras. 15-16; *Innes v. Innes* (2005), 199 O.A.C. 69 (Ont. Div. Ct.)), at paras. 25-27. Rather, the issue for the court is whether the parties have either expressly contemplated the situation now relied on as a material change or, having regard to the terms of the agreement and the surrounding circumstances, must be taken as having contemplated it. Lambert J.A. put it well in *Stones*, at para. 16, when he said that the matter is one which the parties must have had in contemplation and built into the framing of their agreement. This is consistent with what was said in *Miglin*: the question "is the extent to which the ... agreement can be said to have contemplated the situation before the court at the time of the application": para. 89. The converse is also true: the non-occurrence of an event that was contemplated as going to occur may also give rise to a material change in circumstances.

5. With respect to point (2), the relevant part of the analysis from the second step in *Miglin* applies. *Miglin* directs that, when measuring whether the agreement continues in the current circumstances to substantially comply with the objectives of the Act, *all* of the objectives of the Act must be taken into consideration. These include not only the statutory objectives specific to support orders but also the broader objectives of finality, certainty and autonomy that Parliament has endorsed in the Act: *Miglin*, at paras. 53-57 and 91.

6. If a material change is identified, the agreement is also to be considered in determining what variation is justified. Change is not a threshold that permits the court "to jettison the agreement entirely": *Miglin*, at para. 90. Rather, judges making variation orders under s. 17 should limit themselves to making the appropriate variation, but should not make a fresh order unrelated to the existing one: *Miglin*, at para. 91. I agree with Abella and Rothstein JJ. that the court "should limit itself to making only the variation justified by that change": para. 50.

D. Application

93 The parties separated in April 2002 and were divorced on May 13, 2003. On April 30, 2003, the parties entered into a "Consent to Judgment on Provisional Measures and Accessory Measures" which I will refer to as the agreement. Each party was represented by counsel.

94 The 17-page agreement was comprehensive, addressing in detail custody, access, child and spousal support and partition of the family patrimony. It recited that the parties wished to enter into a final agreement settling all of the provisional and accessory measures including, among other things, spousal support. The agreement noted that the former wife was receiving disability insurance and provided for indexed spousal support without time limit or mechanism for review.

95 The husband was at all times fully aware of his wife's medical condition. In fact, the evidence showed that both before and after separation, he made representations to her disability insurer, to pension personnel and to tax authorities that she was unable to work. For example, he wrote to tax authorities on August 12, 2002 (about five months after the separation, but about eight months before the separation agreement was signed in April of 2003), asking for a cancellation of interest and penalties imposed on him, pleading inability to pay. In addition to other matters which the husband relied on to support his request to the tax authorities, he referred to [translation] "the precarious and greatly deteriorated state of health of my wife, who has experienced six (6) new attacks of multiple sclerosis over the past two (2) years".

96 As called for by the agreement, its provisions were incorporated into a court order (dated May 13, 2003), including those relating to indexed spousal support (with no time limit or provision for automatic review) payable by the husband to the wife in the amount of $3,688 per month. The preamble to the order states that the parties took into account the criteria set out in s. 15.2(4) of the *Divorce Act* and those set out in s. 15.2(6).

97 In my respectful view, the Court of Appeal erred in finding that there had been a change in the "means, needs or other circumstances of either former spouse" since the making of the spousal support order which would justify varying it under s. 17(4.1) of the Act. While I am of the view that the agreement in this case should receive greater weight than my colleagues believe, I nonetheless agree with the conclusion found at para. 60 of their reasons that there has not been a material change in circumstances in this case.

98 The parties reached a comprehensive agreement that they intended to be a final settlement of all the outstanding issues between them. The husband knew his wife had multiple sclerosis and could not be expected to seek employment outside the home. The agreement provided for spousal support that was not time-limited or subject to any review mechanism set out in the agreement and was indexed. In light of the terms of the agreement and the circumstances known to the parties at the time, the fact that the wife would not seek employment outside the home must be taken to have been contemplated by their agreement. The wife's failure to search for work cannot be viewed as a circumstance that departed from the reasonable outcomes anticipated by the parties in framing the agreement: *Miglin*, at para. 91. This was not something that "if known at the time, would likely have resulted in different terms": *Willick*, at p. 688.

99 I agree with my colleagues that the findings of the judge at first instance that the wife was capable of working outside the home and that she should seek to become economically self-sufficient are not sustainable in light of the circumstances at the time the original order was made: paras. 52-56.

100 I would therefore join Abella and Rothstein JJ. in proposing to allow the appeal with costs throughout.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* Corrigenda issued by the court on December 22, 2011 and January 16, 2012 respectively have been incorporated herein.

TAB 10

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2021 ONSC 4347
COURT FILE NO.: CV-21-00661458-00CL
DATE: 2021-06-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ONTARIO SECURITIES COMMISSION

Applicant

AND:

BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND

Respondents

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *John Finnigan, Grant Moffat and Adam Driedger*, for the Receiver

Carlo Rossi and Adam Gotfried, for the Ontario Securities Commission

Lawrence Thacker, for Natasha Sharpe

David Bish, for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco

Marc Wasserman and Justine Erickson, for BlackRock Financial Management, Inc.

Kyla Mahar, for RC Morris Capital Management Ltd. and RCM NGB Holdings Limited

Alex MacFarlane, James MacLellan and Charlotte Chien, for Zurich Insurance Company Ltd

Natasha MacParland, for Willoughby Asset Management Inc.

Steven Weisz and Shaun Parsons, for the University of Minnesota Foundation

Steve Graff, for Investors in various Bridging Funds

Melissa MacKewn, for David Sharpe

Fraser Dickson, for a former employee of Bridging Finance Inc.

Caitlin Fell, Sharon Kour, Pat Corney and Andy Kent, for the Ad-Hoc Group of Retail Investors

David Ullmann, for the Respondents, Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas, and 2190330 Ontario Ltd.

HEARD: June 16, 2021

AMENDED ENDORSEMENT

[1] This endorsement addresses the motion brought by PricewaterhouseCoopers Inc. ("PwC"), receiver of each of the Respondents (the "Receiver") for an order requesting, among other things, approval of the Key Employee Retention Plan ("KERP") and the KERP Charge; approving the formation, composition, and mandate of the Limited Partner Advisory Committees; tolling the applicable limitation periods in respect of any Misrepresentation Rights until the Tolling Termination Date; approving the Receiver's recommended course of action in connection with partial repayment of amounts owing under a credit facility made available by certain of the Respondents as described in Confidential Appendix "B" to the Third Report of the Receiver, dated June 9, 2021 (the "Third Report"); sealing Confidential Appendix "A" and Confidential Appendix "B" to the Third Report until further Order of the Court; and approval of the Third Report.

[2] This endorsement also addresses the motion brought by a group of retail investors in the Bridging Funds (the "Ad Hoc Group of Retail Investors") for an order appointing Weisz, Fell, Kour LLP ("WFK") as representative counsel ("Representative Counsel") for all retail investors holding units of the Bridging Funds, excluding investment advisors and institutional investors (the "Retail Investors").

[3] Capitalized terms not expressly defined herein are as defined in the Third Report.

[4] The factual background is set out in the Third Report.

[5] The Receiver is in the process of developing and implementing a strategy to maximize value for all stakeholders. This strategy will include a review of the consolidated portfolio of loans held by all of the Bridging Funds. There will also have to be a reconciliation of inter-fund accounts and review of inter-fund cash allocations.

[6] The objective of all stakeholders should be aligned with respect to the development and implementation of a strategy to maximize the value of the loan portfolio.

[7] However, the alignment of interests may very well be different when it comes to the reconciliation of inter-fund accounts and the review of inter-fund cash allocations. The Third

Report indicates that investors participated through the purchase of units of the Bridging Funds. The Bridging Funds marketed to investors include five limited partnership fund offerings, three RSP fund offerings and two investment trust fund offerings.

[8] It is premature to comment on how the assets realized from the loan portfolio will be divided among the funds, but it is conceivable that there will be disputes between the various funds with respect to asset allocation.

[9] It is against this background that the motions have to be considered.

[10] Certain relief sought by the Receiver was not opposed.

[11] The Receiver is of the view that in order to incentivize certain eligible employees to remain as employees of Bridging Finance Inc. ("BFI") during the course of these proceedings, a KERP should be approved, together with a related charge on the property of the Respondents in the maximum amount of $366,000 (the "KERP Charge") as security for payments under the KERP, which will ranks subordinate to the Receiver's Charge, the Receiver's Borrowing Charge and each Intercompany Charge, but in priority to all other security interests.

[12] As set out in Confidential Appendix "A" to the Third Report, the Receiver has allocated among Eligible Employees approximately $266,000 of the requested KERP Payments. The remaining $100,000 may be allocated among Eligible Employees or additional key Employees provided they meet certain criteria set out in the Bridging KERP.

[13] Courts have frequently recognized the utility and importance of KERPs in restructuring proceedings and have approved KERPs in numerous debtor-in-possession proceedings under both the *Companies' Creditors Arrangement Act* (the "CCAA") and receivership proceedings pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") and the *Courts of Justice Act* (the "CJA").

[14] The CCAA, the BIA and the CJA, as well as the *Securities Act* are silent with respect to the approval of KERPs and the granting of a charge to secure a KERP. Counsel to the Receiver submits that as such, the approval of a KERP and a KERP Charge are matters within the discretion of the court, grounded in the court's inherent and/or statutory jurisdiction to make any orders it sees fit. (See, for example: *Aralez Pharmaceuticals Inc., (Re),* 2018 ONSC 6980; *Cinram International Inc., (Re),* 2012 ONSC 3767 and *Grant Forest Products Inc., (Re),* [2009] O.J. No. 3344.)

[15] The factual and legal basis for the granting of the KERP is set out in the Receiver's factum at paragraphs 5 – 14.

[16] The Receiver recommends that the court exercise its discretion to approve the Bridging KERP and grant the KERP Charge.

[17] I accept this recommendation. The KERP and the KERP Charge are approved.

[18] The Receiver also seeks an order tolling the statutory limitation periods applicable to any "Misrepresentation Rights", as defined at paragraph 16 of the factum, until the stay of proceedings imposed against the Respondents and the Property pursuant to the Appointment Orders is terminated.

[19] The factual and legal basis for granting such relief is set out at paragraphs 16 – 22 of the factum.

[20] The Receiver recommends that the proposed Tolling Order be granted.

[21] I accept this recommendation. The Tolling Order is granted.

[22] The Receiver also recommends that its proposed course of action, as described in Confidential Appendix "B" to the Third Report in connection with a partial repayment of amounts owing under a Credit Facility made available to a borrower by certain of the Respondents should be approved. Having reviewed Confidential Appendix "B" to the Third Report, I am satisfied that the Receiver's recommended course of action should be approved.

[23] The considerations involved in the granting of a sealing order must take into account the recent Supreme Court decision in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38, where Kasirer J. wrote that:

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding

> the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[24] Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects. As such, the Sealing Order should be granted, pending further order of the court.

[25] Confidential Appendix "A" contains the Bridging KERP, which contains confidential and personal information with respect to the compensation of each Eligible Employee.

[26] Confidential Appendix "B" contains the Receiver's recommended course of action in connection with the proposed transaction. The terms of the proposed transactions are confidential and the Receiver submits the disclosure of such confidential commercially sensitive information at this time would undermine its efforts to maximize value for stakeholders.

[27] I am satisfied that no stakeholders will be materially prejudiced by sealing the Confidential Appendices and that the salutary effects of granting the Sealing Order outweigh any deleterious effects. As such, I am satisfied that the sealing order should be granted, pending further order of the court.

[28] In its Notice of Motion, the Receiver requested approval of payments to RC Morris. The request for such approval was deferred.

[29] The Receiver also requested approval of its activities as set out in the draft order. There was no opposition to this request which is granted.

[30] The balance of this endorsement addresses the Receiver's request for approval of limited partner advisory committees and the motion of the Ad Hoc Group of Retail Investors.

[31] The Receiver seeks court approval of the following two Limited Partner Advisory Committees:

> (a) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Funds generally (the "LPAC"); and
>
> (b) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Indigenous Impact Fund (the "BIIF LPAC").

(the LPAC and the BIIF LPAC are referred to as the "Committees").

[32] The Receiver states that the primary functions of the Committees, will be to, among other things:

> (a) provide the Receiver with a confidential forum to obtain input and feedback on behalf of Unitholders in the Bridging Funds regarding actions or decisions of the Receiver, as considered appropriate by the Receiver; and
>
> (b) provide such other input and assistance to the Receiver regarding matters involving Bridging as the Receiver may reasonably request from time to time.

[33] The Receiver contends that the Committees will provide an efficient and cost-effective means for Unitholders to provide direct input to the Receiver but will not have any decision-making authority with respect to any of the Respondents or the Property. The proposed Committee Members represent a diverse cross-section of both retail and institutional Unitholders and each Committee Member will be bound by a confidentiality agreement satisfactory to the Receiver.

[34] Mr. Graff states that he represents 15 different investors in various Bridging Funds with over $400MM of claims, and he does not oppose the relief requested by the Receiver. He points out that his clients have received regular and effective communications from the Receiver.

[35] The appointment of the Committees is challenged by the Ad Hoc Group of Retail Investors. The Ad Hoc Group of Retail Investors are of the view that it is more appropriate to appoint WFK as Representative Counsel for all Retail Investors holding units of the Bridging Funds, excluding investment advisors and institutional investors.

[36] In its factum, counsel points out that the Retail Investors are concerned about recovery of their investments and the protection of their rights and are most concerned about fairness. There are over 25,000 Retail Investors who will bear the brunt of any shortfall. Counsel submits that this receivership was not commenced with the Retail Investors in mind and makes reference to an OSC publicly made statement that, “as a regulatory body, we do not normally recover money for investors.”

[37] Counsel submits that the receivership proceeding lacks meaningful input from the Retail Investors. Counsel also submits that it is not clear from the materials filed by the Receiver as to what role the Committees will perform, since the Receiver has not described what matters it proposes to consult with the Committees. Further, counsel raises concerns that the Committees will be dominated by investment advisors and institutional or professional investors, and this presents the appearance of conflicts.

[38] The gist of the submissions put forward by counsel is that the Retail Investors require representation by counsel whose sole focus and loyalty is to them. The appointment of Representative Counsel will also generally improve the efficiency of the receivership; communication with Retail Investors will be streamlined and a multiplicity of legal retainers avoided.

[39] I have concluded that the relief requested by the Receiver for the appointment of the LPACs should be granted – albeit with certain time limitations.

[40] As noted above, the Receiver is currently involved in the development and implementation of a strategy to maximize value for all stakeholders. A strategic review of the portfolio is in process and the Receiver is not in a position to confirm valuations for certain funds.

[41] It seems to me that the Committees will be in a position to provide the Receiver with meaningful input and feedback on behalf of Unitholders regarding actions or decisions of the Receiver. At this time the focus is on maximizing realizations for the benefit of Unitholders and the Committees may very well be in a position to provide meaningful assistance to the Receiver.

[42] I also note that although the OSC may have made a statement to the effect that "as a regulatory body, we do not normally recover money for investors", it is necessary to take into account that the Receiver was appointed pursuant to the provisions of section 129 of the *Securities Act* in a particular section 129(2) which provides:

> 129 [2] No order shall be made under subsection (1) unless the court is satisfied that,
>
> (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company **is in the best interests of the creditors** of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of our subscribers to the person or company; or
>
> (b) it is appropriate for the due administration of Ontario securities law.
>
> (Emphasis added)

[43] I am also satisfied that the Receiver will take into account the best interests of all Unitholders.

[44] Counsel to the Ad Hoc Group of Retail Investors also questioned the proposed mandate of the Committees. At this point in time, the focus of the Committees is to provide input to the Receiver in connection with a strategic review of the portfolio in an effort to maximize value for all stakeholders. This review take some time but should not be extended for an unlimited time. For this reason, it seems to me that the appointment of the Committees should be time-limited to 60 days, subject to extension by court order. It is my expectation that at the end of 60 days, the Receiver should be in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of inter-fund accounts.

[45] Accordingly, I am satisfied that it is appropriate to approve the Committees as requested by the Receiver, on the terms set out in the proposed order, with the proviso that the appointment of the Committees is time-limited to 60 days, subject to extension by court order.

[46] With respect to the appointment of Representative Counsel, I am satisfied that the court has jurisdiction to appoint representative counsel under section 101 of the CJA, together with Rules 10.01 and 12.07 of the *Rules of Civil Procedure*.

[47] The issue is whether the appointment of Representative Counsel should be entertained at this time, or whether it is more appropriate to defer consideration of this issue until such time as the Receiver is in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of interfund accounts. I have concluded that it is appropriate to defer consideration of this issue for the following reasons.

[48] First, the focus at the present time should be on the portfolio review and developing a strategy to maximize value for all stakeholders.

[49] Second, when the Receiver reports on this issue and provides information with respect to the reconciliation of interfund accounts, it may become clearer as to the role that Representative Counsel can play. It could very well be that the entitlement or potential entitlement of Unitholders in the various funds will differ, which could in turn require the appointment of different Representative Counsel for different funds. In my view, the potential role of Representative Counsel should focus on allocation issues as opposed to realization issues.

[50] The relief requested by the Ad Hoc Group of Retina Investors is dismissed, with leave to reassess the requested relief in 60 days.

[51] The appointment of Representative Counsel can be revisited at the time that the Receiver makes its report in 60 days.

[52] An order shall issue to reflect the foregoing.

Chief Justice G.B. Morawetz

Date: June 22, 2021

TAB 11

Shawna Prebushewski *Appellant*

v.

Dodge City Auto (1984) Ltd. and Chrysler Canada Ltd. *Respondents*

INDEXED AS: PREBUSHEWSKI *v.* DODGE CITY AUTO (1984) LTD.

Neutral citation: 2005 SCC 28.

File No.: 30189.

2005: March 9; 2005: May 19.

Present: Major, Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Sale of goods — Statutory warranties — Breach of warranties — Truck bursting into flames and destroyed due to manufacturing defect — Consumer successfully suing car manufacturer and dealer for breach of statutory warranties pursuant to consumer protection legislation — Whether violation of consumer protection legislation justified award of exemplary damages — Whether violation was "wilful" — Consumer Protection Act, S.S. 1996, c. C-30.1, s. 65.

Damages — Exemplary damages — Consumer protection — Truck bursting into flames and destroyed due to manufacturing defect — Consumer successfully suing car manufacturer and dealer for breach of statutory warranties pursuant to consumer protection legislation — Trial judge awarding exemplary damages against car manufacturer and dealer — Whether violation of consumer protection legislation justified award of exemplary damages — Whether exemplary damages provision merely codified common law test for awarding such damages — Consumer Protection Act, S.S. 1996, c. C-30.1, s. 65.

Costs — Party-and-party costs — Consumer protection — Consumer successfully suing car manufacturer and dealer for breach of statutory warranties pursuant to consumer protection legislation — Court of Appeal

Shawna Prebushewski *Appelante*

c.

Dodge City Auto (1984) Ltd. et Chrysler Canada Ltd. *Intimées*

RÉPERTORIÉ : PREBUSHEWSKI *c.* DODGE CITY AUTO (1984) LTD.

Référence neutre : 2005 CSC 28.

N° du greffe : 30189.

2005 : 9 mars; 2005 : 19 mai.

Présents : Les juges Major, Bastarache, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Vente de marchandises — Garanties légales — Violation de garanties — Camion détruit par un incendie causé par un défaut de fabrication — Consommateur ayant poursuivi avec succès en vertu de la loi sur la protection des consommateurs le fabricant et le détaillant pour violation des garanties légales — La violation de la loi sur la protection des consommateurs justifiait-elle l'octroi de dommages-intérêts exemplaires? — La violation était-elle « délibérée »? — Consumer Protection Act, S.S. 1996, ch. C-30.1, art. 65.

Dommages-intérêts — Dommages-intérêts exemplaires — Protection des consommateurs — Camion détruit par un incendie causé par un défaut de fabrication — Consommateur ayant poursuivi avec succès en vertu de la loi sur la protection des consommateurs le fabricant et le détaillant pour violation des garanties légales — La juge du procès a condamné le fabricant et le détaillant à verser des dommages-intérêts exemplaires — La violation de la loi sur la protection des consommateurs justifiait-elle l'octroi de dommages-intérêts exemplaires? — La disposition relative aux dommages-intérêts exemplaires n'a-t-elle fait que codifier la règle de common law régissant l'octroi de tels dommages-intérêts? — Consumer Protection Act, S.S. 1996, ch. C-30.1, art. 65.

Dépens — Dépens sur la base partie-partie — Protection des consommateurs — Consommateur ayant poursuivi avec succès en vertu de la loi sur la protection des consommateurs le fabricant et le détaillant pour

affirming award of costs to consumer at trial but awarding costs against her on appeal because manufacturer and dealer achieved substantial success — Consumer protection legislation provides that costs may not be awarded against consumer bringing suit against a manufacturer or retail seller for breach of warranty unless suit is frivolous or vexatious — Whether Court of Appeal had jurisdiction to award costs against consumer — Whether protective scope of costs provision limited to proceedings at trials — Consumer Protection Act, S.S. 1996, c. C-30.1, s. 66.

Because of a manufacturing defect in the daytime running light module, P's truck burst into flames and was destroyed. Both the manufacturer and the dealer which sold the truck to P denied liability. They refused to provide any assistance and referred P to her insurer. At trial, the manufacturer's representative testified that the manufacturer had known for several years that there were problems with the module and had not informed its customers or ordered a recall. The trial judge found the manufacturer and the dealer responsible for breaching statutory warranties under the Saskatchewan *Consumer Protection Act*. P was awarded general and exemplary damages. The Court of Appeal overturned the exemplary damages award and awarded costs against P.

Held: The appeal should be allowed.

The trial judge's award of exemplary damages should be restored. The test for exemplary damages set out in s. 65 of the *Consumer Protection Act* is not a codification of the common law test. Rather, s. 65 creates a distinct regime designed to enhance consumer protection. By providing that "wilful" violations of the Act are sufficient to trigger a judge's discretion to award exemplary damages, the legislature has signalled in s. 65 an intention to lower the threshold and grant easier access to that remedy. A "wilful" act is voluntary, intentional, or deliberate. In this case, there was no basis to interfere with the trial judge's conclusion that the violation of the Act by the manufacturer and the dealer was wilful and that exemplary damages were warranted. [23-28] [37-39]

violation des garanties légales — La Cour d'appel a maintenu les dépens accordés au consommateur en première instance mais les a adjugés au fabricant et au détaillant en appel au motif qu'ils avaient eu gain de cause pour l'essentiel — Disposition de la loi sur la protection des consommateurs précisant que le consommateur qui poursuit un fabricant ou un détaillant pour violation de garanties ne peut être condamné aux dépens à moins que son action ne soit frivole ou vexatoire — La Cour d'appel avait-elle le pouvoir de condamner le consommateur aux dépens? — Le champ d'application de cette disposition protégeant les consommateurs contre les condamnations aux dépens se limite-t-il aux procédures intentées en première instance? — Consumer Protection Act, S.S. 1996, ch. C-30.1, art. 66.

En raison d'un défaut de fabrication du module de feux de jour, le camion de P a été détruit par un incendie soudain. Tant le fabricant du camion que le détaillant qui l'a vendu à P ont nié toute responsabilité. Ils ont refusé toute assistance à P et lui ont dit de s'adresser à son assureur. Au procès, le représentant du fabricant a témoigné que ce dernier savait depuis plusieurs années que le module de feux de jour posait des problèmes et n'avait pas informé ses clients du problème ou ordonné le rappel des véhicules. La juge de première instance a conclu à la responsabilité du fabricant et du détaillant pour violation des garanties instituées par la *Consumer Protection Act* de la Saskatchewan, et elle a accordé à P des dommages-intérêts généraux et des dommages-intérêts exemplaires. La Cour d'appel a annulé l'octroi des dommages-intérêts exemplaires et a condamné P aux dépens.

Arrêt : Le pourvoi est accueilli.

L'octroi de dommages-intérêts exemplaires ordonné par la juge de première instance doit être rétabli. Le critère régissant l'octroi de tels dommages-intérêts exemplaires qui est énoncé à l'art. 65 de la *Consumer Protection Act* n'est pas une codification du critère prévu par la common law. L'article 65 établit plutôt un régime distinct visant à accroître la protection des consommateurs. En précisant qu'une contravention « délibérée » à la Loi suffit pour que le juge puisse exercer son pouvoir discrétionnaire et octroyer des dommages-intérêts exemplaires, le législateur a exprimé dans l'art. 65 l'intention d'imposer des conditions moins exigeantes et de faciliter l'accès à cette forme de réparation. Un acte « délibéré » est volontaire ou intentionnel. En l'espèce, il n'existe aucune raison de modifier la conclusion de la juge de première instance selon laquelle la contravention à la Loi par le fabricant et le détaillant était délibérée et que l'octroi de dommages-intérêts exemplaires était justifié. [23-28] [37-39]

The award of costs against P must be set aside. Section 66 provides that costs shall not be awarded against a consumer who brings an action against a manufacturer or retail seller for breach of warranty unless the action is frivolous or vexatious. The prohibition against ordering costs against the consumer applies whether or not the consumer is successful. The protective scope of s. 66 is not limited to proceedings at trials. Since both the trial court and the appeal court held that P was entitled to damages in the amount of the purchase price of the truck, and since there was no suggestion by either the manufacturer or the dealer that this action was frivolous or vexatious, there was no basis for an award of costs against P by the Court of Appeal. [41-44]

Cases Cited

Referred to: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226.

Statutes and Regulations Cited

Bills of Exchange Act, R.S.C. 1952, c. 15, Part V [ad. S.C. 1969-70, c. 48, s. 2].
Consumer Packaging and Labelling Act, S.C. 1970-71-72, c. 41.
Consumer Products Warranties Act, 1977, S.S. 1976-77, c. 15.
Consumer Protection Act, S.S. 1996, c. C-30.1, ss. 3(c), 16, 40(1), 57(1), 65, 66.
Department of Consumer and Corporate Affairs Act, S.C. 1967-68, c. 16.
Food and Drugs Act, S.C. 1952-53, c. 38.
Hazardous Products Act, S.C. 1968-69, c. 42.
Motor Vehicle Safety Act, S.C. 1969-70, c. 30.
Textile Labelling Act, S.C. 1969-70, c. 34.
Weights and Measures Act, S.C. 1970-71-72, c. 36.

Authors Cited

Black's Law Dictionary, 7th ed. St. Paul, Minn.: West Group, 1999, "willful".
Ontario. Law Reform Commission. *Report on Consumer Warranties and Guarantees in the Sale of Goods*. Toronto: Department of Justice, 1972.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Tallis, Sherstobitoff and Lane JJ.A.), [2004] 4 W.W.R. 42, 241 Sask. R. 22, 313 W.A.C. 22, 40 B.L.R. (3d) 90, [2003] S.J. No. 856

La condamnation de P aux dépens doit être annulée. Suivant l'article 66 de la Loi, le consommateur qui poursuit un fabricant ou un détaillant pour violation de garanties ne peut être condamné aux dépens à moins que son action ne soit frivole ou vexatoire. Cette prohibition de condamner le consommateur aux dépens s'applique, et ce, que ce dernier ait gain de cause ou non. La protection accordée par l'art. 66 ne se limite pas seulement aux procédures intentées en première instance. Comme le tribunal de première instance et la Cour d'appel ont tous deux jugé que P avait droit à des dommages-intérêts correspondant au prix d'achat du camion, et que ni le fabricant ni le détaillant n'ont prétendu que la présente action était frivole ou vexatoire, la condamnation de P aux dépens devant la Cour d'appel n'était pas fondée. [41-44]

Jurisprudence

Arrêts mentionnés : *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19; *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; *Norberg c. Wynrib*, [1992] 2 R.C.S. 226.

Lois et règlements cités

Consumer Products Warranties Act, 1977, S.S. 1976-77, ch. 15.
Consumer Protection Act, S.S. 1996, ch. C-30.1, art. 3c), 16, 40(1), 57(1), 65, 66.
Loi des aliments et drogues, S.C. 1952-53, ch. 38.
Loi sur l'emballage et l'étiquetage des produits de consommation, S.C. 1970-71-72, ch. 41.
Loi sur l'étiquetage des textiles, S.C. 1969-70, ch. 34.
Loi sur la sécurité des véhicules automobiles, S.C. 1969-70, ch. 30.
Loi sur le ministère de la Consommation et des Corporations, S.C. 1967-68, ch. 16.
Loi sur les lettres de change, S.R.C. 1952, ch. 15, partie V [aj. S.C. 1969-70, ch. 48, art. 2].
Loi sur les poids et mesures, S.C. 1970-71-72, ch. 36.
Loi sur les produits dangereux, S.C. 1968-69, ch. 42.

Doctrine citée

Black's Law Dictionary, 7th ed. St. Paul, Minn. : West Group, 1999, « *willful* ».
Ontario. Commission de réforme du droit. *Report on Consumer Warranties and Guarantees in the Sale of Goods*. Toronto : Ministère de la Justice, 1972.

POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (les juges Tallis, Sherstobitoff et Lane), [2004] 4 W.W.R. 42, 241 Sask. R. 22, 313 W.A.C. 22, 40 B.L.R. (3d) 90, [2003] S.J.

(QL), 2003 SKCA 133, affirming in part a decision of Rothery J., [2002] 4 W.W.R. 321, 214 Sask. R. 135, 19 B.L.R. (3d) 304, [2001] S.J. No. 739 (QL), 2001 SKQB 537. Appeal allowed.

Ronald J. Balacko and *Darren Grindle*, for the appellant.

Kenneth A. Ready, *Q.C.*, and *Tamara R. Prince*, for the respondents.

The judgment of the Court was delivered by

1 Abella J. — Shawna Prebushewski bought a truck manufactured by Chrysler Canada Ltd. ("Chrysler") from Dodge City Auto (1984) Ltd. ("Dodge City"). Because of a manufacturing defect, the truck burst into flames and was destroyed. At trial, Chrysler and Dodge City were held responsible for breaching statutory warranties under *The Consumer Protection Act*, S.S. 1996, c. C-30.1. Ms. Prebushewski was awarded both general and exemplary, or punitive, damages. The Saskatchewan Court of Appeal overturned the exemplary damages award and awarded costs against her. Ms. Prebushewski's appeal to this Court centres primarily on the interpretation of exemplary damages under the Act.

I. Background

2 On December 17, 1996, Ms. Prebushewski and her husband bought a new, top of the line Dodge Ram 4x4 one-half ton truck from Dodge City. Chrysler manufactured the truck and Dodge City was one of its Saskatchewan dealers. The Prebushewskis paid an additional $1,145 for an extended warranty from Chrysler. The entire purchase price, including taxes and extended warranty, was financed. The Prebushewskis borrowed $43,198.80 and, starting in January 1997, were required to make monthly payments of $721.23. For over a year and approximately 31,000 kilometres, Ms. Prebushewski and her husband drove the truck without incident.

No. 856 (QL), 2003 SKCA 133, qui a confirmé en partie une décision de la juge Rothery, [2002] 4 W.W.R. 321, 214 Sask. R. 135, 19 B.L.R. (3d) 304, [2001] S.J. No. 739 (QL), 2001 SKQB 537. Pourvoi accueilli.

Ronald J. Balacko et *Darren Grindle*, pour l'appelante.

Kenneth A. Ready, *c.r.*, et *Tamara R. Prince*, pour les intimées.

Version française du jugement de la Cour rendu par

La juge Abella — Shawna Prebushewski a acheté chez Dodge City Auto (1984) Ltd. (« Dodge City ») un camion fabriqué par Chrysler Canada Ltée (« Chrysler »). En raison d'un défaut de fabrication, le camion a été détruit par un incendie soudain. La juge de première instance a conclu à la responsabilité de Chrysler et de Dodge City pour violation des garanties instituées par la *Consumer Protection Act*, S.S. 1996, ch. C-30.1 (la « Loi »), et elle a accordé à M^me^ Prebushewski des dommages-intérêts généraux et des dommages-intérêts exemplaires ou punitifs. La Cour d'appel de la Saskatchewan a annulé l'octroi des dommages-intérêts exemplaires et a condamné M^me^ Prebushewski aux dépens. Le pourvoi de M^me^ Prebushewski devant notre Cour porte principalement sur l'interprétation des dommages-intérêts exemplaires prévus par la Loi.

I. Le contexte

Le 17 décembre 1996, M^me^ Prebushewski et son mari ont acheté chez Dodge City un camion neuf haut de gamme, soit un Dodge Ram 4x4 d'une demi-tonne. Il s'agissait d'un camion fabriqué par Chrysler; Dodge City était un des concessionnaires de Chrysler en Saskatchewan. Les Prebushewski ont versé 1 145 $ de plus pour obtenir une garantie prolongée de Chrysler. La totalité du montant de l'achat, taxes et garantie prolongée comprises, a fait l'objet d'un contrat de crédit en vertu duquel les acheteurs ont emprunté la somme de 43 198,80 $, remboursable à raison de paiements mensuels de 721,23 $ commençant au mois de janvier 1997. Pendant plus d'un an, les Prebushewski ont parcouru environ 31 000 kilomètres sans incident avec le camion.

At the end of April 1998, Mr. Prebushewski drove to work and parked the truck on the street outside his workplace. At about 9:00 p.m., he noticed that a vehicle on the street had its headlights on. Shortly afterwards, his employer noticed a fire. When Mr. Prebushewski and his employer went outside to see what was burning, they discovered that the front end of the Prebushewski truck was engulfed in flames. The truck was damaged beyond repair despite the rapid response of the fire department.

Ms. Prebushewski and her husband reported the loss to their insurer, Saskatchewan Government Insurance ("SGI"). After investigating the fire, SGI determined that there was a defect in the daytime running light module which had caused it to short-circuit.

On August 11, 1998, the insurance claim was settled. SGI valued the truck at $27,340 at the time of loss, subtracted the $700 deductible, and gave Ms. Prebushewski $26,640. She in turn gave the full amount to the bank under the terms of a security agreement. Despite this payment, Ms. Prebushewski still owed the bank $11,383.65. Because the security for the loan was destroyed, the bank increased the annual interest rate on the remainder of the loan from 8 percent to 11 percent. Ms. Prebushewski was still making payments to the bank at the time of the trial.

In addition to reporting the loss to their insurance company, the Prebushewskis also repeatedly tried to get assistance from Chrysler and Dodge City over a period of several months, primarily by phone. They were unsuccessful. Dodge City directed the Prebushewskis to Chrysler, and Chrysler directed them to their insurance company.

In May or June 1998, they also sent a letter to both Chrysler and Dodge City. In it they explained that the insurance company investigator had concluded that the loss was caused by an electrical fire but was not yet able to pinpoint the fire's exact origin. They also said that, based on conversations with work colleagues, family members and Transport Canada, they believed the fire was caused by a defect in the

3 À la fin d'avril 1998, M. Prebushewski s'est rendu au travail avec son camion, qu'il a garé dans la rue près de son lieu de travail. Vers 21 h, il a remarqué que les phares d'un véhicule stationné dans la rue étaient allumés. Peu après, son employeur a aperçu des flammes. Lorsque M. Prebushewski et son employeur sont sortis pour voir d'où elles provenaient, ils ont constaté que l'avant du camion du premier était en feu. Le véhicule a subi des dommages irréparables malgré l'intervention rapide des pompiers.

4 Madame Prebushewski et son mari ont signalé la perte à leur assureur, la Saskatchewan Government Insurance (« SGI »), qui a conclu après une enquête qu'une défectuosité dans le module de feux de jour avait causé un court-circuit.

5 La demande d'indemnité a été réglée le 11 août 1998. La SGI a déterminé que, au moment de la perte, le camion valait 27 340 $. Comme il y avait une franchise de 700 $, elle a versé la somme de 26 640 $ à M^me^ Prebushewski, qui l'a remise intégralement à la banque conformément à une convention de garantie. Malgré ce paiement, M^me^ Prebushewski devait toujours 11 383,65 $ à la banque, qui a fait passer de 8 % à 11 % le taux d'intérêt annuel applicable au solde du prêt, en raison de la destruction de la sûreté. Au moment du procès, M^me^ Prebushewski n'avait pas encore fini de rembourser la banque.

6 En plus de déclarer la perte à leur assureur, les Prebushewski ont pendant plusieurs mois tenté à maintes reprises, principalement par téléphone, d'obtenir l'assistance de Chrysler et Dodge City. Leurs démarches ont été infructueuses. Dodge City les renvoyait à Chrysler, qui elle leur disait de s'adresser à leur assureur.

7 En mai ou juin 1998, ils ont également écrit une lettre adressée à Chrysler et à Dodge City. Ils y expliquaient que l'enquêteur de l'assureur avait conclu à un incendie d'origine électrique mais qu'il n'était pas encore en mesure d'en déterminer la cause exacte. Ils ajoutaient qu'à la suite de conversations avec des membres de leur famille, des collègues de travail et des fonctionnaires de Transports Canada,

daytime running light module. The letter also noted that, during a phone conversation with a Chrysler customer service representative, Mr. Prebushewski was told "that's the way the cookie crumbles".

ils croyaient que l'incendie avait été causé par une défectuosité du module de feux de jour. Ils signalaient aussi dans leur lettre que, lors d'une conversation téléphonique avec un représentant du service à la clientèle de Chrysler, M. Prebushewski s'était fait répondre [TRADUCTION] « c'est la vie ».

8 Chrysler replied to the Prebushewskis by letter on June 13, 1998 expressing regrets, but stating that "we must refer you to your insurance company for review". The daytime running light module was not mentioned in Chrysler's letter.

Chrysler a répondu à la lettre des Prebushewski le 13 juin 1998, se disant désolée tout en indiquant qu'elle [TRADUCTION] « devait les renvoyer à leur assureur pour révision de leur dossier ». Il n'était pas question du module de feux de jour dans la lettre de Chrysler.

9 Dodge City did not respond to the Prebushewski letter.

Dodge City n'a pas répondu à la lettre des Prebushewski.

10 On March 31, 1999, Ms. Prebushewski filed a statement of claim against both Chrysler and Dodge City alleging, among other things, breach of statutory warranties under the Act. In addition to general damages, she claimed exemplary damages pursuant to s. 65 of the Act.

Le 31 mars 1999, M^me^ Prebushewski a intenté une action contre Chrysler et contre Dodge City, plaidant notamment la violation des garanties instituées dans la Loi. Outre des dommages-intérêts généraux, M^me^ Prebushewski réclamait des dommages-intérêts exemplaires en vertu de l'art. 65 de la Loi.

11 Chrysler and Dodge City denied liability.

Chrysler et Dodge City ont nié toute responsabilité.

12 At trial, Ms. Prebushewski called uncontradicted expert evidence to establish that a manufacturing defect in the daytime running light module caused the fire.

Au procès, M^me^ Prebushewski a présenté des témoins experts pour établir que l'incendie avait été causé par un défaut de fabrication du module de feux de jour. Leur témoignage n'a pas été contredit.

13 Chrysler and Dodge City called no evidence at trial. Eric Durance, an electrical engineer at Chrysler, was, however, examined for discovery. He was Chrysler's "proper officer", or authorized representative, and it was agreed that his answers were to be binding on it. His evidence revealed that Chrysler had known for several years that there were problems with the daytime running light module:

Chrysler et Dodge City n'ont pas présenté de preuve au procès. Toutefois, un ingénieur électricien travaillant pour Chrysler, Eric Durance, avait été interrogé au préalable. Il était le [TRADUCTION] « représentant compétent » — ou représentant autorisé — de Chrysler, et il était entendu que ses réponses lieraient la société. Il est ressorti de son témoignage que Chrysler savait depuis plusieurs années que le module de feux de jour posait des problèmes :

[TRADUCTION]

Q: So this is what is known as the daytime running light module?

A: The module is the device that performs that function.

Q : C'est donc cela qu'on appelle le module de feux de jour?

R : Le module est le dispositif qui remplit cette fonction.

Q: They have been shorting out?

A: Well, we have had various problems with them.

. . .

Q: Mr. Durance, just so I can get this clear, Chrysler knew it was having problems with the daytime running light module prior to the Prebushewski fire on April 29, 1998?

A: Yes.

Q: Did it take any steps whatsoever to advise Shawna Prebushewski or her husband that there was a problem with the daytime running light modules?

A: No.

Q: How many daytime running light modules are there?

A: Every car has one since 1988.

Q: Roughly?

A: Well, more than a million I would say.

Q: So I take it, to advise every owner of a vehicle with a daytime running light module and bring it in for inspection and perhaps replace it would be quite a costly process?

A: Yes.

Q: How much would it cost to call in a customer and inspect and replace the daytime running light module?

A: I don't know.

. . .

Q: Give us a rough idea?

A: Probably a couple of hundred dollars, $250.

Q: So for a million — a million of them it would be $250,000,000; is that correct?

A: Yes.

The proper officer for Dodge City, comptroller Jim Wilkins, was also examined for discovery. He admitted that Dodge City had done nothing to investigate the fire or to compensate Ms. Prebushewski.

Q : Des courts-circuits s'y produisent?

R : Eh bien, nous avons eu divers problèmes avec ces modules.

. . .

Q : M. Durance, pour que ce soit bien clair, Chrysler savait que le module de feux de jour posait des problèmes avant l'incendie du camion des Prebushewski le 29 avril 1998?

R : Oui.

Q : A-t-elle pris des mesures pour informer Shawna Prebushewski ou son mari de l'existence d'un problème lié au module de feux de jour?

R : Non.

Q : Combien y a-t-il de modules de feux de jour?

R : Il y en a un dans chaque véhicule depuis 1988.

Q : En gros?

R : Je dirais plus d'un million.

Q : Donc, ce serait très coûteux d'informer chaque propriétaire de véhicule équipé d'un module de feux de jour, de rappeler les véhicules pour inspection et, éventuellement, de remplacer la pièce?

R : Oui.

Q : Combien cela coûterait-il pour rappeler un véhicule, l'inspecter et remplacer le module de feux de jour?

R : Je ne sais pas.

. . .

Q : Donnez-nous une estimation approximative?

R : Probablement 200 $, 250 $.

Q : Donc, pour un million — un million de véhicules, cela coûterait 250 000 000 $; est-ce exact?

R : Oui.

14

Le responsable compétent chez Dodge City, le contrôleur Jim Wilkins, a également fait l'objet d'un interrogatoire préalable. Il a admis que Dodge City n'avait pas enquêté sur l'incendie ni fait quoi que ce soit pour indemniser M^me^ Prebushewski.

15 The trial judge, Rothery J., found Chrysler and Dodge City jointly liable for breaching the statutory warranties provided for in the Act: (2001), 214 Sask. R. 135, 2001 SKQB 537. Section 57(1) provides that a consumer is entitled to recover damages from both the manufacturer and the "retail seller" for breaches of statutory warranties.

16 The trial judge observed that s. 65(1) allows for the recovery of exemplary damages if there has been a "wilful violation" of the Act. Relying on *Black's Law Dictionary* (7th ed. 1999), at p. 1593, she defined "wilful" as "[v]oluntary and intentional, but not necessarily malicious." Based on this interpretation, she concluded that if Chrysler and Dodge City's violation of the Act was intentional, exemplary damages were potentially appropriate.

17 Rothery J. then made a number of factual findings to support the exercise of her discretion to award exemplary damages: Chrysler knew about the defect in the daytime running light module before the fire, but did not advise Ms. Prebushewski or any other consumer about the defect; Chrysler made a business decision not to advise its customers of the defect or to recall the vehicles; and neither Chrysler nor Dodge City made any effort to investigate the fire or to compensate Ms. Prebushewski.

18 She awarded Ms. Prebushewski $25,000 in exemplary damages in addition to $41,969.83 in general damages.

19 On appeal to the Saskatchewan Court of Appeal, Tallis J.A., writing for a unanimous court (Sherstobitoff and Lane JJ.A.), upheld the general damages award but set aside the exemplary damages award: (2003), 241 Sask. R. 22, 2003 SKCA 133. In his view, the trial judge had unduly focused on Chrysler and Dodge City's failure to compensate Ms. Prebushewski. Tallis J.A. held that this was insufficient to support an award of exemplary

En première instance, la juge Rothery a déclaré Chrysler et Dodge City conjointement responsables de violation des garanties instituées dans la Loi : (2001), 214 Sask. R. 135, 2001 SKQB 537. Le paragraphe 57(1) dispose que le consommateur a droit à des dommages-intérêts de la part du fabricant ainsi que du [TRADUCTION] « détaillant » en cas de violation des garanties légales.

La juge en première instance a souligné que le par. 65(1) de la Loi permet l'octroi de dommages-intérêts exemplaires lorsque les défendeurs ont commis une [TRADUCTION] « contravention délibérée » (*wilful violation*) à la Loi. S'appuyant sur le *Black's Law Dictionary* (7e éd. 1999), p. 1593, elle a défini ainsi le terme « délibéré » : [TRADUCTION] « [v]olontaire et intentionnel, mais pas nécessairement avec malveillance. » Sur la base de cette interprétation, elle a conclu que, si Chrysler et Dodge City avaient contrevenu à la Loi d'une manière intentionnelle, des dommages-intérêts exemplaires pourraient s'avérer indiqués.

La juge Rothery a ensuite tiré plusieurs conclusions de fait l'autorisant selon elle à octroyer des dommages-intérêts exemplaires en vertu de son pouvoir discrétionnaire : Chrysler était au courant, avant l'incendie, des défectuosités des modules de feux de jour, mais n'en a pas informé Mme Prebushewski ni aucun autre consommateur; Chrysler a pris la décision d'affaires de ne pas informer ses clients du problème et de ne pas rappeler les véhicules; ni Chrysler ni Dodge City n'ont enquêté sur l'incendie ou fait quoi que ce soit pour indemniser Mme Prebushewski.

Elle a accordé à Mme Prebushewski des dommages-intérêts de 25 000 $, en plus de dommages-intérêts généraux de 41 969,83 $.

Dans un jugement unanime rédigé par le juge Tallis (auquel ont souscrit les juges Sherstobitoff et Lane), la Cour d'appel de la Saskatchewan a maintenu les dommages-intérêts généraux, mais a annulé l'octroi de dommages-intérêts exemplaires : (2003), 241 Sask. R. 22, 2003 SKCA 133. Le juge Tallis a estimé que la juge de première instance avait accordé trop d'importance au refus de Chrysler et de Dodge City d'indemniser Mme Prebushewski. Selon

damages because the defendants had not acted in bad faith when they took the position that the loss was essentially an insurance claim.

Tallis J.A. also disagreed with Rothery J.'s condemnation of Chrysler's corporate policy and, despite her express finding to the contrary, was of the view that, before the Prebushewskis' truck burned, there was no indication that the daytime running light module defect caused fires. In his words:

> There was no evidence that Chrysler knew of, or should have expected a fire loss of this magnitude before the occurrence of this loss. Furthermore, there was no evidence adduced of any corporate policy of placing profits before the potential danger to its customer's safety. . . .
>
> In light of the evidence, we find no rational purpose in the award of exemplary damages in this case . . . . [paras. 50-51]

There was no explicit analysis of what the applicable test for an award of exemplary damages was under the Act, but the Court of Appeal appears to have accepted Chrysler and Dodge City's argument that the common law test prevailed.

In addition to setting aside the award of exemplary damages, the Court of Appeal awarded Chrysler and Dodge City their costs of the appeal. Ms. Prebushewski appealed both conclusions.

II. Analysis

A. *Exemplary Damages*

The primary issue in this appeal is whether the violation of the Act in this case gave rise to exemplary damages under s. 65 of the Act. This requires a determination of whether s. 65 articulates a discrete test for exemplary damages, or should be interpreted as merely codifying the common law.

lui, ce refus ne suffisait pas à justifier l'octroi de dommages-intérêts exemplaires, parce que les défenderesses n'avaient pas agi de mauvaise foi en faisant valoir que la perte consistait essentiellement en un sinistre indemnisable par l'assureur.

20 Le juge Tallis n'a pas souscrit non plus à la condamnation de la politique de Chrysler par la juge Rothery. Malgré la conclusion expresse à l'effet contraire de cette dernière, il s'est dit d'avis que, avant la destruction par les flammes du camion des Prebushewski, rien n'indiquait que la défectuosité du module de feux de jour provoquait des incendies. Voici en quels termes il s'est exprimé :

> [TRADUCTION] La preuve n'a pas établi que Chrysler savait ou qu'elle aurait dû prévoir qu'un incendie pourrait occasionner une perte de cette ampleur avant qu'elle ne survienne. De plus, aucun élément de preuve n'indiquait que l'entreprise avait pour politique de faire passer les bénéfices avant les dangers potentiels pour la sécurité de ses clients. . .
>
> Étant donné la preuve, nous sommes d'avis que l'octroi de dommages-intérêts exemplaires en l'espèce n'est pas rationnellement justifié . . . [par. 50-51]

21 La Cour d'appel n'a pas explicitement examiné la question de savoir quel était le critère applicable, en vertu de la Loi, pour l'octroi de dommages-intérêts exemplaires, mais elle semble avoir implicitement accepté l'argument de Chrysler et de Dodge City selon lequel c'est le critère de la common law qui s'appliquait.

22 En plus d'annuler l'octroi de dommages-intérêts exemplaires, la Cour d'appel a accordé leurs dépens en appel à Chrysler et à Dodge City. Madame Prebushewski a interjeté appel de ces deux conclusions.

II. Analyse

A. *Les dommages-intérêts exemplaires*

23 La principale question en litige dans le présent pourvoi est de savoir si la contravention à la Loi en l'espèce pouvait donner lieu à l'octroi de dommages-intérêts exemplaires en vertu de l'art. 65 de cette loi. Pour la trancher, il faut déterminer si cette disposition établit un critère distinct pour l'octroi de

Section 65 is found in Part III of *The Consumer Protection Act* dealing with consumer product warranties:

65(1) In addition to any other remedy provided by this Part or any other law in force in the province, a consumer or a person mentioned in subsection 41(1) or in section 64 may recover exemplary damages from any manufacturer, retail seller or warrantor who has committed a wilful violation of this Part.

(2) In an action in which exemplary damages are claimed, evidence respecting the existence of similar conduct in transactions between the manufacturer, retail seller or warrantor and other consumers is admissible for the purposes of proving that violation of this Part was wilful or of proving the degree of wilfulness of the violation.

24 At common law, exemplary or punitive damages are awarded only in exceptional cases to meet the goals of retribution, deterrence and denunciation in cases of "malicious, oppressive and high-handed" conduct that "offends the court's sense of decency". The test limits the award to "misconduct that represents a marked departure from ordinary standards of decent behaviour"; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, at para. 79; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 36; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 199; and *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 267.

25 In my view a different test for exemplary damages is anticipated by s. 65(1). The language of s. 65(1) is clear and unambiguous: once a wilful — or deliberate — violation has been found, the trial judge has a discretion to award exemplary damages. Had the legislature intended that the common law — and more exacting — test apply, it could easily have used words affiliated with the traditional approach to exemplary damages, such as "malicious" or "oppressive". By designating instead that "wilful" violations of the Act are sufficient to trigger a judge's discretion, the legislature has signalled

dommages-intérêts exemplaires, ou si l'on doit n'y voir qu'une simple codification du critère prévu par la common law. L'article 65 figure dans la partie III de la Loi, qui porte sur les garanties relatives aux produits de consommation :

[TRADUCTION]

65(1) Outre les autres recours prévus par la présente partie ou reconnus en droit dans la province, le consommateur ou la personne visée au paragraphe 41(1) ou à l'article 64 peut recouvrer des dommages-intérêts exemplaires d'un fabricant, d'un détaillant ou d'un garant qui a commis une contravention délibérée à la présente partie.

(2) Lorsque des dommages-intérêts exemplaires sont réclamés dans une action, la preuve de l'existence d'un comportement similaire dans des opérations entre le fabricant, le détaillant ou le garant et d'autres consommateurs est recevable pour démontrer que la contravention était délibérée ou pour établir à quel degré elle l'était.

En common law, des dommages-intérêts exemplaires ou punitifs ne sont octroyés que dans des cas exceptionnels, afin de punir, de dissuader ou de dénoncer une conduite « malveillante, opprimante et abusive » qui « choque le sens de la dignité de la cour ». Le critère limite de tels dommages-intérêts aux seules « conduites répréhensibles représentant un écart marqué par rapport aux normes ordinaires en matière de comportement acceptable » : *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19, par. 79; *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, par. 36; *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, par. 199; et *Norberg c. Wynrib*, [1992] 2 R.C.S. 226, p. 267.

À mon avis, le par. 65(1) établit un critère différent en matière de dommages-intérêts exemplaires. Le texte de ce paragraphe est clair et non ambigu : le juge qui conclut à l'existence d'une contravention délibérée a le pouvoir discrétionnaire d'accorder des dommages-intérêts exemplaires. Si le législateur avait voulu que le critère plus exigeant de la common law s'applique, il aurait facilement pu employer des mots associés à la notion classique de dommages-intérêts exemplaires, par exemple « malveillant » ou « opprimant ». En énonçant plutôt qu'une contravention « délibérée » à la Loi suffit pour que le

an intention to lower the threshold and grant easier access to the remedy of exemplary damages.

This intention to override existing law, such as the common law test, is reinforced by the introductory words to s. 65, which state:

In addition to any other remedy provided by this Part or any other law in force in the province, a consumer . . . may recover exemplary damages . . . .

Similarly, an intention that it be interpreted as charting a different remedial course from the common law can be found in s. 40(1), which, like s. 65, is found in Part III of the Act:

40(1) The rights and remedies provided in this Part are in addition to any other rights or remedies under any other law in force in Saskatchewan unless a right or remedy under that law is expressly or impliedly contradicted by this Part.

This provision, which explicitly acknowledges that the Act takes precedence over existing law, would be inoperable if s. 65(1) were interpreted in accordance with common law precepts rather than as reflecting an intention to replace them by creating a distinct regime designed to enhance consumer protection.

Each of these two sections signals the distinctiveness of the approach to exemplary or punitive damages in the legislative scheme; together, they trumpet it.

One can find additional support for the view that s. 65(1) represents a departure from the common law test for exemplary damages from the way such damages are referred to in s. 16, contained in Part II of the Act. Part II addresses unfair marketplace practices. Section 16(1)(b) provides that when a court finds that a supplier has committed an unfair practice, it may

juge puisse exercer son pouvoir discrétionnaire, le législateur a exprimé l'intention d'imposer des conditions moins exigeantes et de faciliter l'accès aux dommages-intérêts exemplaires.

26 La conclusion selon laquelle le législateur entendait écarter le droit existant, notamment le critère prévu par la common law, est renforcée par l'énoncé liminaire du par. 65(1), reproduit ci-après :

[TRADUCTION] Outre les autres recours prévus par la présente partie ou reconnus en droit dans la province, le consommateur [. . .] peut recouvrer des dommages-intérêts exemplaires . . .

27 De même, l'intention du législateur de voir cette disposition être interprétée comme ouvrant un recours différent de celui de la common law peut aussi être trouvée au par. 40(1) qui, tout comme l'art. 65, figure dans la partie III de la Loi :

[TRADUCTION]

40(1) Les droits et recours prévus par la présente partie s'ajoutent à ceux reconnus en droit dans la province à moins qu'ils ne soient expressément ou implicitement contraires à la présente partie.

28 Ce paragraphe, qui indique explicitement que les dispositions de la Loi l'emportent sur les règles de droit existantes, serait sans effet si l'on interprétait le par. 65(1) selon les principes de la common law plutôt que d'y voir une indication de l'intention de remplacer ceux-ci en établissant un régime distinct visant à accroître la protection des consommateurs.

29 Chacune de ces deux dispositions indique le caractère particulier des règles établies par la Loi en matière de dommages-intérêts exemplaires ou punitifs; prises ensemble, elles l'expriment d'une manière éclatante.

30 À l'appui de la conclusion selon laquelle le par. 65(1) s'écarte du critère de la common law en matière de dommages-intérêts exemplaires, on peut aussi invoquer les termes dans lesquels il est fait mention de ces dommages-intérêts à l'art. 16, qui se trouve dans la partie II de la Loi. La partie II porte sur les pratiques commerciales déloyales. L'alinéa 16(1)b) précise que, lorsque le tribunal conclut qu'un fournisseur s'est livré à une pratique déloyale, il peut

award the consumer damages in the amount of any loss suffered because of the unfair practice, including punitive or exemplary damages;

31 Section 16(1)(b), by referring to "punitive or exemplary" damages without any limiting modifiers, can be seen as alluding to a different test for exemplary damages than the one set out in s. 65(1). The use of different language in s. 16 and s. 65 must be presumed to be meaningful.

32 The conclusion that the s. 65(1) test for exemplary damages replaces the common law approach also emerges from an analysis of the historical context and legislative history of Saskatchewan's consumer protection legislation.

33 Part III of the Act, in which s. 65 is found, was originally enacted in 1977 as *The Consumer Products Warranties Act, 1977*, S.S. 1976-77, c. 15. It was part of an emerging legislative pattern in North America designed to equitably reconfigure the imbalance in bargaining power between consumers and those who manufacture and sell products. In order to inform consumers and protect them from unsafe products and fraudulent or deceptive practices, legislation was introduced to rectify consumer vulnerability resulting from such common law principles as *caveat emptor.*

34 In Canada, the federal government enacted the *Department of Consumer and Corporate Affairs Act*, S.C. 1967-68, c. 16. A new Department of Consumer and Corporate Affairs was given responsibility for coordinating the enforcement of a number of federal consumer protection statutes. Other significant federal enactments included the *Food and Drugs Act*, S.C. 1952-53, c. 38, the *Hazardous Products Act*, S.C. 1968-69, c. 42, the *Motor Vehicle Safety Act*, S.C. 1969-70, c. 30, the *Textile Labelling Act*, S.C. 1969-70, c. 34, the consumer notes provisions of the *Bills of Exchange Act*, R.S.C. 1952, c. 15,

[TRADUCTION] accorder au consommateur des dommages-intérêts correspondant à la perte subie par suite de la pratique déloyale, y compris des dommages-intérêts punitifs ou exemplaires;

Puisque la mention de dommages-intérêts [TRADUCTION] « punitifs ou exemplaires », dans cette disposition, n'est assortie d'aucun autre énoncé limitatif, on peut conclure qu'elle renvoie à un critère différent de celui qui est formulé au par. 65(1). Il faut présumer que l'emploi d'une formulation différente aux art. 16 et 65 est significatif.

La conclusion que le critère établi au par. 65(1) à l'égard des dommages-intérêts exemplaires remplace les principes de la common law ressort aussi d'une analyse du contexte historique et des origines de la législation de la Saskatchewan en matière de protection du consommateur.

La partie III de la Loi, dans laquelle se trouve l'art. 65, a été édictée initialement en 1977 en tant que loi intitulée *The Consumer Products Warranties Act, 1977*, S.S. 1976-77, ch. 15. Ce texte s'inscrivait dans le mouvement observé alors en Amérique du Nord, où des lois étaient édictées en vue de corriger le déséquilibre entre les pouvoirs de négociation respectifs des consommateurs et des fabricants et vendeurs de produits. Afin d'informer les consommateurs et de les protéger contre les produits dangereux et les pratiques frauduleuses ou trompeuses, des mesures législatives ont été adoptées pour corriger la situation vulnérable dans laquelle des principes de common law comme la règle *caveat emptor* (que l'acheteur prenne garde) plaçaient le consommateur.

Au Canada, le gouvernement fédéral a édicté la *Loi sur le ministère de la Consommation et des Corporations*, S.C. 1967-68, ch. 16, qui confiait au nouveau ministère la tâche de coordonner l'application de diverses lois fédérales visant à protéger les consommateurs. Au nombre des lois fédérales importantes en cette matière figurent également la *Loi des aliments et drogues*, S.C. 1952-53, ch. 38, la *Loi sur les produits dangereux*, S.C. 1968-69, ch. 42, la *Loi sur la sécurité des véhicules automobiles*, S.C. 1969-70, ch. 30, la *Loi sur l'étiquetage des textiles*, S.C. 1969-70, ch. 34, les dispositions relatives

Part V (added by S.C. 1969-70, c. 48, s. 2), the *Weights and Measures Act*, S.C. 1970-71-72, c. 36, and the *Consumer Packaging and Labelling Act*, S.C. 1970-71-72, c. 41.

Provincial governments, through their jurisdiction over property and civil rights, also began to enact legislation designed to improve protection for consumers and enhance their remedial options. One such statute was Saskatchewan's *Consumer Products Warranties Act, 1977.*

When this statute was introduced in the Saskatchewan legislature, the then Minister of Consumer Affairs referred to a 1972 Ontario Law Reform Commission *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972), to explain why similar Saskatchewan warranty law was inadequate to meet the needs of consumers. The Minister quoted the following passage from p. 23 of the report:

> [Ontario's *Sale of Goods Act*] proceeds from the fictitious premise that the parties are bargaining from positions of equal strength and sophistication . . . . Especially serious is the Act's preoccupation with the bilateral relationship between the seller and the buyer, which totally ignores the powerful position of the manufacturer in today's marketing structure. . . . [O]ur sales law is private law and it has failed to provide any meaningful machinery for the redress of consumer grievances. This last weakness is perhaps the most serious of all weaknesses, for as has been frequently observed, a right is only as strong as the remedy available to enforce it. [Emphasis added.]

In my view, the combined effect of the statute's language, history and purpose leads inexorably to the trial judge's conclusion that the s. 65 test for exemplary damages is different from the common law approach. A "wilful" act is voluntary, intentional or deliberate. The words embraced by the concept of wilfulness under the Act represent a less onerous entry point than the words acting as gatekeepers to an award of exemplary damages at common

aux billets de consommation de la *Loi sur les lettres de change*, S.R.C. 1952, ch. 15, partie V (ajoutée par S.C. 1969-70, ch. 48, art. 2), la *Loi sur les poids et mesures*, S.C. 1970-71-72, ch. 36, et la *Loi sur l'emballage et l'étiquetage des produits de consommation*, S.C. 1970-71-72, ch. 41.

35 Les provinces ont elles aussi commencé à adopter des lois visant à améliorer la protection et les recours des consommateurs, en vertu de leur compétence en matière de propriété et de droits civils. La *Consumer Products Warranties Act, 1977*, de la Saskatchewan, faisait partie de ces lois.

36 Lors du dépôt du projet de loi à l'assemblée législative de la Saskatchewan, le ministre de la Consommation de l'époque a fait état d'un rapport de la Commission de réforme du droit de l'Ontario, intitulé *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972), afin d'expliquer les raisons pour lesquelles les dispositions législatives similaires de la Saskatchewan en matière de garantie ne répondaient pas adéquatement aux besoins des consommateurs. Il a cité le passage suivant du rapport ontarien, figurant à la p. 23 :

> [TRADUCTION] [La *Loi sur la vente d'objets* de l'Ontario] repose sur la prémisse illusoire selon laquelle les parties à la négociation sont de force égale et aussi bien informées l'une que l'autre [. . .] L'insistance avec laquelle la Loi affirme la symétrie de la relation entre le vendeur et l'acheteur est particulièrement préoccupante, car ce principe ne tient aucun compte de la position de force qu'occupent aujourd'hui les fabricants dans la structure commerciale. [. . .] [L]es règles régissant la vente relèvent du droit privé et elles n'offrent aucune voie de recours efficace aux consommateurs lésés. Cette dernière lacune est peut-être la plus grave car il n'y a de droit, comme on l'a souvent fait remarquer, que s'il existe un moyen de le faire valoir. [Je souligne.]

37 À mon avis, l'effet conjugué du libellé, des origines et de l'objectif de la Loi conduisent inexorablement à la conclusion de la juge de première instance : le critère énoncé à l'art. 65 en matière de dommages-intérêts exemplaires diffère des règles de la common law. Un acte [TRADUCTION] « délibéré » est volontaire ou intentionnel. Les mots auxquels renvoie la notion d'acte délibéré exprimée dans la Loi posent une condition moins exigeante

law, and fulfil the legislature's intention to enhance the accessibility of the remedy. There is no basis for imputing the common law test into a provision so clearly designed to replace it.

que les mots qui limitent l'octroi de dommages-intérêts exemplaires en common law, et ils répondent à l'intention du législateur, qui voulait accroître l'accessibilité du recours. Rien ne justifie d'incorporer le critère prévu par la common law dans une disposition qui a si clairement pour but de le remplacer.

38 As previously indicated, the trial judge made a number of factual findings underpinning her conclusion that the violation was wilful and that exemplary damages were warranted. She stated:

Comme il a été mentionné plus tôt, la juge de première instance a tiré plusieurs constatations de fait qui l'ont amenée à conclure que la violation était délibérée et que l'octroi de dommages-intérêts exemplaires était justifié. Elle s'est exprimée en ces termes :

. . . the admissions of Eric Durance on behalf of Chrysler clearly show that not only did Chrysler know about the problems of the defective daytime running light modules, it did not advise the plaintiff of this. It simply chose to ignore the plaintiff's requests for compensation and told her to seek recovery from her insurance company. Chrysler . . . made a business decision to neither advise its customers of the problem nor to recall the vehicles to replace the modules. . . . Chrysler was not prepared to spend $250 million even though it knew what the defective module might do.

[TRADUCTION] . . . les aveux d'Eric Durance au nom de Chrysler montrent clairement que non seulement Chrysler était au courant des problèmes liés aux modules de feux de jour, mais qu'elle n'en a pas informé la demanderesse. Elle a simplement décidé de ne pas donner suite à la demande d'indemnisation de cette dernière et lui a dit de s'adresser à son assureur. Chrysler [. . .] a pris la décision d'affaires de ne pas informer ses clients du problème et de ne pas rappeler les véhicules pour remplacer le module. [. . .] Chrysler n'était pas disposée à dépenser 250 millions de dollars, même si elle savait ce que la défectuosité du module était susceptible de provoquer.

Mr. Durance admits that there is no other explanation for the fire in the plaintiff's truck. There is no indication that the plaintiff did anything to the truck to cause the fire. Jim Wilkins, the proper officer for Dodge, admitted that Dodge has done nothing to find out why the truck burned. Mr. Wilkins admits that Dodge has done nothing to compensate the plaintiff.

Monsieur Durance reconnaît que l'incendie du camion de la demanderesse ne s'explique d'aucune autre façon. Rien n'indique que la demanderesse ait fait quoi que ce soit au camion qui aurait provoqué l'incendie. Jim Wilkins, le responsable compétent chez Dodge, admet que Dodge n'a rien fait afin de déterminer la cause de l'incendie du camion. Il reconnaît que Dodge n'a pas fait quoi que ce soit pour indemniser la demanderesse.

Counsel for the defendants argues that this matter had to be resolved by litigation because the plaintiff and the defendants simply had a difference of opinion on whether the plaintiff should be compensated by the defendants. Had the defendants [had] some dispute as to the cause of the fire, that may have been sufficient to prove that they had not wilfully violated this Part of the Act. They did not. They knew about the defective daytime running light module. They did nothing to replace the burned truck for the plaintiff. They offered the plaintiff no compensation for her loss. Counsels' position that the definition of the return of the purchase price is an arguable point is not sufficient to negate the defendants' violation of this Part of the Act. I find the violation of the defendants to be

L'avocat des défenderesses fait valoir que l'affaire devait se régler devant les tribunaux parce que la demanderesse et les défenderesses différaient tout simplement d'avis sur la question de savoir si la demanderesse devait être indemnisée par les défenderesses. Si les défenderesses pensaient que la cause de l'incendie était contestable, cela aurait pu suffire à démontrer qu'elles n'avaient pas délibérément contrevenu à cette partie de la Loi. Or elles ne l'ont pas contestée. Elles étaient au fait de la défectuosité du module de feux de jour. Elles n'ont rien fait pour remplacer le camion incendié de la demanderesse. Elles ne lui ont rien offert pour l'indemniser de sa perte. La thèse de leur avocat selon laquelle la définition de la remise du prix d'achat est un point susceptible

wilful. Thus, I find that exemplary damages are appropriate on the facts of this case. [paras. 42-44]

Her factual findings were available on the record. I see no basis for interfering either with them or her conclusion that they represent a "wilful" violation of the Act attracting exemplary damages. Since the quantum of those damages is not at issue, I would restore the trial judge's award of exemplary damages in the amount of $25,000.

B. *Costs*

In the Court of Appeal, costs were awarded against Ms. Prebushewski, an award she submits the Court of Appeal had no jurisdiction to make.

Unless the action is frivolous or vexatious, s. 66 of the Act provides that costs "shall" not be awarded against a consumer who brings an action against a manufacturer or retail seller for breach of warranty, whether or not the consumer is successful:

66(1) No costs shall be awarded against a consumer, a person mentioned in subsection 41(1) who derives his or her property or interest in a consumer product from or through a consumer, or a person mentioned in section 64, who:

(a) brings an action against a manufacturer, retail seller or warrantor for breach of a warranty pursuant to this Part;

. . .

(2) Subsection (1) applies regardless of whether the consumer or other person is successful in his or her action, defence or counterclaim unless, in the opinion of the court, the action, defence or counterclaim was frivolous or vexatious.

Chrysler and Dodge City argue that this provision's protective scope is limited to proceedings in the Court of Queen's Bench. They rely on s. 3(c) of

d'être débattu ne suffit pas pour neutraliser la violation par les défenderesses de cette partie de la Loi. J'estime que la violation commise par les défenderesses était délibérée. Je conclus par conséquent que l'octroi de dommages-intérêts exemplaires est indiqué au vu des faits de l'affaire. [par. 42-44]

39 La preuve autorisait la juge de première instance à tirer de telles constatations de fait. Je ne vois aucune raison de modifier ces constatations ou la conclusion selon laquelle elles indiquent une contravention [TRADUCTION] « délibérée » à la Loi justifiant une condamnation à des dommages-intérêts exemplaires. Comme le montant de ces dommages-intérêts n'est pas contesté, je suis d'avis de rétablir l'octroi de dommages-intérêts exemplaires de 25 000 $ ordonné par la juge de première instance.

B. *Les dépens*

40 La Cour d'appel a condamné M^me^ Prebushewski aux dépens. Selon cette dernière, la cour n'avait pas le pouvoir de le faire.

41 Suivant l'article 66 de la Loi, le consommateur qui poursuit un fabricant ou un détaillant pour violation de garantie ne peut être condamné aux dépens — et ce, qu'il ait gain de cause ou non —, à moins que son action ne soit frivole ou vexatoire :

[TRADUCTION]

66(1) Ne peuvent être condamnés aux dépens le consommateur, la personne visée au paragraphe 41(1) qui tient son droit de propriété ou son intérêt sur un produit de consommation d'un consommateur ou la personne visée à l'article 64, qui :

a) soit intente une action contre un fabricant, un détaillant ou un garant pour violation d'une garantie prévue à la présente partie;

. . .

(2) Le paragraphe (1) s'applique sans égard à l'issue de l'action, de la défense ou de la demande reconventionnelle, à moins que le tribunal n'estime qu'elle était frivole ou vexatoire.

42 S'appuyant sur l'al. 3c) de la Loi, où le mot [TRADUCTION] « tribunal » est défini comme étant la « Cour du Banc de la Reine », Chrysler et Dodge

the Act which defines "court" as "Court of Queen's Bench". I see nothing in the language of s. 66 that either expressly or implicitly limits its application to the first stage in the natural progression of legal proceedings. Section 66(1), which stipulates that no costs should be awarded against a consumer, is clearly the defining provision in s. 66. It does not mention the word "court". The presence of that word in s. 66(2), a modifying provision, should not be read in a way that detracts from the clear purpose articulated in s. 66(1).

43 The spirit of s. 66 is to protect consumers who start legitimate lawsuits from the disincentive of potentially onerous costs awards against them. Its intent is to encourage the lawful pursuit of such claims. Limiting the application of such costs protection to the trial level would have the opposite effect, given the likelihood that unsuccessful defendants may, as they have a right to do, seek to appeal.

44 Since both the trial and the appeal court held that Ms. Prebushewski was entitled to damages in the amount of the purchase price of the truck, and since there is no suggestion by either Chrysler or Dodge City that this action is frivolous or vexatious, there was no basis for an award of costs against her in the Court of Appeal.

45 I would allow the appeal with costs throughout and restore the decision of the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: Rusnak Balacko Kachur Rusnak, Yorkton, Saskatchewan.

Solicitors for the respondents: McDougall Gauley, Regina.

City soutiennent que la protection accordée par cette disposition s'applique seulement aux instances devant la Cour du Banc de la Reine. Je ne vois rien dans le libellé de l'art. 66 qui restreigne expressément ou implicitement l'application de cette disposition à la première étape du cheminement naturel d'une action judiciaire. Le paragraphe 66(1), qui énonce que le consommateur ne peut être condamné aux dépens, constitue incontestablement la disposition essentielle de l'article. Le terme [TRADUCTION] « tribunal » n'y figure pas. La présence de ce terme au par. 66(2), qui est une disposition de modulation, ne saurait recevoir d'interprétation dérogeant à l'objet clairement exprimé au par. 66(1).

L'article 66 vise à protéger les consommateurs qui intentent des poursuites légitimes contre la possibilité dissuasive d'une condamnation à des dépens élevés. L'intention du législateur est ici de favoriser de telles poursuites. Limiter à la première instance cette protection relative aux dépens aurait le résultat inverse, étant donné la possibilité que les défendeurs condamnés souhaitent interjeter appel, comme ils en ont le droit.

Comme le tribunal de première instance et la Cour d'appel ont jugé que M^me^ Prebushewski avait droit à des dommages-intérêts correspondant au prix d'achat du camion, et que ni Chrysler ni Dodge City n'ont prétendu que l'action était frivole ou vexatoire, la condamnation de M^me^ Prebushewski aux dépens devant la Cour d'appel n'était pas fondée.

Je suis d'avis d'accueillir l'appel avec dépens dans toutes les cours, et de rétablir la décision de la juge de première instance.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Rusnak Balacko Kachur Rusnak, Yorkton, Saskatchewan.

Procureurs des intimées : McDougall Gauley, Regina.

TAB 12

1995 CarswellAlta 733
Supreme Court of Canada

R. v. Adams

1995 CarswellAlta 733, 1995 CarswellAlta 837, [1995] 4 S.C.R. 707, [1995] S.C.J. No. 105, [1996] A.W.L.D. 105, 103 C.C.C. (3d) 262, 110 W.A.C. 161, 131 D.L.R. (4th) 1, 178 A.R. 161, 190 N.R. 161, 29 W.C.B. (2d) 185, 44 C.R. (4th) 195, EYB 1995-66962

R. v. JOHN RICHARD ADAMS

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

Heard: October 6, 1995
Judgment: December 21, 1995
Docket: Doc. 24252

Counsel: *Jack Watson, Q.C.*, for the Crown.
Philip G. Lister, Q.C., for respondent.

The judgment of the court was delivered by *Sopinka J.*:

1 This appeal concerns the power of a trial judge to rescind a ban on publication made under s. 486(3) and (4) of the *Criminal Code*, R.S.C. 1985, c. C-46. The order banning publication of the name of the complainant and any information capable of identifying her was issued on request of the Crown. After acquitting the respondent, the trial judge on his own motion rescinded the order on the ground that the complainant's evidence was not credible. The Crown appeals from the rescission order on the grounds that under the *Criminal Code* provisions there is no power to rescind and, if there is, it was not properly exercised in this case.

I. Facts

2 The respondent John Adams was charged with one count of sexual assault using a weapon, one count of confining, one count of aggravated assault, one count of threatening and one count of possession of a weapon. At the request of the Crown, the trial judge imposed a ban on the publication of the complainant's name pursuant to s. 486(4) of the *Criminal Code*.

3 During the course of the trial, Feehan J. found that the complainant was a prostitute. The trial judge further held that the complainant had agreed to engage in prostitution with Mr. Adams.

4 The evidence led at trial was confusing and contradictory. While the complainant claimed that Adams had threatened her with a sword and forced her to perform sexual acts, Adams stated that he had refused to engage in sexual acts with the complainant upon learning that she was pregnant. In addition, Adams claimed that the complainant had stolen $900 from his wallet, and that when he had discovered that the money was missing, the complainant became hysterical and attacked him with a sword.

5 After reviewing all of the evidence before him, Feehan J. found that he was unable to determine exactly what happened on the night in question. Neither the complainant nor the accused had given completely reliable evidence, and the various allegations could not be verified by independent witnesses. As a result of these findings, the trial judge made the following statement:

> There is an important rule of law which applies in this case as it applies in all criminal cases and it is known as the presumption of innocence. To be put simply, it means that the accused person is presumed to be innocent until the Crown has proven his guilt beyond a reasonable doubt. The presumption of innocence and the burden of proof in a criminal case

are inseparable. The onus or burden of proving the guilt of the accused beyond a reasonable doubt rests with the Crown, and that burden never shifts. There is no burden on the accused to prove his innocence. The Crown must prove each and every ingredient of the offence charged beyond a reasonable doubt. If a judge believes the complainant, he may convict. If he believes the accused, most times he must acquit, but there is something in between. If the judge is unsure, if he's not convinced beyond a reasonable doubt, that doubt must go to the accused and not to the Crown.

All charges against the accused are dismissed. *I lift the ban on the publication of the name of the complainant*. [Emphasis added.]

At the conclusion of the trial, counsel for the Crown submitted that the publication ban should not have been lifted. The trial judge stayed the revocation of the ban pending a further hearing of the matter. At the conclusion of the hearing the trial judge upheld his revocation order citing his findings that the complainant was a prostitute and a liar. The later was not a finding which appears to have been made at trial. Subsequently the order lifting the ban was stayed by Wachowich A.C.J. pending appeal.

II. Statutory Provisions

6 *Criminal Code*, R.S.C. 1985, c. C-46

486. ...

(3) Subject to subsection (4), where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 346 or 347, the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published on any document or broadcast in any way.

(4) The presiding judge or justice shall

(*a*) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant to proceedings in respect of an offence mentioned in subsection (3) of the right to make an application for an order under subsection (3); and

(*b*) on application made by the complainant, the prosecutor or any such witness, make an order under that subsection.

III. Judgment Below

Alberta Court of Queen's Bench

7 On July 21, 1994, Feehan J. addressed the Crown's arguments concerning the revocation of the publication ban. Although he was willing to accept that lifting the ban could deter some individuals from reporting sexual assault, the judge expressed the view that the primary purpose of the ban was to protect "innocent" victims. In his view, the protection of s. 486(4) should extend to "honest evidence" only, and should not be applied where the complainant is "a liar" and "a prostitute".

8 Feehan J. then went on to consider policy reasons in favour of lifting the publication ban. In his view:

... this woman went into the beer parlor as a predator, and this fellow says he lost $900. I didn't make that as a finding of fact, but he says he lost $900.

Don't we owe society a duty to tell the next person that goes into that beer parlor for a beer and maybe also looking for a prostitute, that this is a dangerous one[?]

Feehan J. accordingly held that the protection of s. 486(4) should not apply in the case at bar, and upheld his original ruling revoking the publication ban.

IV. Issues

9 The following issues were raised by the parties:

1. Does this court have jurisdiction to hear this appeal?

2. Is this appeal moot?

3. Do subss. (3) and (4) of s. 486 of the *Criminal Code* authorizea judge to revoke an order banning publication without obtaining the consent of the Crown and the complainant?

4. If the answer to No. 3 is yes, was the revocation order properly made in the circumstances of this case?

10 In view of the conclusion I have reached with respect to the first three issues, it will not be necessary to deal with the fourth issue.

V. Analysis

1. Jurisdiction

11 The Crown applied for leave to appeal directly to this court from the order of the trial judge, pursuant to s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26. By reason of the jurisdictional issue raised by the application, an oral hearing of the leave application was ordered. A full bench heard the application which included submissions as to jurisdiction. The application was granted without reasons. The issue of jurisdiction was further raised on the appeal. In my view, the court had jurisdiction to grant leave and to hear the appeal.

12 Section 40(1) of the *Supreme Court Act* authorizes an appeal to this court with leave of this court from "any ... judgment ... of the highest court of final resort in a province, or a judge thereof". If the Crown did have the right to appeal to the Court of Appeal, this court would lack the jurisdiction to hear an appeal of the order in question based on s. 40(1) of the *Supreme Court Act*. It is, therefore, necessary to consider whether the Crown had the right to appeal to the Court of Appeal from the order in question. Appeals by the Crown in criminal matters are governed by the *Criminal Code*. Section 676(1) provides as follows:

676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

(*b*) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercisejurisdiction on an indictment;

(*c*) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or

(*d*) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

13 The order in issue was made after the respondent had been acquitted. The acquittal was based on the trial judge's conclusion, based on his assessment of the evidence, that the Crown had failed to prove the guilt of the accused beyond a reasonable doubt. Understandably, the Crown has decided not to attempt to challenge this finding on appeal. Since no point of law appeared to be raised, the Crown could not surmount the jurisdictional hurdle imposed by s. 676(1)(*a*) that the appeal involve "a question of law alone". An appeal from the order itself does not fit within any of the subsections of s. 676(1) and the trial court is, therefore, the court of last resort in the province with respect to the order sought to be appealed. Section 2 of the *Supreme Court Act* defines "judgment" as including "any ... order ...". Accordingly, s. 40(1) confers jurisdiction on this court unless this conclusion is precluded by s. 40(3) of the *Supreme Court Act*.

14 Section 40(3) provides as follows:

40. ...

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

15 It is apparently intended to exclude an appeal under s. 40(3) of the *Supreme Court Act* of judgments in respect of which an appeal lies by virtue of the *Criminal Code* provisions. In respect of indictable offences, the subsection prohibits an appeal from a judgment of any court:

(1) acquitting,

(2) convicting,

(3) setting aside a conviction,

(4) affirming a conviction,

(5) setting aside an acquittal,

(6) affirming an acquittal.

The use of the words "[n]o appeal to the Court lies under this section" implies that it was the intention of Parliament to affirm that in the instances I have listed above the avenues of appeal provided in the Code were to be followed. When s. 40(3) (formerly s. 41(3)) was passed in 1949, s. 691 (formerly s. 1023) provided and continues to provide for an appeal to this court by the accused from a judgment:

(a) affirming a conviction (s. 691(1), formerly s. 1023(1)),

(b) setting aside an acquittal (s. 691(2), formerly s. 1023(2)).

Section 693 (formerly s. 1023) provided and continues to provide for an appeal to this court from a judgment:

(a) setting aside a conviction (s. 693(1), formerly s. 1023(3)),

(b) affirming an acquittal (s. 693(1), formerly s. 1023(3)) — This is expressed as dismissing an appeal taken pursuant to s. 676(1)(*a*) (formerly s. 1013), thus affirming the acquittal.

16 Accordingly, these rights of appeal are excluded by items (3), (4), (5) and (6) listed above. In 1985, and after s. 40(3) was passed, the avenues of appeal to this court by the Crown were expanded under the *Criminal Code* to permit an appeal from a judgment dismissing a Crown appeal from an order of a superior court (1) quashing an indictment, (2) refusing to exercise jurisdiction on an indictment, or (3) staying an indictment. See R.S.C. 1985, c. 27 (1st Supp.), s. 139. However, s. 40(3) was not updated to reflect this change in the Code.

17 Items (1) and (2) preclude an appeal under s. 40(1) where an appeal is provided under the provisions of the *Criminal Code* to the Crown from an acquittal (s. 676(1)(*a*)) and to the accused from conviction (s. 675). When s. 40(3) was enacted these rights of appeal were contained in s. 1013 of the *Criminal Code*, R.S.C. 1927, c. 36, as amended.

18 It is clear, therefore, that s. 40(3) precludes an appeal that falls within one of the 6 categories that I have listed and in respect of which an appeal lies pursuant to the provisions of the *Criminal Code*. In addition, this court has recently held, in *R. v. Hinse*, S.C.C., No. 24320, November 30, 1995 [reported at 44 C.R. (4th) 209], that s. 40(3) extends to any order that is integrally related to one of the categories. In concluding that an order made under the ancillary jurisdiction of a court of appeal pursuant to s. 686(8) is not integrally related to one of the kinds of judgments listed in s. 40(3), the Chief Justice stated (at para. 28 [p. 258]):

> However, in my view, when a court of appeal exercises its power to impose an order under s. 686(8), it is *not* rendering an order which constitutes an integral part of a "judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence". Rather, as I shall endeavour to explain, the court is imposing an order which is by nature *ancillary* to the underlying judgment rendered by the court. As such, I am of the view that in accordance with a purposive interpretation of ss. 2 and 40(3), an accused or the Crown is entitled to seek leave to appeal a s. 686(8) order under this court's general jurisdiction as defined in s. 40(1) of the *Supreme Court Act*. [Emphasis in original.]

As a result, an appeal is precluded by s. 40(3) not only in respect of the six instances which I have listed but also the vast array of interlocutory orders and rulings made at trial with respect to the conduct of the proceedings.

19 Applying the foregoing to this appeal, it is manifest that the order revoking the ban was not a "judgment ... acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence". The order was made after an acquittal had been ordered and no appeal would lie to the Court of Appeal from the order itself under the provisions of the *Criminal Code*. The order is not integrally related to the acquittal. Indeed, it had no bearing whatsoever on the acquittal. Accordingly, s. 40(3) is not a bar and this court has jurisdiction to hear this appeal.

2. Mootness

20 The respondent submitted that the appeal was moot on the ground that no media outlet has yet expressed the desire to publish the name of the complainant. He submits, therefore, that there is no live controversy and that we should not exercise our discretion to hear the appeal.

21 An issue of mootness involves a two-stage process. The first stage requires consideration of whether a live controversy remains. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353, this court stated:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties.

22 The second stage applies if no live controversy remains. The court must then consider whether to exercise its discretion to hear the appeal notwithstanding that it is moot. In my view, the case at bar cannot be considered moot. Clearly, the dispute between the parties remains unresolved. Although no news organization has yet deemed the complainant's name to be newsworthy information, this does not mean that no media outlet will ever wish to publish the complainant's name if the ban is lifted. The publicity surrounding this case increases the likelihood that a news organization might seek to print the complainant's name.

23 In any event, even if the appeal were moot I would exercise the court's discretion to hear the appeal. The issue is one that is important and may affect future cases. It is in the public interest that the question be resolved.

3. Was the Order Authorized?

24 To answer this question it is necessary to consider (1) whether the language of s. 486(3) and (4) authorizes a judge to revoke the order, and (2) whether the revocation of the order is supportable on the basis of the exercise of an inherent power of a court to reconsider an order previously made. In approaching the interpretation of any statutory provision, it is prudent to keep in mind the simple but fundamental instruction offered by the court in *Reigate Rural District Council v. Sutton District Water Co.* (1908), 99 L.T.R. 168 (K.B.), at p. 170, and affirmed by this court in *Hirsch v. Montreal Protestant School Board*, *(*sub nom. *Reference re Certain Questions Relative to the Educational System of Island of Montreal)* [1926] S.C.R. 246:

> ... it is always necessary in construing a statute, and in dealing with the words you find in it, to consider the object with which the statute was passed, because it enables one to understand the meaning of the words introduced into the enactment.

This well-settled rule of statutory interpretation has continued to be followed by this court to the present time.

25 The "object and purpose" of the s. 486 publication ban were considered by this court in *Canadian Newspaper Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122. In that case, the court held that the object of the predecessor to the relevant subsections was to encourage the reporting of sexual offences. In addition, the subsections were held to pursue the broader objective of suppressing criminal activity. According to Lamer J. (as he then was) for the court, at p. 130:

> Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban ... is to favour the suppression of crime and to improve the administration of justice.

These objectives were held to be "pressing and substantial" within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*.

26 According to the court in *Canadian Newspapers*, the mandatory nature of an order under s. 486 serves to further the goal of encouraging the reporting of sexual offences. As Lamer J. stated, at pp. 131-32:

> When considering all of the evidence adduced by the appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section [486] is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it.

In addition, the court pointed out that complainants must be *certain* that their names will not be published in order for the object of the publication ban to be achieved. According to Lamer J., at p. 132:

> Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication should be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it. [Emphasis omitted.]

Lamer J. went on to hold that a "discretionary ban is not an option as it is not effective in attaining Parliament's pressing goal" (pp. 132-33). As a result, the mandatory nature of the publication ban was not only necessary to ensure certainty for the complainant, but it was also necessary in order for the section to achieve parliament's objective. Had the order in question been merely discretionary, s. 486 might not have survived the "rational connection" branch of the *Oakes* test [*R. v. Oakes*, [1986] 1 S.C.R. 103].

27 A revocable publication ban, like a discretionary ban, would fail to provide the certainty that is necessary to encourage victims to come forward. If the trial judge were given the power by the legislation to revoke the ban, the complainant would never be certain that her anonymity would be protected. The ban would serve as little more than a temporary guarantee of anonymity. There is nothing in the language of s. 486(4) that purports to authorize revocation of the order and, given the purpose of the legislation, no such power can or ought to be implied.

28 The respondent submits, however, that there is nothing in the section that prevents a judge from reconsidering and, if appropriate, from revoking the order. Reliance is, therefore, placed on the inherent power of a trial judge to reconsider, vary or rescind previous orders made during the course of trial.

29 I agree with the respondent that nothing in the language of s. 486 of the *Criminal Code* expressly excludes any power possessed by a court to reconsider an order made under s. 486(3) and (4). These provisions address the making of the order but do not deal with whether the order is reviewable after it has been made. It is, therefore, not inconsistent with the interpretation

of these subsections to hold that, whatever inherent power to reconsider resides in a court, survives. Indeed, as I shall point out hereafter, it may be desirable and in keeping with the purpose and objects of the section to permit reconsideration and revocation of the order if the circumstances which justified its making have ceased to exist. It is, therefore, necessary to consider what authority a judge has to reconsider a previous order and its application to the circumstances of this case.

30 A court has a limited power to reconsider and vary its judgment disposing of the case as long as the court is not functus. The court continues to be seized of the case and is not functus until the formal judgment has been drawn up and entered. See *Oley v. Fredericton (City)* (1983), 50 N.B.R. (2d) 196 (C.A.). With respect to orders made during trial relating to the conduct of the trial, the approach is less formalistic and more flexible. These orders generally do not result in a formal order being drawn up and the circumstances under which they may be varied or set aside or also less rigid. The ease with which such an order may be varied or set aside will depend on the importance of the order and the nature of the rule of law pursuant to which the order is made. For instance, if the order is a discretionary order pursuant to a common law rule, the precondition to its variation or revocation will be less formal. On the other hand, an order made underthe authority of statute will attract more stringent conditions before it can be varied or revoked. This will apply with greater force when the initial making of the order is mandatory.

31 As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place. In *R. v. Khela*, S.C.C., No. 24265, November 16, 1995, [reported 43 C.R. (4th) 368] this court had occasion to consider this issue in relation to an order requiring the Crown to disclose pursuant to the principles of this court's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. In the majority reasons the following statement was made with respect to proper approach to reconsideration of such an order (at para. 10 [p. 392]):

> Where new evidence which may warrant a change in the terms of the Crown's obligation to disclose comes into the possession of the Crown, the appropriate procedure is an application to the trial judge to vary. The trial judge has a discretion to vary an order for disclosure on the basis of evidence which establishes that the factual foundation upon which the order was based has changed. Such an application should be made at the earliest opportunity. Difficulties in compliance with disclosure orders should be resolved by application to vary disclosure obligations rather than by non-compliance followed by an attempt at ex post facto justification on the basis of alleged new circumstances.

Where an order is required to be made by statute, the circumstances that are relevant are those whose presence makes the order mandatory. As long as these circumstances are present, there cannot be a material change of circumstances.

32 Subsections (3) and (4) of s. 486 make the order banning publication mandatory on the application of the prosecution, the complainant or a witness under the age of 18. In this case, the circumstance that made the order mandatory was an application by the prosecutor. The Crown did not withdraw its application or consent to revocation of the order. Accordingly, the circumstances that were present and required the order to be made had not changed. The trial judge, therefore, did not have the power to revoke the order.

33 While this conclusion is sufficient to dispose of this case, it is useful to add that, had the Crown consented to the revocation order but the complainant did not, the trial judge would equally have had no authority to revoke. The complainant was also entitled to the publication ban even if the Crown had not applied for it. If, however, both the Crown and the complainant consent, then the circumstances which make the publication ban mandatory are no longer present and, subject to any rights that the accused may have under s. 486(3), the trial judge can revoke the order. There may be circumstances in which the facts are such that both the Crown and the complainant conclude, after hearing the evidence or some of it, that the public interest and that of the complainant are better served if the facts are published.

34 It might still be argued that a witness might object to the revocation. Whether such an objection would prevail requires considerable speculation as to the nature of the order, whether revocation would disclose the identity of the witness and whether the witness is one that the section is designed to protect. I would leave for another day the question whether every witness under 18 years of age could insist on the ban being maintained against the wishes of the Crown and the complainant. As well, I would not rule out the traditional power of a court to set aside or review an order that has been obtained by fraud or misrepresentation.

No such issue arises here and I would prefer to leave consideration of the exercise of this power to a case in which the point is raised directly.

35 In the result, the appeal is allowed, the order of the trial judge dated June 17, 1994 and affirmed on July 21, 1994 is set aside and the order banning publication dated June 14, 1994 is restored.

Appeal allowed.

TAB 13

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

***Pepall J.*:**

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act*. [1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re* [5] ; *Smurfit-Stone Container Canada Inc., Re* [6] ; and *Calpine Canada Energy Ltd., Re* [7] . In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re* [8] and *Global Light Telecommunications Inc., Re* [9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re* [10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re* [11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the

context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended

2 R.S.C. 1985, c.C.44.

3 R.S.C. 1985, c. B-3, as amended.

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522 (S.C.C.).

TAB 14

See paras. 83-84

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

Re Brainhunter, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60 at para 24; *Re Indalex Ltd.*, [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd.*, 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp.*, [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.*, [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Re Sino-Forest Corp., 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.*,*supra*.

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang, supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Re Grant Forest Products Inc., [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

[77] While *Re Grant Forest Products Inc*. involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

TAB 15

See para. 47

COURT FILE NO.: 09-CL-7950
DATE: 20090723

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF

S. Philpott, for the Former Employees

K. Zych, for Noteholders

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

HEARD &
DECIDED: JUNE 29, 2009

E N D O R S E M E N T

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

[30] The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra,* at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc*. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc*. (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> …we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the "old company" is not

> feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc*. (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc*. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale…be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"…Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged…

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary…

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

TAB 16

See para. 23

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation et al.

Ontario Reports

Ontario Superior Court of Justice,

Newbould J.

August 19, 2014

121 O.R. (3d) 228 | 2014 ONSC 4777

[Indexed as: Nortel Networks Corp. (Re)]

Case Summary

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Interest — "Interest stops" rule applying in Companies' Creditors Arrangement Act proceedings — Bondholders not entitled to post-filing interest — Court having jurisdiction to make declaration to that effect in absence of plan of arrangement — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), the court was asked to determine whether bondholders were entitled to post-filing interest.

Held, bondholders were not entitled to post-filing interest.

The "interest stops" rule applies in *CCAA* proceedings. To permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the *CCAA*. While this was a liquidating *CCAA* proceeding, there is no need for there to be a liquidating *CCAA* proceeding in order for the interest stops rule to apply. The reasoning for the application of the common law insolvency rule -- that is, the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule -- is equally applicable to a *CCAA* proceeding that is not a liquidating proceeding. The court had jurisdiction to declare that the bondholders were not entitled to post-filing interest even though a plan of arrangement or compromise had not been negotiated by the debtor and its creditors.

Century Services Inc. v. Canada (Attorney General), [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, [2010] G.S.T.C. 186; *Indalex Ltd. (Re)*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, 301 O.A.C. 1, 96 C.B.R. (5th) 171, 8 B.L.R. (5th) 1, 354 D.L.R. (4th) 581, 2013EXP-356, 2013EXPT-246, J.E. 2013-185, D.T.E. 2013T-97, EYB 2013-217414, 439 N.R. 235, 20 P.P.S.A.C. (3d) 1, 2 C.C.P.B. (2d) 1, 223 A.C.W.S. (3d) 1049, **consd**

Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, 269 D.L.R. (4th) 79, 349 N.R. 1, J.E. 2006-1215, 212 O.A.C. 338, 20 C.B.R. (5th) 1, 10 P.P.S.A.C. (3d) 66, 148 A.C.W.S. (3d) 182; *Stelco Inc. (Re)*, [2007] O.J. No. 2533, 2007 ONCA 483, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 158 A.C.W.S. (3d) 877, **distd**

Other cases referred to

Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp., [1992] A.J. No. 227, 89 D.L.R. (4th) 84, [1992] 4 W.W.R. 309, 1 Alta. L.R. (3d) 257, 125 A.R. 45, 11 C.B.R. (3d) 193, 14 W.A.C. 45, 32 A.C.W.S. (3d) 350 (C.A.); *AbitibiBowater Inc. (Re)*, [2009] Q.J. No. 19125, 2009 QCCS 6461 (Sup. Ct.); *Canada (Attorney General) v. Confederation Life Insurance Co*., [2001] O.J. No. 2610, [2001] O.T.C. 486, 106 A.C.W.S. (3d) 245 (S.C.J.); [page229] *In re Humber Ironworks and Shipbuilding Co.* (1869), L.R. 4 Ch. App. 643 (C.A.); *Indalex Ltd. (Re)*, [2009] O.J. No. 3165, 55 C.B.R. (5th) 64, 79 C.C.P.B. 104, 179 A.C.W.S. (3d) 267 (S.C.J.); *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.); *Lehndorff General Partner Ltd. (Re)*, [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847 (Gen. Div.); *Nortel Networks Corp. (Re)*, [2012] O.J. No. 1115, 2012 ONSC 1213, 88 C.B.R. (5th) 111, 66 C.E.L.R. (3d) 310, 213 A.C.W.S. (3d) 665 (S.C.J.); *Savin (Re)* (1872), L.R. 7 Ch. 760 (C.A.); *Shoppers Trust Corp. (Liquidator of) v. Shoppers Trust Co*. (2005), 74 O.R. (3d) 652, [2005] O.J. No. 1081, 251 D.L.R. (4th) 315, 195 O.A.C. 331, 10 C.B.R. (5th) 93, 138 A.C.W.S. (3d) 225 (C.A.); *Thibodeau v. Thibodeau* (2011), 104 O.R. (3d) 161, [2011] O.J. No. 573, 2011 ONCA 110, 277 O.A.C. 359, 87 C.C.P.B. 1, 331 D.L.R. (4th) 606, 5 R.F.L. (7th) 16, 73 C.B.R. (5th) 173, 199 A.C.W.S. (3d) 1068; *Timminco Ltd. (Re)*, [2014] O.J. No. 3270, 2014 ONSC 3393, 14 C.B.R. (6th) 113 (S.C.J.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.], s. 11(1)

Excise Tax Act, R.S.C. 1985, c. E-15 [as am.]

United States Bankruptcy Code, 11 U.S.C., c. 11

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11 [as am.]

Authorities referred to

Sarra, Janis P., *Rescue!: The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013)

RULING on the entitlement of certain creditors to post-filing interest.

Benjamin Zarnett and *Graham Smith*, for monitor and Canadian debtors.

Ken Rosenberg, for Canadian Creditors' Committee.

Michael Barrack, *D.J. Miller* and *Michael Shakra*, for U.K. pension claimants.

Tracy Wynne, for EMEA debtors.

Kenneth Kraft, for Wilmington Trust, National Association.

Richard Swan, *Gavin Finlayson* and *Kevin Zych*, for *ad hoc* group of bondholders.

Shayne Kukulowicz, for U.S. Unsecured Creditors' Committee.

John D. Marshall, for Law Debenture Trust Company of New York.

Brett Harrison, for Bank of New York Mellon.

Andrew Gray and *Scott Bomhof*, for U.S. debtors.

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[1] Endorsement of **NEWBOULD J.**: — Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other U.S. debtors [page230] filed petitions in Delaware under the *United States Bankruptcy Code*, 11 U.S.C., c. 11.

[2] Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a U.S. Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus, all of the notes are payable by Nortel entities in both Canada and the U.S., either as the maker or guarantor. Under claims procedures in both the Canadian and U.S. proceedings, claims by bondholders for principal and pre-filing interest in the amount of US$4.092 billion have been made against each of the Canadian and U.S. estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US$1.6 billion.

[3] The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, U.S. and European, Middle East and African estates ("EMEA") are approximately US$7.3 billion, and thus the post-filing bond interest claims of now more than US$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the

insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

[4] The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the *CCAA* proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the *CCAA* proceedings that authorized procedures to determine claims for all purposes.

[5] By direction of June 24, 2014, it was ordered that the following issues be argued:

(a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and [page231]

(b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

[6] The hearing in the U.S. Bankruptcy Court was scheduled to proceed at the same time as the hearing in this court but was adjourned due to an apparent settlement between the U.S. debtors and the U.S. Unsecured Creditors' Committee.

[7] The monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the U.K. pension claimants, the EMEA debtors and the Wilmington Trust take the position that in a liquidating *CCAA* proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The *ad hoc* group of bondholders, supported by the U.S. Unsecured Creditors' Committee, Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in *CCAA* proceedings and that the right to interest on the crossover bonds is not lost on the filing of *CCAA* proceedings and can be the subject of negotiations regarding a *CCAA* plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the *CCAA* except under a negotiated *CCAA* plan duly approved by the requisite majorities of creditors and sanctioned by the court.

[8] For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

The Interest Stops Rule

[9] In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

[10] The Canadian debtors contend that the interest stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the *CCAA* is silent as to the right to post-filing interest, it does not rule out the interest stops rule.

[11] The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement [page232] to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodeau* (2011), 104 O.R. (3d) 161, [2011] O.J. No. 573 (C.A.), at para. 43. However, the question remains as to whether their contractual rights should prevail.

[12] It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Corp. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652, [2005] O.J. No. 1081 (C.A.), at para. 25, *per* Blair J.A.; and *Indalex Ltd. (Re)*, [2009] O.J. No. 3165, 55 C.B.R. (5th) 64 (S.C.J.), at para. 16, *per* Morawetz J. This common law principle has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, [2001] O.T.C. 486 (S.C.J.), Blair J. (as he then was) stated the following [at para. 20]:

> One of the governing principles of insolvency law -- including proceedings in a winding-up -- is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:
>
> > I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

[13] This rule is "judge-made" law. See *In re Humber Ironworks and Shipbuilding Co.* (1869), L.R. 4 Ch. App. 643 (C.A.), at p. 647 Ch. App., *per* Sir G. M. Giffard L.J.

[14] In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated [at para. 25]:

> The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks*, at p. 646. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390 at paras. 12-16 (C.A.); and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up. [page233]

[15] The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust*, Blair J.A. stated [at para. 26]:

> Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

[16] In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.*, [1992] A.J. No. 277, 11 C.B.R. (3d) 193 (C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") even though, in his view, the *BIA* assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Re Savin* [*Savin (Re)* (1872), L.R. 7 Ch. 760 (C.A.)], quoted by Blair J. in *Confederation Life*. Kerans J.A. stated [at para. 19]:

> . . . I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

[17] In *Confederation Life*, Blair J. was of the view that the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (the "*Winding-up Act*") and the *BIA* could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated [at paras. 22-23]:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view.
> . . .
> Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

[18] Thus, I see no reason to not apply the interest stops rule to a *CCAA* proceeding because the *CCAA* does not expressly provide for its application. The issue is whether the rule should apply to this *CCAA* proceeding.

Nature of the CCAA Proceeding

[19] When the Nortel entities filed for *CCAA* protection on January 14, 2009, and filed on the same date in the U.S. and the U.K., the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However, that hope quickly evaporated, and on June 19, 2009, Nortel issued a news release announcing it had sold its [page234] CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US$2.8 billion and second by the sale of its residual patent portfolio under a stalking-

horse bid process in June 2011 for US$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

[20] The Canadian debtors contend that this *CCAA* proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the *BIA*. The bondholders contend that there is no definition of a "liquidating" *CCAA* proceeding and no distinct legal category of a liquidating *CCAA*, essentially arguing that like beauty, it is in the eyes of the beholder.

[21] In this case, I think there is little doubt that this is a liquidating *CCAA* process and has been since June 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar Consortium for US$4.5 billion. In *Nortel Networks Corp. (Re)*, [2012] O.J. No. 1115, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (S.C.J.), Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the *CCAA* can be applied in "a liquidating insolvency". See, also, Dr. Janis P. Sarra, *Rescue!: The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 167, in which she states, "increasingly, there are 'liquidating *CCAA*' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

[22] In *Lehndorff General Partner Ltd. (Re)*, [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.), Farley J. recognized, in para. 7, that a *CCAA* proceeding might involve liquidation. He stated:

> It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company . . . provided the same is proposed in the best interests of the creditors generally.

[23] It is quite common now for there to be liquidating *CCAA* proceedings in which there is no successful restructuring of the business, but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such *CCAA* proceedings.

Can the Interest Stops Rule Apply in a CCAA Proceeding?

[24] There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under [page235] the *CCAA*, let alone under a liquidating *CCAA* process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

[25] The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating *CCAA* proceeding as it is in a *BIA* or winding-up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the *CCAA* stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no

compensation. They cite Sir G.M. Giffard L.J. in *Humber Ironworks*:

> . . . I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

[26] In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, Deschamps J. reaffirmed that the purpose of a *CCAA* stay of proceedings is to preserve the *status quo*. She stated, at para. 77:

> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

[27] If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

[28] It has long been recognized that the federal insolvency regime includes the *CCAA* and the *BIA* and that the two statutes create a complimentary and interrelated scheme for dealing with the property of insolvent companies. See *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.), at paras. 62 and 64, *per* Laskin J.A.

[29] Recently, the Supreme Court of Canada analyzed the *CCAA* and indicated that the *BIA* and *CCAA* are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the *CCAA* and *BIA*, and the court will avoid interpretations that give creditors incentives to prefer *BIA* processes. [page236]

[30] In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the *CCAA*. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the *CCAA*. The case involved competing interpretations of the federal *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*") and the *CCAA* in considering a deemed trust for GST collections. The *ETA* expressly excluded the provisions in the *BIA* rendering deemed trusts ineffective, but did not exclude similar provisions in the *CCAA*. In holding in favour of a stay under the *CCAA*, Deschamps J. was guided in her interpretation of the relevant *CCAA* provision by the desire to have similar results under the *BIA* and *CCAA*.

[31] In her analysis, Deschamps J. made a number of statements, including:

> Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]
>
> With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation . . . . [para. 24]
>
> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can

> only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert. [para. 47]
>
> Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes . . . [para. 54]
>
> [The *CCAA* and *BIA*] are related and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy. [para. 78]

[32] In *Indalex Ltd. (Re)*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the *CCAA*, Deschamps J. had occasion to refer to the *Century Services* case [page237] and her statement in *Century Services*, in para. 23, referred to above. She then stated [at para. 51]:

> In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements.

[33] Thus, it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the *BIA* and *Winding-Up Act* before legislative amendments to those statutes were made (or if the comments of Blair J. in *Confederation Life* are accepted that the *BIA* still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating *CCAA* proceedings. I accept this and note that there is no provision in the *CCAA* that would not permit the application of the rule.

[34] There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the *CCAA*.

[35] In my view, there is no need for there to be a "liquidating" *CCAA* proceeding in order for the interest stops rule to apply to a *CCAA* proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a *CCAA* proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

[36] The bondholders contend, however, that *Stelco Inc. (Re)*, [2007] O.J. No. 2533, 2007 ONCA 483, 32 B.L.R. (4th) 77 is binding authority that the interest stops rule does not apply in

any *CCAA* proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the *CCAA* by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class and [page238] *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

[37] The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to s. 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

[38] Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior note holders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the *CCAA* filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a *CCAA* plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor A.C.J.O, Goudge and Blair JJ.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

[39] In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a *CCAA* proceeding, and referred to statements of Binnie J. in *Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24 ("*NAV Canada*"). A number of comments can be made.

[40] First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including [page239] forgoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result." Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada.*

[41] In *NAV Canada*, Canada 3000 Airlines filed for protection under the *CCAA*. Three days later, the monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/ lessors of the aircraft as to the extent that the owners/ lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

[42] Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, *i.e.*, interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

[43] In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

[44] At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the *CCAA* [at para. 96]:

> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, [page240] then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

[45] The Quebec airline in question had first filed to make a proposal under the *BIA* and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus, the comments of Binnie J. regarding the *CCAA* could not have related to the Quebec airline, but only to Canada 3000, which had been under the *CCAA* for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

[46] There was no discussion of the common law interest stops rule and whether it could apply during the three-day period in question or whether it should apply to a liquidating *CCAA* proceeding. Nor was there any discussion of the definition of claim in the *CCAA*, being a claim provable within the meaning of the *BIA*, and how that might impact a claim for post-filing interest under the *CCAA*. The statement regarding interest under the *CCAA* was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

[47] In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a *CCAA* proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel, involving several years of compound interest in excess of US$1.6 billion out of a total worldwide asset base of US$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

Need for a CCAA Plan

[48] The bondholders contend that there is no authority under the *CCAA* to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a *CCAA* proceeding except in the context of approving a plan approved by the creditors. They also [page241] assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US$7.3 billion is to be allocated to each of the Canadian, U.S. or EMEA estates.

[49] One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

[50] However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in *CCAA* proceedings.

[51] In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders' claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

[52] It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

[53] I first note that the *CCAA* makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the *CCAA* does not expressly provide for a liquidating *CCAA* process. There is no provision that requires distributions to be made under a plan of arrangement.

[54] A court has wide powers in a *CCAA* proceeding to do what is just in the circumstances. Section 11(1) provided that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the *CCAA*, and [page242] therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated [at paras. 65, 67-68]:

> I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).
>
> . . . . .
>
> The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the matter . . . , subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.
> In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

(Underlining added)

[55] I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Ltd. (Re)*, [2014] O.J. No. 3270, 2014 ONSC 3393 (S.C.J.), Morawetz J. noted, at para. 38, that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured

creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the *CCAA* to do so.

[56] In *AbitibiBowater Inc. (Re)*, [2009] Q.J. No. 19125, 2009 QCCS 6461 (Sup. Ct.), Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case [at paras. 56-58]: [page243]

> The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.
>
> By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.
> Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[57] Justice Gascon did not accept this argument. He stated [at para. 71]:

> Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada.

(Underlining added)

[58] Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

[59] There is a comment by Laskin J.A. in *Ivaco Inc. (Re)*, *supra*, that questions the right of a judge to order payment out of funds realized on the sale of assets under a *CCAA* process, in that case to pension plan administrators for funding deficiencies. He stated [at para. 60]:

> [I]n my view, absent an agreement, I doubt that the *CCAA* even authorized the motions judge to order this payment. Once restructuring was not possible and the *CCAA* proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

[60] This was an *obiter* statement. But in any event, Justice Laskin was discussing a situation in which all parties agreed that the *CCAA* proceedings "were spent". That is, there was effectively no *CCAA* proceeding any more. This is not the situation with [page244] Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon, distribution orders without a plan are common in Canada.

[61] While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

Conclusion

[62] I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion).

[63] Those seeking costs may make cost submissions in writing within ten days and responding submissions may be made in writing within a further ten days. Submissions are to be brief and include a proper cost outline for costs sought.

Order accordingly.

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In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation et al.

Ontario Reports

Court of Appeal for Ontario,

Simmons, Gillese and Rouleau JJ.A.

October 13, 2015

127 O.R. (3d) 641 | 2015 ONCA 681

[Indexed as: Nortel Networks Corp. (Re)]

Case Summary

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Interest — Bondholders with contractual claim to continuing accrual of interest until payment filing claims in Companies' Creditors Arrangement Act ("CCAA") proceedings — "Interest stops" rule applying in CCAA proceedings — CCAA judge not erring in holding that bondholders were not legally entitled to claim or receive any amounts above and beyond outstanding principal debt and pre-petition interest — CCAA judge's use of word "receive" not precluding bondholders from receiving post-filing interest under future plan of compromise or arrangement — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

N Corp. was subject to a proceeding under the *Companies' Creditors Arrangement Act*. The appellants held unsecured bonds either issued or guaranteed by certain N Corp. entities. The relevant indentures provided for the continuing accrual of interest until payment, at contractually specified interest rates. N Corp.'s other creditors were mostly pensioners with no contractual right to post-filing interest. The *CCAA* judge found that the appellants were not legally entitled to claim or receive any amounts above and beyond the outstanding principal debt and pre-petition interest. The appellants appealed.

Held, the appeal should be dismissed.

The *CCAA* judge correctly held that the common law "interest stops" rule applies in *CCAA* proceedings. The "interest stops" rule is a fundamental tenet of insolvency law. It has been consistently applied in proceedings under bankruptcy and winding-up legislation. The same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings -- namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate -- apply with equal force to *CCAA* proceedings. There are sound reasons for adopting an interest stops rule in the *CCAA* context. First, the *CCAA* is part of an integrated insolvency regime, which also includes the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible. Second, if the interest stops rule were not to apply to *CCAA* proceedings, the

creditors who do not have a contractual right to post-filing interest would have skewed incentives against reorganizing under the *CCAA* and would be more likely to proceed under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors. Third, the *CCAA* creates conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining an interest-bearing judgment, the status quo has not been preserved. Fourth, if the interest stops rule were not to apply to *CCAA* proceedings, the key objective of that statute -- [page642] to facilitate the restructuring of corporations through flexibility and creativity -- may be undermined. Fifth, the principle of fairness supports the application of the interest stops rule.

The *CCAA* judge's ruling that the appellants were not legally entitled to "receive" any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest did not preclude the payment of post-filing interest under a future plan of compromise or arrangement.

Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, 269 D.L.R. (4th) 79, 349 N.R. 1, J.E. 2006-1215, 212 O.A.C. 338, 20 C.B.R. (5th) 1, 10 P.P.S.A.C. (3d) 66, 148 A.C.W.S. (3d) 182, varg (2004), 69 O.R. (3d) 1, [2004] O.J. No. 141, 235 D.L.R. (4th) 618, 183 O.A.C. 201, 3 C.B.R. (5th) 207, 128 A.C.W.S. (3d) 869 (C.A.), varg [2002] O.J. No. 1775, [2002] O.T.C. 310, 33 C.B.R. (4th) 184, 5 P.P.S.A.C. (3d) 272, 113 A.C.W.S. (3d) 938 (S.C.J.); *Stelco Inc. (Re)*, [2007] O.J. No. 2533, 2007 ONCA 483, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 158 A.C.W.S. (3d) 877, varg [2006] O.J. No. 3219, 20 B.L.R. (4th) 286, 24 C.B.R. (5th) 59, [2006] O.T.C. 748, 150 A.C.W.S. (3d) 538 (S.C.J.), **consd**

Other cases referred to

Canada (Attorney General) v. Confederation Life Insurance Co., [2001] O.J. No. 2610, [2001] O.T.C. 486, 106 A.C.W.S. (3d) 245 (S.C.J.); *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, [2010] G.S.T.C. 186, 196 A.C.W.S. (3d) 27; *In re Humber Ironworks and Shipbuilding Co*. (1869), L.R. 4 Ch. App. 643; *Nortel Networks Corp. (Re)*, [2015] O.J. No. 2440, 2015 ONSC 2987, 27 C.B.R. (6th) 175, 254 A.C.W.S. (3d) 522 (S.C.J.); *R. v. Henry*, [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, 2005 SCC 76, 260 D.L.R. (4th) 411, 342 N.R. 259, [2006] 4 W.W.R. 605, J.E. 2006-62, 376 A.R. 1, 219 B.C.A.C. 1, 49 B.C.L.R. (4th) 1, 202 C.C.C. (3d) 449, 33 C.R. (6th) 215, 136 C.R.R. (2d) 121, EYB 2005-98899, 67 W.C.B. (2d) 809; *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, 301 O.A.C. 1, 96 C.B.R. (5th) 171, 8 B.L.R. (5th) 1, 354 D.L.R. (4th) 581, 2013EXP-356, 2013EXPT-246, J.E. 2013-185, D.T.E.

2013T-97, EYB 2013-217414, 439 N.R. 235, 20 P.P.S.A.C. (3d) 1, 2 C.C.P.B. (2d) 1, 223 A.C.W.S. (3d) 1049

Statutes referred to

Aeronautics Act, R.S.C. 1985, c. A-2 [as am.]

Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 [as am.], s. 9 [as am.], (1)

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [as am.], ss. 121 [as am.], 122 [as am.]

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20 [as am.], ss. 55, 56

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

United States Bankruptcy Code, 11 U.S.C., c. 11

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11 [as am.]

Authorities referred to

Mokal, Rizwaan Jameel, "Priority as Pathology: The *Pari Passu* Myth" (2001), 60:3 Cambridge L.J. 581

Wood, Roderick J., *Bankruptcy & Insolvency Law* (Toronto: Irwin Law, 2009) [page643]

APPEAL from the order of Newbould J. (2014), 121 O.R. (3d) 228, [2014] O.J. No. 3843, 2014 ONSC 4777 (S.C.J.) in the *Companies' Creditors Arrangement Act* proceedings.

Richard B. Swan, *S. Richard Orzy* and *Gavin H. Finlayson*, for appellant *ad hoc* group of bondholders.

Andrew Kent and *Brett Harrison*, for respondent Bank of New York Mellon.

Edmond Lamek, for respondent Law Debenture Trust Company of New York.

Benjamin Zarnett and *Graham D. Smith*, monitor and respondent Canadian debtors.

Kenneth D. Kraft and *John J. Salmas*, for respondent Wilmington Trust, National Association.

Kenneth T. Rosenberg and *Ari N. Kaplan*, for respondent Canadian Creditors' Committee.

Tracy Wynne, for joint administrators (EMEA).

Scott A. Bomhof and *Adam M. Slavens*, for Nortel Networks Inc./U.S. debtors.

The judgment of the court was delivered by
ROULEAU J.A.: —

A. *Overview*

[1] This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been ongoing since January 2009. A parallel proceeding under Chapter 11 of the *United States Bankruptcy Code* has also been ongoing in Delaware since that time.

[2] The *ad hoc* group of bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such a make-whole provisions and trustee fees.

[3] In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

[4] Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US$4.092 billion against each of the Canadian and U.S. Nortel estates. They also [page644] claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately $7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

[5] In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued [at para. 5]:

> (a) whether the holders of the crossover bond claims are legally entitled . . . to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> (b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

[6] The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *Canada 3000 Inc., Re*; *Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, and this court's subsequent decision in *Stelco*

Inc. (Re), [2007] O.J. No. 2533, 2007 ONCA 483, 35 C.B.R. (5th) 174, are binding authority that the interest stops rule does not apply in the *CCAA* context.

[7] On appeal, the appellant raises two related issues -- whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

[8] I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco* and *Canada 3000,* they do not preclude such a result. Nor do I see a basis for varying the order that he made. [page645]

B. *Background*

[9] In the *CCAA* court's initial order of January 14, 2009, the Canadian debtors[1] were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian debtors to any of their creditors as of the filing date, unless approved by the monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian debtors, were stayed absent consent of the Canadian debtors and the monitor, or leave of the court.

[10] In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

[11] As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

[12] In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: *Nortel Networks Corp. (Re)*, [2015] O.J. No. 2440, 2015 ONSC 2987, 27 C.B.R. (6th) 175 (S.C.J.), at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates". A number of parties have sought leave to appeal that decision. [page646]

[13] It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. *Decision Below*

[14] The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described [at para. 12] as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found [at para. 18] there was "no reason to not apply the [common law] interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application". The issue was "whether the rule should apply to this CCAA proceeding".

[15] He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the *CCAA*, let alone under a liquidating *CCAA* process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60 and *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6.

[16] The *CCAA* judge thus ordered [at para. 5] that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion)".

D. *Issues on Appeal*

[17] The appellant raises two related issues:

(1) Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?

(2) If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of crossover bonds claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest? [page647]

00,04,0E. *Analysis*

(1) *Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?*

[18] The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

[19] First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the interplay between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[20] The appellant also submits that the application of the interest stops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

[21] Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

[22] I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) *Should the interest stops rule apply in CCAA proceedings?*

(i) *Origin and scope of the interest stops rule*

[23] It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, [2001] O.T.C. 486 (S.C.J.), at para. 20, *per* Blair J.[2] In fact, [page648] the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal, "Priority as Pathology: The *Pari Passu* Myth" (2001), 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed . . . in geography and time": Mokal, at pp. 581-82.

[24] The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

[25] As explained in *In re Humber Ironworks and Shipbuilding Co.* (1869), L.R. 4 Ch. App. 643, nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-46 Ch. App.:

> In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.
>
> . . . . .
>
> It is very difficult to conceive a case in which the assets of a company could be . . . immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and

> rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.
>
> [26] Giffard L.J. similarly stated, at p. 647-48 Ch. App.:
> That rule . . . works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.
>
> . . . . .
>
> I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

[27] Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate. [page649]

[28] The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.,* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view. Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

[29] I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) *Should the interest stops rule apply in CCAA proceedings?*

[30] The respondents[3] maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

[31] The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of

a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for [page650] any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

[32] In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

[33] The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so.

[34] I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings -- namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate -- apply with equal force to *CCAA* proceedings. I say so for several reasons.

[35] First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation". The court went on to explain, [page651] at para. 78, that the *CCAA* and *BIA* are related and "no aegap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

[36] Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

[37] Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services*, at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the

very social ills that it was enacted to avert". This concern over skewed incentives was confirmed in *Sun Indalex*, where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

[38] Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

[39] Third, as recognized by the Supreme Court in *Century Services,* at para. 77, the "*CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

[40] As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the status quo has not been preserved.

[41] Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute -- to facilitate [page652] the restructuring of corporations through flexibility and creativity -- may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

[42] Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

[43] Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from $4.092 billion to $5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the monitor achieve the very significant recoveries made ($7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

[44] Finally, I wish to respond to the appellant's concerns.

[45] As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, [page653] which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

[46] The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

[47] This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

[48] There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

[49] In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) *Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?*

[50] The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

[51] I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this [page654] appeal -- whether the common law interest stops rule applies in *CCAA* proceedings.

(i)*Canada 3000*

Background and lower court decisions

[52] The decision in *Canada 3000* arose out of the collapse of three airlines -- Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter-Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

[53] At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A-2.

[54] The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

[55] In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc. (Re)*, [2002] O.J. No. 1775, 33 C.B.R. (4th) 184 (S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

[56] On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc. (Re)* (2004), 69 O.R. (3d) 1, [2004] O.J. No. 141 (C.A.), at para. 197.

Supreme Court's decision

[57] On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the [page655] bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

[58] In deciding that issue, Binnie J. made the following comment, at para. 96:

> *While a CCAA filing does not stop the accrual of interest*, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

(Emphasis added)

[59] The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

[60] While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, 2005 SCC 76, Binnie J. warned, at para. 57, against reading "each phrase in a judgment . . . as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

[61] To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

[62] At para. 40, Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted, at para. 36, the case was "from first to last an exercise in statutory interpretation".

[63] After engaging in a lengthy exercise of statutory interpretation, he concluded that (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

[64] Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on [page656] disposition, he included a section simply entitled "Interest", starting at para. 93.

[65] He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

[66] "The question then", said Binnie J., at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

> The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.
> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. *While a CCAA filing does not stop the accrual of interest*, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

(Emphasis added)

[67] Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In

fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

[68] Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely, charges under *CANSCA* and the *Airports Act*. Binnie J. was not answering an abstract legal question, but rather deciding how long interest ran in the particular factual and statutory context.

[69] In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. [page657] He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

[70] Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) *Stelco*

Background and motion judge's decision

[71] The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco (Re)*, [2006] O.J. No. 3219, 24 C.B.R. (5th) 59 (S.C.J.), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "junior noteholders") pursuant to Stelco's plan of arrangement (the "plan"). The claim to these funds ("turnover proceeds") was made by the "senior debentureholders".

[72] The dispute over the turnover proceeds arose after Stelco's plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The senior debentureholders claimed the turnover proceeds on the basis of subordination provisions contained in the note indenture under which Stelco had issued convertible unsecured subordinated debentures to the junior noteholders.

[73] Under the terms of the note indenture, the junior noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "senior debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The plan, however, provided that the rights as between the senior debentureholders and the junior noteholders were preserved. The senior debentureholders, who had not received payment of post-filing interest from Stelco under the plan, demanded payment of it from the junior

noteholders pursuant to the terms of the note indenture. The junior noteholders argued, [page658] among other things, that the subordination provisions did not survive the plan's implementation and that the senior debentureholders were not entitled to claim post-filing interest from them.

[75] The motion judge, and on appeal, this court ruled in favour of the senior debentureholders. The courts found that the plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read Stelco?

[76] The appellant and the respondents offer different readings of *Stelco*.

[77] The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include, para. 67:

> [T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:
>
> > While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[78] The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter-creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

[79] I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

[80] This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The junior noteholders had accepted the subordination terms in the note indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held senior debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor. [page659]

[81] As noted, this was a "no interest" plan, meaning that the senior debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the junior noteholders' share of the proceeds. The court found that the Stelco plan contemplated the continued accrual of interest to senior debentureholders for the purpose of their rights as against the junior noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the senior debentureholders in accordance with the Stelco plan: para. 70.

[82] The court's conclusion that the junior noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

[83] The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the note indenture. That paragraph reads as follows:

> 6.2 Distribution on Insolvency or Winding-up.
>
> . . . . .
>
> (1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest *due thereon*, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, *which may be payable or deliverable in any such event in respect of any of the Debentures*[.]

(Emphasis added)

[84] The first argument is that the senior debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the senior debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

[85] The second argument is that, by the terms of s. 6.2(1), the senior debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the junior noteholders unless they could claim post-filing interest from Stelco. [page660]

[86] I would not give effect to either submission.

[87] In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

[88] In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide and, specifically, should we read the panel as implicitly deciding that the senior debentureholders could not recover post-filing interest from the junior noteholders unless they could claim post-filing interest against Stelco?

[89] In discussing post-filing interest, the court's only mention of the senior debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a aeclaim' [as defined in the plan] they have against Stelco for such interest" and that "[i] f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

[90] Admittedly, the panel made this comment in discussing the effect of the Stelco plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the junior noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the senior debentureholders in the event of insolvency, and the plan affirmed that the senior noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words, at para. 70, there is no interest stops rule "that precludes such a result". In my view, therefore, this court did not make an implicit finding that the senior debentureholders had to be able to claim post-filing interest from Stelco in order to claim post-filing interest from the junior noteholders.

[91] In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question. [page661]

> (2) *If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of crossover bonds claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?*

[92] The appellant objects to the wording of the *CCAA* judge's order. It provides that [at para. 62] "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

[93] As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

[94] As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco,* or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA* judge's comment, at para. 35 of his reasons, that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done".

[95] The appellant also seeks clarification as to the effect of the words [at para. 5] "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the

wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before [page662] the *CCAA* judge with respect to any amounts other than post-filing interest.

[96] The issue the *CCAA* judge [at para. 5] was directed to answer was "whether the holders of the crossover bond claims [were] legally entitled . . . to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

[97] As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. *Final Comments*

[98] I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment *vis-à-vis* other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

[99] This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or [page663] arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

[100] The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. *Disposition*

[101] For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent monitor, as successful party, costs as against the appellant fixed in the amount of $40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

Appeal dismissed.

Notes

1 There are five Canadian debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.

2 As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law, 2009), at p. 1.

3 The respondents are the monitor, the Canadian debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically the Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

2016 CarswellOnt 7202
Supreme Court of Canada

2016 CarswellOnt 7202, 2016 CarswellOnt 7203, 42 C.B.R. (6th) 3

Ad Hoc Group of Bondholders v. Ernst & Young Inc. in its capacity as Monitor, Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Superintendent of Financial Services as Administrator of the Pension Guarantee Fund, Wilmington Trust, National Association, Law Debenture Trust Company of New York, Bank of New York Mellon, Nortel Networks Inc., Canadian Creditors Committee, Joint Administrators of Nortel Networks UK Limited, Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited

McLachlin C.J.C., Moldaver, Gascon JJ.

Judgment: May 5, 2016
Docket: 36778

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2015), 32 C.B.R. (6th) 21, 340 O.A.C. 234, 127 O.R. (3d) 641, 2015 CarswellOnt 15461, 2015 ONCA 681, 391 D.L.R. (4th) 283, E.E. Gillese J.A., Janet Simmons J.A., Paul Rouleau J.A. (Ont. C.A.); affirming *Nortel Networks Corp., Re* (2014), 2014 CarswellOnt 17193, 2014 ONSC 4777, 121 O.R. (3d) 228, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Counsel — not provided

***Per curiam*:**

1 The motions of the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited to be added as respondents and for an extension of time to serve and file the response to the application for leave to appeal are granted. The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C59703, 2015 ONCA 681, dated October 13, 2015, is dismissed with costs.

Application dismissed.

TAB 17

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C., 1985, c. B-3 [now the *Bankruptcy and Insolvency Act*], s. 121(1).
Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

Authors Cited

Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville, Que.: Yvon Blais, 1991.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

Lois et règlements cités

Employment Standards Act, R.S.O. 1970, ch. 147, art. 13(2).
Employment Standards Act, 1974, S.O. 1974, ch. 112, art. 40(7).
Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2.
Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

Doctrine citée

Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
Côté, Pierre-André. *Interprétation des lois*, 2e éd. Cowansville, Qué.: Yvon Blais, 1990.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, pp. 1236-37.
Ontario. *Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, p. 1699.
Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;