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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
	IN THE MATTER OF THE *COMPANIES'* CREDITORS *ARRANGEMENT ACT*, RSC 1985, c C-36, as amended
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF Independent Energy Corp.
DOCUMENT	**Brief of the Applicant Independent Energy Corp.**

Clerk's Stamp

CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

FASKEN MARTINEAU DUMOULIN LLP

#3400 – 350 7th Ave SW

Calgary, AB

T2P 3N9

Attn: Robyn Gurofsky / Anthony Mersich

Telephone: (403) 261- 9469 / (587) 233 4124

Email: rgurofsky@fasken.com / amersich@fasken.com

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TABLE OF CONTENTS

I. INTRODUCTION:

1. On June 22, 2023, the Applicant, Independent Energy Corp. ("**IEC**" or the "**Company**"), was granted creditor protection pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**")[1] and an Initial Order of this Court. Amongst other things, the Initial Order appointed Ernst & Young Inc. as Monitor (the "**Monitor**") in the CCAA proceedings. On July 4, 2023, this Court granted an Amended and Restated Initial Order (the "**ARIO**"), which, amongst other things, extended the Stay Period (defined therein) up to and including August 11, 2023. The Stay Period was subsequently extended up to and including September 29, 2023, and then further extended until January 15, 2024.

2. On September 6, 2023, this Honourable Court granted an Order approving a sale and investment solicitation process (the "**SISP**") in respect of IEC's property and business (the "**SISP Order**"). The Company is in the midst of that process.

3. On this application, the Company seeks orders for the following relief:

   (a) abridging the time for service of this Application and the supporting materials and deeming service thereof to be good and sufficient;

   (b) declaring that the Saskatchewan Surface Lease Agreement dated October 13, 2022 (the "**Surface Lease**") between IEC and Pivotal Energy Partners Inc. ("**Pivotal**") in respect of a portion of the lands described as SW Sec 27 Twp 33 Rge 22 W3 Extension 4 (the "**Facility Lands**", and such portion being the "**Leased Lands**") located near the Facility (defined below) is void *ab initio*;

   (c) in the alternative, declaring that the Surface Lease has been validly terminated by IEC;

   (d) in the further alternative, declaring that Pivotal is in default of the Surface Lease and that IEC may terminate the Surface Lease;

   (e) declaring that Pivotal deliver vacant possession of the Leased Lands to IEC by no later than February 15, 2024 or such other time as this Honourable Court directs;

   (f) extending the Stay Period granted by paragraph 14 of the ARIO and extended pursuant to paragraph 3 of the stay extension order granted by this Court on

[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [CCAA] [**TAB 1**].

September 6, 2023, until March 31, 2024, or such other date that this Honourable Court deems appropriate (the **"Extended Stay Period**"); and

(g) such further and other relief as may be sought by the Applicant and this Honourable Court deems appropriate.

4. IEC states that the Surface Lease is void for failing to comply with Part VII Division 1 of the *Planning and Development Act, 2007*, SS 2007, c P-13.2 (the "**PD Act**"). The term of the Surface Lease, including renewals, exceeds ten years and is in respect of only a portion of the Facility Lands. As a result, the Surface Lease is a "subdividing instrument" under the PD Act and must be approved by the appropriate approving authority. The Surface Lease has not been approved and therefore it violates section 121 of the PD Act. A lease that violates planning and development legislation is unenforceable and void *ab initio*.[2]

5. In the alternative, IEC states that it has terminated the Surface Lease due to Pivotal's repudiation of both the CO&O Agreement (as defined below) and the Surface Lease, which agreements are inextricably linked. The fundamental purpose of the Surface Lease was to allow Pivotal fulfill its obligations under the CO&O Agreement, namely to construct and operate the Storage Tanks (defined below) on the Leased Lands. When Pivotal left the site and ceased construction of the Storage Tanks in February of 2023, it repudiated the CO&O Agreement, and by extension, the Surface Lease. The repudiation of the CO&O Agreement was accepted by the Company, as evidenced by the Company's disclaimer thereof, together with each of the other agreements between IEC and Pivotal. Importantly, Pivotal did not oppose those disclaimers. By extension, Pivotal has repudiated the Surface Lease and the Company has accepted such repudiation, as evidenced by its termination.

6. In the further alternative, if the Court does not find that the Surface Lease has been terminated, IEC seeks to terminate the Surface Lease on the basis of Pivotal's failure to comply with the fundamental purpose and conditions of the Surface Lease, including as aforesaid, the failure to construct and thereafter operate the Storage Tanks.

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[2] *Idle-O Apartments Inc v Charlyn Investments Ltd*, 2010 BCCA 460 at para 20 [***Idle-O 1***] **[TAB 2]**

7. As a result of the foregoing, Pivotal must now collect their Storage Tanks and deliver up vacant possession of the Leased Lands to IEC so that IEC can optimize any transaction value generated in the within CCAA proceedings.

8. IEC also seeks an extension of the Stay Period in these proceedings. IEC has been acting in good faith and with due diligence since the granting of the Initial Order. IEC submits that the relief sought in this application is fair and reasonable and necessary to allow IEC to continue to advance its efforts to maximize value for its stakeholders throughout the within CCAA proceedings through the continued implementation of the SISP. This includes realigning the Stay Period with the revised bid deadlines, which includes a final bid deadline of January 22, 2024. That final bid deadline is presently scheduled to take place after the Stay Period is set to expire.

II. FACTS:

9. The background facts relating to the Company's Business and the factors leading to the commencement of these CCAA proceedings are set out in the Affidavit of Bryce Karl, sworn June 21, 2023 (the "**First Karl Affidavit**"). The facts particularly related to the within application are set out in the Third Affidavit of Bryce Karl, sworn November 13, 2023 (the "**Third Karl Affidavit**").

10. Capitalized terms used herein have the meanings given in the Third Karl Affidavit unless otherwise defined.

The Facility and Agreements with Pivotal

11. The Company owns a newly constructed oil refinery located near Kerrobert, Saskatchewan (the "**Facility**").

12. During the planning and construction of the Facility, IEC and Pivotal entered into several agreements that were intended to be integrated with the Facility's operations once construction of the Facility was completed.[3] Those Agreements were:

[3] Third Karl Affidavit at paras 7 – 17.

(a) a sales agreement for the sale of crude oil by Pivotal to IEC dated September 11, 2020 (the "**Crude Oil Sales Agreement**");

(b) an agreement for the commercial supply and marketing by Pivotal to IEC of butane and condensate dated September 11, 2020 (the "**Crude Oil Logistics Agreement**");

(c) a purchase agreement in respect of butane dated August 9, 2021 (the "**C4 Purchase Agreement**")

(d) a purchase agreement in respect of naphtha/condensate (the "**C5 Purchase Agreement**");

(e) an agreement for the construction, ownership and operation of oil storage tanks (the "**Storage Tanks**") to be located on the Facility Lands (the "**CO&O Agreement**"); and

(f) the Surface Lease, dated October 13, 2022

(collectively, the "**Pivotal Agreements**").

13. Among the Pivotal Agreements, the CO&O Agreement was inextricably linked to the Surace Lease, in that it was intended to work together with the CO&O Agreement, since the Storage Tanks were to be situated on the Leased Lands.[4]

14. Key terms of the CO&O Agreement include:[5]

(a) The purpose of the Storage Tanks was to store refined products at the same location as the Facility (Recital C);

(b) Pivotal has "title and risk to, and shall own 100% of the Storage Tanks" (Article 3.3);

(c) the Storage Tanks shall at all times be deemed to be chattels and not fixtures (Article 3.6);

(d) the initial term for operating the Storage Tanks would be for a period of five years following the date on which the Storage Tanks are constructed, commissioned and ready for service (the "**Initial Term**"). At the conclusion of the Initial Term, the parties were required to negotiate an additional term for the agreement. If, within 6 months of the end of the Initial Term or any additional term, the parties were unable to negotiate an additional term to the agreement, IEC was deemed to exercised the Buy-Out Option (defined below) (Article 8.1);

(e) IEC has the option to buy-out the Storage Tanks from Pivotal commencing at the end of the Initial Term (Article 4.5, the "**Buy-Out Option**"), or to attempt to negotiate an additional term with Pivotal (Article 8.1); and

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[4] Third Karl Affidavit at para 16.

[5] Third Karl Affidavit at para 13.

(f) upon termination of the CO&O Agreement, IEC has the right to sever or otherwise disconnect the Storage Tanks from the Facility (Article 8.2).

15. Key terms of the Surface Lease include that:[6]

(a) It was granted in favour of Pivotal for "the installation and operation of three storage tanks and the associated secondary containment" (Recital);

(b) IEC's interest in the Leased Lands is subject to the exceptions, conditions, encumbrances, liens and interests contained in or noted upon the existing Certificate of Title of the Facility Lands (Recital);

(c) The Leased Lands were the portion of the Facility Lands that were shown outlined in green on the sketch or plan attached to the Surface Lease (Recital);

(d) Pivotal would pay annual compensation to IEC of $1.00 (Recital);

(e) The initial term of the Surface Lease was ten years, and would be automatically renewed for a further period of ten years if Pivotal was not in default of the Surface Lease at the end of the initial ten-year term (Section 2); and

(f) The Surface Lease would be terminated if IEC exercised the "Buy-Out Option" provided in the CO&O Agreement (Recital) allowing IEC to purchase the Storage Tanks.

16. Pivotal commenced construction on the Storage Tanks on or around August of 2022, but halted construction on or around February 9, 2023. IEC understands that construction stopped because Pivotal was unable to obtain financing to continue.[7]

17. Despite the fact that the Surface Lease was signed on October 13, 2022, Pivotal did not register the Lease against the Facility Lands until February 10, 2023.

18. At the time the Surface Lease was being negotiated, IEC and Pivotal never discussed allowing Pivotal to register the Surface Lease against IEC's title for the Facility Lands.[8]

19. Pivotal initially paid for the construction of the Storage Tanks from its own cash reserves. However, beginning in or around December of 2022, Pivotal required financing to fund the remaining stages of construction of the Storage Tanks.[9]

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[6] Third Karl Affidavit at para 17.

[7] Third Karl Affidavit at para 21, 25.

[8] Third Karl Affidavit at para 19.

[9] Third Karl Affidavit at para 20-21.

20. Pivotal sought financing from various lenders. Those lenders were only willing to advance funds to finish construction of the Storage Tanks if the Surface Lease was registered against the Facility Lands in priority to Cortland's mortgage.[10]

21. In or around December of 2022 or January of 2023, Pivotal contacted IEC in order to obtain IEC's consent to register the Surface Lease against the Facility Lands. IEC advised Pivotal that IEC could not consent to this, since it would violate the terms of IEC's loan agreement with Cortland. Pivotal then contacted Cortland, seeking its consent to register the Surface Lease against the Facility Lands in a priority position to Cortland's mortgage on the Facility Lands. Cortland was not willing to provide such consent.[11]

22. Construction on the Storage Tanks stopped on February 9, 2023, leaving the tanks in varying degrees of completion (90%, 50% and 0%, respectively).[12] The following day, Pivotal registered the Surface Lease against the Facility Lands. No Pivotal representatives have attended at the Leased Lands, and no work has taken place on the Storage Tanks or to fulfill the Surface Lease obligations, since this time.[13] The Leased Lands are currently unusable because of the presence of the Storage Tanks, which are only partially constructed.[14]

23. In late March of 2023, Pivotal contacted IEC to propose that IEC purchase the partially completed Storage Tanks from Pivotal, indicating a desire by Pivotal to extricate itself from the CO&O Agreement and its obligations relating to the Storage Tanks. IEC was not in a financial position to enter into such a arrangement at that time.[15]

24. On June 22, 2023, the Company entered creditor protection under the CCAA. On July 28, 2023, with the support of Cortland and the Monitor, the Company sent the Disclaimer Notice to Pivotal advising that IEC was disclaiming:[16]

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[10] Third Karl Affidavit at para 21.
[11] Third Karl Affidavit at para 22-23.
[12] Third Karl Affidavit at para 26-28, 30.
[13] Third Karl Affidavit at para 29.
[14] Third Karl Affidavit at para 28.
[15] Third Karl Affidavit at para 29.
[16] Third Karl Affidavit at para 32-33.

(a) The Crude Oil Sales Agreement;
(b) the Crude Oil Logistics Agreement;
(c) the C4 Purchase Agreement;
(d) the C5 Purchase Agreement; and
(e) the CO&O Agreement,

(collectively, the "**Disclaimed Agreements**").

25. Pivotal did not object to the Disclaimer Notice within the 15-day period required under section 32(2) of the CCAA, or at all.[17]

26. On August 22, 2023, the Company advised Pivotal by letter (the "**August 22 Letter**") that it was of the view that the Surface Lease was void *ab initio* as a result of failing to comply with the PD Act, and that, in the alternative, the Company was terminating the Surface Lease. IEC requested that Pivotal remove the Storage Tanks from the Leased Lands.[18]

27. Pivotal has advised IEC that it disagrees that the Surface Lease is void and refutes IEC's termination of the Surface Lease in the alternative. The Storage Tanks presently remain on the Leased Lands.[19]

Impact on the SISP

28. On September 6, 2023, the Company obtained this Court's approval to commence the SISP. That process is presently underway, with an extended Phase 1 Bid Deadline of November 22, 2023 and Phase 2 Bid Deadline of January 22, 2024.[20]

29. The Sales Advisor and the Monitor have indicated that the ongoing dispute with Pivotal regarding the termination of the Surface Lease and the status of the Storage Tanks is creating uncertainty in the process.[21] Uncertainty inherently impairs realization potential.

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[17] Third Karl Affidavit at para 35.
[18] Third Karl Affidavit at para 36- 37, Exhibit J.
[19] Third Karl Affidavit at para 38.
[20] Third Karl Affidavit at para 39.
[21] Third Karl Affidavit at para 41.

Extending the Stay Period

30. IEC is acting and has been acting in good faith and with due diligence since the date of the Initial Order in pursuing restructuring options in an effort to maximize value for its stakeholders. Specifically, since its last Court appearance IEC has:

(a) refined a further seven batches of crude oil feedstock, totalling 281,983 bbls since the commencement of the CCAA proceedings;

(b) achieved production of at least 17,000 bbls/day over a consecutive 24 hour period;

(c) generated estimated revenues of approximately $44.5 million between August 1 and October 31, 2023 and repaid approximately $28.5 million to Cortland from such revenues, pursuant to the terms of the Interim Financing Facility;

(d) continued to negotiate offtake agreements for batch production at the Facility;

(e) negotiated an enhancement project that will allow the Facility to run continuously rather than on a batch basis throughout the winter months;

(f) commenced the SISP with the assistance and under the supervision of the Sales Advisor and Monitor and in consultation with Cortland;

(g) negotiated railcar sublease agreements, resulting in monthly costs savings of approximately $128,000;

(h) disclaimed agreements with Plains Midstream Canada ULC and Ground Effects Environmental Services Inc.;

(i) advised employees of the KERP/KEIP, and made certain payments pursuant to the terms thereof upon achieving a retention milestone and the operational production incentive milestone;

(j) continued to work closely with the Monitor and Cortland, modelling Facility production scenarios, including a winter refining strategy;

(k) conducted consistent operational updates in between weekly update calls with the Monitor and Cortland to discuss operational and cash flow requirements over the period, and restructuring options available to the Company;

(l) provided daily operational updates to the Monitor and Cortland including details of the products refined, the specifications met and agreements negotiated with purchasers of refined products; and

(m) otherwise continued ongoing communication and engagement with various other stakeholders, including creditors, suppliers and employees.

31. Extending the Stay Period is necessary and appropriate in the circumstances to enable the Company to continue implementing the SISP, including realigning the Stay Period with the revised bid deadlines, which includes a final bid deadline of January 22, 2024. That final bid deadline is presently after the Stay Period is set to expire. The extended Stay Period is also necessary to enable the Company time to negotiate definitive documents respecting a transaction, and schedule an application for approval of such transaction.[22]

32. If the Extended Stay Period is granted, the Company intends to implement the winter refining strategy, generating sufficient revenue to sustain operations in tandem with the available credit under the Interim Financing Facility.[23]

33. The relief sought by the Company on the within application is supported by both the Monitor and Cortland.[24]

III. ISSUES:

34. The issues before this Honourable Court are:

(a) Is the Surface Lease void for failing to comply with the PD Act?

(b) In the alternative, has Pivotal repudiated the Surface Lease?

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[22] Third Karl Affidavit at para 50.

[23] Third Karl Affidavit at para 51.

[24] Third Karl Affidavit at paras 52 – 53.

(c) In the further alternative, has the Surface Lease been terminated due to a breach by Pivotal?

(d) Should the Stay Period be extended?

IV. LAW & ANALYSIS

a. The Surface Lease is void for violating the PD Act

35. Section 120(1)(f) of the PD Act defines a "subdividing instrument" as

> an interest that is less than title based on an agreement for sale, easement, lease or mortgage, or any other document or group of documents that:
>
> (a) affects or encumbers only part of a parcel;
>
> (b) creates or declares any right, interest or estate in only part of a parcel; or
>
> (c) otherwise has the effect of subdividing land.

36. The Surface Lease is a "subdividing instrument" because it purports to create an interest in Pivotal's favour in respect of only a portion of the Facility Lands.

37. Subsections 121(1) & (2) of the PD Act address how "subdividing instruments" are treated, and provide as follows:

> 121(1) Subject to section 122, every subdivision or subdividing instrument is to be:
>
> (a) made in accordance with this Act and any regulations or bylaws made pursuant to this Act; and
>
> (b) submitted for approval to the appropriate approving authority
>
> 121(2) No person shall submit to the land registry any subdividing instrument or apply to the Registrar of Titles to register a transfer of title or to obtain title to a new parcel of land if registration of the application would subdivide or have the effect of subdividing land unless the appropriate approving authority has approved the subdivision or subdividing instrument.

38. Section 122(1)(d) of the PD Act provides an exemption in respect of leases that have a term of less than ten years, including all renewal terms. However, the term of the Surface Lease

is for ten years and automatically renews for another ten years if Pivotal is not in default under the Lease at the time of renewal. Accordingly, this exemption does not apply to the Surface Lease.

39. As none of the other exemptions set out in PD Act s. 122 apply to the present circumstances, the Lease is a "subdividing instrument" under the PD Act, and must be approved by the appropriate authority in order to be submitted to the land registry.

40. The Saskatchewan Court of Queen's Bench (as it then was) in *101066763 Saskatchewan Ltd. v. Weyburn Trailer Court Ltd*., relying upon the Saskatchewan Court of Appeal's (the "**SKCA**") decision in *Redmond v Logel*, [25] held that a lease that fails to comply with the subdivision requirements under the PD Act is unenforceable.[26] Further, it is not within the Court's power to order the Registrar to effect a subdivision that violates planning and development legislation.[27]

41. In *Redmond*, the SKCA found that a transfer of an interest in land that is in violation of the Act cannot be registered under the *Land Titles Act*, and that the lessee does not have a legal interest in the lands given the leased lands do not conform to the Province's planning and subdivision legislation.[28]

42. *Weyburn Trailer* also relies upon a line of authority originating from the British Columba Court of Appeal's ("**BCCA**") decision in *International Paper Industries Ltd. v. Top Line Industries Inc*.[29] In *Top Line,* a landlord and tenant had entered into a lease agreement having a term of fifty-one months in respect of a portion of a parcel of land. The BCCA cited with approval Alberta case law holding that the lease in question was invalid as it contravened the applicable subdivision legislation.[30]

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[25] [1985] S.J. No 210 (SKCA) [***Redmond***] **[TAB 3]**.
[26] 2008 SKQB 264 at paras 7-8 [***Weyburn Trailer***] **[TAB 4]**.
[27] *Landswest School Division No 123 (Applicant) and Neil Klein (Respondent)*, 2005 SKQB 272, at para 29 **[TAB 5]**.
[28] *Redmond, supra* note 25 at para 12 **[TAB 3]**.
[29] [1996] BCJ. No 1089 (BCCA) [***Top Line***] **[TAB 6]**.
[30] *Ibid* at para 29 **[TAB 6]**.

43. The British Columbia Supreme Court's ("**BCSC**") decision in *R & R Ginseng Enterprises Ltd. v. Layton Bryson Outfitting & Trailriding Ltd.*[31], also cited in *Weyburn Trailer*, found a lease to be inoperative for failing to comply with the applicable subdivision legislation. In that case, a land-owner and lessee entered into a lease agreement in respect of a thirteen-acre portion of a 160 acre parcel of land. The term of the lease was fifty-seven months, and the leased parcel was never formally subdivided. A dispute later arose between the parties and the lessor applied to have the lease declared void as a result of violating section 73 of the *Land Title Act*, R.S.B.C. 1979, c. 219, which provides, in part, as follows:

> 73(1) Except on compliance with this Part, no person shall subdivide land into smaller parcels than those of which he is the owner for the purpose of
>
> (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.
>
> (4) No instrument executed by a person in contravention of this section confers on the party claiming under it a right to registration of the instrument or a part of it.

44. The BCSC, relying on *Top Line*, held that the lease was unenforceable for failing to comply with section 73 of the *Land Title Act*.

45. The reasoning in *Top Line* has been followed in numerous decisions, including *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*.[32] In that case, the BCCA held that a lease for a portion of land for a term of 998 years was invalid and void *ab inito* despite the fact that:

(a) the parties to the lease were unaware that the lease offended the *Land Title Act* at the time it was executed;

(b) the parties subsequently acted as though the lease was valid for twenty six years; and

(c) the lessee had constructed buildings on the leased lands at its own expense.[33]

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[31] [1997] BCJ No 1011 (BCSC) [***R&R Ginseng***] **[TAB 7]**.

[32] *Idle-O 1 supra*, note 2 **[TAB 2]**.

[33] *Ibid* at paras 5-7 **[TAB 2]**.

46. Each of the cases cited above apply directly to the matter at hand. The Surface Lease is an instrument that fails to comply with Saskatchewan's planning and development legislation. It is a lease for a term of ten years or greater and is only for a portion of a parcel of land. As a result, it is a "subdividing interest" under the PD Act and must be approved by the appropriate authority in order to be valid. Since the Surface Lease was not approved by the appropriate authority, it violates PD Act s. 121 and is therefore void and unenforceable. As in *Idle-O 1*, the Surface Lease is void regardless of the course of conduct of the parties or whether they were aware of the registration requirements.

47. Four years after the BCCA decided *Idle-O 1*, however, the parties returned to the BCCA, at which time the lessee argued that the equitable doctrine of proprietary estoppel preserved its interest in the leased lands.[34] The Court of Appeal agreed based on the circumstances before it, describing the equitable doctrine as follows:[35]

    (a) An equity will be established where:

        (i) There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property; and

        (ii) The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.

    (b) If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the equity.

48. The BCCA applied the doctrine of equitable estoppel in *Idle-O 2* based on the unique facts of that case. In particular, the lessee had constructed improvements on the recreational property after the parties purported to subdivide, including improvements to cottages, a tennis court, a car port and landscaping. Further, the lessee expected to, and did in fact use and enjoy the property, together with the improvements it constructed, for approximately 26 years before the dispute arose. Based on these facts, the BCCA agreed with the trial

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[34] *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451[***Idle-O 2***] **[TAB 8]**.

[35] *Ibid* at para 49 **[TAB 8].**

court that the lessee's expectations were reasonable, and the cancellation of the lease after 26 years, resulting in the lessee's inability to enjoy the fruits of its labour, was unconscionable.[36]

49. The facts of *Idle-O 2* are markedly different from the present facts.

50. Pivotal entered into the Surface Lease aware that the Facility Lands were already encumbered by Cortland's mortgage.[37] At that time, Pivotal and IEC did not discuss registering the Surface Lease against the Facility Lands,[38] and Pivotal only requested same from IEC once it began seeking financing to finish construction on the Storage Tanks.[39] Ultimately, it was unable to complete construction of the Storage Tanks, leaving the Leased Lands unusable and frustrating the underlying purpose of the Surface Lease.

51. Given the underlying purpose of the Surface Lease, the only reasonable expectation Pivotal could have had in terms of using the Leased Lands, was in relation to the construction and safe operation of the Storage Tanks. This use is no longer legally available to Pivotal, nor has Pivotal indicated, either expressly or through its conduct, a desire to use the Surface Lease for its underlying purpose. Thus, there is a significant difference between the expectations of the lessees in *Idle-O 2* and the only credible expectations of Pivotal under the Surface Lease.

52. On this basis, IEC submits that proprietary estoppel does not apply because equity cannot be established in favour of Pivotal.

53. The Surface Lease also offends other legislation in Saskatchewan. In particular, under the Saskatchewan *Land Titles Act*, no lease for a term of more than three years of mortgaged land is valid as against the mortgagee unless (i) the mortgagee has consented in writing to the lease before its registration, or (ii) the mortgagee subsequently

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[36] *Ibid* at paras 85-86 **[TAB 8]**

[37] Third Karl Affidavit at Exhibit "F", Exhibit "A".

[38] Third Karl Affidavit at para 19.

[39] Third Karl Affidavit at paras 21-23.

adopts the lease.[40] Cortland has never consented to the Surface Lease nor has it adopted the Surface Lease.[41]

54. It is not unconscionable for IEC to now assert that the Surface Lease is void. Pivotal knowingly entered into the Surface Lease without first obtaining Cortland's consent or a subordination of Cortland's mortgage interest.

55. Pivotal is a sophisticated business party. It made a business decision to proceed with the Surface Lease despite the risks that should have been plainly apparent, namely that it did not have the consent of IEC's primary secured creditor and mortgagee on the Leased Land to register the Surface Lease.

56. As a result of Pivotal's failure to address the risks associated with the Surface Lease prior to entering into it, Pivotal was unable to obtain additional financing from lenders to complete construction of the Storage Tanks. As a result, construction of the Storage Tanks ceased on February 9, 2023. Pivotal has not returned to the Storage Tanks or the Leased Lands since then.[42]

57. Pivotal provided no plan for completing construction on the Storage Tanks, no did it indicate in any way that it intended to complete construction on the Storage Tanks prior to the CO&O being disclaimed on July 28, 2023. Now that the CO&O Agreement has been disclaimed, Pivotal will not complete construction of the Storage Tanks, and therefore the purpose of the Surface Lease has become moot and proprietary estoppel therefore ought not apply to preserve Pivotal's interest in the Surface Lease.

58. On balance, the prejudice to IEC associated with maintaining the Surface Lease, is greater than the prejudice to Pivotal if the Surface Lease is recognized as void, given the negative impact of the partially constructed Storage Tanks and ownership structure on IEC's restructuring proceedings.

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[40] *Land Titles Act, 2000,* SS 2000, c L-5.1 s. 139 [***Land Titles Act***] **[TAB 9]**.

[41] Third Karl Affidavit at para 23.

[42] Third Karl Affidavit at para 28.

b. IEC validly terminated the Surface Lease because Pivotal repudiated the CO&O Agreement and the Surface Lease

59. In the event this Honourable Court determines that the Surface Lease is valid despite offending the PD Act, then IEC submits in the alternative that Pivotal committed an anticipatory breach and repudiated the Surface Lease, entitling IEC to terminate the Surface Lease.

60. Repudiation or anticipatory breach occurs where one party, by acts or omissions, evidences an intention that he or she will not complete the contract, or, by acts or omissions, demonstrates that he or she cannot carry out the contract.[43] The breach must relate to a fundamental term such that the breach frustrates the commercial purpose of the agreement.[44]

61. Once a party repudiates an agreement, the innocent party may accept the repudiation and treat the contract as terminated.[45]

62. IEC submits that Pivotal's conduct evidenced that it repudiated the CO&O Agreement in or around February or March of 2023.

63. Pivotal ceased construction on the Storage Tanks on February 9, 2023. Construction has not resumed since it was halted, and neither Pivotal's representatives nor any of its subcontractors have attended at the Leased Lands or the Storage Tanks since that time.[46] Further, Pivotal asked IEC to buy them out of the CO&O Agreement.[47] In addition, Pivotal failed to comply with its obligations in the Surface Lease associated with the safe operation of the Storage Tanks.[48]

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[43] *Pompeani v Bonik Inc*, [1997] OJ No 4174 at paras 39-40 (ONCA) **[TAB 10]**.
[44] *Café Orca v Cashline Inc*, 2004 BCSC 1033 at paras 38, 43 **[TAB 11]**.
[45] *Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423 at para 40 **[TAB 12]**.
[46] Third Karl Affidavit at para 28.
[47] Third Karl Affidavit at para 29.
[48] Third Karl Affidavit at para 28.

64. Pivotal was unable to obtain additional financing to complete construction on the Storage Tanks because the Surface Lease was not registered against the Facility Lands in priority to Cortland's mortgage. Without additional financing, Pivotal was not willing or able to spend further amounts towards construction of the Storage Tanks.[49]

65. By late March of 2023, Pivotal desired to extricate itself from the CO&O Agreement and its obligations relating to the Storage Tanks. Pivotal advised IEC that it would be interested in having IEC buy Pivotal out of the Storage Tanks.[50] Given IEC's financial circumstances at the time, it was not possible for IEC to enter into any such arrangement.

66. Given the foregoing, it was clear to IEC that Pivotal was not willing or able to complete construction of the Storage Tanks as contemplated by the CO&O Agreement.

67. That is, Pivotal (i) didn't have sufficient funds of its own to complete the Storage Tanks, (ii) was unable to obtain additional financing to fund the remaining construction of the Storage Tanks, (iii) hadn't progressed construction of the Storage Tanks for six weeks, (iv) failed to comply with its obligations under the Surface Lease associated with the safe operation of the Storage Tanks, and (v) had advised IEC that it wanted to be bought out of the Storage Tanks and the CO&O Agreement. As a result of the foregoing, IEC formed the view at that time that Pivotal was unwilling and unable to discharge its obligations under the CO&O Agreement, and had therefore repudiated the CO&O Agreement.

68. On July 28, 2023, IEC sent Pivotal notices that it was disclaiming several agreements between IEC and Pivotal, including the CO&O Agreement.[51] Pivotal did not object to the disclaimers, which confirmed its prior repudiation of the CO&O Agreement.[52]

69. The Surface Lease expressly provides that Pivotal's rights provided therein are "for the purposes and uses as may be necessary for the installation and operation of three storage

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[49] Third Karl Affidavit at para 21.

[50] Third Karl Affidavit at para 29.

[51] Third Karl Affidavit at para 33, Exhibit "I".

[52] Third Karl Affidavit at para 35.

tanks and the associated secondary containment." This is clearly a reference to the Storage Tanks that were to be constructed pursuant to the CO&O Agreement.

70. By repudiating the CO&O Agreement, Pivotal also repudiated the Surface Lease. The CO&O Agreement is referred to in, and is appended to, the Surface Lease. They formed an integrated arrangement between IEC and Pivotal for the construction and storage of hydrocarbon products, including crude oil and condensate at the Facility.[53]

71. The Surface Lease's sole purpose was to provide a location for Pivotal to build the Storage Tanks. The Storage Tanks are currently unfinished and will not be completed by Pivotal. That is, the commercial purpose of the Surface Lease has been frustrated by Pivotal's unwillingness or inability to complete the Storage Tanks. Pivotal has not returned to the Leased Lands since February 2023, further evidencing an intention to repudiate the Surface Lease agreement. As a result of the foregoing, IEC submits that Pivotal has also repudiated the Surface Lease. IEC accepted Pivotal's repudiation pursuant to the August 22 Letter, wherein it confirmed that the Surface Lease had been terminated.

c. The Surface Lease has been terminated due to Pivotal's breach thereof

72. Although the Surface Lease does not contain an express termination provision in IEC's favour, under Saskatchewan's *Land Titles Act, 2000* and at common-law, a breach of condition on which a tenancy expressly has been made to depend, gives the lessor the right to avoid a lease and re-enter without an express proviso for re-entry.[54]

73. As noted above, the Surface Lease expressly provides that Pivotal's rights provided therein are "for the purposes and uses as may be necessary for the installation and operation of three storage tanks and the associated secondary containment."[55]

74. Pivotal will not finish the installation of, or operate, the Storage Tanks, and therefore, Pivotal will never be able to use the Leased Lands in accordance with the purpose provided

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[53] Third Karl Affidavit at para 16.

[54] Anger & Honsberger, Law of Real Property, 3rd Edition, looseleaf, at § 7:31. Forfeiture Generally **[TAB 13]**; *Land Titles Act, supra* note 40 at ss. 140-141 [**TAB 9**].

[55] Third Karl Affidavit at para 17(a), Exhibit F.

for in the Surface Lease. Failing to use the lands in accordance with the stated purpose provided in the Surface Lease violates an express term of the Surface Lease, and accordingly, authorizes IEC to re-enter the Leased Lands and terminate the Surface Lease.[56]

75. IEC understands that the consequences of terminating the Surface Lease in the circumstances may seem inequitable. Not only are Pivotal's rights under the Surface Lease extinguished, but since the CO&O Agreement expressly provides that the Storage Tanks are Pivotal's chattels, Pivotal has been in trespass on the Facility Lands since the Surface Lease was terminated. Pivotal must therefore remove the Storage Tanks from the Facility Lands.[57] However, those consequences have arisen in large part because of Pivotal's business judgment and risk tolerance.

76. Pivotal signed the CO&O Agreement and the Surface Lease in the latter-half of 2022 - approximately one year after Cortland had registered its mortgage against the Facility Lands at Saskatchewan's land registry. The Surface Lease acknowledges that IEC's interest in the Leased Lands is subject to "the exceptions, conditions, encumbrances, liens and interests contained in or noted upon the Certificate of Title." Pivotal should therefore have been aware that the Leased Lands were subject to Cortland's mortgage when it entered into the Surface Lease and that Cortland's prior ranking mortgage could adversely impair its rights as a lessee.

77. Cortland did not agree to subordinate its mortgage to the Surface Lease. Further, since the Surface Lease is for a period exceeding three years, it is not binding on a prior ranking mortgagee.[58] Under a foreclosure or judicial-listing process, the Facility Lands would be sold to a purchaser free and clear of Cortland's mortgage and any subsequent encumbrances, including the Surface Lease. Pivotal therefore accepted whatever business risk may arise from being subordinate to Cortland's mortgage, which secures over

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[56] *Regina Airport Authority v Lumsden Aero Ltd*, 2002 SKQB 96 at paras 113 – 116 **[TAB 14]**.

[57] Third Karl Affidavit at para 38.

[58] *Land Titles Act, supra* note 40 at s. 139 **[TAB 9]**.

$200,000,000. That risk includes having its interest in the Leased Lands vested-out by a court supervised sales process with no guarantee of receiving any form of compensation.

78. Further, Pivotal elected to retain ownership of the Storage Tanks and classify them as chattels. Had Pivotal instead agreed that the Storage Tanks would be fixtures on the Leased Lands, Pivotal would not be required to remove them upon termination of the Surface Lease. This was a business decision that Pivotal voluntarily made.

79. The Sales Advisor and the Monitor have advised IEC that the dispute between IEC and Pivotal regarding the validity of the Surface Lease termination and status of the Storage Tanks is creating uncertainty in the SISP.[59] Uncertainty inherently impairs realization potential and therefore, IEC's ability to maximize the value realized during the SISP is at risk, to the detriment of IEC's stakeholders and creditors.

80. In any event, if the Surface Lease is not found to be void, or the termination is not found to be valid, IEC anticipates applying to have the Surface Lease vested out from the Facility Lands when seeking this Court's approval of a transaction arising out of the SISP.

81. In *Romspen Investment Corporation v Woods Property Development Inc.*, the Superior Court of Ontario approved the sale of a property in a receivership where a lessee had a leasehold interest in a portion of the property that was subordinate to the enforcing mortgagee. The Court held that it possessed the authority to vest out a leasehold interest so long as a consideration of "the equities of the positions of the various parties involved" occurred.[60]

82. The decision in *Romspen* was ultimately overturned on appeal, but only because the motion judge misapprehended the standard of proof by failing to draw certain reasonable inferences, mainly regarding disputed facts. As a result, the matter was remitted to the lower court for a new hearing. The principle that subordinate leasehold interests may be vested out remains valid law.

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[59] Third Karl Affidavit at para 41.

[60] *Romspen Investment Corporation v Woods Property Development Inc*, 2011 ONSC 3648 at para 65 **[TAB 15]** citing in part to *Meridian Credit Union Ltd v 984 Bay Street Inc* [2006] OJ No 3169 at para 19. See also, generally *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc* 2019 ONCA 508 **[TAB 16]**.

83. In the present circumstances, the equities favour vesting out the Surface Lease. As noted above, Pivotal made a business decision to accept the risks associated with entering into a long-term lease that is subordinate to a mortgage. Once those risks materialized, Pivotal attempted but failed to negotiate an improved position. It would be inequitable for Pivotal to be relieved of the natural consequences arising from a business decision it voluntarily made.

d. The Stay Period should be extended

84. The Company seeks to extend the Stay Period up to and including March 31, 2024, during which time it will continue to administer the SISP with a view to closing a transaction emanating from that process. Presently, the Final Bid Deadline established with respect to the SISP is January 22, 2024, being after the Stay Period is set to expire. The Company will require additional time, after the Final Bid Deadline, to work with the Monitor, the Sales Advisor and the proposed purchaser to negotiate definitive documents and bring an application to approve a transaction. As a result, the Company is seeking the extension to the end of March to accommodate these steps.

85. Section 11.02(2) of the CCAA provides that a Court may extend a stay of proceedings for any period necessary, so long as the Court is satisfied that: i) circumstances exist that make the order appropriate, and ii) the applicant has acted, and is acting, in good faith and with due diligence.[61]

86. The evidence establishes that the Company is acting and has been acting in good faith and with due diligence since the date of the Initial Order in pursuing restructuring options in an effort to maximize value for its stakeholders. Specifically, since its last Court appearance the Company has:[62]

(a) Refined a further seven batches of crude oil feedstock, totalling 281,983 bbls since the commencement of the CCAA proceedings.

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[61] CCAA, *supra* s 11.02(2) [**TAB 1**].

[62] Third Karl Affidavit at paras 43 -48.

(b) Achieved production of at least 17,000 bbls/day over a consecutive 24 hour period;

(c) Repaid approximately $28.5 million to Cortland from revenue generated from its batch production, pursuant to the terms of the Interim Financing Facility;

(d) Continued to negotiate offtake agreements for batch production at the Facility;

(e) Commenced the SISP with the assistance and under the supervision of the Sales Advisor and Monitor and in consultation with Cortland;

(f) Negotiated railcar sublease agreements, resulting in monthly costs savings of approximately $128,000;

(g) Disclaimed agreements with Plains Midstream Canada ULC and Ground Effects Environmental Services Inc.;

(h) Advised employees of the KERP/KEIP, and made certain payments pursuant to the terms thereof upon achieving a retention milestone and the operational production incentive milestone;

(i) Continued to work closely with the Monitor and Cortland, modelling Facility production scenarios, including a winter refining strategy;

(j) Conducted weekly update calls with the Monitor and Cortland to discuss operational and cash flow requirements over the period, and restructuring options available to the Company;

(k) Provided consistent operational updates between weekly update calls to the Monitor and Cortland including details of the products refined, the specifications met and agreements negotiated with purchasers of refined products; and

(l) Otherwise continued ongoing communication and engagement with various other stakeholders, including creditors, suppliers and employees.

87. The Company, in conjunction with the Monitor, has prepared an updated Cash Flow Forecast for the week ending November 12, 2023 to the week ending March 31, 2024,

which encompasses the extension of the Stay Period. The Company's principal use of cash during the Extended Stay Period will consist of operational costs necessary to continue operations at the Facility, including payment for the supply of feedstock, employee and contractor compensation, general administrative expenses, and payment of the professional advisors engaged to assist the Company with its restructuring efforts, as well as the professionals advising Cortland.[63]

88. Extending the Stay Period is necessary and appropriate in the circumstances to enable the Company to continue implementing the SISP to maximize value for the benefit of all of the Company's creditors and stakeholders. This includes realigning the Stay Period with the revised bid deadlines, which includes a Final Bid Deadline of January 22, 2024.

89. The extended Stay Period is also necessary to enable the Company time to negotiate definitive documents respecting a transaction, and schedule an application for approval of such transaction before this Court.

90. If the Extended Stay Period is granted, the Company intends to continue implementing the SISP with the assistance of the Sales Advisor, under the supervision of the Monitor, and in consultation with Cortland, and implement the winter refining strategy, generating sufficient revenue to sustain operations in tandem with the available credit under the Interim Financing Facility.

91. No creditors will suffer material prejudice as a result of the extension of the Stay of Proceedings for the Extended Stay Period. Further, the Monitor is of the view that the Extended Stay Period is appropriate and supports the Company's request.[64] The Extended Stay Period is also supported by Cortland, the Company's first secured creditor and Interim Lender in the within proceedings.[65]

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[63] Third Karl Affidavit at para 49, Exhibit K.

[64] Third Karl Affidavit at para 53.

[65] Third Karl Affidavit at para 52.

V. CONCLUSION

92. The Surface Lease between the Company and Pivotal has been void from the outset for failing to comply with the PD Act.

93. Alternatively, Pivotal repudiated the CO&O Agreement, and by extension, the Surface Lease, the fundamental purpose of which was to allow Pivotal to fulfill its obligations under the CO&O Agreement. That purpose ceased to exist when Pivotal walked off the site and ceased construction of the Storage Tanks in February of 2023. Pivotal's repudiation of the CO&O Agreement was recognized by IEC when it disclaimed that agreement, together with the other agreements between the parties. Pivotal accepted the disclaimers.

94. As a result of Pivotal's repudiation of the CO&O Agreement and Surface Lease, IEC validly terminated the Surface Lease on August 22, 2023.

95. Pivotal has no connection to the Leased Lands, other than through ownership of partially completed Storage Tanks, which Pivotal has agreed constitute chattels. Pivotal, by its own conduct in failing to comply with their contractual obligations, is responsible for the circumstances in which they find themselves.

96. The dispute regarding the termination of the Surface Lease and the status of the Storage Tanks is creating uncertainty for IEC in the SISP, which inherently impairs realization value. On balance, the interests of the stakeholders involuntarily participating in these proceedings should be favoured over the interests of Pivotal, who voluntarily and knowingly entered into a business arrangement with significant risk and failed to fulfill its obligations thereunder.

97. The termination of the Surface Lease was valid in the circumstances and Pivotal is now required to remove its chattels from the Leased Lands.

98. The Company has been acting in good faith and with due diligence throughout these CCAA proceedings. The requested stay extension will allow the Company time to continue implementing the SISP and seek approval of a transaction resulting from that strategic process.

99. Accordingly, for the reasons set out above, the Company submits that it is necessary and appropriate in the circumstances to grant the requested relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF NOVEMBER, 2023.

FASKEN MARTINEAU DUMOULIN LLP

Per: _____
R. Gurofsky/A. Mersich
Solicitors for the Applicant

List of Authorities

TAB	
1	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36
2	*Idle-O Apartments Inc v Charlyn Investments Ltd,* 2010 BCCA 460
3	*Redmond v Logel,* [1985] S.J. No 210 (SKCA)
4	*101066763 Saskatchewan Ltd. v. Weyburn Trailer Court Ltd*, 2008 SKQB 264
5	*Landswest School Division No 123 (Applicant) and Neil Klein (Respondent)*, 2005 SKQB 272
6	*International Paper Industries Ltd. v. Top Line Industries Inc,* [1996] BCJ. No 1089 (BCCA)
7	*R & R Ginseng Enterprises Ltd. v. Layton Bryson Outfitting & Trailriding Ltd.,* [1997] BCJ No 1011 (BCSC)
8	*Idle-O Apartments Inc. v. Charlyn Investments Ltd*., 2014 BCCA 451
9	*Land Titles Act, 2000*, SS 2000, c L-5.1
10	*Pompeani v Bonik Inc*, [1997] OJ No 4174
11	*Café Orca v Cashline Inc*, 2004 BCSC 1033
12	*Guarantee Co of North America v Gordon Capital Corp*, [1999] 3 SCR 423
13	Anger & Honsberger, *Law of Real Property*, 3rd Edition, looseleaf, at § 7:31. Forfeiture Generally
14	*Regina Airport Authority v Lumsden Aero Ltd*, 2002 SKQB 96
15	*Romspen Investment Corporation v Woods Property Development Inc*, 2011 ONSC 3648
16	*Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc* 2019 ONCA 508

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.02

s 11.02

Currency

11.02

11.02(1)Stays, etc. — initial application

A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(2)Stays, etc. — other than initial application

A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02(3)Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.02(4)Restriction

Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Amendment History
2005, c. 47, s. 128; 2019, c. 29, s. 137

Currency
Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

TAB 2

2010 BCCA 460
British Columbia Court of Appeal

Idle-O Apartments Inc. v. Charlyn Investments Ltd.

2010 CarswellBC 2760, 2010 BCCA 460, [2010] B.C.W.L.D. 8353, [2010] B.C.W.L.D. 8383, 10 B.C.L.R. (5th) 117, 194 A.C.W.S. (3d) 280, 292 B.C.A.C. 277, 493 W.A.C. 277, 97 R.P.R. (4th) 183

Idle-O Apartments Inc. (Appellant / Plaintiff) and Charlyn Investments Ltd. (Respondent / Defendant)

Levine, K. Smith, Kirkpatrick JJ.A.

Heard: May 17, 2010
Judgment: October 19, 2010
Docket: Vancouver CA036296

Proceedings: reversing *Idle-O Apartments Inc. v. Charlyn Investments Ltd.* (2008), 2008 CarswellBC 1363, 73 R.P.R. (4th) 300, 85 B.C.L.R. (4th) 342, 2008 BCSC 849 (B.C. S.C.)

Counsel: H.W. Veenstra for Appellant
W.D. Holder for Respondent

Subject: Property; Public; Civil Practice and Procedure

Headnote

Real property --- Landlord and tenant — Nature and elements of lease — Illegality

Lease was entered into for 99 years in 1974, and in 1978, new lease was entered into between respondent C Ltd. and appellant I Inc. for term of 998 years — In case decided by this court in 1996, it was held that effect of s. 73 of Land Title Act was that lease of unsubdivided land for term exceeding three years was illegal and unenforceable, and did not create any personal rights between parties — In 2000, after dispute arose, both parties in present case learned that 1978 lease contravened s. 73 of Act, which prohibits long-term leasing of unsubdivided portion of land — In 2004, I Inc. commenced action seeking declaration that lease was illegal and unenforceable — In May 2007, Act was amended by addition of s. 73.1, which provides that such lease "is not unenforceable between the parties" — Summary trial had begun in 2006 but was not completed until 2008, when submissions relating to s. 73.1 of Act were heard — Trial judge found that s. 73.1 of Act was retrospective in its application and that its effect was to validate 1978 lease — I Inc. appealed — Appeal allowed — In this case, "operative event" to which s. 73.1 would apply was either creation of 1978 lease or commencement of proceedings in 2004, both of which occurred long before amendment was enacted — There was no procedural basis to apply s. 73.1 to lease, other than on basis that it was retrospective in effect, and there was no basis in law to give lease retrospective effect.

Statutes --- Retroactive and retrospective operation — Pending actions — General principles

Lease was entered into for 99 years in 1974, and in 1978, new lease was entered into between respondent C Ltd. and appellant I Inc. for term of 998 years — In case decided by this court in 1996, it was held that effect of s. 73 of Land Title Act was that lease of unsubdivided land for term exceeding three years was illegal and unenforceable, and did not create any personal rights between parties — In 2000, after dispute arose, both parties learned that 1978 lease contravened s. 73 of Act, which prohibits long-term leasing of unsubdivided portion of land — In 2004, I Inc. commenced action seeking declaration that lease was illegal and unenforceable — In May 2007, Act was amended by addition of s. 73.1, which provides that such lease "is not unenforceable between the parties" — Summary trial had begun in 2006 but was not completed until 2008, when submissions

relating to s. 73.1 of Act were heard — Trial judge found that s. 73.1 of Act was retrospective in its application and that its effect was to validate lease — I Inc. appealed — Appeal allowed — Well-accepted principles of statutory construction do not provide for result ordered by trial judge — There is nothing in language of s. 73.1 that expressly or by necessary implication requires retrospective effect — Evidence of legislative intent did not support decision — There was some evidence that s. 73.1 was enacted in response to court's 1996 decision, but there was no specific evidence that legislature intended amendment to be applied retrospectively.

APPEAL from judgment reported at *Idle-O Apartments Inc. v. Charlyn Investments Ltd.* (2008), 2008 CarswellBC 1363, 73 R.P.R. (4th) 300, 85 B.C.L.R. (4th) 342, 2008 BCSC 849 (B.C. S.C.), granting declaration that 998-year lease was valid and enforceable.

***Levine J.A.*:**

Introduction

1 This appeal concerns the validity of a lease of unsubdivided land on the western shore of Osoyoos Lake. The lease was entered into for 99 years in 1974, and amended to extend the term to 998 years in 1978. The land has been occupied continuously since 1966 by the principals of the respondent, Charlyn Investments Ltd., for their personal and family use.

2 The legal issue is whether the lease is invalid, in accordance with the judgment of this Court in *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (B.C. C.A.) [*Top Line*], or is validated by an amendment to the *Land Title Act*, R.S.B.C. 1996, c. 250, made in May 2007. In *Top Line*, the Court decided the effect of s. 73 of the *Act* was that a lease of unsubdivided land for a term exceeding three years was illegal and unenforceable, and did not create any personal rights between the parties. In May 2007, the *Act* was amended by the addition of s. 73.1, which provides that such a lease "is not unenforceable between the parties". The question on appeal is whether s. 73.1 is retrospective, having the effect of validating an invalid lease entered into before s. 73.1 came into effect.

3 The appeal is from the order of a Supreme Court justice who found that s. 73.1 was retrospective in its application, and its effect was to validate the lease.

4 It is my opinion that the trial judge erred. There is no basis in law for concluding that the Legislature intended s. 73.1 to have retrospective effect. It follows that I would allow the appeal, set aside the order appealed from, and return the matter to the Supreme Court for determination of matters not decided by the trial judge.

Background

5 The principals of the respondent company (the Deans) have occupied the leased land, a .62 acre site on the western shore of Osoyoos Lake, since 1966. The leased land is part of a 3.49 acre site ("Lot 1"), subdivided in 1971 from a larger site purchased by the Deans with a friend in 1966. The Deans transferred Lot 1 to Charlyn in 1971. In 1974, the appellant, Idle-O Apartments Inc., was incorporated, and on May 1, 1974, Charlyn sold Lot 1 to Idle-O. On June 1, 1974, Idle-O leased the leased land to Charlyn for 99 years. A new lease was entered into between Charlyn and Idle-O in 1978 for a term of 998 years.

6 Idle-O was formed for the purpose of selling units in an apartment building on Lot 1, through the sale of shares in Idle-O. By 1976, Mr. Dean was no longer a director of Idle-O, which was directed and managed by the occupants of the apartments.

7 The Deans have used the leased land for their personal and family use. They built four cottages on it between 1966 and 1971. In 1999, the Deans started construction on a two-story building. There was a dispute about whether the lease required Charlyn to obtain consent from Idle-O for the construction. Idle-O ultimately refused consent in February 2000. In June 2000, the directors of Idle-O informed Mr. Dean that Idle-O's legal counsel had advised that the lease was illegal for failure to comply with s. 73 of the *Act*. In June 2001, counsel for Idle-O wrote to counsel for Charlyn, formally asserting that the lease was invalid and unenforceable, and demanding that Charlyn forthwith deliver up possession of the leased land. Charlyn has not done so.

8 The parties engaged in negotiations between 2000 and 2003. Idle-O commenced its action on May 27, 2004, seeking a declaration that the lease is illegal and unenforceable.

9 After procedural delays and adjournments, the summary trial was heard on June 22-23, 2006. Judgment was reserved.

10 In May 2007, the *Act* was amended to add s. 73.1 (*Miscellaneous Statutes Amendment Act (No. 2)*, *2007*, S.B.C. 2007, c. 24, s. 26).

11 The parties applied to the trial judge to make further submissions with respect to the application of s. 73.1, which were heard February 15, 2008, and judgment was again reserved.

12 Reasons for judgment were released on June 30, 2008. The trial judge dismissed Idle-O's application, and decided that the 1978 lease of the leased land was valid. She concluded the 2007 amendment to the *Act* to add s. 73.1 was retrospective in its application, and that its effect was to validate the lease. The basis for retrospective application was that it was remedial legislation, enacted to counteract the "mischief or hardship" caused by *Top Line* (at para. 111).

Statutory Provisions

13 The relevant parts of s. 73 of the *Act* provide:

> 73(1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
>
> (a) transferring it, or
>
> (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.
>
> . . . . .
>
> (3) Subsection (1) does not apply to a subdivision for the purpose of leasing a building or part of a building.
>
> . . . . .
>
> (6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.

14 Section 73.1 provides:

> 73.1(1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease by reason only that
>
> (a) the lease or agreement for lease does not comply with this Part, or
>
> (b) an application for the registration of the lease or agreement for lease may be refused or rejected.
>
> (2) This section does not apply to an airport lease, as defined in section 41 of the *Municipalities Enabling and Validating Act (No. 2)*.

15 Section 59 of the *Miscellaneous Statutes Amendment Act (No. 2)*, *2007*, which in s. 26 enacted s. 73.1 of the *Act*, provided that s. 26 came into force on the date of Royal Assent, which was May 31, 2007. The *Miscellaneous Statutes Amendment Act (No. 2)*, *2007* contains no other transitional provision with respect to s. 26.

Top Line - Section 73 of the Act

16 In *Top Line*, a landlord and tenant had agreed to a long term lease of a portion of unsubdivided property, including a right of renewal. At the time the lease was entered into, neither party understood the significance of s. 73 of the *Act*. When the tenant sought to renew the lease, the landlord refused, relying on various grounds, including s. 73. The Court held that a lease

of a portion of property for a term of more than three years, where the leased portion was not subdivided from the remainder of the property, was illegal and unenforceable in its entirety.

17 The objectives of s. 73 were described by Newbury J.A. for the Court (at paras. 17-18):

> ... an important purpose of s. 73 is to ensure that municipal authorities retain control over subdivision as a means of regulating zoning, drainage, utility supply, building encroachment, siting, local aesthetics, and land development and use generally in the public interest. ...
>
> Another objective of the prohibition is, I suggest, to ensure the operation of the Torrens land registration system in this Province. Obviously, if it were possible for property owners simply to subdivide at will, the system of surveyed parcels of land to which title may be bought and sold in reliance on the register would quickly break down. The public benefits of the Torrens system are too obvious to need elaboration.

18 The tenant in *Top Line* argued that the Court should treat the lease as a licence, giving the tenant rights of occupation identical to its lease rights, or fashion an equitable remedy to similar effect. Madam Justice Newbury rejected these propositions, concluding that to enforce any right of occupation or personal or proprietary rights in respect of the leased premises would offend the public policy aims and objectives of s. 73 (at paras. 34-35).

19 After judgment was given in the first *Top Line* case, the landlord applied to the Court to recover rent from the tenant for the time after the landlord took the position that the lease was unenforceable until the tenant was eventually ordered to vacate. The Court of Appeal dismissed that claim in *Top Line Industries Inc. v. International Paper Industries Ltd.*, 2000 BCCA 23, 184 D.L.R. (4th) 534 (B.C. C.A.), [*Top Line (No. 2)*]. Madam Justice Newbury commented (at para. 13):

> ... the Landlord concedes that in order to obtain its remedy, it must have consented to the Tenant's occupation, but its consent was only given pursuant to a lease, and the lease was illegal. That illegality was not a minor defect. ... The lease was invalid from the beginning, even though neither of the parties was aware of that fact.

20 Thus, the decisions in *Top Line* and *Top Line (No. 2)* establish that a lease granted in violation of the statutory prohibition in s. 73 is an illegal and unenforceable contract and is void *ab initio*.

Enactment of Section 73.1 of the Act

21 The respondent's position, in Supreme Court and on the appeal, is that s. 73.1 was enacted as "remedial legislation to remedy the hardships caused by the *Top Line* decision" (at para. 71). This argument was accepted by the trial judge and formed the basis for her decision that s. 73.1 was to be given retrospective effect.

22 The trial judge set out the background to the enactment of s. 73.1, as provided to her in the respondent's submissions (at paras. 72-77):

> The defence points to the concerns that the *Top Line* case caused. In July 2005, the British Columbia Law Institute issued a report, "Report on Leases of Unsubdivided Land and the Top Line Case". The British Columbia Law Institute ("BCLI") was created in 1997 under the *Society Act* to promote the clarification and simplification of the law and its adaptation to modern social needs, to promote improvement of the administration of justice, and to promote and carry out scholarly legal research. It succeeds the former Law Reform Commission of British Columbia.
>
> After setting out its summary and criticism of the *Top Line* case, and detailing its consultation process, the BCLI recommended legislative reform to the B.C. Provincial Legislature. In faulting *Top Line*, the report stated at page 5, "The Land Title Act does not dictate the harsh result of invalidity; it only provides that such leases cannot be registered." Further at page 5, the report stated:
>
> > Other criticisms of *Top Line* have focussed on the effect that the decision could have on commercial leasing. The court touched on these concerns when it referred to "... the desirability of holding parties to their contractual obligations...."

> A Declaration that an agreement is void *ab initio* can cause a disaster for one party and a windfall for the other. Even in the absence of a windfall, parties to leases similar to the one in *Top Line* may have an incentive to litigate. Increased litigation would cast doubt on existing commercial leases. Avoiding potential litigation could also add time and expense to the process of negotiating new leases.
>
> [Emphasis added]

At page 10 of its report, the BCLI recommended that the legislature enact legislation to address the difficulties created by the *Top Line* case. Their recommendation was an amendment to the *Land Title Act*.

The suggested draft legislation by the BCLI was as follows:

> 1 *The Land Title Act, R.S.B.C. 1996, c. 250 is amended by adding the following section:*
>
> > 73.1(1) A purported lease executed in contravention of section 73 must take effect as a licence for the purpose of creating personal rights and obligations among the parties to it.
> >
> > (2) Nothing in subsection (1) affects the right of the purported lessee to claim damages for breach of contract.
> >
> > (3) Subsection (1) applies to purported leases executed before or after the subsection comes into force, unless the purported lease is the subject of a proceeding commenced before the subsection comes into force.

When Bill 35 was put forward last year, that being the *Miscellaneous Statutes Amendment Act (No. 2)*, by the Attorney General, the explanatory note issued by the legislature stated as follows:

> Section 25: [Land Title Act, section 73.1] provides that a lease or an agreement for lease of part of a parcel of land is not unenforceable for specified reasons only, abrogating a 1996 ruling of the British Columbia Court of Appeal in *International Paper Industries Ltd. v. Top Line Industries Inc.*

Counsel for the defendant then produced the Official Report of the Debates of the Legislative Assembly for May 14, 2007, when the Attorney General moved the enactment of Bill 35. The Attorney General stated as follows:

> Amendments to the Land Title Act will also create new opportunities for farmers by ensuring they can enter into valid, enforceable longterm leases for unused portions of agricultural land. The amendment addresses side effects of a 1996 decision, a court case that interpreted the act's requirements on leases on unsubdivided land. The decision has resulted in confusion, extra costs for farmers and an unintended burden on local governments. The amendments will enhance farmers' abilities to affordably access unused farmland and set out requirements for leases with terms exceeding three years. The change will promote certainty for land agreements and reduce unnecessary litigation.

Reasons of the Trial Judge

23 The trial judge summarized her reasons for finding s. 73.1 to have retrospective effect and her conclusion (at paras. 111-116):

> In my view, s. 73.1 is clearly remedial legislation. It was passed to bring fairness and equity to a situation like this. The mischief or hardship caused by the ***Top Line*** case was so apparent that the BCLI as well as the provincial legislature drafted legislation to ensure that the unfairness would not continue.
>
> This is a situation where the intention of the legislature is before us; the mischief must be corrected.
>
> The rules of statute construction allow the courts to go beyond strict literal interpretation, given certain circumstances. Namely, to avoid unfairness, observe the rule of law, and give full meaning to the intention of the legislature.

I adopt the observation by Professor Côté in *The Interpretation of Legislation in Canada*, "... the statute applying immediately in the present does not allow for the survival of previous legislation." This case is still before the courts. The former legislation is not. The recent amendment is. The recent amendment governs the rights and obligations between these parties. There is also the desirability of holding parties to their contractual obligations.

In my view, the 1978 lease is legal. It is a valid lease between these two parties. Nor is this a case where the plaintiff "carried on upon the faith of the then existing law". Both parties carried on for 26 years in complete ignorance of s. 73 of the *Land Title Act*.

The plaintiff's claim to have the lease of September 12, 1978 declared illegal and unenforceable is dismissed.

Grounds of Appeal

24 The appellant sets out three grounds of appeal: that the trial judge erred in giving retrospective effect to s. 73.1 of the *Act*, interpreting s. 73.1 in a manner that deprived the appellant of its vested rights, and applying s. 73.1 to the appellant's pending legal action.

25 As I am of the view that the trial judge erred in giving s. 73.1 retrospective effect, it is not necessary to deal with the grounds of appeal concerning vested rights and pending legal proceedings.

Analysis

26 The starting point for the analysis of the effect of s. 73.1 is that there is nothing in its wording that expressly provides for retrospective application. In the absence of any express intent to apply legislation retroactively or retrospectively, legislation is construed as so applying only "by necessary implication required by the language of the Act": see *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 (S.C.C.), at 279, cited by this Court in, among other cases, *Wiest v. Middelkamp*, 2003 BCCA 437 (B.C. C.A.) at para. 15, (2003), 15 B.C.L.R. (4th) 197 (B.C. C.A.), and more recently by the Supreme Court of Canada in *Union des consommateurs c. Dell Computer Corp.*, 2007 SCC 34 (S.C.C.) at para. 161, [2007] 2 S.C.R. 801 (S.C.C.).

27 The respondent's arguments do not address whether the language of s. 73.1 requires, "by necessary implication", retrospective application. Rather, the respondent repeats the arguments made at trial that s. 73.1 was intended to be remedial legislation. It also argues that s. 73.1 has procedural, not substantive, effect on unregisterable leases, to which the presumption against retrospective legislation does not apply. The respondent relies on the cases cited by the trial judge in support of her conclusion that remedial intent supports retrospective application.

28 The short answer to the question raised on appeal is that the well-accepted principles of statutory construction do not provide for the result ordered by the trial judge. There is nothing in the language of s. 73.1 that expressly or by necessary implication requires retrospective effect.

29 The evidence of legislative intent - the BCLI Report, the explanatory note when the amendment was introduced in the Legislature, and the excerpt from Hansard - do not support the decision. While they provide some evidence that s. 73.1 was enacted in response to *Top Line*, there is no specific evidence that the Legislature intended the amendment to be applied retrospectively. If anything, the rejection of the expressly retrospective draft provision suggested by the BCLI would tend to indicate that the Legislature considered and decided against s. 73.1 having retrospective effect.

30 Nor can the amendment properly be characterized as procedural. Section 73.1 has the effect of granting substantive rights in respect of a previously otherwise unenforceable lease.

31 The cases relied on by the respondent are not of assistance. In *Campbell v. Campbell* (1995), 130 D.L.R. (4th) 622 (Man. C.A.), the parties had agreed that an amendment to a statute had retroactive effect. The Court of Appeal nonetheless considered

the issue, and concluded that giving the statute retrospective effect "gives effect to the intent of the legislation and deals with the mischief the amendment was clearly intended to deal with" (at para. 20).

32 In *Campbell*, the Court referred to *Steele-Smith v. Acme (Village) School District* (1932), [1933] S.C.R. 47 (S.C.C.). *Acme (Village)* concerned the termination of a teacher in July 1931, in conformity with the terms of her 1929 employment contract, but in violation of amendments to the *School Act*, which came into force July 1, 1931. The court found the amendments applied in that case, even though the contract was entered prior to their enactment, because of their clear remedial purpose and the fact there was no express provision indicating that the amendment was only intended to apply to teachers whose contracts were entered into after July 1, 1931.

33 The respondent also cites *C.A.I.M.A.W., Local 4 v. British Columbia (Director of Employment Standards Branch)* (1992), 91 D.L.R. (4th) 219 (B.C. S.C.), in which Vickers J. gave effect to amendments to the *Employment Standards Act* concerning notice periods for termination, though they came into effect after the respondent issued notices of termination to the petitioner's members. Mr. Justice Vickers' interpretation of the relevant statutory provisions was guided by the remedial purpose of the amendments, but the basis for his decision was that the "operative event" was termination, not the giving of notice. Thus, he did not have to give the provisions retrospective effect.

34 Similar reasoning is applicable to the result in *Acme (Village)*. In that case, the amendments concerned procedural requirements for the teacher's termination (the "operative event"), which took place after the amendments were enacted. Thus, the amendment was not actually given retrospective effect.

35 In this case, the "operative event" to which s. 73.1 would apply was either the creation of the lease in 1978 or the commencement of the proceedings in 2004, both of which occurred long before the amendment was enacted. There is no procedural basis, as in *Acme (Village)* and *C.A.I.M.A.W.*, to apply s. 73.1 to the lease, other than on the basis that it is retrospective in effect, and there is no basis in law to give the lease retrospective effect.

Summary

36 The trial judge's conclusion that s. 73.1 must be given retrospective effect on the basis that it is remedial legislation is not supported by the well-established legal principles that govern the interpretation of statutes and their applicability. It follows that the lease is invalid and unenforceable, as dictated by the decision in *Top Line*.

37 There is no question that this result creates what the BCLI referred to in its report on the implications of *Top Line*: "A Declaration that an agreement is void *ab initio* can cause a disaster for one party and a windfall for the other." These parties carried on for 26 years on the basis that they had entered into a valid lease. However, unless and until this Court decides that *Top Line* was wrongly decided, or the Legislature makes it clear that s. 73.1 is to be given retrospective effect, leases entered into before the enactment of s. 73.1 on May 31, 2007 are invalid and unenforceable.

Other Matters

38 The respondent seeks an order, if the appeal is not dismissed, that the matter be referred back to the trial judge for determination of the alternative relief claimed in its Amended Counterclaim. The alternative relief claimed was:

> (i) a Declaration that the Respondent is entitled to an irrevocable licence to the Leased Property pursuant to the terms of the Second Lease;
>
> (ii) in the alternative, a Declaration that the Appellant holds the Leased Property pursuant to a constructive trust in favour of the Respondent, and an Order granting the Respondent an undivided interest in the Lands equal to the value of the Leased Property as against the Lands;
>
> (iii) in the further alternative, damages for the loss of the Lease;

(iv) in the further alternative, damages for unjust enrichment and an Order referring the assessment of those damages to a Registrar of this Honourable Court;

39 The appellant suggests that the claims for an irrevocable licence and a constructive trust were rejected in *Top Line*, and therefore there is "little to be served by remitting these claims back to the Supreme Court". It concedes that the other claims raise substantive arguments.

40 I would remit all of these claims to the Supreme Court for determination. It is not for this Court to summarily dismiss claims that have not been adjudicated without full argument, which has not been made here.

Conclusion

41 I would allow the appeal, set aside the order appealed from, and declare that the lease is invalid and unenforceable.

42 I would remit to the Supreme Court for determination the respondent's alternative claims set out in para. 38 of these reasons for judgment.

43 I would also remit to the Supreme Court the appellant's request for an order that the respondent deliver up possession of the leased land and remove all buildings and chattels belonging to it from the leased land, as no submissions were made in this Court addressing any terms and conditions for possession, including timing.

44 I would order that the appellant is entitled to the costs of the appeal, and that the costs of the summary trial be determined by the Supreme Court following the determination of the respondent's alternative claims.

***K. Smith J.A.*:**

I agree.

***Kirkpatrick J.A.*:**

I agree.

Appeal allowed.

TAB 3

1985 CarswellSask 492
Saskatchewan Court of Appeal

Redmond v. Logel

1985 CarswellSask 492, [1985] S.J. No. 210, 30 A.C.W.S. (2d) 243, 37 Sask. R. 270

Redmond v. Logel and Logel

Tallis, Cameron and Vancise, JJ.A.

Oral reasons: January 31, 1985
Docket: Doc. 7716

Counsel: *T.R. Waller*, for the appellants, Logel and Logel.
Dale M. Scrivens, for the respondent, Redmond.

Subject: Public; Municipal

Headnote

Municipal Law --- Subdivision control — Agreements contravening statutory subdivision control — Unregisterability of instrument

Planning and Development Act, R.S.S. 1978, c. P-13, s. 116(1).

Plaintiff selling land to defendants' predecessors and reserving two acre lot for himself — Act preventing registration of transfer in those terms as offending subdivision control provisions of Act — Transfer of entire land accordingly registered and plaintiff filing caveat on lands reserved by agreement — Defendants having notice of plaintiff's interest in offer to purchase from predecessors — Trial Court allowing plaintiff's application for order vesting title in his name and requiring defendants to seek subdivision approval to effect registrable transfer — Defendants' appeal allowed — Attempts by plaintiff and defendant's predecessors to avoid transfers prohibited by Act not to be given judicial approval in form of vesting order or otherwise.

Tallis, J.A. **[Orally, for the court]:**

1 George Logel and Shirley Logel appeal from a judgment delivered on 29 September, 1981, which ordered "rectification" of the description of the two acre farm site occupied by the respondent (plaintiff) Joseph Redmond and directed them to seek approval of a subdivision under the relevant legislation and then deliver a transfer of the said farm site to Mr. Redmond, if approval was obtained.

2 The facts are set out in the written reasons for judgment. However, before defining and dealing with the principal issues, I find it helpful to recite the skeletal facts of this case. On 10 October, 1975, the respondent Mr. Redmond sold a section of farmland for $100,000.00 to Calvin Mohl under an agreement for sale which purported to except the farm home and yard in these terms:

> **AGREEMENT**
>
> 1. The Vendor agrees to sell to the Purchaser, who agrees to purchase from the Vendor, the land and property being in the Province of Saskatchewan, described as follows: *FIRSTLY*: The South Half of Section Thirty- Four (34), in Township Twenty-one (21), in Range Thirteen (13), West of the Second Meridian, in the Province of Saskatchewan, in the Dominion of Canada, *EXCEPTING, out of the extreme South East corner of the said lands a parcel approximately 200 feet by 650 feet containing Two* (*2*) *acres more or less*.
>
> *SECONDLY* ... at and for the price and sum of ----- ONE HUNDRED THOUSAND DOLLARS -----
>
> (my emphasis)

3 Paragraph 15 of this agreement also provided:

> The property herein described shall be deemed to include all buildings whether on foundation or skids, all fixtures and improvements; except the following: All the buildings presently located on the extreme South East corner of the South Half of Section Thirty-Four (34), in Township Twenty-one (21), in Range Thirteen (13), West of the Second Meridian, in the Province of Saskatchewan, in the Dominion of Canada.

4 Calvin Mohl (who was added as a party to this appeal by previous order of this court) arranged the necessary financing and in June, 1976, a transfer to all the land covered by the agreement for sale was registered but the transfer did not reserve the farm site because the purported subdivision or severance offended the provisions of the *Planning and Development Act*, R.S.S. 1978, c. P-13, and the zoning bylaws of the Rural Municipality of North Qu'Appelle. However, approval under this legislation and the zoning bylaws was not a condition precedent to the validity or enforceability of the agreement for sale. The respondent Redmond filed a caveat concurrently with the registration of the transfer to protect his interest in the farm site. This caveat reads as follows:

> TAKE NOTICE THAT I Joseph Redmond of Lebret, CLAIMING AN INTEREST as the beneficial owner of an area approximately 200' × 650' containing two acres, more or less, as set out in a certain Agreement for Sale between myself as Vendor and Calvin Mohl of Fort Qu'Appelle as Purchaser, and dated the 10th day of October, A.D. 1975...

5 Mr. Mohl later sold the land to the appellants George and Shirley Logel and the transfer under this sale was registered in the Land Titles office on 9 March, 1978 without any reservation of the farm site occupied by Mr. Redmond--no doubt because such a reservation offended the applicable legislation. However, Mr. and Mrs. Logel did have notice of Mr. Redmond's interest because of the caveat and in the offer to purchase which was signed with Mr. Mohl, paragraph 10 reads:

> 10. Special Terms: It is acknowledged, by the purchaser that the 200' × 650' plot Southeast corner of Southeast 34-21-13 W2nd is the property of Joseph Redmond and not that of the Vendor.

6 Since the original sale to Mr. Mohl, Mr. Redmond has enjoyed possession of his farm home and farm site. The appellants have not tried to lapse or remove his caveat or otherwise interfere with his occupancy and possession. They have supplied water to his premises and paid for power utilized by him.

7 The respondent took no action to obtain title to the farm site until after the property had been transferred by Mr. Mohl to the appellants. He later brought an action in Queen's Bench seeking the following relief:

> (a) Rectification of the metes and bounds description of the farm site, and a declaration that he is the owner of the fee simple estate in the most Southerly 650 feet of the most Easterly 200 feet, of the Southeast quarter 34-21-13 W2nd;
>
> (b) A consequent order vesting title in the name of the plaintiff subject to applicable zoning or planning regulations or bylaw;
>
> (c) In the alternative, damages against the defendants for the value of the land for which they refused to convey;
>
> (d) The costs of the action.

8 There are three principal issues on this appeal which I paraphrase as follows:

> 1. Whether the learned trial judge erred in holding that the respondent Mr. Redmond had retained a legal interest in the farm site that may form the basis of a registerable transfer under the *Land Titles Act*.
>
> 2. (depending on the answer to issue no. 1), whether the learned trial judge erred in ordering the appellants (who were purchasers under a subsequent agreement for sale with Mr. Mohl) to undertake to obtain the necessary subdivision to permit such a transfer.

3. (depending on the answer to issue no. 1 and 2) whether the learned trial judge erred in ordering "rectification"--the trial judge's word --being a conversion of the land description to metes and bounds for the purposes of effecting a transfer or vesting of title.

Several subsidiary issues were also raised on this appeal but during the argument the above questions emerged as the principal issues.

9 In order to focus on the first issue in this case, I find it necessary to quote the following relevant provisions of the *Planning and Development Act*, R.S.S. 1978, c. P-13, (herein-after called the *Act*) which were in force at that time of the agreement between Mr. Mohl and Mr. Redmond and the subsequent agreement between Mr. Mohl and the appellants:

2. In this Act

(w) 'subdivision' means a division of land heretofore or hereafter made:

. . . . .

98. No subdivision of land shall be made unless in accordance with this Act and the regulations and with plans and specifications submitted to and approved by the minister.

. . . . .

113. An application for subdivision shall not be approved unless:

(a) the land, in the opinion of the approving authority, is suited to the purpose for which the subdivision is proposed and may be expected to be used for that purpose within a reasonable period of time;

(b) the proposed subdivision conforms to an existing community planning scheme, municipal development or zoning bylaw and is in accordance with the spirit and intent of this Act;

(c) the person proposing the subdivision, where required by the municipality, enters into an agreement with the municipality with such assurances as to performance as the council may consider requisite in each case, undertaking that the person will, within the time or times designated in agreement install or construct within the proposed subdivision at the person's expense or partly at the person's expence and partly at the expense of the municipality and in accordance with the specifications set forth in the agreement, such of the following works as the council may require, namely: storm sewers, sanitary sewers, drains, watermains and lateral, hydrants sidewalks, boulevards, curbs, gutters, street lights and graded, gravelled or paved streets and lanes, connections to existing services, area grading and levelling of land, street name plates, connecting and boundary streets, landscaping of parks and boulevards and such other works as the council shall require.

. . . . .

116.(1) Where an instrument:

(a) granting a lease or part only of a parcel of land; or

(b) charging, mortgaging or otherwise encumbering a part only of a parcel of land:

has the effect or may have the effect of subdividing the parcel, the registrar shall not accept the instrument for registration unless it is approved in accordance with this Act and the regulations....

10 At the time the respondent Mr. Redmond sought to reserve the two acre farm site unto himself, s. 7.1(2)E of Bylaw 741 of the Rural Municipality of North Qu'Appelle provided:

> An agricultural holding may be subdivided or severed to provide a separate site for an existing dwelling provided that no other dwellings exist on separate sites in the same quarter section. The site to be subdivided or severed shall have an area of not less than five acres.

11 The purpose of these and other provisions in the Act is "the prevention of the unrestricted subdivision of land": see *Forfar v. East Gwillimbury* (*Township*), [1971] 3 O.R. 337, 20 D.L.R. (3d) 277 (C.A.), and *Redmond v. Rothschild* (1970), [1971] 1 O.R. 436, 15 D.L.R. (3d) 538 (C.A.). The chief object in controlling subdivisions and passing zoning bylaws is to control land development. In the case before the court, s. 116(1) of the *Act* prohibits disposition of land in various ways and the respondent's transaction with Mr. Mohl falls into a prohibited category. From a fair reading of the record, we infer that the respondent Mr. Redmond knew or since he was represented by a solicitor, must be taken to have known that the subdivision was, in the absence of official approval, in violation of the applicable legislation; hence he sought to protect his position by the expediency of a caveat. (See Vol II Appeal book p. 129 and Exhibit P. 9 at Volume I Appeal Book at p. 15.) The transaction between Mr. Redmond and Mr. Mohl appears to have been concluded in such a way as to avoid the effect of the legislation. Under such circumstances the court should try to prevent the wholesale frustration of the legislature's objects. The relief sought by Mr. Redmond in this action is tantamount to a judicially ordered partition of land to avoid the effect of the *Act* and the zoning bylaw.

12 We agree with counsel for the appellants that the respondent in this case, who has failed to comply with the *Act* and zoning bylaw, purports to claim as against his purchaser's successor a greater title in the land than he would have able [sic] to obtain at the time of the original sale. A transfer in violation of the *Act* cannot be registered under the *Land Titles Act*: In *Capital Grocers Ltd. v. Saskatchewan* (*Registrar of Land Titles*) [1952], 7 W.W.R. (N.S.) 315 (Sask. C.A.).

13 In the circumstances of this case, the appellants are entitled to succeed on the first issue. In view of our conclusion on this first issue, we do not find it necessary or desirable to deal with issues 2 and 3.

14 In the result the within appeal is allowed with costs to the appellants in this court and at trial.

End of Document

TAB 4

2008 SKQB 264
Saskatchewan Court of Queen's Bench

101066763 Saskatchewan Ltd. v. Weyburn Trailer Court Ltd.

2008 CarswellSask 425, 2008 SKQB 264, 171 A.C.W.S. (3d) 445, 333 Sask. R. 104

101066763 SASKATCHEWAN LTD. (Applicant) and WEYBURN TRAILER COURT LTD. (Respondent)

R.K. Ottenbreit J.

Judgment: June 27, 2008
Docket: Regina Q.B.G. 715/08

Counsel: Scott A. Mazinke for Applicant
Diana K. Lee for Respondent

Subject: Property

Headnote

Real property --- Landlord and tenant — Nature and elements of lease — Options — To purchase — Miscellaneous

Tenant pursuant to lease agreement was also optionee pursuant to option agreement with respect to leased premises and lands, subject of miscellaneous interests — Lease provided that tenant occupy lands for 10 years with further five year renewal at option of landlord — Landlord served on tenant notice to terminate lease, indicating that tenant was in arrears of rent — Tenant vacated premises and landlord re-took possession — Tenant registered miscellaneous interests against lands, and brought statement of claim respecting lease and option agreements — Landlord served notices to discharge miscellaneous interests — Landlord contended that both lease and option agreements offended Planning and Development Act, 2007 — Landlord contended agreements specifically offended s. 121(2) of Act which provided that no person shall submit instrument for registration which would have effect of subdividing land unless subdivision approval had been obtained — Landlord contended that s. 122 of Act, which exempted leases from subdivision requirement, but only if term together with renewals did not exceed 10 years, did not apply in this case — Tenant brought application for order that miscellaneous interests be extended until further order or judgment — Order issued that miscellaneous interest registrations be discharged — Lease and option did not create, in these circumstances, interest under s. 2(1)(s) of Land Titles Act, 2000, as both lease agreement and option agreement were not in conformity with Planning and Development Act, 2007 — Miscellaneous interest registrations of tenant could not be sustained.

Real property --- Registration of real property — Registration of land — Land titles — Registration requirements — Miscellaneous

Tenant pursuant to lease agreement was also optionee pursuant to option agreement with respect to leased premises and lands, subject of miscellaneous interests — Lease provided that tenant occupy lands for 10 years with further five year renewal at option of landlord — Landlord served on tenant notice to terminate lease, indicating that tenant was in arrears of rent — Tenant vacated premises and landlord re-took possession — Tenant registered miscellaneous interests against lands, and brought statement of claim respecting lease and option agreements — Landlord served notices to discharge miscellaneous interests — Landlord contended that both lease and option agreements offended Planning and Development Act, 2007 — Landlord contended agreements specifically offended s. 121(2) of Act which provided that no person shall submit instrument for registration which would have effect of subdividing land unless subdivision approval had been obtained — Landlord contended that s. 122 of Act, which exempted leases from subdivision requirement, but only if term together with renewals did not exceed 10 years, did not apply in this case — Tenant brought application for order that miscellaneous interests be extended until further order or judgment — Order issued that miscellaneous interest registrations be discharged — Lease and option did not create, in these circumstances, interest under s. 2(1)(s) of Land Titles Act, 2000, as both lease agreement and option agreement were not in conformity with Planning and Development Act, 2007 — Miscellaneous interest registrations of tenant could not be sustained.

APPLICATION by tenant for order that certain miscellaneous interests against lands be extended until further order or judgment.

***R.K. Ottenbreit J.*:**

1 The applicant applies for an order under s. 107 of *The Land Titles Act, 2000*, S.S. 2000, c. L-5.1, as am. and s. 46 of *The Land Titles Regulations, 2001*, R.R.S. 2000, c. L-5.1, Reg. 1 as am. directing that certain miscellaneous interests as set out in the notice of motion be extended until further order or judgment of the court.

2 The applicant is a tenant and optionee pursuant to a lease agreement and an option agreement with the respondent, both dated June 6, 2006 respecting the leased premises and lands, the subject of the miscellaneous interests. The lease provides that the applicant occupy the lands for a period of 10 years with a further five year renewal at the option of the respondent. The option agreement provides for a preferred purchase price of the leased premises by the applicant in the event that 80% or more of the leased premises were to be sold by the respondent. The option agreement also provided that in the event the lease is terminated or found to no longer be valid, the option agreement expires. The leased and optioned premises consist of 6.44 acres including a large building, all of which are part of a 20 acre block of Lot 1, Lot 3 and Lot 5, Block 97, Plan GC 1279 consisting of three surface parcels.

3 The respondent served on the applicant a notice to terminate lease dated February 12, 2008. The notice indicates that the applicant was in arrears of rent in excess of $140,000.00. Thereafter, the applicant vacated the premises and the respondent landlord re-took possession. The applicant did not apply for relief from forfeiture because, as their counsel indicated, they did not have the resources to comply with possible terms of relief. Instead, on February 27, 2008, the applicant registered miscellaneous interests Nos. 141838522, 141838544 and 141838533 against the lands. The applicant also commenced a statement of claim respecting the lease and option agreements on May 21, 2008.

4 The applicant argues that the miscellaneous interests should be continued on the basis that to not do so would harm the applicant. The applicant argues that the actions of the respondent were precipitous and were done to deprive the applicant of any interest in the lease and the option. The applicant says that the respondent did not complain about the arrears of rent and that the landlord was merely taking advantage of a situation which the applicant had with its sub-tenants. The applicant asks that if the interests are discharged that the respondent pay some security for them into court or that the respondent pay some part of the proceeds of any sale of the property into court when the property is sold.

5 The applicant also argues that there were substantial improvements made to the building by it and it would be unfair to not continue the miscellaneous interests. The respondent had served the proper notices to discharge the miscellaneous interests. The applicant does not disagree with *The Planning and Development Act, 2006*, S.S. 2007, c. P-13.2 sections cited by the respondent but says that they do not apply to this situation. Moreover, the applicant questions the applicability of the cases cited by the respondent.

6 The respondent argues that the lease has been terminated and that the applicant has failed to apply for relief from forfeiture and therefore has accepted the termination and surrendered the lease. Even if this is not so, the respondent argues that both the lease and the option agreements offend *The Planning and Development Act, 2006*, specifically s. 121(2) which provides that no person shall submit an instrument for registration at the Land Titles Registry which would have the effect of subdividing land unless subdivision approval has been obtained. The respondent argues that s. 122 of the Act, which exempts leases from the subdivision requirement but only if the term of the lease, together with any renewal terms, do not exceed 10 years, does not apply in this case since the lease along with any renewal is, in fact, 15 years. The respondent argues that the sections of *The Planning and Development Act, 2006* apply with equal force to the option agreement and makes it unenforceable or void. The respondent cites the case of *R & R Ginseng Enterprises Ltd. v. Layton Bryson Outfitting & Trailriding Ltd.*, [1997] B.C.J. No. 1011, 10 R.P.R. (3d) 313 (B.C. S.C.), which considered legislation similar to ss. 121 and 122 of *The Planning and Development Act, 2006* of Saskatchewan. In that case, the court was faced with a lease for 13 acres of a 160 acre parcel with a 57 month term. In the B.C. legislation, the term of years similar to the Saskatchewan s. 122 legislation was three years. The court held that any lease exceeding three years was unenforceable and that there was no discretion to find otherwise.

7 With respect to the option, the Saskatchewan Court of Appeal decision in *Redmond v. Logel* (1985), 37 Sask. R. 270, [1985] S.J. No. 210 (Sask. C.A.), was cited by the respondent. There, Redmond sold a section of farmland excepting out of the section the farm house and surrounding yard of about two acres. When the land was subsequently sold to a third party by the purchaser, Redmond's registered interest against the land for the portion over the farm yard was found not to be based on any legal interest. The court, in that case, took note of s. 116 (at that time) of *The Planning and Development Act, 2006* which stated that the Land Titles Registrar shall not accept an instrument for registration which "has the effect ... of subdividing the parcel ... unless it is approved in accordance with this Act". In short, the respondent submits that both the lease and the option are unenforceable because each of the agreements creates an illegal subdivision under ss. 121 and 122 of *The Planning and Development Act, 2006*.

8 It is common ground between the parties that the applicant was substantially in arrears on its lease. It is also common ground that the option to the land is only exercisable during the term of the lease. The applicant disputes whether the lease has been terminated despite the fact that no application for relief from forfeiture is brought by it. However, it is not necessary for me to decide whether the lease has been properly terminated or the applicant has surrendered the leased premises back to the landlord and accepted the termination. I agree with the arguments of the respondent respecting the applicability of *The Planning and Development Act, 2006* and specifically ss. 121 and 122. Both the *R & R Ginseng Enterprises Ltd. v. Layton Bryson Outfitting & Trailriding Ltd.* case, *supra*, and the *Redmond v. Logel* case, *supra*, apply in this situation. Without deciding any other issue which the parties may have between them, I find that both the lease and the option do not create, in these circumstances, an interest "under s. 21(s) of *The Land Titles Act, 2000*", as both the lease agreement and the option agreement are not in conformity with *The Planning and Development Act, 2006* mentioned earlier. Accordingly, the miscellaneous interest registrations of the applicant cannot be sustained and will be discharged. There will be an order discharging miscellaneous interests registered at the Land Registry operated by Information Services Corporation of Canada as interest nos. 141838522, 141838544 and 141838533, interest register no. 114143093 registered on February 27, 2008 against surface parcel nos. 111784271, 163503750 and 107239394. There will be no order as to costs.

Order accordingly.

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TAB 5

2005 SKQB 272
Saskatchewan Court of Queen's Bench

Landswest School Division No. 123 v. Klein

2005 CarswellSask 403, 2005 SKQB 272, [2005] 11 W.W.R. 469,
141 A.C.W.S. (3d) 1059, 267 Sask. R. 310, 35 R.P.R. (4th) 273

Landswest School Division No. 123 (Applicant) and Neil Klein (Respondent)

Wilkinson J.

Judgment: June 9, 2005
Docket: Battleford Q.B.G. 158/2005

Counsel: L.K. Neil for Applicant
H.J. Neufeld for Respondent

Subject: Property; Contracts; Public; Municipal

Headnote

Real property --- Registration of land — Land registry — Miscellaneous issues

Order directing registration of plan of subdivision — In 1994 school division sold 7.5 acre parcel to F, believing it was selling old school site — Proposed parcel G never legally existed as separate parcel and was in fact located within parcel owned by E — Parcel actually conveyed to F ("parcel F") was church cemetery — F used proposed parcel G as residence and constructed corrals on it for livestock operation — F lacked title to proposed parcel G and did not obtain development permit before making improvements — Upon discovering error in 1995, school division purchased proposed parcel G from E, conditional upon subdivision approval and F transferring title to parcel F back to school division — Agreement was executed by E and school division, but neither F nor church were parties and no caveat was registered — School division proceeded with subdivision plans but encountered difficulties as they could not obtain necessary consents from neighbour B — Respondent K purchased E's property and claimed to be bona fide purchaser without notice of F's interest — F registered caveat claiming interest in proposed parcel G in 1997 — K initiated complaints about F's livestock operations, refused to consent to proposed subdivision, and municipality closed its file — Seven years later, school division applied for vesting order and for order directing Registrar of Titles to register plan of subdivision and to issue transform approval certificate — Matter remitted to trial — Facts were in dispute and adverse interests could only be resolved at trial — It is not within court's power to order Registrar to effect subdivision contrary to provisions of Planning and Development Act where such is precondition to making of vesting order.

Sale of land --- Judicial sale — Vesting order

In 1994 school division sold 7.5 acre parcel to F, believing it was selling old school site — Proposed parcel G never legally existed as separate parcel and was in fact located within parcel owned by E — Parcel actually conveyed to F ("parcel F") was church cemetery — F used proposed parcel G as residence and constructed corrals on it for livestock operation — F lacked title to proposed parcel G and did not obtain development permit before making improvements — Upon discovering error in 1995, school division purchased proposed parcel G from E, conditional upon subdivision approval and F transferring title to parcel F back to school division — Agreement was executed by E and school division, but neither F nor church were parties and no caveat was registered — School division proceeded with subdivision plans but encountered difficulties as they could not obtain necessary consents from neighbour B — Respondent K purchased E's property and claimed to be bona fide purchaser without notice of F's interest — F registered caveat claiming interest in proposed parcel G in 1997 — K initiated complaints about F's livestock operations, refused to consent to proposed subdivision, and municipality closed its file — Seven years later, school division applied for vesting order and for order directing Registrar of Titles to register plan of subdivision and to issue transform approval certificate — Matter remitted to trial — Facts were in dispute and adverse interests could only be resolved at trial — It is not within court's power to order Registrar to effect subdivision contrary to provisions of Planning and Development Act where such is precondition to making of vesting order.

Municipal law --- Subdivision control — Miscellaneous issues
Order directing registration of plan of subdivision — In 1994 school division sold 7.5 acre parcel to F, believing it was selling old school site — Proposed parcel G never legally existed as separate parcel and was in fact located within parcel owned by E — Parcel actually conveyed to F ("parcel F") was church cemetery — F used proposed parcel G as residence and constructed corrals on it for livestock operation — F lacked title to proposed parcel G and did not obtain development permit before making improvements — Upon discovering error in 1995, school division purchased proposed parcel G from E, conditional upon subdivision approval and F transferring title to parcel F back to school division — Agreement was executed by E and school division, but neither F nor church were parties and no caveat was registered — School division proceeded with subdivision plans but encountered difficulties as they could not obtain necessary consents from neighbour B — Respondent K purchased E's property and claimed to be bona fide purchaser without notice of F's interest — F registered caveat claiming interest in proposed parcel G in 1997 — K initiated complaints about F's livestock operations, refused to consent to proposed subdivision, and municipality closed its file — Seven years later, school division applied for vesting order and for order directing Registrar of Titles to register plan of subdivision and to issue transform approval certificate — Matter remitted to trial — Facts were in dispute and adverse interests could only be resolved at trial — It is not within court's power to order Registrar to effect subdivision contrary to provisions of Planning and Development Act where such is precondition to making of vesting order.

APPLICATION for vesting order regarding unsubdivided parcel of land.

***Wilkinson J.*:**

1 The applicant, Landswest School Division No. 123, asks for a vesting order regarding a presently unsubdivided parcel of land (proposed Parcel G) located within the SW 15-37-28 W3M owned by the respondent, Neil Klein. As part and parcel of its request for a vesting order, the School Division seeks an order directing the Registrar of Titles to register the Plan of Proposed Subdivision with respect to Parcel G and to issue a Transform Approval Certificate. The requested relief cannot be provided unless the Court has authority to order that a subdivision of land be effected outside the requirements of *The Planning and Development Act, 1983*, R.S.S. 1983-84, c. P-13.1.

2 The issue arises in a rather complex fact situation. In 1994, the School Division's predecessor (the Kerrobert School Division #44) sold a 7.5 acre parcel of land to purchasers (the Flads), in the belief it was selling an existing parcel of land commonly known as "the old St. Mary's School site". The property that the School Division believed it was selling to the Flads never legally existed as a separate parcel, and was in fact located within a quarter section owned by one Ronald Erker [SW 15-37-28 W3M].

3 The parcel actually conveyed by the School Division to the Flads (Parcel F) is a cemetery formerly owned by the Episcopal Corporation of Saskatoon. The Episcopal Corporation had previously transferred their cemetery, Parcel F, to the School Division operating under the same mistaken belief, namely that Parcel F was the old St. Mary's School site.

4 There is some evidence indicating that a predecessor in title to Mr. Erker had donated part of the St. Mary's School site (4 acres) to the School Division's predecessor (Kerrobert School Division #44) in 1946, and subsequently sold them the balance (3.5 acres) in 1961 but the school site was never properly subdivided or transferred. As the school was built directly adjacent to a church (Parcel D) and cemetery (Parcel F) owned by the Episcopal Corporation, the confusion was shared by the church.

5 The Flads have been in occupation of proposed Parcel G, using the property as a residence and constructing corrals for use in their livestock operation. In addition to their lack of title, they failed to obtain a development permit before making improvements to the site. As such, some of their subsequent difficulties were of their own making, and not solely ascribable to the mistakes of title. The property they paid $12,500 for is now, according to the Flads, worth $90,000 or more.

6 When the error first came to light in 1995, the School Division arranged to purchase proposed Parcel G from Ronald Erker, the registered owner, for $5,600. This agreement was concluded in 1996, conditional on subdivision approval, which the School Division agreed to obtain at its own cost. The agreement was further conditional upon the Flads transferring title to Parcel F back to the School Division. This agreement was executed by Mr. Erker and the Kerrobert School Division #44.

C.A.), but on the grounds that a case of mutual mistake had not been made out, and that the doctrine of laches barred the claim. The person claiming to be the rightful owner of the interest had done nothing for 20 years, both parties to the transaction had died, and the action was between the executors of their respective estates.

28 I refer lastly to *Hanson v. Cook* (1989), 75 Sask. R. 66 (Sask. C.A.), where there was an appeal from a vesting order made under s. 2 of *The Improvements Under the Mistake of Title Act*. Adjoining cottage owners had all built on lots one removed from the lot to which they had title. The vesting order was made on a notice of motion as the facts were not in issue. One owner wanted to retain rights to his original lot and objected to the order. The Court of Appeal held that lasting improvements had been made on the lots in the mistaken belief as to title, and a judge was empowered under s. 2 to make vesting orders rather than awarding monetary compensation.

29 Without commenting on the propriety of making any of the orders made in the foregoing cases (which can only be determined on a full examination of the evidence and not in a summary fashion), I am of the view that where the appropriate remedies are sought and where all the interested parties have participated and their rights have been adjudicated upon, there are other means of achieving the desired ends. However, it is not within the Court's power to order the Registrar to effect a subdivision contrary to the provisions of *The Planning and Development Act, 1983* where such is a precondition to the making of a vesting order sought by an applicant.

30 The applicant requested that I make an order for cross-examination of the respondent on his affidavit, if I declined to grant the order requested. I do not believe that will go far toward resolving the complicated issues that present in this matter. I am prepared to direct the trial of an issue, however, the parties should have an opportunity to make submissions as to the framing of the issues, who will bear the burden of proof in the issues as framed, and what procedures should be followed. There will undoubtedly have to be some future consideration given to bringing all the interested parties together in consolidated or joined proceedings in the interests of effective adjudication. The Flads were not served with notice of the present application. I have no information about the nature and status of the proceedings taken by the Flads in connection with their caveat. I am therefore requesting, on the matter of directing trial of an issue, that further written submissions by the parties be filed within 30 days.

Order accordingly.

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TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Idle-O Apartments Inc. v. Charlyn Investments Ltd. | 2013 BCSC 2158, 2013 CarswellBC 3621, [2014] B.C.W.L.D. 1365, [2014] B.C.W.L.D. 1366, [2014] B.C.W.L.D. 1391, [2014] B.C.W.L.D. 1439, [2014] B.C.W.L.D. 1464, 38 R.P.R. (5th) 197, [2013] B.C.J. No. 2597, 237 A.C.W.S. (3d) 416 | (B.C. S.C., Nov 27, 2013)

1996 CarswellBC 1108
British Columbia Court of Appeal

International Paper Industries Ltd. v. Top Line Industries Inc.

1996 CarswellBC 1108, [1996] 7 W.W.R. 179, [1996] B.C.W.L.D. 1615, [1996] B.C.J. No. 1089, 125 W.A.C. 114, 135 D.L.R. (4th) 423, 20 B.C.L.R. (3d) 41, 2 R.P.R. (3d) 1, 63 A.C.W.S. (3d) 530, 76 B.C.A.C. 114

International Paper Industries Ltd. (Petitioner / Respondent) and Top Line Industries Inc. (Respondent / Appellant)

Macfarlane, Legg and Newbury JJ.A.

Heard: February 26, 1996
Judgment: May 21, 1996
Docket: Vancouver CA18808

Counsel: *M.D. Macaulay, Q.C.*, for appellant.
G.F. Gregory, for respondent.

Subject: Contracts; Property; Civil Practice and Procedure
Headnote
Contracts --- Illegal contracts — Prohibited by statute — Planning legislation
Landlord and Tenant --- Renewal of lease — Option to renew
Practice --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — Illegality or immorality
Landlord and tenant — Nature and elements of lease — Illegality — Landlord declining to renew tenant's lease of portion of unsubdivided land — Chambers judge finding tenant having rights under lease despite prohibition in Land Title Act, s. 73 and ordering landlord to renew — Court of Appeal ruling that Act prohibiting such rights and allowing landlord's appeal.
Practice — Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — General principles — Landlord raising lease's illegality under statute for first time in tenant's action for order for renewal — Court of Appeal ruling statutory prohibition overriding res judicata and allowing landlord's appeal from order.
The parties entered into a long term lease of a portion of a property owned by the landlord. The leased portion was not subdivided from the remainder of the property. Neither party considered the prohibition in s. 73 of the *Land Title Act* against long term leases of unsubdivided portions of parcels of real property. On two occasions, disputes arose between the parties which were resolved by court orders in the tenant's favour. Those orders were made on the assumption, by court and counsel, that the lease was valid. The lease came up for renewal and the tenant attempted to exercise its contractual right of renewal. The landlord declined to renew. The tenant applied for a declaration that the lease was valid and gave a right to renew. The landlord opposed the application, raising for the first time the illegality of the lease. The chambers judge ruled that the lease, although illegal, created personal rights between the landlord and the tenant. The landlord was ordered to renew the lease. The landlord appealed.
Held:
Appeal allowed.
The statutory prohibition against long term leases without the benefit of proper subdivision was enacted to ensure that municipalities retained control of development. That public policy operated on the interests of the landlord and the tenant

equally. It was therefore incorrect to say that an illegal lease of unsubdivided property nevertheless gave personal rights. The general public statute precluded such rights. Further, there was no implication in the lease that the landlord would act to obtain all necessary public approvals. Such a term should only be implied where both parties are aware that an approval must be obtained. Courts should be cautious in implying terms. It was unacceptable to avoid the operation of the statute by deeming the lease to be a licence.
While the failure of the landlord to raise the issue of illegality in the previous court proceedings would normally be fatal to its present position, the public interest was sufficiently important that it could not be overridden by a private res judicata. The statutory prohibition against the lease between the parties should be given effect and the declaration of the chambers judge set aside.

Appeal by landlord from judgment of Tysoe J., 93 B.C.L.R. (2d) 135, 38 R.P.R. (2d) 194, declaring that lease of unsubdivided portion of land valid and tenant entitled to renew.

The judgment of the court was delivered by *Newbury J.A.*:

1 It a well-known aphorism that "Ignorance of the law is no excuse". This case raises the question of whether such ignorance can serve as a shield to protect one party from contractual obligations voluntarily entered into by it and relied upon in turn by another party, equally unaware of the law. The law in question here is s. 73 of the *Land Title Act*, R.S.B.C. 1979, c. 219 (the "Act"), which prohibits the subdivision of land except on compliance with Part 7 thereof. The contractual obligations in question arise under a lease of an unsubdivided portion of land that has on two previous occasions been the subject of court orders that assumed its validity. Now, several years after entering into the lease, the Landlord defends against the Tenant's petition for a declaration that the lease is valid, on the basis that it is an illegal contract. We are thus obliged to consider at least three important policies — the desirability of holding parties to their contractual obligations, the public interest in municipal control of real estate development that lies behind s. 73, and the policy in favour of the finality of judicial proceedings — and to determine how they apply to the concrete situation before us.

2 Mercifully, there is no dispute about the facts of the case. They are reported at (1994), 93 B.C.L.R. (2d) 135, but may be briefly summarized. In 1989, the respondent International Paper Industries Ltd. (the "Tenant"), which carries on a waste recycling business, was approaching the end of the term of its lease of its business premises. Evidently, the Tenant owned the building from which it operated. It began negotiations with the appellant Topline Industries Inc. (the "Landlord") and eventually they agreed that the Landlord would buy the building from the Tenant, the building would be moved to the Landlord's property in Sooke, and the Tenant would then lease a portion of that property, including the building.

3 The parties prepared their own lease using a draft form provided by the Tenant. They made certain additions, deletions and changes, and annexed to it a sketched plan of the Landlord's property to show the portion being leased. The document was entitled "Indenture of Lease", and clearly *was* a lease. The Landlord agreed to "demise and lease" to the Tenant the premises shown on the plan for a term of 51 months expiring March 31, 1994, subject to a right of renewal under certain conditions. In return for exclusive and quiet possession, the Tenant agreed to pay a specified "gross rent" each month, to pay utilities, not to sublet the leased premises without the Landlord's consent, and provided various other covenants normally seen in leases. No mention was made, however, of whether the Lease was to be registered; nor did the Lease state whether, how, or by whom the property was to be properly subdivided at any future date.

4 The Tenant duly entered into possession of the premises at the commencement of the term. Unfortunately, the tenancy was marred by disputes that resulted in two judicial proceedings prior to this one. In April 1992, the Landlord petitioned the Supreme Court for a declaration that the Lease was cancelled due to an alleged default on the Tenant's part. The Tenant counterclaimed, alleging that the Landlord had failed to provide a loading dock required under the terms of the Lease. The Court found that the Tenant was not in default and ordered the Landlord to provide the dock. Then in 1993, the Tenant failed to pay its rent on a timely basis and the Landlord refused to accept it late. The Tenant sued for relief from forfeiture and in September obtained an order of the Supreme Court to that effect. Counsel and the Court proceeded in both hearings on the assumption that the Lease was a valid one.

> *to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement*. In the circumstances of this case, the only reasonable inference to be drawn is that an implied obligation rested on the vendor to apply for subdivision. [at 27-28; emphasis added].

In the result, the would-be purchaser was held entitled to a declaration that the contract between the parties was binding "in accordance with its terms", including an implied term that the owner would seek subdivision approval. He was ordered to make and pursue a *bona fide* application to obtain registration of an approved plan of subdivision.

26 As Mr. Macaulay argued, the parties in both *Queensway* and *Dynamic Transport* had been aware of the statute in question at the time they entered their agreement. That was not the case, however, in *Dodge v. Eisenman* (1985), 68 B.C.L.R. 327, a decision of this Court. There, the parties had agreed to settle litigation on terms that included the transfer to the plaintiff of an interest in certain mineral claims. Under the Canada Mining Regulations, however, no person who was not a licensee thereunder could acquire such interest. The plaintiffs therefore sued for a declaration that the contract was void for illegality. The majority of the Court rejected this contention, noting that at 336:

> Each of the parties must be taken to have contemplated that this routine requirement would be fulfilled as and when it was necessary to put the transfer into registrable form. The acquisition by transfer was not complete, in the circumstances of this case, until that was done.

Further, the Court cited the judgment of Devlin, J. in *St. John Shipping Corp. v. Joseph Rank Ltd.* (1956), [1957] 1 Q.B. 267, where it was said that:

> Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. ...
>
> It may be questionable also whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression. Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. ... I have said enough, and perhaps more than enough, to show how important it is that the courts should be slow to apply the statutory prohibition of contracts, and should do so only when the implication is quite clear. [at 28-29].

On this basis, Macfarlane, J.A. for the majority in *Dodge v. Eisenman* concluded:

> I think this to be a case where it cannot be said that the whole object of the contract was to violate the regulation. I do not think there was any intention to do so. To hold otherwise would be to fail to give to the agreement the commercial effect which the parties intended. Illegal contracts are not enforced as a matter of public policy. There is nothing in this contract or in the circumstances of this case upon which to base a conclusion that this arrangement offended public policy. [at 337-8].

27 It must be acknowledged that *Dodge v. Eisenman* may be distinguished on the basis that the statutory requirement at issue in the case at bar is likely not a trivial one. Unfortunately, there is no evidence before us as to the cost involved in complying with the local drainage requirements that at present stand in the way of a legal subdivision of the Landlord's property. Presumably, if the cost were small, one of the parties would have taken care of it long ago.

28 Nor, as earlier noted, is there any evidence that either party was aware of the subdivision requirement at the time it entered into the Lease or at any time before the present litigation arose. The significance of this point has been considered in a line of cases from Alberta that limit the effect of *Dynamic Transport, supra*. In the first of these, *Otan Developments Ltd. v. Kuropatwa* (1978), 94 D.L.R. (3d) 37 , the Appellate Division of the Alberta Supreme Court ruled that a lease entered into in contravention of the *Planning Act*, R.S.A. 1970, c. 276, and a *caveat* supporting the lease, were both invalid. Morrow, J.A.'s concurring judgment noted that although the lease might have been acceptable "if its term was reasonably short to protect the

interest while a contemplated application for planning approval was made which would be consistent with the position laid down by the Supreme Court of Canada in *Dynamic Transport* ...", in fact the lease was "almost akin to attempting to obtain the benefits of a subdivision under the guise of calling it a lease but without having to, within the foreseeable future, comply with the applicable legislation. The whole purport, particularly with the term being placed at 49 years, could almost be termed colourable." (See also *Knowlton v. Alberta (Registrar of Land Titles for North Alberta Land Registration District)* (1982), 19 Alta. L.R. (2d) 31 (Q.B.).)

29 More important for our purposes is the decision of the Alberta Queen's Bench in *Robinson v. Guthrie* (1982), 20 Alta. L.R. (2d) 167. In that case, the plaintiff and the defendant's predecessor in title had entered into a 99-year lease with respect to ten acres of a quarter-section of land. The ten acres were not subdivided off, and the tenant did not seek to register any *caveat* to protect his interest until the owners decided to subdivide the parcel into residential lots. The tenant then petitioned for a declaration that his lease was valid. The Court refused the petition, notwithstanding the argument that it should follow *Dynamic Transport* by implying that the lease had been conditional upon subdivision approval being obtained. Dea, J. reasoned as follows:

> The facts of the case at bar do not disclose any attempt to evade the provisions of the *Planning Act*. *The evidence is that the parties were not even aware of its existence, let alone its requirements*. As well, the plaintiff argues that the actions of the parties disclose that neither intended a subdivision to occur. In support of this he cites the failure of the plaintiff to file a caveat, the plaintiff's decision to prepay power costs in order to avoid an encumbrance by the power authority and the decision of the plaintiff to forego natural gas service because of the need to grant a right-of-way easement to the natural gas authority. ...
>
> I take no issue with [the finding in *Otan, supra*] but do not consider it decisive in this case. *Otan* was concerned with the concept of a condition for subdivision approval which, pending approval or rejection, allowed the lease to exist for some purposes as discussed in *Dynamic, supra*. *Otan is not, in my view, authority for the proposition that an instrument otherwise offensive to s. 23 is beyond the purview of the prohibitions therein unless it is an attempt to circumvent the Planning Act. Such a proposition emasculates s. 23 by adding to its operative effect a requirement of bad faith. The legislation does not, in my view, impose such a requirement*. Once an instrument is found *prima facie* offensive to s. 23 — and whether it is a lease, a mortgage or a sale — that ends the matter, unless the instrument has been made subject to a requirement of subdivision approval (*Dynamic* and *Otan*) or, unless pursuant to s. 3, the infringement on the individual rights occasioned by the requirement of subdivision approval imposed by s. 23 is beyond what is needed for the greater public interest. [at 173-4; emphasis added]

(There is no counterpart in the *Land Title Act* in British Columbia to s. 3 of the *Alberta Planning Act*.)

30 The Court of Appeal of Alberta affirmed this reasoning in *Sullivan v. Newsome* (1987), 52 Alta. L.R. (2d) 304, where it distinguished *Dynamic Transport* on the basis that:

> ... in that case the requirement of obtaining subdivision approval was a condition precedent to the performance of the obligations to buy and sell. Notwithstanding the judgment of this court in *Dynamic Tpt.* it has always been a rule that a court should be cautious in implying terms into a written contract in order to give it business efficacy. In *G. Ford Homes Ltd. v. Draft Masonry (York) Co.* (1983) 43 O.R. (2d) 401 ..., Cory J.A. of the Ontario Court of Appeal said at p. 403:
>
> > When may a term be implied in a contract? A court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts. ...

> ... In my view the course of the transactions herein and the documents supporting them are not sufficient to support the imposition of an obligation on the Newsomes to obtain subdivision approval. I therefore conclude that if the agreement is interpreted as being the sale of only one-half of block 7 the caveat filed by Sullivan is unenforceable because it offends s. 88(1). [at 312-4]

31 Having anxiously considered both this line of cases and the *Dynamic Transport Line*, I have come to the conclusion that we ought not to imply into the terms of the Lease before us, a covenant or obligation on the part of one party or the other to seek and obtain subdivision approval, notwithstanding that such a result would on one view merely give business efficacy to the Lease. No Canadian case cited to us has gone this far where the parties were unaware of the statutory requirement; and there seems much wisdom in the comment that courts should be cautious in implying or imposing terms into contracts. This is especially true where, as here, such terms may involve major expense and the Court cannot be confident that had the parties thought of the subdivision issue, they would have provided for it in a particular way. In my view, then, it would not be appropriate for us to regard the Lease as being subject to a condition precedent, namely compliance with s. 73, or for us to impose a duty on either party now to make the effort and expenditures necessary to obtain subdivision, assuming it could be obtained.

Fashioning a "Licence"

32 I turn next to Mr. Gregory's argument, based on the decision of the Court of Appeal of New South Wales in *Silovi v. Barbaro* (1988), 13 N.S.W.L.R. 466 (C.A.), that the Lease should be treated as a "licence" that would give the plaintiff no interest in real property but certain rights to possession or occupation of the premises. In *Silovi*, a company that had purchased a property with notice that the plaintiff had a lease in respect of a portion thereof *and* a licence to use another portion, sought to "get the plaintiffs out" on the ground that the *Local Government Act* prohibited the sale or lease of a portion of land unless shown in a "current plan". In defence to the plaintiffs' action for equitable relief, the purchaser contended that the plaintiffs had no interest or estate in the land sufficient to support a *caveat*. Priestly, J.A. summarized the defendant's position thus:

> For Silovi it was argued that the provisions of s. 327AA of the *Local Government Act* made the arrangements between the owners and the plaintiffs illegal and incapable of giving rise to any rights or equities in the plaintiffs against either the owners or Silovi. It was further submitted that if an equity against the owners was established, no conduct of Silovi's justified the finding of any equitable rights against it or unconscionable conduct by it. Finally, it was submitted that if relief were to be granted to the plaintiffs it should be by way of monetary compensation only which should be paid by the owners. [at 471].

33 The trial judge rejected these arguments, apparently concluding that it would be unconscionable either for the original owners or for the purchaser to "destroy" or "override" the plaintiffs' rights. The Court of Appeal based its dismissal of the appeal on the doctrine of equitable estoppel as well as on unconscionability. After dealing with an argument based on the particular wording of s. 327AA, the Court said it felt no difficulty in upholding the orders granted by the trial judge. Priestly, J.A. reasoned:

> There can be no objection based on s. 327 or s. 327AA to orders substantially permitting the satisfaction of the plaintiffs' equity, if those orders are so framed that there is no breach of the sections. ... *The effect of the orders is not to render the relevant parts of the land immediately available for separate occupation (which because of the definition of "subdivision" already referred to might well be contrary to the section) but to ensure to the plaintiffs access to the land and their Cocos palms which does not preclude the owners from occupation of the land, and is not inconsistent with the usual idea of licences*, that is, permitting the use of land by the licensee simultaneously with the continuing occupation of the owner. [Emphasis added]

As to the nature of the plaintiffs' interest, the Court said this:

> It is true that the authorities support the position that a later equitable interest may prevail over a personal equity even where the later interest has notice of the earlier ... Here however the holder of the later equitable interest was not only on notice of the salient facts giving rise to the earlier "position" (to use for the moment a neutral word) of the plaintiffs, but acquired its interest subject to one way of stating those salient facts. But leaving that aside, I do not think the position of

> the plaintiffs is accurately described as their having nothing more than a personal right against the owners. Treating the plaintiffs' equity arising from the equitable estoppel as that to which Powell, J.'s orders would give effect, *it amounts to a personal licence to the plaintiffs coupled with an interest in the nature of a profit à prendre represented by the right of the plaintiffs in regard to the Cocos palms*. This seems to me to be quite sufficient to justify treating the plaintiffs' rights against the owners as *more than personal, and as sufficient to prevent the later equitable interest, acquired in the particular circumstances of the present case, from prevailing over the earlier rights*. ... [Emphasis added; at 475].

34 With respect, I think that *Silovi* must be restricted to its unique facts, which involved both a lease and a licence, and a purchaser who had bought with notice. Any application of *Silovi* to the case at bar — for example by a finding that the Tenant has a licence or other "personal" rights that would effectively put it in the position of the holder of an unregistered lease — would be exceedingly artificial. More importantly, if the Tenant were said merely to have a contractual right or licence, enforceable against the Landlord only, to occupy the leased premises in accordance with the terms set forth in the Lease, the public policy aims of s. 73 would still be offended — the requirements as to access, highway allowances, drainage, flooding, erosion, environmental impact, and future subdivision listed in s. 86 would all be circumvented; the Tenant would be vulnerable to be defeated by a third party purchaser; and any such purchaser relying on the register would be buying a lawsuit at best. As well, the door would be opened, if only a crack, for arguments in other cases by landowners and developers in whose interest it would be to remain or appear ignorant of the requirements of the *Land Title Act*. All in all, these are weighty considerations in the balance against the equities of the individual parties in this case — as was observed by Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp. 341:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but is found in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff by accident, if I may so say.

35 I have the same difficulty with Mr. Gregory's suggestion that this Court "do a rescue operation" on behalf of his client and fashion an equitable remedy that would assure the Tenant at least some rights in respect of the leased premises. This is what occurred in *Silovi*, although even there, the Court noted that its orders did not give rights of "separate occupation (which ... might well be contrary to the section)". Mr. Gregory says this also occurred in *Southgate Borough Council v. Watson*, [1944] 1 All E.R. 603 (C.A.), but I do not read that very brief decision as supporting the proposition that a court may take what is clearly a lease and "deem" it to be in fact a licence in order to circumnavigate a statutory prohibition. Ultimately, the problem remains that any order assuring to the Tenant a right of occupation, whether exclusive or otherwise, would still offend the objectives behind s. 73 to which I have referred. In the absence of persuasive case authority, I would therefore conclude that s. 73 precludes the Tenant from enforcing personal or proprietary rights in respect of the leased premises pursuant to the Lease.

Res Judicata

36 Last, I turn to the Tenant's argument that Landlord should be estopped from relying on the illegality of the Lease as a defence to the Tenant's action, on the basis of *res judicata*. The Chambers judge preferred not to decide the case on this basis, commenting that "it would be anomalous for the court to enforce an illegal contract simply because the point was not raised" in the previous proceedings between the parties.

37 Setting aside the illegality of the Lease for the moment, there is no doubt that *res judicata* would apply to preclude the Landlord from raising a question as to the validity or enforceability of the Lease in this proceeding. As stated in Spencer-Bower and Turner, *The Doctrine of Res Judicata* (1969):

> Whenever it is shown that the party against whom a judicial decision is ultimately pronounced omitted to raise by pleading, argument, evidence, or otherwise some question ... which he could have raised in his favour by way of defence or support to his case without detriment to his position or interests in the pending, or in future, proceedings and which, therefore, it was his duty (in a sense) to have them raised, the adverse general decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question ... just as much as if it had been expressly raised by the party, and expressly determined against him. [at 160].

The prime authority for this principle is *Henderson v. Henderson* (1843), 3 Hare 100 at 114-5. Interestingly, Spencer-Bower and Turner give as an example the following:

> Thus, in an action on an agreement for a lease, the plaintiff must be supposed to be alleging both the subsistence and the validity of the agreement, which implied allegation, being traversable, the defendant omits to traverse at his peril — the peril, that is, of a judgment in the plaintiff's favour being deemed to carry with it an affirmation of the validity, as well as the making, of the agreement, so as to preclude the defendant in any subsequent litigation with the plaintiff in respect of the same agreement from setting up that it was invalid by reason of its not having conformed to the requirements of ... the Statute of Frauds. [at 165].

38 But where the defence or issue not raised is one of illegality, the question is more complex and again depends in large measure in the legislative purpose behind the prohibition. I say this on the basis of the authority of the Privy Council opinion in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.*, [1964] 1 All E.R. 300, where their Lordships considered the effect of a plea of illegality on the principle of *res judicata*. The plaintiff had been held entitled to recover a sum of money from the defendant by virtue of a written agreement under which machinery and equipment were rented. In a later proceeding, the defendant set up as a defence the argument that the agreement had contravened the *Bills of Sale Ordinance* and the *Moneylenders Ordinance* of Malaya, which required that certain formalities be observed with respect of bills of sale, failing which the instrument was void. Viscount Radcliffe for the Privy Council noted that "there is, in most cases, no estoppel against a defendant who wishes to set up the statutory in validity of some contract or transaction on which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel", citing *Bankruptcy Notice, Re*, [1908-10] All E.R. 733. On the other hand, his Lordship said:

> ... there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not essentially prohibitory so do not preclude estoppels. One example of these is the Statute of Frauds ... another is the Stamp Act or Acts in their application to oral contracts of marine insurance, which, according to the decision in *Barrow Mutual Ship Insurance Co. Ltd. v. Ashburner* ([1855] 54 L.J.Q.B. 377) are not prohibited so much as penalized.
>
> It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied on is imposed in the public interest or "on grounds of general public policy". ... However, a principle as widely stated as this might prove to be rather an elusive guide, *since there is no statute, at least public general statute, for which this claim might not be made*. In their lordships' opinion *a more direct test to apply in any case such as the present, where the laws of money lending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally* or some section of the public, despite any rules of evidence as between themselves that the parties might have created by their conduct or otherwise. [at 308].

39 *Kok Hoong* was applied by the English Court of Appeal in *E.D. & F. Man (Sugar) Ltd. v. Haryanto*, [1991] 1 Lloyd's Rep. 429, where Neill, L.J. (with whom all other members of the panel concurred on this point) accepted that "where one party seeks to rely on the principle of *res judicata* and the other party seeks to rely on the principle that the Court will not enforce that which is illegal, the Court may have to carry out a balancing exercise". In the result, it was held that the public policy behind the (Indonesian) statute in question was not one that should prevail over the competing public interest in the finality of judicial proceedings in England.

40 Can it be said that the objectives of s. 73 are not of a public nature such that the countervailing public interest in the finality of judicial proceedings should prevail? In my opinion, it cannot. Section 73 seems to me to represent if not a "social policy", then a societal interest, in the proper regulation of land use and subdivision and in the protection of third parties who are encouraged to rely on the Torrens system. On this ground, I would again conclude that these policies must prevail over what must would otherwise be an unassailable argument based on *estoppel per rem judicatem*.

Disposition

41 In the result, I would with some regret allow the Landlord's appeal and set aside the declaration granted by the Chambers judge. It bears emphasizing that this result is without prejudice to any entitlement the Tenant may have to sue for whatever other remedies might be available to it on other branches of the law.

42 We are indebted to both counsel for their thoughtful arguments, oral and written.

Appeal allowed.

TAB 7

1997 CarswellBC 986
British Columbia Supreme Court

R & R Ginseng Enterprises Ltd. v. Layton Bryson Outfitting & Trailriding Ltd.

1997 CarswellBC 986, [1997] B.C.J. No. 1011, 10 R.P.R. (3d) 313, 70 A.C.W.S. (3d) 924

R & R Ginseng Enterprises Ltd., Plaintiff v. Layton Bryson Outfitting and Trailriding Ltd. and Peter Minten, Defendants

Layton Bryson Outfitting and Trailriding Ltd., Plaintiff v. R & R Ginseng Enterprises Ltd., Defendant

Grist J.

Heard: December 18, 1996
Judgment: April 29, 1997
Docket: Vancouver C960326, C956602

Counsel: *William Holburn*, for plaintiff.
Darren Blois, for defendant Layton Bryson Outfitting and Trailriding Ltd.
Donald Yule, for defendant Peter Minten.

Subject: Property; Municipal

Headnote

Municipal law --- Subdivision control — Agreements contravening statutory subdivision control — Agreement void

Parties entered written agreements styled "lease and crop sharing agreements" whereby portions of defendant's lands dedicated for 57-month terms to be developed as gardens by plaintiff — Dispute between parties culminated in action by each against other, parties claiming damages for breach of agreements, plaintiff also seeking declaration of constructive trust over subject lands — Defendant applied to dismiss plaintiff's action on basis that agreements constituting long term leases unenforceable as contravening subdivision control legislation, plaintiff applied in both actions to determine whether agreements created any rights between parties — Defendant's application granted in part, plaintiff's applications determined by disposition thereof — Agreements in substance leases, not licences with profit a prendre — Agreements not saved by option alleged to permit extension of terms to include whole parcel of land — As Court of Appeal held that necessary inference that legislation prohibited leases of less than whole parcel of land for term exceed 3 years, court having no discretion but to declare agreements unenforceable — While action for damages or possession could not be founded on breach of agreements, other causes of action not precluded by finding of unenforceability — As insufficient evidence to resolve constructive trust issue, plaintiff should be free to further develop it in pleadings, and both parties to proceed by further similar application — Land Title Act, R.S.B.C. 1979, c. 219, s. 73. — British Columbia, Rules of Court, 1990, B.C. Reg. 221/90, R. 18A.

Municipal law --- Subdivision control — Abutting lands — Lease

Parties entered written agreements styled "lease and crop sharing agreements" whereby portions of defendant's lands dedicated for 57-month terms to be developed as gardens by plaintiff with assistance of defendant who was to provide specified services thereunder, and was to have access to property for that purpose — Agreements purported to be registrable, prohibited assignment by plaintiff, gave defendant right of re-entry on default by plaintiff, included options whereby terms might be extended to cover further portions of land — Dispute between parties culminated in action by each against other, parties claiming damages for breach of agreements, plaintiff also seeking declaration of constructive trust over subject lands — Defendant applied to dismiss plaintiff's action on basis that agreements constituted long-term leases which violated subdivision control legislation, plaintiff applied in both actions to determine whether agreements created any rights between parties — Defendant's application granted in part, plaintiff's applications determined by disposition thereof — Plaintiff contended agreements not leases but licences coupled with profit a prendre interest in crop, and accordingly did not violate legislation — Agreements in essence leases as they were intended to be, particularly given right of re-entry, and were not saved by options, violated legislation, and were accordingly

unenforceable — While action for damages or possession could not be based on breach of agreements, other causes of action not foreclosed by finding of unenforceability — Land Title Act, R.S.B.C. 1979, c. 219, s. 73.

Restitution --- General principles — When remedy available

Plaintiff and defendant each commenced actions against other in which both parties alleged breaches of lease and crop sharing agreements respecting certain lands — Plaintiff also alleged constructive trust interest in subject lands — In context of applications to determine effect of subdivision control legislation, held that agreements constituted long-term leases in contravention of legislation and thus incapable of forming basis for action founded on breach — Other causes of action not precluded, however, by finding of enforceability — Finding of unjust enrichment necessary to sustain constructive trust claim — Evidence respecting value of crop at relevant time necessary to resolve issue — As court unable to resolve issue on evidence before it, given that further evidence might be available, plaintiff should be free to develop issue in pleadings and both parties later to proceed by further similar application — British Columbia, Rules of Court, 1990, B.C. Reg. 221/90, R. 18A.

The parties entered into two written "lease and crop sharing agreements" which dedicated portions of the defendant's lands to be developed as ginseng gardens by the plaintiff.

The agreements, which purported to be registrable, each stipulated a 57-month term. They provided that access to the plaintiff's plots was limited to the defendant and the employees of the the plaintiff unless prior written permission were granted by the plaintiff, and that all others would be considered trespassers. The defendant agreed thereunder to provide specified farm work and to supply sprays, both obligations to be performed by the defendant's principal unless otherwise agreed by the plaintiff. The plaintiff was to pay lump sum rent for the full term of each agreement from the proceeds of sale and by allocation of harvested seed. It covenanted not to assign, sublet or otherwise part with the demised lands. In the event of default by the plaintiff, the defendant was entitled to re-enter and take possession of the lands. Finally, each agreement contained a renewal option whereby it might be extended to include further portions of the defendant's land.

A dispute arose between the parties culminating in a confrontation between the employees of the plaintiff and defendant. Following the confrontation, the plaintiff's employees were allowed on the property on only two further occasions to attempt a harvest. No ginseng was ever harvested.

The plaintiff commenced an action for damages for breach of the agreements and for a declaration of constructive trust in respect of the subject lands. The defendant then sued the plaintiff for damages for breach of the agreements and for trespass. When the British Columbia Court of appeal determined, in another case, that a lease of a portion of an unsubdivided parcel of land for a term in excess of three years was unenforceable, as offending s. 73 of the *Land Title Act*, the defendant applied to dismiss the plaintiff's action. The plaintiff applied in both actions to determine whether the agreements created any rights between the parties.

The plaintiff contended that the agreements were not leases, but in essence licences to come onto the property to carry out its obligations together with a *profit a prendre* right to share in the crop, and therefore did not contravene the Act; that even if the agreements were leases, the existence of the options allowed for interpretations that did not contravene the Act; that any breach of s.73 could, in any event, be put aside so long as the claim under the agreements was for relief other than enforcement of possession and that even if it could not sue on the agreements, there were causes of action sustainable on other grounds, including *quantum meruit*, constructive trust, and an alleged partnership relationship.

Held: The defendant's application was granted in part.

While the plaintiff's applications were without definition in the pleadings, they could in practical terms be determined in the course of determining the defendant's application.

Notable provisions of the agreements did not support the intention to create a licence. These included those purporting to allow for their registration on title, those providing for the defendant's right of re-entry on default by the plaintiff, those whereby the plaintiff covenanted not to assign, sublet or otherwise part with the lands, and those whereby anything less than exclusive possession was apparently confined to the specific contractual obligations taken on by the defendant.

While a finding that the plaintiff had a licence might be attractive, in that it would allow the parties to bring forward the respective merits in relation to a fair bargain struck by willing participants, such an approach would appear to be a reading down of the lease to bring about the desired, rather artificial effect.

Each of the agreements was in its essential nature what its designer intended it to be, a lease. The right of entry given to the landlord under the leases on a construction of the document as a whole was more consistent with permission to the defendant to come onto the demised property to perform the contractual obligations than with a grant of a licence to undertake the garden

on the property otherwise free to be occupied by the defendant. The greater security of a leasehold interest was the intent of the agreement put into effect prior to the unanticipated effect of the Court of Appeal decision.

Section 73 of the *Land Title Act* provides among other things, that except on compliance with the part of the Act in which it is contained , no person shall subdivide land into smaller parcels than those of which he is the owner for the purpose of leasing it for a term exceeding three years and that no instrument executed in contravention of that section confers on the party claiming under it a right to registration of the instrument or a part of it.

The parties' unwitting breach of that section, which in itself raised no merits between them, might preclude the court from effecting substantial justice between them. While there was authority to the effect that the court should go slow in implying that there is a statutory prohibition in respect of a commercial contract entered into by parties unwitting of the breach, it did no go so far as to suggest a discretionary application of the rule. The finding by the Court of Appeal that there was a necessary inference in the construction of s. 73 prohibiting leases of less than a whole parcel a land for a term exceeding three years determined the question without individual analysis of the degree of public harm posed by the leases in question. They were unenforceable and neither of the parties to them could bring an action for breach of their terms, whether the claim for relief be by way of enforcement of possession or damages.

Moreover, the options, puported by the plaintiff to extend the agreements to cover the whole of the defendant's land, did not save the agreements. One of the agreements excepted a portion of the complete parcels. More generally, the options did not provide for two forms of completion - legal and illegal - but simply allowed the parties to enter into a subsequent lease.

The finding that they were unenforceable did not foreclose the right of the plaintiff to sue for whatever other remedies might be available to it on other branches of the law. The remedies by way of claims based on partnership and for a *quantum meruit*were not well-founded: they were not raised in the pleadings and the leases belied a partnership and would preclude a *quantum meruit* claim.

A finding of unjust enrichment would be necessary if a constructive trust were to be imposed. While it could be inferred from the evidence that when the dispute arose, the plaintiff felt there was value to be preserved in cultivating the crop, the evidence did not speak directly to the question whether the crop was sustainable with continued cultivation and hence presumably of some value. Value at this point in time would likely be the issue in determining unjust enrichment. If such value was subsequently discarded by the defendant or compromised for some other purpose, a claim might well lie. As the issue could not be resolved on the evidence, the plaintiff's claim in this regard would not be determined. As further evidence might be available, and the issue needed further development through the pleadings, the plaintiff should be free to present a further and better statement of claim and both parties should be free to present a further application in respect of these pleadings under R. 18A of the British Columbia *Rules of Court*.

APPLICATION by defendant to dismiss plaintiff's action; applications by plaintiff for determination of whether certain agreements between parties created right between them.

***Grist J.*:**

1 The parties entered into two written agreements styled as "lease and crop sharing" agreements dated January 29, 1992 and August 26, 1993, which dedicated portions of the defendant's lands to be developed as Ginseng Gardens. The agreements also stipulated that the defendant perform farm services necessary to the development of the crop, with further provisions requiring the defendant to make certain equipment available. Payment was to be by way of a lump sum rent for the full term of the lease payable from the proceeds of sale of the ginseng and an allocation of the seed harvested from the garden.

2 The lands are near Lillooet. The agreements stipulate a term of fifty-seven months, roughly the time necessary for a rotation of this crop. The land dedicated to growing ginseng under the agreements amounts to approximately thirteen acres of a 160 acre parcel, which otherwise has been used by the defendant for raising cattle. The parties became at odds in the spring or summer of 1995. Each subsequently sued the other. The first action was commenced by R & R Ginseng (hereinafter referred to as "the plaintiff") for damages for breach of the lease agreements and for a declaration of a constructive trust in respect of the land on which the gardens were situate. The action begun by Layton Bryson Outfitting (hereinafter referred to as "the defendant") also claims damages for breach of the lease agreements and damages for alleged subsequent trespass on the lands. No ginseng was ever harvested from the site.

3 *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (B.C. C.A.), determined that a lease of a portion of an unsubdivided parcel of land, of a term in excess of 3 years, was unenforceable as offending s. 73 of the *Land Title Act*. Both parties apply under Rule 18A in light of this decision. The defendant's application asks that the action brought by R & R Ginseng be dismissed. The plaintiff's application is brought in both actions and asks for a determination whether the agreements, "create any rights between the parties, ... whether personal, possessory or otherwise". The applications proposed by the plaintiff are without any definition as might be provided by the pleadings, but perhaps in practical terms are determined in any event in the course of determing the application brought by the defendant.

4 The application poses three main issues.

1. Are the agreements truly leases?

2. Does contravention of s. 73 of the Act in the circumstances of this case require that all provisions of the lease be declared unenforceable?

3. Are there any other features of the relationship between the parties arising from the pleadings which are capable of founding an action independent of the claims of breach of the leases.

Lease or Licence:

5 The plaintiff's contention is that the agreements, when examined to establish their true nature and intent, amount to licences to allow its employees to come onto the property to carry out its obligations in the venture, together with a *profit a prendre* right to share in the crop. In effect, that the words chosen by the solicitor drafting the document do not determine its essential nature.

6 In support of this proposition, the plaintiff cited *Street v. Mountford*, [1985] 2 All E.R. 289 (U.K. H.L.), a case in which a written agreement was determined to be a lease, although referred to by the parties through the title and body of the document as a licence. The essential distinguishing feature found in the agreement was the grant of exclusive occupancy, which determined the legal relationship, irrespective of the name the parties put to it.

7 Here the agreements demise the stipulated property to the plaintiff in the fashion of a lease but the two agreements also provide, "access to the tenant's plots 1/2/3 is limited to the landlord and employees of R & R Ginseng Enterprises Ltd. (the plaintiff), unless prior written permission is granted by a director of R & R Ginseng Enterprises Ltd. All others will be considered trespassers." This, the plaintiff says, is less than an exclusive grant and with the reservation of access to the "the landlord" the lease can be seen to be a licence.

8 Further provisions of the agreements, however, do not support the intention to create a licence. Notably,

1. The document is purportedly drawn to allow registration as a lease in the Land Title Office. Licences cannot be registered.

2. As noted, the document speaks of a demise, and the remedy to the landlord on default of the tenant is stipulated as re-entry and taking possession of the lands.

3. The tenant covenants not to assign, sublet or otherwise part with the lands; words inappropriate to a licence.

4. The documents specifically provide that the landlord contracts to perform specified form work as required to install the gardens and plant the crop, and annually to apply sprays. This work is to be performed by the principal of the defendant company, unless otherwise agreed by the plaintiff. These provisions, in my view, support the defendant's argument that anything less than exclusive possession is limited and confined to the specific contractual obligations taken on by the plaintiff.

9 In *Silovi Property Ltd. v. Barbaro* (1988), 13 N.S.W.L.R. 466 (New South Wales C.A.), the New South Wales Court of Appeal dealt with a document styled as a lease, intended for registration, but which fell afoul of a statutory section which had

a similar effect to s. 73 of the *Land Title Act*. The statute in that case also precluded leases of less than the whole of a defined parcel, having a term greater than a stipulated minimum number of years. The lease was originally drawn to allow the tenant to grow Cocos Palms, an enterprise which required a term of ten years. The plaintiff in *Silovi* was a successor in title to the land owner who had granted the lease. He sued to put the tenant under the unregistered lease off the land. In construing the putative lease, the court held that the document amounted to a personal licence coupled with an interest in the nature of a *profit a prendre*, an equitable interest in the land greater than a personal licence, which could be recognized in circumstances where the subsequent purchaser had full knowledge of the outstanding agreement and could be thereby estopped from prevailing over the tenant's interest.

10 Further details of the agreement in *Silovi* are not given, however, the facts are comparable in many respects to this case. In *International Paper*, however, the court commented on *Silovi* saying,

> A finding that the tenant has a licence or other "personal" rights that would effectively put it in the position of the holder of an unregistered lease — would be exceedingly artificial.

The court then went on to comment on the effective avoidance of the public policy aims of s. 73, which would be inherent in such an approach.

11 The result in *Silovi* had an attractive feature in that it allowed the court to avoid what was felt to be an unconscionable act by the subsequent purchaser. Here a similar finding would allow the parties to bring forward the respective merits in relation to a fair bargain struck by willing participants. The approach adopted by the court in *Silovi*, however, does appear to be a reading down of the lease to bring about the desired, rather artificial, effect.

12 In this case I am of the view that each of the agreements is in its essential nature what its designer intended it to be, a lease. The right of entry given to the landlord under the leases on a construction of the document as a whole is more consistent with permission to the landlord to come onto the demised property to perform the contractual obligations than with a grant of a licence to the plaintiff to undertake the Ginseng Garden on property otherwise free to be occupied by the defendant. The greater security of a leasehold interest was, in my view, the intent of the agreement, put into effect prior to the unanticipated effect of the *International Paper* case.

Breach of Section 73 - Land Title Act

13 Section 73 of the *Land Title Act* provides:

> s. 73
>
> (1) Except on compliance with this Part, no person shall subdivide land into smaller parcels than those of which he is the owner for the purpose of
>
> (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.
>
> (4) No instrument executed by a person in contravention of this section confers on the party claiming under it a right to registration of the instrument or a part of it.

14 The court in *International Paper* found at page 49,

> ... an important purpose of s. 73 is to ensure that municipal authorities retain control over subdivision as a means of regulating zoning, drainage, utility supply, building encroachment, siting, local aesthetics, and land development and use generally in the public interest.

15 Another purpose identified was to provide general support for the Torrens Land Registration system, which might be undermined if property was effectively subdivided by procedures outside of those stipulated under the Act. Additionally,

the section might be said to be protection to persons purchasing property from unregistered leases, at least to the extent of unregistered leases with a term greater than three years.

16 The decision in *International Paper* precluded the tenant from enforcing any of the obligations under the lease. The agreement between the landlord and tenant in that case had the effect of allowing the tenant to move its business structure onto the landlord's lands and gave the tenant exclusive use of part of those lands to conduct its business, with the ongoing advantage of an evergreen renewal clause. In the present case, the lease provides a vehicle to allow suitable land to be dedicated for a purpose which appears to be consonant with the pre-existing agricultural use of the land. The term in this case is greater than 3 years, as required by the particular crop cycle.

17 In *International Paper* the court expressed some regret in holding the agreement to be unenforceable but found it necessary to support the public policy objectives of s. 73. When argued at their strongest, the agreements in this case in themselves are likely less of a threat to public policy than the lease considered by the Court of Appeal. The thirteen acre portion of the legal title was put to a similar use to that already adopted for the land and does not require a permanent structure or change in the quality of the land such that there would be difficulty in returning it to its original use. The length of term is what is required for the crop cycle and not so long as to amount to an unreasonable alienation of the parcel. Further, compliance with the statute by way of subdivision to accommodate such an agricultural lease would be so cumbersome and unrealistic as to preclude this sort of agricultural lease as a useful vehicle. Lastly, the immediate consideration in relation to this case is that the unwitting breach of s. 73, which in itself raises no merits between the parties, may preclude the court from effecting substantial justice between the parties. This raises the question as to whether there is any discretion in declaring such a contract unenforceable as a result of breach of the statutory condition.

18 In *Dodge v. Eisenman* (1985), 68 B.C.L.R. 327 (B.C. C.A.), MacFarlane, J.A. cited Devlin, J. in *St. John Shipping Corp. v. Joseph Rank Ltd.* (1956), [1957] 1 Q.B. 267 (Eng. Q.B.), at 288.

> A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or 'necessary inference,' as Parke B. put it, that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that it is clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken. To nullify a bargain in such circumstances frequently means that in a case — perhaps of such triviality that no authority would have felt it worth while to prosecute — a seller, because he cannot enforce his civil rights, may forfeit a sum vastly in excess of any penalty that a criminal court would impose; and the sum forfeited will not go into the public purse but into the pockets of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it.
>
> . . . . .
>
> It may be questionable also whether public policy is well served by driving from the seal of judgment everyone who has been guilty of a minor transgression. Commercial men who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice, and may go elsewhere for it if courts of law will not give it to them. In the last resort they will, if necessary, set up their own machinery for dealing with their own disputes in the way that those whom the law puts beyond the pale, such as gamblers, have done. I have said enough, and perhaps more than enough, to show how important it is that the courts should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear.

The words of caution of Devlin, J. suggest the court should go slow in implying that there is a statutory prohibition in respect of a commercial contract entered into by parties unwitting of the breach, however, it does not go so far as to suggest a discretionary application of the rule. The Court of Appeal has found that there is a 'necessary inference' in the construction of s. 73 prohibiting leases of less than a whole parcel of land for a term greater than three years. This, in my view, determines the question without

individual analysis of the degree of public harm posed by the particular leases in question and in the ultimate neither of the parties to these leases can bring action for breach of their terms.

19 The plaintiff has suggested that its action does not give rise to a claim for possession of the lands. Its action is founded on claims for damages for failure of the crops. The argument suggests that any breach of s. 73 can be put aside so long as the claim under the lease is for relief other than enforcement of possession of the lands. This argument does not have merit in my view. If the lease is unenforceable it cannot found an action for breach, whether the claim for relief be by way of enforcement of possession, or damages.

20 The plaintiff also suggested that the leases in question contain options to extend the terms of the lease to include the entire portions of land in the vicinity of the Ginseng Gardens, which could allow for a construction of the lease which does not infringe s. 73. This argument does not hold for the first lease which excepts a portion of the complete parcels. In more general terms, however, the option does not provide two forms of completion of the obligations under the contract, one legal and one illegal, but rather grants an option to enter into a further lease which would amount to a subsequent contract between the parties.

The Claim for Constructive Trust:

21 The plaintiff argues that notwithstanding an adverse decision in relation to the causes of action founded on enforcement of the provisions of the lease, there remain causes of action sustainable on other grounds. In particular, the plaintiff alleges that the relationship between the parties amounts to a partnership, or alternatively that they can found their action on a claim for a *quantum meruit*, or ultimately that the work done by the plaintiff in developing the ginseng gardens gives rise to a claim for a constructive trust. In *International Paper* the court commented at p. 61,

> It bears emphasizing that this result is without prejudice to any entitlement the Tenant may have to sue for whatever other remedies might be available to it on other branches of the law.

22 The remedies by way of claims based on partnership or for a *quantum meruit* are not well founded. There are no pleadings which raise these issues. Further the leases themselves belie a partnership relationship and would preclude a claim for a *quantum meruit*. The leases are not nullities, they are simply unenforceable. The claim within the pleadings for declaration of a constructive trust has more life, however. A claim for a constructive trust is an action in unjust enrichment with the prayer for the specific relief by way of a declaration of constructive trust.

23 The defendant counters that for an unjust enrichment action to proceed, there must be some form of enrichment, an element the defendant says is non-existent in this case in that no ginseng was ever harvested.

24 The affidavit evidence does not directly address the question of value at the time the dispute arose. The plaintiff says that they were cultivating the gardens until the summer of 1995. The dispute with the defendant apparently ultimately resulted in a confrontation on July 26, 1995, when the defendant's employees blocked the road from the gardens and refused to let the plaintiff's employees leave. Mr. Bryson was arrested on this occasion. Thereafter, the plaintiff's employees were only allowed on the property on two further occasions, to attempt a harvest (paragraph 9 of the Affidavit of Layton Bryson, December 6, 1996). At paragraph 7 of this Affidavit, Mr. Bryson says that no marketable ginseng has ever been grown which he attributes to the plaintiff's mismanagement.

25 The evidence leaves the inference that when the dispute arose, the plaintiff felt there was value to be preserved in cultivating the crop, while the defendants was of the opinion that continuation of the relationship was not in his interest. The Affidavits do not speak directly to the question of whether the crop was sustainable with continued cultivation and hence, presumably, of some value. Value at this point in time would likely be the issue in determining if there was an unjust enrichment. If, say, the value was subsequently discarded by the defendant or compromised for some other purpose, a claim might well lie.

26 Due to the fact that I cannot resolve this issue on the evidence provided, the plaintiff's claim in this regard will not be determined. In light of the fact that further evidence may be available to satisfy the court on this issue by way of a similar further application, and the fact that the issue needs further development through pleadings, there should be liberty to the plaintiff to

present a further and better statement of claim, with liberty to each party to present a further application in respect of these pleadings under Rule 18A.

Order accordingly.

TAB 8

2014 BCCA 451
British Columbia Court of Appeal

Idle-O Apartments Inc. v. Charlyn Investments Ltd.

2014 CarswellBC 3430, 2014 BCCA 451, [2014] B.C.J. No. 2839, [2015] 2 W.W.R. 243, 247 A.C.W.S. (3d) 373, 363 B.C.A.C. 282, 49 R.P.R. (5th) 169, 624 W.A.C. 282, 66 B.C.L.R. (5th) 288

Idle-O Apartments Inc., Appellant/Respondent on Cross Appeal (Plaintiff) and Charlyn Investments Ltd., Respondent/Appellant on Cross Appeal (Defendant)

Newbury, Garson, Harris JJ.A.

Heard: October 8-9, 2014
Judgment: November 20, 2014
Docket: Vancouver CA041414

Proceedings: reversing in part *Idle-O Apartments Inc. v. Charlyn Investments Ltd.* (2013), 38 R.P.R. (5th) 197, 2013 BCSC 2158, 2013 CarswellBC 3621, Watchuk J., In Chambers (B.C. S.C.)

Counsel: H.W. Veenstra, for Appellant
S. Batkin, R.A. Clark, for Respondent

Subject: Civil Practice and Procedure; Contracts; Property; Restitution

Headnote

Estoppel --- Estoppel in pais — Particular classes — Miscellaneous

In 1978, plaintiff purported to grant long-term lease, 998 years, of unsubdivided land to defendant — Parties did not learn that lease was illegal until 2000 — Plaintiff brought action seeking declaration that lease was unenforceable and invalid — Court of Appeal held that long-term lease of unsubdivided land was contrary to s. 73 of Land Title Act ("Act") — Lease was declared invalid and unenforceable — Plaintiff brought claim for exclusive possession of land and defendant counterclaimed — Trial judge dismissed plaintiff's claim for exclusive possession of land and concluded that defendant made out claim in proprietary estoppel — Plaintiff appealed — Appeal allowed in part — Trial judge was aware that proprietary estoppel may not be created out of illegal agreement per se — Trial judge found that equitable remedy flowed out of defendant's claim in proprietary estoppel and in granting remedy court would be giving effect to right that had arose out of conduct of parties, not pursuant to agreement itself, and there was no error in trial judge's reasoning — Trial judge found as fact that parties shared mistaken belief that they were bound to legally valid lease and she did not fail to deal with lack of knowledge on plaintiff's part — Trial judge did not err in finding unconscionability in circumstances, as it would be inequitable or unconscionable for plaintiff to rely on its strict legal rights against defendant — Trial judge did not err in finding that elements of proprietary estoppel were met — It was not necessary for trial judge to apply s. 73.1 of Act in order to grant remedy in proprietary estoppel — Circumstances that existed and informed public policy included that legislature passed legislation that permitted invalid leases to be enforceable notwithstanding s. 73 and public interests it protected — To extent trial judge applied s. 73.1, she was in error but result could have been properly reached on balancing of interests — However, trial judge should have considered not only parties' expectations as expressed in lease but also problems of public nature created by fact of non-compliance with requirements that were normally imposed as condition of subdivision approval — Terms relating to defendant's possession of land should be modified to minimize those difficulties — Term of 998 years was deleted and replaced by term that land may only be used for purposes of recreation of those individuals who were now defendant's directors and their children — Upon death of last survivor of present directors and their children, all defendant's rights under order would end.

Real property --- Landlord and tenant — Relationship of landlord and tenant — Estoppel

Contracts --- Formation of contract — Consensus ad idem — Intention of parties

Contracts --- Remedies for breach — Specific performance — Availability in particular contracts — Leases

Restitution and unjust enrichment --- General principles — Miscellaneous

APPEAL by plaintiff from decision reported at *Idle-O Apartments Inc. v. Charlyn Investments Ltd.* (2013), 2013 BCSC 2158, 2013 CarswellBC 3621, 38 R.P.R. (5th) 197 (B.C. S.C.), which dismissed plaintiff's claim for exclusive possession of land and concluded that defendant made out claim in proprietary estoppel.

***Newbury J.A.*:**

1 This appeal arises as a result of a 1996 decision of this court (and this judge) which found that a long-term lease of unsubdivided land was contrary to s. 73 of the *Land Title Act*, R.S.B.C. 1996, c. 250 and therefore illegal and unenforceable: see *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (B.C. C.A.). The Court emphasized that its order setting aside a declaration of validity was "without prejudice to any entitlement the tenant may have to sue for whatever other remedies might be available to it on other branches of the law." (At 61.)

2 The appeal before us has been many years coming, but requires that we now address the doctrines of proprietary estoppel and/or unjust enrichment in another instance in which the owner of real property (here, the appellant Idle-O Apartments Inc. ("Idle-O")) purported to grant a long-term (998 years) lease of unsubdivided land, here to the respondent Charlyn Investments Ltd. ("Charlyn") in 1978. The trial judge found that both parties shared a mistaken belief at the time that "they were bound by a legally valid lease" and that they had conducted themselves accordingly for some 22 years. (Para. 149.) It appears they did not learn that their lease was illegal until 2000.

3 For lengthy and detailed reasons indexed as 2013 BCSC 2158 (B.C. S.C.), the summary trial judge dismissed Idle-O's claim for exclusive possession of the land and ruled that Charlyn had made out a claim in proprietary estoppel. She granted Charlyn the remedy of a "replacement" lease in the same terms as the original "1978 lease". In the alternative, she ruled that Charlyn had made out its counterclaim in unjust enrichment, for which she granted damages in an amount to be determined. Charlyn's remaining claims were dismissed. (Paras. 287-90.)

4 On appeal, Idle-O submits that the trial judge erred in giving "retrospective application" to s. 73.1 of the *Land Title Act* — a provision enacted in 2007 in response to *Top Line;* in granting a remedy under the principle of proprietary estoppel; and in awarding an alternative remedy in unjust enrichment. Charlyn cross-appeals, seeking a replacement lease as a remedy for unjust enrichment in the event Idle-O succeeds in having the trial judge's remedy for proprietary estoppel set aside.

Factual Background

5 The lease with which we are concerned was not a straightforward matter between two arm's-length commercial parties. The narrative begins in 1971, when Mr. and Mrs. Dean became the sole owners of a parcel of 3.49 acres of recreational property on Osoyoos Lake. The Deans' parcel was referred to by counsel and the trial judge as "Lot 1". Between 1966 and 1971, the Deans constructed four cottages on Lot 1 which are now located on the land under dispute, being a .62-acre portion in the southwest corner of Lot 1.

6 Mr. Dean incorporated Charlyn in 1971 and transferred Lot 1 to it. By 1974, Charlyn had built an apartment building on the property. The Deans then incorporated Idle-O as an "apartment corporation". As the trial judge noted, such corporations are analogous to strata corporations in that they create a "web of rights and obligations between 'owners' of various apartments. Each 'owner' becomes a shareholder in the corporation and is given the right to occupy a particular unit under a long-term lease between the owner and the corporation." (See D.J. Pavlich, *Condominium Law in British Columbia* (1983) at 38-46.) In this instance, the apartment leases had terms of 99 years. Mr. and Mrs. Dean each took a single common share of Idle-O on incorporation.

7 On May 1, 1974, Idle-O issued another 499,998 shares to Charlyn for $1 per share. The Deans transferred their initial two shares as well to Charlyn, with the result that it became the sole shareholder of Idle-O. The trial judge described what happened next:

That same day, Charlyn and Idle-O entered into an agreement (the "Purchase Agreement"). Under the Purchase Agreement, Charlyn was to transfer to Idle-O [Lot 1] and any buildings thereon. The "total price or consideration" for the transfer was $700,000. As payment, Idle-O:

1. assumed two mortgages, the principal amounts of which totalled $200,000;

2. issued 500,000 common shares to Charlyn;

3. allowed Charlyn to subscribe for 200,000 further shares in Idle-O by two Subscription Agreements; and

4. granted Charlyn 998 year leases in each of the apartments in the apartment building.

Thus Charlyn remained the sole shareholder of Idle-O, and also owned leasehold interests in each apartment in the apartment building. Idle-O owned the whole property, including the apartment building and the cottages.

The Purchase Agreement included clause 10 which provided that:

> The parties further agree to execute all such further documents or perform all such further acts or deeds as may be necessary to perfect the intent of this Agreement.

Mr. and Mrs. Dean acted as signatories for both Charlyn and Idle-O. Since they controlled both companies, they were effectively on both sides of the transaction.

On May 14, 1974, the Deans held another Idle-O director's meeting. The Deans passed a resolution that assigned to each unit in the apartment building a certain number of Idle-O shares and a corresponding obligation to pay a portion of the apartment building's monthly assessments. This created a relationship wherein each Idle-O shareholder would be both a co-owner of the corporation and a lessee of a particular unit in the apartment building. [At paras. 29-33.]

8 In June 1974, two other developments occurred: first, Idle-O granted Charlyn a lease over a 1.58-acre portion of Lot 1, which included about half of the beachfront and the cottages. The Deans signed the lease on behalf of both Idle-O as landlord and Charlyn as tenant. The term of the lease was 99 years and the rent payable by Charlyn consisted of $100 per year, payment of municipal taxes on the leased portion of the land above $100, and payment of utilities. The lease specified that the tenant could use the land only for vacation or holiday purposes of Charlyn's directors, their immediate family and friends.

9 Second, the Deans signed a prospectus under which they sold their shares in Idle-O to the public. The 1974 lease was disclosed in the prospectus as a material contract and the fair market value of Lot 1 was said to be $700,000, consistent with the purchase price paid by Idle-O under the agreement of May 1, 1974. (Para. 35.) By the end of September, Charlyn had sold all its shares in Idle-O. In due course, five new directors of the company were elected and Mr. Dean ceased acting as a director.

10 Over the years, however, the residents in the apartment building (and shareholders of Idle-O) sought a new arrangement which would permit some of them to use certain areas for gardens or storage sheds. Mr. Dean and Idle-O's directors met to discuss a modification of the 1974 lease and on September 12, 1978, they signed a new lease (herein called the "Lease") which replaced the earlier one. As the trial judge noted at para. 39 of her reasons, the Lease granted Charlyn a "smaller but longer lasting interest in the property": the term of the Lease was now 998 years but the Lease covered 60% less land than the original lease had. This smaller area is the .62 acres which the trial judge referred to as "the land". The rent was $100 per year and Charlyn was required to pay utilities and water charges attributable to the land. Article 2 of the Lease provided that if the tenant assigned the Lease or sub-let, or if a change of control of Charlyn took place, the rent would thereafter also include the amount of municipal taxes attributable to the land. Charlyn was required to offer the Lease to Idle-O before it could assign its interest to a third party and to obtain the lessor's permission before changing its use of the land, constructing any new buildings or replacing existing buildings. Idle-O, of course, covenanted to provide quiet enjoyment.

11 The trial judge noted at para. 41 that "at some point" an application was made to subdivide the land, as Mr. Dean intended to ask Idle-O to transfer the land outright to Charlyn rather than carrying on with the Lease. No explanation was provided as to why a transfer had not been sought earlier, but I note that the Court in an earlier proceeding between the parties (see 2008 BCSC 849 (B.C. S.C.)) recounted that:

> There is also some evidence that between June 1974 and August 1978, Mr. Dean made inquiries about subdividing the leased land from the rest of Lot 1. He deposed that if the application for subdivision had been successful, he intended to ask Idle-O to transfer the ownership of the leased portion of Lot 1 to Charlyn rather than continue with a lease.
>
> When Dean and Coulter had originally subdivided their block of land in 1971, there was no impediment because the area was considered unorganized territory. However, by 1974, the Regional District had come into existence, the land was zoned, and subdivision approval was more difficult to obtain. ... [At paras. 23-4; emphasis added.]

The trial judge in the present proceeding said this:

> There is some controversy over how the subdivision application came to be made. Mr. Dean says that his surveyor applied for subdivision without Mr. Dean's knowledge. Idle-O argues that Mr. Dean must have known about the application. Idle-O also says that since the 1978 Lease was in [registrable] form, Mr. Dean's solicitor had taken steps to prepare the lease for registration, and subdivision was a precondition for registration, someone on behalf of Mr. Dean must have sought the subdivision. Little if anything turns on this dispute. [At para. 42.]

12 In a letter dated October 4, 1979 addressed to Mr. Dean, the Ministry of Transportation, Communications and Highways denied the subdivision application on the grounds that it was contrary to applicable zoning laws, required the approval of the B.C. Land Commission, did not comply with local bylaws regarding frontage and potable water, and was contrary to s. 86(a) of the then *Land Registry Act*. Charlyn did not inform Idle-O that the subdivision application had been unsuccessful or that the Lease had not been registered; but on the other hand, there is no indication that Charlyn represented to Idle-O that it *had* been registered or even submitted for registration. Understandably, Charlyn itself seems not to have appreciated the implications of the denial of the subdivision application.

13 The trial judge found that in the years following the execution and delivery of the Lease, Charlyn made some improvements to the land, including "upgrades to the cottages, the construction of a tennis court, the construction of a carport, and various landscaping efforts." In the fall of 1999, the company had begun constructing a new two-storey building on the land, having acquired a building permit. However, it did not seek Idle-O's consent before it began construction, and after Idle-O complained to the Regional District, the permit was withdrawn. It was when Idle-O sought legal advice concerning this dispute that it learned that on the basis of *Top Line* and s. 73 of the *Land Title Act*, the Lease was illegal and unenforceable. Section 73 provides in material part:

> (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
>
> (a) transferring it, or
>
> (b) leasing it, or agreeing to lease it, for life or for a term exceeding 3 years.
>
> (2) Except on compliance with this Part, a person must not subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.
>
> (3) Subsection (1) does not apply to a subdivision for the purpose of leasing a building or part of a building.
>
> . . .

> (6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.

As noted in *Top Line*, s. 73 and predecessors thereof have been in force in this province since 1919.

14 In June 2000, Idle-O formally asserted that the Lease was unenforceable and invalid. It demanded that Charlyn vacate the cottages and deliver possession of the land to Idle-O. Protracted negotiations between the parties were unsuccessful as efforts on Charlyn's part to obtain the necessary approvals for registration — one of which was conditional on Idle-O's consent — were dismissed as "futile" by Idle-O. It refused to accept rent from Charlyn. The litigation began with Idle-O's filing of a writ of summons in May 2004 seeking exclusive possession of the land, free of Charlyn's tenancy.

15 In 2007, the Legislature enacted the new s. 73.1 of the *Land Title Act* in response to concerns regarding *Top Line*. Most notably, the B.C. Law Institute had issued a *Report on Leases of Unsubdivided Land and the Top Line Case* in 2005. It noted that declaring a lease void *ab initio* can cause "a disaster for one party and a windfall for the other." (At 5.) In order to avoid the "harsh result" of *Top Line*, it recommended the enactment of a provision that would allow a lease executed in contravention of s. 73 to take effect as a licence "for the purpose of creating personal rights and obligations among the parties to it". Such a provision would apply to leases executed *before or after* the enactment of the recommended provision.

16 The government of the day introduced responsive legislation in 2007 (see S.B.C. 2007, c. 24), predicting that the amendment would allow farmers to enter into valid and enforceable long-term leases for agricultural land and that the "confusion" created by *Top Line* would abate. (See 2010 BCCA 460 (B.C. C.A.) at para. 22.) However, the new s. 73.1 did not fully reflect the Law Institute's recommendations. Section 73.1 read as follows:

> (1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease by reason only that
>
> (a) the lease or agreement for lease does not comply with this Part, or
>
> (b) an application for the registration of the lease or agreement for lease may be refused or rejected.
>
> (2) This section does not apply to an airport lease, as defined in section 41 of the *Municipalities Enabling and Validating Act (No. 2)*. [Emphasis added.]

It will be noted that the new provision was silent on the topic of retrospective application.

17 The first summary trial judge, Morrison J., issued her reasons, indexed as 2008 BCSC 849 (B.C. S.C.), in early 2008. She formed the view that the Legislature had intended to "remediate" the impact of s. 73 as interpreted in *Top Line*, and that s. 73.1 should be given retrospective effect. Thus she ruled that the Lease was valid and enforceable, and dismissed Idle-O's action. Two years later, she issued supplementary reasons, indexed as 2010 BCSC 132 (B.C. S.C.), in which she held that *Top Line* had not been decided *per incuriam*, that the *Property Law Act*, R.S.B.C. 1996, c. 377 does not require a lessor to consent to a subdivision in order to provide the tenant with a registrable lease, and that it would be inappropriate to insert into the Lease a term requiring Idle-O to consent to the subdivision.

18 Idle-O was successful on its appeal from Morrison J.'s reasons of 2008. For reasons indexed as 2010 BCCA 460 (B.C. C.A.), this court held that nothing in the language of s. 73.1 expressly or by necessary implication required that it be given retrospective effect. Thus the Lease remained invalid and unenforceable.

19 The remaining claims of Charlyn, seeking a declaration of an irrevocable licence, a declaration of constructive trust, and damages for loss of the Lease and for unjust enrichment, were remitted to the Supreme Court. These matters — by then refined to include proprietary estoppel, unjust enrichment and damages — were heard by the summary trial judge in early 2013, and she issued her reasons (2013 BCSC 2158 (B.C. S.C.)) in November of that year. It is from her order, granting a "replacement lease" as a remedy for proprietary estoppel, that this appeal is brought.

The Trial Judge's Reasons

Factual Findings

20 Beginning at para. 57 of her reasons, the summary trial judge described various factual controversies relevant to the elements of proprietary estoppel, unjust enrichment, and possible remedies therefor. In summary terms, she found that:

> 1. The original 1974 lease was "not part of the consideration" for Charlyn's transfer of the entire property to Idle-O on May 1, 1974. (Para. 62.)
>
> 2. The stated price of $700,000 for Lot 1 in 1974 was its fair market value. (Para. 71.)
>
> 3. It was not possible on the evidence to determine the value of improvements made by Charlyn to the land and, since the remedy ultimately granted by the Court was a replacement lease, it was not necessary to do so. (Para. 91.)
>
> 4. The parties' disagreement on the appraisal of the land was described at paras. 93-5 but again, since the Court ultimately granted a replacement lease as a remedy for proprietary estoppel, it was not necessary to resolve this question. (Para. 95.)

The Court did not find it necessary to make any findings concerning the capacity of the septic system on Lot 1, although there was considerable expert evidence on the topic. Idle-O argues in its factum that this evidence makes it clear that Charlyn's septic field is non-compliant with local regulations.

Proprietary Estoppel

21 The trial judge began her analysis with an "overview" of proprietary estoppel beginning at para. 96, quoting a passage from *Halsbury's* (4th ed., Vol. 16 at para. 1072), which states:

> The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.

This passage had been quoted with approval by this court in *Sykes v. Rosebery Parklands Development Society*, 2011 BCCA 15 (B.C. C.A.) at para. 45.

22 The judge noted that courts have traditionally enunciated four elements that found a claim in proprietary estoppel — i) the claim is brought in a property context; ii) the party seeking to rely on its legal rights makes a representation to the claimant; iii) the claimant reasonably relies on the representation; and iv) it would be unconscionable or unjust in all the circumstances for the representor to go back on the assumption that it had allowed the claimant to make. In support, the Court cited *Trethewey-Edge Dyking (District) v. Coniagas Ranches Ltd.*, 2003 BCCA 197 (B.C. C.A.) at para. 64 and the trial decision in *Sabey v. von Hopffgarten Estate*, 2013 BCSC 642 (B.C. S.C.) at paras. 43-4. (Shortly before the hearing of this appeal, this court allowed the appeal in *Sabey* on a different point: see 2014 BCCA 360 (B.C. C.A.).) The judge then continued:

> Furthermore, although it is broadly stated, a claimant cannot simply assert that it would be unfair for the other party to rely on their strict legal rights. Something more is required. The claimant must demonstrate why it would be unconscionable or unfair for the other party to be allowed to rely on and enforce its legal rights. In that regard, then, it would "rarely, if ever, be unconscionable to insist on strict legal rights" in the absence of any detriment or prejudice to the claimant: *Sykes* at para. 47. Thus, the claimant typically must demonstrate that it will suffer some detriment if the other party is allowed to rely on its strict legal rights.
>
> Detriment may take many forms. It is not a "narrow or technical concept": *Gillett v. Holt*, [2001] Ch. 210 at 232 ... . The court must survey all of the circumstances to determine whether any particular outcome would be unfair, unjust or

> unconscionable. As a result, the court is not restricted to simply reviewing what expenditures were made by the claimant. It may also consider, among other things, any lost opportunities or lost or foregone wages that arose due to the representation.
>
> If the court finds that an equity does arise in a particular case, although it has a wide discretion in granting a remedy, any relief granted must be appropriate and must be the minimum equity necessary to do justice to the claimant: *The Law of Real Property*, 7th ed. (London: Sweet & Maxwell, 2008) at 716-718. [At paras. 98-100; emphasis added.]

23 After summarizing her conclusions, the judge provided a detailed description of the parties' respective positions (paras. 104-15), and a brief history of the doctrine of proprietary estoppel (paras. 116-45). At the end of that history, she observed that the doctrine is no longer a "Procrustean bed constructed from some alterable criteria" (quoting from *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.* (1979), [1981] 1 All E.R. 897 (Eng. Ch. Div.)), but is now a "flexible" doctrine aimed at seeing that justice is done. (*Zelmer v. Victor Projects Ltd.* (1997), 34 B.C.L.R. (3d) 125 (B.C. C.A.), at 134.) She then posed three questions that must be answered in any claim for proprietary estoppel:

> (a) **Is there an equity established?** By this, the claimant must believe in the existence of a right created or encouraged by the words or the actions of the other party such that it would be unfair, unjust or unconscionable to allow the representor to set up its undoubted rights against the claimant. Although knowledge, detriment, acquiescence or encouragement may go toward raising the unfairness or injustice to the level requiring the exercise of judgment, they are not necessary elements. Accordingly, a claim in proprietary estoppel may arise even when both parties proceed under a shared mistaken belief as to their legal rights.
>
> (b) **If so, what is the extent of the equity?** The court must look at the circumstances in each case to determine how the equity can best be satisfied: *Megarry and Wade* at 716. It must, however, grant only the minimum equity necessary to do justice. Accordingly, it cannot give a greater right or interest than the claimant believed he had or expected to receive.
>
> (c) **What is the relief appropriate to satisfy the equity?** Although the claimant's expectations provide an upper limit to the relief that may be granted, "the court is not bound to give effect to them in the manner which [the claimant] envisaged if circumstances have changed so as to make it inappropriate, or if a more appropriate form of relief would remedy the unconscionability": *Megarry and Wade* at 718. [At para. 147; emphasis added.]

24 As I understand it, the first question incorporates the four elements mentioned earlier that are necessary to give rise to an equity in favour of the claimant. In *Sabey v. von Hopffgarten Estate*, this court recently collapsed them into two:

> a. There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property, and
>
> b. The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance. [At para. 30.]

25 In this case, the judge found, Idle-O had made a "clear and express representation or statement in the form of the ... Lease." It had not been a *mis*representation in the sense that Idle-O had known the Lease was invalid; rather the parties had shared a mistaken belief "where Idle-O, as much as Charlyn, believed that they were bound by a legally valid lease." (Para. 149.) The Court distinguished *J.S. Reimer Trucking Ltd. v. Triple "G" Logging Ltd.*, [1994] B.C.J. No. 1114 (B.C. S.C.), in which proprietary estoppel had not been found in the absence of any "misrepresentation" on the part of the defendants. In addition, *Reimer* had been decided before *Zelmer*, in which this court adopted the more flexible approach to proprietary estoppel.

26 Having found both a "statement" by Idle-O and a "shared assumption" by the parties that the Lease was valid, the trial judge found it would be "unconscionable and unjust" for Idle-O now to rely on its legal rights. Charlyn should not, she stated, be made to bear the brunt of this shared but mistaken assumption that there existed a legally binding lease. (Para. 157.)

Bars to Estoppel

27 Idle-O argued that even if proprietary estoppel had been made out, the illegality of the Lease barred Charlyn's claim. In *Top Line*, the Court had weighed the equities arising from the parties' relationship against the public policy aims of s. 73 and concluded that it could not accept the tenant's arguments in support of estoppel against the landlord without undermining those policies. Relying on the opinion of the Privy Council in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* (1963), [1964] A.C. 993 (Malaysia P.C.), this court had reasoned:

> Can it be said that the objectives of s. 73 are not of a public nature such that the countervailing public interest in the finality of judicial proceedings should prevail? In my opinion, it cannot. Section 73 seems to me to represent if not a "social policy", then a societal interest, in the proper regulation of land use and subdivision and in the protection of third parties who are encouraged to rely on the Torrens system. On this ground, I would again conclude that these policies must prevail over what must would otherwise be an unassailable argument based on estoppel *per rem judicatem*. [At para. 40.]

(The reference to estoppel *per rem judicatem* arose from the fact that in previous court proceedings, the legality of the lease in *Top Line* had been assumed without challenge.)

28 Without more, then, it appeared that *Top Line* barred any equitable claim of Charlyn, including any claim based on proprietary estoppel. As stated in *Snell's Equity* (32nd ed., 2010), "... no claim [in estoppel] will arise against any party if the right claimed would stultify the operation of a statute." (At §12-23.) However, the trial judge continued, the principle of "general social policy", which is aimed at upholding the intent or purposes of the Legislature, is subject to some qualifications. First, it applies only where it would be "contrary to the policy of the statute to permit a party to rely on an estoppel" (citing *Yaxley v. Gotts* (1999), [2000] 1 All E.R. 711 (Eng. & Wales C.A. (Civil))); and second, regardless of the policy of the statute, the court will grant relief to the extent that it does not conflict with the statute. (Paras. 170-172.) Finally, the trial judge observed, the principle is concerned with the public policy underlying the statute *at the time the remedy is granted*. Accordingly, she turned to consider the *Land Title Act* "as amended" — i.e., at the date of her order. (Para. 173.)

29 In this regard, the trial judge noted the report of the Law Institute mentioned above, in response to which s. 73.1 had been added to the *Land Title Act*. (*Supra*, at para. 16.) As we have seen, the effect of s. 73.1 was that a lease that does not comply with Part 7 of the Act or is unregistrable is not unenforceable *between the parties to the lease*. The judge inferred from s. 73.1 that:

> (i) As a matter of policy, the government is content with allowing individuals to enter into unregistered agreements regarding how land will be divided and shared between them notwithstanding the formal requirements of subdivision.
>
> (ii) The legislature does not intend to protect the Torrens land registration system in this Province to the extent that tenants who have entered into [unregistrable] leases will have no rights. The Attorney General's comments when he moved the enactment of Bill 35, stated that s. 73.1 is aimed at: (a) ensuring that farmers can enter into valid, enforceable long-term leases for unused portions of agricultural land; (b) limiting the costs, confusion, and unintended burden on local governments arising out the *Top Line* decision; and (c) promoting certainty for land agreements. The policies or purposes of s. 73.1, as identified by the Attorney General, overtake those identified in *Top Line*.
>
> (iii) Section 73.1 is a complete answer to the third policy objective identified in *Top Line*, that [unregistrable] leases should be deterred. There is no longer any need to deter such contracts as the legislature now specifically recognizes this type of lease as valid and enforceable between the parties. Deterrence is of no importance because the conduct to be deterred is no longer illegal. If Charlyn and Idle-O were to enter into a lease today with exactly the same terms as those of the lease they entered into in 1974 or 1978, the lease would be legal and enforceable, albeit [unregistrable] and therefore of no effect against third-parties.
>
> As described by the Court of Appeal [in 2010 BCCA 460], s. 73.1 is not simply procedural; rather it "has the effect of granting substantive rights in respect of a previously otherwise unenforceable lease" (*Idle-O Appeal* at para. 30). The statutory provision is now "not essentially prohibitory", and thus it does not preclude estoppel. [At paras. 181-2; emphasis added.]

30 Given that the "Legislature [had] spoken", the trial judge reasoned that the illegality of the Lease was not a bar to Charlyn's claim in proprietary estoppel. She relied on *Erickson v. Jones*, 2008 BCCA 379 (B.C. C.A.), which involved the granting of an access road, and *Kinane v. Mackie-Conteh*, [2005] EWCA Civ 45 (Eng. & Wales C.A. (Civil)), where the Court invoked a statutory provision (s. 2(5) of the *Law of Property Act 1989*) that expressly allowed a constructive trust to be created in order to give effect to a security agreement that was otherwise invalid under s. 2(1). Arden L.J. reasoned that:

> ... the presence of section 2(5) clearly demonstrates that Parliament intended a party to be relieved from the consequences of section 2(1) in the circumstances specified in section 2(5).
>
> In my judgment, therefore, a party seeking to rely on proprietary estoppel as the basis for disapplying section 2(1) of the 1989 Act is not prevented from relying in support of his case on the agreement which section 2(1) would otherwise render invalid. Thus, the requirement that the defendant encouraged (or allowed) the claimant to believe that he would require an interest in land may (depending on the facts) consist in the defendant encouraging the claimant (by words or conduct) to believe that the agreement for the disposition of an interest in land (here a security interest) was valid and binding. [At paras. 27-8; emphasis added.]

It does not appear that any question of retrospectivity arose in *Kinane* concerning s. 2(5).

31 The trial judge added that in giving effect to proprietary estoppel in the circumstances of this case she was *not* effectively applying s. 73.1 retrospectively, nor creating new rights or interfering with vested rights. Rather, she was "applying the public policy principle to the case at hand" consistent with the ruling in *Top Line*. Again, she stressed that the principle should not be restricted to the public policy underlying the statute at the time of the breach but rather at the time the remedy is issued in order to reflect policies different from those identified in *Top Line*. (Para. 186.)

32 The judge also "distinguished" *Top Line* on the basis of "changes in the common law". On this point, she noted *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 (S.C.C.), in which the question of illegality of a contract in the context of s. 347 of the *Criminal Code* arose. The Court ruled that a contract involving a criminal rate of interest could be partially enforced by the severance of the offending provisions of the contract. In so doing, it adopted a four-part test suggested in the Ontario Court of Appeal:

> As outlined above, in [*Wm. E. Thomson Assoc. Inc. v. Carpenter* (1989) 61 D.L.R. (4th) 1] Blair J.A. identified four considerations relevant to the determination of whether public policy ought to allow an otherwise illegal agreement to be partially enforced rather than being declared void *ab initio* in the face of illegality in the contract:
>
> 1. whether the purpose or policy of s. 347 would be subverted by severance;
>
> 2. whether the parties entered into the agreement for an illegal purpose or with an evil intention;
>
> 3. the relative bargaining positions of the parties and their conduct in reaching the agreement;
>
> 4. the potential for the debtor to enjoy an unjustified windfall.

33 The Court here found that the fourth consideration weighed heavily in this case in favour of "enforcing the contract", and that the policy reasons enunciated in *Top Line* at para. 34 now applied "with diminished force in this case as a result of the passage of time and changes in legislation." Overall, it was said, the balance of equities as between the parties favoured "enforcing the Lease .... [T]he lease between Charlyn and Idle-O is the basis of an equitable remedy." (Para. 190.)

34 The judge then summarized her findings in support of the conclusion that proprietary estoppel had been made out:

> i. The claim is brought in a property context — the Lease of the land.
>
> ii. Idle-O made a representation to Charlyn.

> In entering the 1978 Lease, Idle-O represented to Charlyn that Charlyn would have a 998-year lease over the disputed property. Although the 1974 Lease was, in effect, entered into with the same party as the controlling mind of both Charlyn and Idle-O at the time, this has no bearing here because the 1978 Lease was entered into between Charlyn and Idle-O after Mr. Dean had been removed as a director of Idle-O. Accordingly, as in *Taylor Fashions*, the result is that two parties entered into a lease that did not satisfy all of the statutory requirements.
>
> iii. Charlyn relied on Idle-O's representation that it held a leasehold interest.
>
> It is common ground that for over 20 years all parties operated on the basis that there was a valid and binding lease. This reliance was reasonable, similar to that found by Oliver J. in *Taylor Fashions* where he did not take issue with the tenant's conduct in similar circumstances.
>
> Whether the parties proceeded on a correct assumption or not, or whether that assumption was the product of a mistake is not determinative. That the parties proceeded on the basis of that underlying assumption is the important factual underpinning. I have dealt with the issue of mistake below.
>
> iv. Charlyn suffered a detriment.
>
> The evidence establishes that Charlyn expended money on the disputed property and paid rent and taxes. The authorities support the proposition that expenditures on its own property or otherwise will support the necessary detriment: *Erickson* at paras. 45 and 59. In *Sykes*, the court found that expenditures made by the plaintiffs in constructing a dock adjacent to the servient tenement were sufficient to establish detriment. Finally, that this expenditure will provide a basis for the necessary detriment arises from the fifth and last "probanda" discussed in *Willmott*, in requiring that the plaintiff establish that he has expended money or done other acts as a result of the encouragement by the plaintiff.
>
> I also accept Charlyn's argument that it, like the plaintiffs in Erickson, lost an opportunity to have resolved its rights in the 1974 and 1978 leased lands. In *Erickson*, the detriment arose from their "forbearance of pursuing their entitlement to access" [by] the old road (para. 59). In this case, Charlyn says that if it knew then what it knows now, it would have acted differently before entering into either of the 1974 or 1978 Leases. The alleged detriment is analogous to the detriment in *Erickson*. Specifically, at the time of entering the 1978 Lease, Charlyn could have insisted a subdivision rather than a new lease. [At para. 191; emphasis added.]

Remedy

35 Turning next to remedy, the trial judge instructed herself that the remedy granted "must be the minimum equity necessary to do justice in meeting the claimant's expectations, 'that is by granting him what he was promised or its monetary equivalent' (*Hayward [v. Bennett* 2011 BCSC 1015 at para. 68)." The judge found it was possible to meet Charlyn's expectations "by granting it what it was promised", whereas an irrevocable licence in the property would give it a greater interest than was originally intended and a monetary award would be inadequate and insufficient to do justice. Thus, she concluded, the appropriate remedy was a replacement lease granted on the same terms as the Lease.

36 In the result, the Court ordered that:

> The plaintiff execute a replacement lease effective as of the date of this Order in the same terms as the lease between the Plaintiff and Defendant dated September 12, 1978.

Unjust Enrichment

37 In light of counsel's "extensive submissions", the trial judge also addressed Charlyn's claim for a remedy in unjust enrichment in the event she was wrong with respect to proprietary estoppel. I do not find it necessary to review her analysis of unjust enrichment in detail given my conclusions regarding proprietary estoppel. It will be sufficient to note here that the

Court found the improvements made by Charlyn to the land were "incontrovertible benefits", despite Idle-O's assertion that the cottages and other improvements constructed by Charlyn were badly in need of repair. On the other hand, because the 1974 lease was not part of the consideration given by Idle-O for its purchase of the land, Idle-O must be considered to have paid full market value. Thus the non-enforceability of the Lease did not result in an enrichment to Idle-O. (Para. 235.)

38 The judge next considered Idle-O's argument that there was a juristic reason for Idle-O's enrichment — i.e., the illegality of the Lease. She observed that illegality can be construed as a juristic reason under the second branch of the test enunciated in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at para. 46. However, the starting point was the traditional rule that if a contract is unenforceable for illegality, then it is also unenforceable in restitution: see *Holman v. Johnson* (1775), 98 E.R. 1120 (Eng. K.B.), *per* Lord Mansfield at 1121, quoted by the trial judge at para. 246. According to P.D. Maddaugh and John D. McCamus, *The Law of Restitution* (looseleaf, 2012), this rule applies "even where it works an injustice, for example, by conferring a windfall."

39 There were four exceptions to the rule in *Holman*, the Court noted, the first being mistake of fact. Charlyn relied on this exception, citing Maddaugh at 15-7. The mistake here was one of law, but the trial judge noted that the Supreme Court of Canada has largely abandoned the distinction between mistakes of law and mistakes of fact in other contexts: see *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1 (S.C.C.) at para. 39; and *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 (S.C.C.). She followed this lead. In her analysis:

> The parties here have made a similar mistake: they both mistakenly believed that the contract was effective, when in fact it was not. Neither party intended any illegality. Since this case features value conferred by mistake, it falls into a traditional exception to the doctrine of illegality and therefore compensation in unjust enrichment is possible. [At para. 259.]

40 Alternatively, even if there had been no mutual mistake of law, the trial judge noted that *Holman* is no longer strictly applied and that many courts have ordered restitution even when a contract is unenforceable due to illegality. On this point, she noted *Equuscorp Pty Ltd. v. Haxton*, [2012] H.C.A. 7 (Australia H.C.) at paras. 101-4, where the High Court of Australia advocated a "policy-driven approach to illegality in restitution". (Para. 263.) A similar approach was taken in Canada in the criminal interest case, *Transport North*, at para. 42, and in *Tsoi v. Lai*, 2012 BCSC 1082 (B.C. S.C.) at paras. 20-2.

41 The trial judge in the case at bar then concluded:

> The question in this case is therefore one of weighing the concern about an unjustified windfall against a concern about the nature of the illegality. That in turn requires an assessment of the policies animating s. 73 of the *Land Title Act*. Those policies were described ... in *Top Line*, and they are: the need to ensure the integrity of the Torrens system of land registration and the desire to ensure that municipalities can effectively create and enforce bylaws.
>
> The analysis of the present state of those policy reasons is contained in the section above on Proprietary Estoppel. Those policy reasons have been overtaken by the enactment of s. 73.1 and recent case law. [At paras. 266-7; emphasis added.]

She ruled that accordingly, an award in restitution should be available. (Para. 268.)

42 As to whether a constructive trust would be the appropriate remedy for unjust enrichment, she considered some of the relevant case law, including *McMillan v. Johnson Estate*, 2011 BCCA 48 (B.C. C.A.) and *Kerr v. Baranow*, 2011 SCC 10 (S.C.C.), and reasoned that constructive trust would *not* be an appropriate remedy in this case. In her analysis, there was no connection between the unjust enrichment and the land itself and "granting Charlyn a trust interest in the land would give it a better interest than it was entitled to as a lessee, since as holder of an unregistered interest in land it was vulnerable to third parties." (Para. 281.)

43 Finally, the trial judge found she was unable to assess damages on the evidence before the Court. She granted Charlyn damages as an alternative remedy in an amount to be determined by the Court if the parties were unable to agree. (Para. 285.) Charlyn's claim for breach of contract was dismissed.

On Appeal

44 In this court, Idle-O submits in its factum that the summary trial judge erred:

(a) in giving a retrospective application to s. 73.1 of the *Land Title Act*;

(b) in granting a proprietary remedy pursuant to proprietary estoppel; and

(c) in awarding a remedy in unjust enrichment.

As mentioned above, I do not find it necessary to consider the third ground.

45 The second ground does not allege any particular error of law or fact, but from Idle-O's factum, I infer the following errors:

1) the trial judge erred in proceeding on the basis that the "representation" element of proprietary estoppel could be found in the invalid contract itself;

2) the trial judge erred in failing to "deal with the lack of knowledge on the part of Idle-O";

3) the trial judge erred in finding proprietary estoppel where there was a "mutual unawareness of the applicable law";

4) the trial judge's findings of reliance and detriment were not supported by the evidence;

5) because the element of detriment was not made out, the trial judge erred in finding "unconscionability" in the circumstances of this case.

Idle-O also makes more specific assertions with respect to remedy, which I will address later in these reasons.

Proprietary Estoppel

First Principles

46 At the outset, one returns to the "five probanda" enunciated by Fry J. in *Willmott v. Barber* (1880), 15 Ch. D. 96 (Eng. Ch. Div.), as follows:

> A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do. [At 105-6.]

47 As I noted in a concurring judgment in *Trethewey-Edge Dyking (District) v. Coniagas Ranches Ltd.* [2003 CarswellBC 657 (B.C. C.A.)], these five elements have been overtaken "by a broader and less literal approach to proprietary estoppel" which does not require "fraud" or that the representor knew of the existence of its right or that it was inconsistent with the claimant's understanding. Thus *Halsbury's* (4th ed., Vol. 16) describes the doctrine as follows:

> The more recent cases raise the question whether it is essential to find all the five tests literally applicable and satisfied in any particular case. The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories. [At para. 1072; emphasis added.]

Consistent with this, it is now beyond question that the estoppel may arise where *both* parties are 'mistaken' as to the representation or assumption, provided the claimant was induced or encouraged by the landowner to act on it to his detriment: see *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1981] 3 All E.R. 577 (Eng. C.A.), at 584; *Taylor Fashions* at 916, citing *E.R. Ives Investment Ltd. v. High* (1966), [1967] 1 All E.R. 504 (Eng. C.A.), at 507-8; *Trethewey* at paras. 48 and 67.

48 This court has adopted the "broader" approach to proprietary estoppel: see *Zelmer* at para. 49, *Erickson* at paras. 55-7, and most recently in *Sabey* at paras. 28-9. This approach is consistent with the judgment of Lord Denning in the seminal English case of *Crabb v. Arun District Council* (1975), [1976] 1 Ch. 179 (Eng. C.A.) at 187-9; Oliver J. in *Taylor Fashions*; Buckley L.J. in *Shaw v. Applegate* (1977), [1978] 1 All E.R. 123 (Eng. C.A.), at 130-1; and various other English authorities. On the other hand, English and Australian courts (and to some extent Canadian courts) have in recent years been at pains to emphasize that proprietary estoppel does not arise simply out of conduct that a court finds to be unconscionable. As observed by Lord Scott in *Cobbe v. Yeoman's Row Management Ltd.*, [2008] UKHL 55 (U.K. H.L.):

> ... unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion. [At para. 16.]

(See also *Muschinski v. Dodds* (1984), 160 C.L.R. 583 (Australia H.C.) where the Court warned against the "formless void of individual moral opinion". (At 615.))

49 From the foregoing I infer that although proprietary estoppel is, like most equitable remedies, flexible and aimed at doing justice, and although the basic elements of the doctrine are not to be technically confined, those elements must still be made out and an equity established. I reproduce again the encapsulation of the doctrine provided recently in *Sabey*:

> 1. Is an equity established? An equity will be established where:
>
> a. There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property, and
>
> b. The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.
>
> 2. If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the equity.

On this basis, I proceed to the questions raised by the second ground of appeal.

A "Representation" in the Invalid Contract Itself?

50 Idle-O's first point is that a representation that is alleged to give rise to proprietary estoppel in the face of an invalid agreement cannot be found in the contract itself. In support, Idle-O notes the comment of Arden L.J. in *Kinane* as follows:

> ... the requirement that the defendant encouraged or permitted the claimant in his erroneous belief is not satisfied simply by the admission of the invalid agreement in evidence. In this sort of case, the claimant has to show that the defendant represented to the claimant, by his words or conduct, including conduct in the provision or delivery of the agreement, that the agreement created an enforceable obligation. The cause of action in proprietary estoppel is thus not founded on the unenforceable agreement but upon the defendant's conduct which, when viewed in all relevant respects, is unconscionable. [At para. 29; emphasis added.]

51 In my respectful view, the trial judge in the case at bar was clearly aware of the fact that proprietary estoppel may not be created out of an illegal agreement *per se*. Instead, she said, the equitable remedy would "flow out of Charlyn's claim in proprietary estoppel" and that in granting a remedy, the Court would be "giving effect to a right that has arisen out of the conduct of the parties, not pursuant to the lease agreement itself." (Para. 103; my emphasis.) She repeated this conclusion with particular reference to *Kinane* at para. 185. (See also *Taylor Fashions*, where the Court granted specific performance of a renewal option in a lease despite the fact the option was void because it was not registered; and *J. T. Developments Ltd. v. Quinn* (1991), 62 P. & C.R. 33 (Eng. C.A.), where based on the conduct of the parties the Court of Appeal ordered the landlord to grant a renewed lease even though the tenant had not given proper counter-notice of its intent to exercise its option to renew, as required by statute.)

52 I see no error in the trial judge's reasoning on this point.

'Lack of Knowledge' on Idle-O's Part

53 Idle-O also argues that at least in the circumstances of this case, the fact it was unaware prior to 2001 of the invalidity of the Lease and that it had been refused for registration, should have precluded a finding of proprietary estoppel. Counsel notes Professor MacDougall's statement that: "... if the claimant is responsible for having created the situation that is to its disadvantage, there is no inequity on which proprietary estoppel will operate." (*Estoppel* (2012) at 496.) In Idle-O's submission, since it was Charlyn's lawyer who prepared the Lease and (presumably) attempted to register it, Charlyn in fact "created the situation" of which it now complains.

54 The trial judge found as a fact, however, that *both* parties had been unaware of the implications of non-registration of the Lease. This is not at all difficult to believe, since until *Top Line* was decided in 1996 (many years after the Lease was executed) there was no other authority to this effect and it appears the result in *Top Line* took many by surprise. As Idle-O acknowledged in its factum, an estoppel can arise from a "shared assumption of law" in appropriate circumstances. Of course, it is not enough that each party is simply unaware of the law (see *London Borough of Hillingdon v. Arc Ltd.*, [2000] R.V.R. 283 (Eng. C.A.), cited in *Bridgestart Properties Ltd. v. London Underground Ltd.*, [2004] EWCA Civ 793 (Eng. & Wales C.A. (Civil)) at para. 23): there must have been words or conduct that induced the claimant to rely on the shared assumption to its detriment. Such conduct was found in this instance.

55 It is also clear that the mistake in question may be one of law. This principle seems to have been first accepted by Lord Denning in *Moorgate Mercantile Co. v. Twitchings*, [1975] 3 All E.R. 314 (Eng. C.A.), where he wrote:

> Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J [in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674] put it in these words:
>
> > The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations.

> In 1947, after the *High Trees* case, I had some correspondence with Dixon J about it, and I think I may say that he would not limit the principle to an assumption of fact, but would extend it, as I would, to include an assumption of fact or law, present or future. At any rate, it applies to an assumption of ownership or absence of ownership. This gives rise to what may be called proprietary estoppel. There are many cases where the true owner of goods or of land has led another to believe that he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such cases it has been held repeatedly that the owner is not to be allowed to go back on what he has led the other to believe. So much so that his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct — what he has led the other to believe — even though he never intended it. [At 323, quoted and followed in *Taylor Fashions* at 918; emphasis added.]

In Canada, see *Ryan v. Moore*, 2005 SCC 38 (S.C.C.) at para. 51 and *Zelmer* at para. 36, both citing *Amalgamated Investment & Property Co.*, *supra*.

56 The trial judge here found as a fact that the parties shared a mistaken belief where "Idle-O, as much as Charlyn, believed that they were bound by a legally valid lease." (Para. 149.) Thus I cannot accede to Idle-O's argument that the Court "failed to deal with the lack of knowledge on the part of Idle-O" or erred in finding proprietary estoppel where the mistake was one of law.

Reliance and Detriment

57 Nor do I agree that the trial judge's finding of detrimental reliance was unsupported by the evidence. The judge recognized that detrimental reliance on the part of the claimant "underpins the claim and establishes the unfairness or unjustness that ought to be addressed by equity. Without such, ... the doctrine may become 'somewhat pointless' and a 'circumlocution for doing justice'." (Para 142.) At para. 99, she noted that detriment may take many forms and is not a "narrow or technical concept". (See *Snell's Equity* (31st ed., 2005) at §10-19.) Accordingly, she said, the Court was not restricted to simply reviewing expenditures made by the claimant; any lost opportunities that arose as a result of the representation or conduct of the other party could also be considered.

58 At para. 191 (quoted above at para. 34), she found on the evidence that Charlyn had expended money on the land, paid rent and taxes, and lost an opportunity to have resolved its rights, or insisted they be resolved in some manner, before entering the Lease(s) with Idle-O. This detriment was analogous to that in *Erickson*, where the plaintiffs had relied on their neighbour's construction of an access road to their property and discontinued using an "old road" which they mistakenly believed to be public. The Court found they had given up the opportunity "to have resolved their right to use the old road, either by litigation or through some other means ....". They were granted an equitable easement over the defendant's property which afforded them access to their own property.

59 Finally under this rubric, Idle-O contends that Charlyn's payment of rent and its expenditures on upgrades to cottages, a tennis court, a carport, and other items were carried out for the benefit of Charlyn itself and its directors and thus cannot support a claim in proprietary estoppel (or unjust enrichment). In support, the appellant referred us to *Cook v. Thomas*, [2010] EWCA Civ 227 (Eng. & Wales C.A. (Civil)), an action brought by a widow to evict her daughter and son-in-law from her house and farm. The defendants had moved into her home when their own home became uninhabitable, and had taken over the farming activity on the property and performed various repairs to buildings located thereon. They relied on four "promises" allegedly made by Mrs. Cook to them; but the trial judge found that she had not made any representation that could reasonably have led them to believe they would be entitled to remain on the farm for their lives, or that they would eventually inherit the farm. The defendants' challenges to the trial judge's findings of fact did not succeed in the Court of Appeal. The defendants were found to have had only an "open-ended licence" terminable on reasonable notice. The Court also rejected the defendants' claim in unjust enrichment, ruling that what work they did had been "up to them" and that most of it had benefited *them* (and only them) "in making parts of the property habitable which they were going to use." (Para. 107.) It followed that detrimental reliance had not been shown. (See also *Scholz v. Scholz*, 2013 BCCA 309 (B.C. C.A.).)

60 The facts as found by the trial judge in the instant case are very different from those in *Cook* and *Scholz*: Idle-O by its words and conduct led Charlyn to believe it was the tenant under a valid lease, and Charlyn relied on that assumption to its detriment. While it is no doubt true that its directors "enjoyed" the use of the land, their decision to enter into the relationship with Idle-O and to expend time and money on the land were made in reliance on having a long-term right of occupation on the terms set out in the Lease. It will almost always be the case that where a contract is involved, both parties will benefit in some way. Further, the finding that Charlyn lost an opportunity to explore and find ways of resolving or avoiding the subdivision problem has not been shown to be wrong. As I suggest later in these reasons, it seems likely this would have been less difficult in 1978 than now. (The evidence of Charlyn's efforts in recent years indicates that Idle-O's consent would have allowed Charlyn to surmount one of the hurdles, but that Idle-O refused to provide such consent.)

Unconscionability

61 I would also dismiss Idle-O's submission that the trial judge erred in finding "unconscionability" in the circumstances of this case. Unconscionability will usually follow proof of the other elements of proprietary estoppel and I see no reason why the trial judge should not have drawn a similar inference in this instance. In short, I agree with the trial judge that it would be inequitable or unconscionable to permit Idle-O to rely on its strict legal rights as against Charlyn.

62 Having found that the judge did not err in finding the elements of proprietary estoppel to be met, I turn next to the specific defences or "bars" to proprietary estoppel raised by Idle-O under the rubric of its first ground of appeal.

Retrospective Application of s. 73.1?

63 It will be recalled that in *Top Line*, this court found that s. 73 of the *Land Title Act* represented, if not a "social policy", then a societal interest, in "the proper regulation of land use and subdivision and in the protection of third parties who are encouraged to rely on the Torrens system." It will also be recalled that this court ruled in 2010 that s. 73.1 of the Act was not to be applied retrospectively and that the Lease therefore remained invalid and unenforceable.

64 In the appellant's submission, the trial judge circumvented these rulings — effectively doing indirectly what could not be done directly — by purporting to apply s. 73.1, or the public policy underlying it, in the face of *Top Line*. Indeed, at para. 173, the judge stated that in determining whether a claim in estoppel could stand in this case, "the court should consider the *Land Title Act* as amended." This, she reasoned, followed from the fact that in determining whether "the legislative purpose" would be frustrated by the granting of a remedy, the court looks at the "public policy underlying the statute at the time the remedy is granted."

65 The judge went on to observe that by adding s. 73.1 to the Act, the Legislature had made it clear that the policies underlying the Act and identified in *Top Line* had been "overtaken." Further, at paras. 180-1, she suggested that s. 73.1 had been enacted in order to "abrogate" *Top Line* and that:

> Section 73.1 is a complete answer to the third policy objective identified in *Top Line*, that [unregistrable] leases should be deterred. There is no longer any need to deter such contracts as the legislature now specifically recognizes this type of lease as valid and enforceable between the parties. Deterrence is of no importance because the conduct to be deterred is no longer illegal. If Charlyn and Idle-O were to enter into a lease today with exactly the same terms as those of the [Lease] ..., the lease would be legal and enforceable, albeit [unregistrable] and therefore of no effect against third-parties. [At para. 181.]

Finally, she stated at para. 190 that as a result of the passage of time and changes in legislation, the policy reasons identified in *Top Line* "apply with diminished force" and that *Top Line* can now be "restricted to its facts".

66 With respect, the Legislature did not "abrogate" *Top Line* or s. 73 when it enacted s. 73.1. Rather, it attempted to soften the harshness of the consequence of applying s. 73 (as in *Top Line*) by allowing unregistrable long-term leases to be effective as between the parties to the lease. The policy reasons enunciated in *Top Line* — the "societal interest in the proper regulation of land use and subdivision and in the protection of third parties who are encouraged to rely on the Torrens system" — have not,

in my respectful opinion, diminished over time. Indeed, the various rules that must now be complied with in order to subdivide land continue to be numerous and complex, involving matters ranging from sewage disposal to land use in general. (See s. 938 of the *Local Government Act*, R.S.B.C. 1996, c. 323, and s. 87(b) of the *Land Title Act*.) Nothing was brought to our attention on this appeal to suggest that these rules have become less "important", whether to the Province or to local authorities, in recent years or that as a result of s. 73.1 they are enforced with less vigour than before.

67 In my view, it was not necessary for the trial judge to apply s. 73.1 (retrospectively) in order to grant a remedy in proprietary estoppel in this case. The trial judge herself wrote at para. 185 that the cause of action is not founded on the unenforceable agreement — nor, one might add, on the statute — but upon "the defendant's conduct which, when viewed in all relevant respects, is unconscionable." (Citing *Kinane* at para. 29.) The judge had only to determine whether the remedy she was considering would, as stated in *Snell's Equity* (at §12-023), "stultify" the operation of the statute. In making this determination, the court normally considers public policy at the time the court speaks: see for example *Wren, Re*, [1945] O.R. 778 (Ont. H.C.), where the Court stated:

> The matter of not creating new heads of public policy has been discussed at some length by McCardie J. in *Naylor, Benzon and Co., Limited v. Karinische Industrie Gesellschaft*, [1918] 1 K.B. 331, later affirmed by the Court of Appeal, [1918] 2 K.B. 486. There he points out that "the Courts have not hesitated in the past to apply the doctrine [of public policy] whenever the facts demanded its application." "The truth of the matter," he says, "seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time.
>
> . . . . .
>
> It is a well-recognized rule that courts may look at various Dominion and Provincial Acts and public law as an aid in determining principles relative to public policy: see *Walkerville Brewing Co. Ltd. v. Mayrand*, 63 O.L.R. 573, [1929] 2 D.L.R. 945. [At 780-1.]

Idle-O cited no authority in support of its argument that the relevant time was instead the date of the transaction giving rise to the estoppel.

68 The circumstances that now exist and inform public policy include the fact that the Legislature has passed legislation permitting invalid leases to be enforceable between the parties notwithstanding s. 73 and the public interests it protects. The "balancing exercise" referred to in *E.D. & F. Man (Sugar) Ltd. v. Haryanto*, [1991] 1 Lloyd's Rep. 429 (Eng. C.A.) (quoted in *Top Line* at 61) has in this sense changed somewhat since 1996 and the countervailing equity that favours a remedy in this case weighs more heavily than the public interest in the finality of judicial proceedings did in *Top Line*. (See 61.) Indeed, even if s. 73.1 had never come into existence, it would have been open to the trial judge to fashion an equitable remedy in the form of a "lease" (in reality a court order) that is enforceable only between the parties and which thus poses little danger to third parties relying on the Torrens system of registration. Further, as Idle-O acknowledges in its factum, it is an unusual feature of this case that as an apartment corporation, Idle-O is likely to hold Lot 1 only until the apartment building comes to the end of its useful life. The site would likely then be sold to a third party, who would not be bound by any proprietary claim of Charlyn.

69 To the extent, then, that the trial judge *applied* s. 73.1, she was in my respectful view, in error. However, she did not err merely by *taking into account* the policy judgement underlying s. 73.1 as one circumstance informing the issue before her — whether granting the remedy would "stultify" s. 73. In my view, the result she reached could have been properly reached on a "balancing" of the interests involved in this case.

70 Finally, since the trial judge here was not construing a statute but fashioning an equitable remedy, I do not agree with the appellant's contention that proprietary estoppel operated erroneously in this case to deprive Idle-O of a "vested legal right" in the form of a right to the exclusive possession of the land. The rule against interfering with vested rights is a rule of statutory construction only, and vested rights will often be affected by the granting of a remedy in proprietary estoppel.

Remedy

71 I turn next to Idle-O's challenge of the remedy granted by the court below. From Idle-O's factum, I draw the following grounds of appeal, namely that:

> 1) the trial judge applied the wrong test as to remedy and assumed that granting a replacement lease was the "minimum equity necessary to do justice in meeting the claimant's expectations";
>
> 2) the trial judge granted a remedy that was disproportionate to the benefit Idle-O would enjoy if the remedy were granted by the Court and should have held that the "equity" was fully satisfied; and
>
> 3) alternatively, the trial judge should have granted Charlyn only a monetary award for the current value of the improvements it had made to the land since 1978.

Like the other grounds of appeal relating to proprietary estoppel specifically, these grounds overlap. Indeed since the concepts of "minimum equity necessary" and disproportionality are in my view inextricably linked, I propose to address them together.

72 At the outset, I note that the granting of a remedy for proprietary estoppel is a discretionary matter that attracts a high degree of appellate defence. The classic statement of the applicable standard of review may be found in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), where the Court quoted with approval the following passage from *Charles Osenton & Co. v. Johnston* (1941), [1942] A.C. 130 (U.K. H.L.):

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [At 138; emphasis added.]

(See also *Wenngatz v. 371431 Alberta Ltd.*, 2013 BCCA 225 (B.C. C.A.) at para. 9; *Stone v. Ellerman*, 2009 BCCA 294 (B.C. C.A.) at para. 94; and *Harper v. Canada (Attorney General)*, 2000 SCC 57 (S.C.C.) at para. 26.)

Minimum Equity, Proportionality and Expectations

73 The notion that the appropriate remedy in proprietary estoppel is the "minimum equity necessary to do justice" has been widely adopted: see Megarry and Wade, *The Law of Real Property* (7th ed., 2008) at 716-8. The principle was applied without comment by Scarman L.J. in *Crabb v. Arun District Council* at 198 and by this court in *Sykes* at para. 57 and was adopted by the trial judge in the case at bar at paras. 100 and 145.

74 At para 193, the trial judge went further, stating that the relief granted must be "the minimum equity necessary to do justice in meeting the claimant's expectations, 'that is by granting him what he was promised or its monetary equivalent'." (My emphasis.) The Court cited *Hayward v. Bennett* [2011 CarswellBC 2003 (B.C. S.C.)], in which Sewell J. quoted the following passage from *Halsbury's* (4th ed., Vol. 16(2)):

> The court has a very wide discretion in satisfying an equity arising under the doctrine of proprietary estoppel. The Court cannot, however, exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case. In the majority of cases the courts have satisfied the equity raised by estoppel by meeting the claimant's expectations, that is by granting him what he was promised or its monetary equivalent. [At para. 1092; emphasis added.]

I do not read this passage as suggesting that the "minimum equity" in every case will necessarily be to grant the claimant what it was promised or its monetary equivalent. To this extent, I agree with Idle-O that the trial judge may, with respect, have overstated the principle.

75 That said, there is no doubt that the claimant's reasonable expectations will usually be a very important factor, and perhaps the primary factor, in the fashioning of a remedy for proprietary estoppel. As noted by Adam Ship, "The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis", (2008) 46 *Alta. L. Rev.* 77, there is strong support for "expectation relief" in England, Australia and the United States. (At 100.) With respect to Canada, Ship (writing prior to *Sabey*) observed at 82 that in all reported appellate level cases where the court granted a remedy based on estoppel, the remedy was consistent with the expectation measure rather than the "reliance measure". (See also W.D. Rankin, "Concerning an Expectancy-Based Remedial Theory of Promissory Estoppel", (2011) 69 *U. T. Fac. L. Rev.* 116; and see *Trethewey* at para. 56, *Sykes* at para. 79, and *Erickson* at para. 60.)

76 The competing principle that has arisen in recent years is that of proportionality — the notion that the remedy granted should be proportionate to the detriment experienced by the claimant as the result of its reliance on the landowner's words or conduct. The leading English case on this point is *Jennings v. Rice*, [2002] EWCA Civ 159 (Eng. C.A.), another "personal services" case. The two judgments written in that case, one by Aldous L.J. and one by Walker L.J., both will Mantell L.J. concurring, reflect the debate between counsel in the case at bar. Aldous L.J. began by reviewing various authorities, including *Pascoe v. Turner*, [1979] 1 W.L.R. 431 (Eng. C.A.), in which the Court gave effect to the claimant's expectation by ordering the defendant to transfer fee simple of the disputed property to the claimant; and *Sledmore v. Dalby* (1996), 72 P. & C.R. 196 (Eng. & Wales C.A. (Civil)), where the Court refused to give effect to the claimant's expectations and quoted with approval the observation of the Australian High Court in *The Commonwealth v. Verwayen*, [1990] H.C.A. 39 (Australia H.C.), that all remedies for estoppel require "a proportionality between the remedy and the detriment." Lord Aldous then summarized his view as follows:

> ... There is a clear line of authority from at least *Crabb* to the present day which establishes that once the elements of proprietary estoppel are established, an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there be proportionality between the expectation and the detriment. [At para. 36; emphasis added.]

77 Lord Walker approved this approach but drew a distinction between cases where the claimant's expectation is "uncertain" (as in *Jennings*) from those in which the expectation arose from a clear "bargain". He suggested that satisfying the claimant's expectations may be appropriate in the latter category of cases:

> Sometimes the assurances, and the claimant's reliance on them, have a consensual character falling not far short of an enforceable contract (if the only bar to the formation of a contract is non-compliance with section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989*, the proprietary estoppel may become indistinguishable from a constructive trust: *Yaxley v Gotts* [2000] Ch 162). In a case of that sort both the claimant's expectations and the element of detriment to the claimant will have been defined with reasonable clarity. A typical case would be an elderly benefactor who reaches a clear understanding with the claimant (who may be a relative, a friend, or a remunerated companion or carer) that if the claimant resides with and cares for the benefactor, the claimant will inherit the benefactor's house (or will have a home for life). In a case like that the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate. Cases of that sort, if free from other complications, fit fairly comfortably into Dr. Gardner's first or second hypothesis (both of which aim to vindicate the claimant's expectations as far as possible, and if possible by providing the claimant with the specific property which the benefactor has promised). [At para. 45; emphasis added.]

78 On the other hand, Lord Walker observed that in cases where the expectation was not clear, the claimant's "specific vindication cannot be the appropriate test." He continued:

> ... A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point. [At para. 47.]

79 His Lordship then summarized these "categories" of cases:

> To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way. [At para. 50; emphasis added.]

80 Lord Walker's bargain/non-bargain dichotomy has been cited in subsequent English cases, including *Powell v. Benney*, [2007] EWCA Civ 1283 (Eng. & Wales C.A. (Civil)), and *Ottey v. Grundy*, [2003] EWCA Civ 1176 (Eng. & Wales C.A. (Civil)). (See also the discussion by Susan Bright and Ben McFarlane in "Proprietary Estoppel in Property Rights", (2005) 64 *Camb. L.J.* 449 at 458-465.) It now appears that in England, the principle of proportionality will be observed, at least implicitly, in "non-bargain" cases, but that where the parties have a mutual understanding of the claimant's expectation, and that expectation arises out of a consensual bargain that for whatever reason is not enforceable as a contract, the courts generally tend to give effect to the claimant's expectations. One observer (Simon Gardner, "The Remedial Discretion in Proprietary Estoppel — Again" (2006) 122 *L.Q.R.* 492) suggests that "It would be more elegant ... to regard the set of possible estoppel cases as a continuum, in which a discretion ... is always present." (At 496.)

81 Until this court's recent decision in *Sabey v. von Hopffgarten Estate*, Canadian courts had not commented on the notion of proportionality or on Lord Walker's dichotomy in *Jennings*. *Sabey* itself was a 'non-bargain' case in which the trial judge rewarded the claimant his "expectation interest" after finding that he had detrimentally relied on the landowner's assurances that the claimant would "inherit the farm". Madam Justice Bennett, writing for the majority, reviewed *Jennings*, emphasizing Lord Aldous's statement that the central element of proprietary estoppel is "that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption." (Para. 73.) As well, she cited the following passage from Lord Walker's concurring reasons:

> It would be unwise to attempt any comprehensive enumeration of the factors relevant to the exercise of the court's discretion, or to suggest any hierarchy of factors. In my view they include, but are not limited to ... misconduct of the claimant as in *J Willis & Sons v Willis* [1979] Ch 261 or particularly oppressive conduct on the part of the defendant, as in *Crabb v Arun District Council* or *Pascoe v Turner* [1979] 1 WLR 431 ... To these can safely be added the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the benefactor's assets and circumstances, especially where the benefactor's assurances have been given, and the claimant's detriment has been suffered, over a long period of years; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate. No doubt there are many other factors which it may be right for the court to take into account in particular factual situations. [At para. 52.]

(As to the significance of the factors mentioned above to both unconscionability and the "mode" of relief, see Gardner, *supra*, at 502-4.)

82 Bennett J.A. did not comment in *Sabey* on the 'categorization' of cases suggested by Walker L.J., but concluded that given the limited extent of the detriment suffered by the claimant, it would be unconscionable to give him the farm. The case was

remitted to the trial court for reconsideration, the Court noting that it would be open to the trial judge "to also assess the issue of proportionality based on the trial evidence." (Para. 83.)

The Remedy in This Case

83 Although I would not necessarily endorse an approach that strictly categorizes cases in the manner suggested by Lord Walker or constrains the court's equitable discretion, there is certainly no doubt as to the parties' expectations in this case. But that cannot be the only factor, as Lord Walker acknowledged in *Jennings*. Idle-O contends that the trial judge should also have considered the nature and condition of the improvements that were built on the land by Charlyn; the fact that Charlyn has had access to the site since 1978 at a low rent (there is no finding that it was below market); the fact that this is a case of mutual unawareness of the law rather than misrepresentation on the part of the landowner; and the fact that the Idle-O sewage system is at full capacity and the Charlyn sewage system is "having difficulties and in a no-longer permissible location." (Idle-O also contends that Charlyn was aware of the fact the Lease could not be registered but "concealed" it from Idle-O. This was not found by the trial judge and I will therefore say no more about it.)

84 To the foregoing factors I would add the fact that the original 1974 lease (which the Lease replaced) was entered into by parties who were not at arm's length at the time and perhaps for that reason, the question of registration was neglected. Then, when the new Lease replaced the old one in 1978, Mr. Dean let the matter slide after the application for registration was rejected. Also relevant is the fact that the land is obviously of *personal* value to the Deans (and the other directors of Charlyn, if any) — a fact that led the trial judge to reject the possibility of a damage award as insufficient to do justice in this case. I agree with that conclusion.

85 In the end, however, I believe the trial judge should have considered not only the parties' expectations as expressed in the Lease, but also the problems of a public nature (such as sewage disposal incapacity) created by the fact of non-compliance with the requirements normally imposed as a condition of subdivision approval. Thus despite the clarity of the parties' expectations in this case, the terms relating to Charlyn's possession of the land should be modified somewhat to minimize these difficulties. In particular, I would delete the term of 998 years and substitute a term that the land may be used only for purposes of recreation of those individuals who are *now* Charlyn's directors and their children (and their guests from time to time.) Thus on the death of the last survivor of the present directors and their children, all of Charlyn's rights under the order would cease. The order should also incorporate an arrangement for Idle-O to be informed of the deaths of those persons from time to time. (If counsel are unable to agree on such a mechanism, this court will impose one.) The 'lease' arrangement reflected by this court's order would of course continue to be binding only on the parties.

86 In this way, I hope that the remedy in this case can fulfil the parties' expectations in the main, but without affecting too adversely and for too long a time, the *public* interests which are served by the requirements surrounding the subdivision of land in British Columbia. To this extent only, I would allow the appeal.

***Garson J.A.*:**

I AGREE:

***Harris J.A.*:**

I AGREE:

Appeal allowed in part.

TAB 9

The Land Titles Act, 2000

being

Chapter L-5.1* of *The Statutes of Saskatchewan, 2000* (effective June 25, 2001, except for sections 51, 151 and subsection 167(2)) as amended by the *Statutes of Saskatchewan*, 2001, c.20 and 33; 2002, c.C-11.1 and 51; 2004, c.L-16.1 and 59; 2005, c.M-36.1; 2006, c.R-22.0001; 2007, c.P-13.2; 2009, c.10 and c.21; 2010, c.E-9.22; 2013, c.O-4.2 and c.27; 2014, c.24; 2015, c.I-9.11; 2016, c.P-31.1; 2019, c.8; and 2022. c.17.

***NOTE:** Pursuant to subsection 33(1) of *The Interpretation Act, 1995*, the Consequential Amendment sections, schedules and/or tables within this Act have been removed. Upon coming into force, the consequential amendments contained in those sections became part of the enactment(s) that they amend, and have thereby been incorporated into the corresponding Acts. Please refer to the Separate Chapter to obtain consequential amendment details and specifics.

(6) The termination by the mortgagee or by any assignee of the mortgagee of the tenancy created by the lease does not entitle the mortgagee to possession of the mortgaged land in any case in which the tenant has any other interest in the land.

(7) Subsection (6) applies, with any necessary modification, to the termination by a vendor of land or by the assignee of the vendor of any tenancy similarly created in any agreement for sale of land or in any instrument or agreement subsequent to and relevant to or dealing with any agreement for sale of land.

2000, c.L-5.1, s.137.

DIVISION 2
Leases

Right to purchase leased land

138 A right for the lessee to purchase the land described in the lease may be stipulated in the lease.

2000, c.L-5.1, s.138.

Lease of mortgaged land

139 No lease for a term of more than three years of mortgaged land is valid as against the mortgagee unless the mortgagee:

(a) has consented in writing to the lease before registration of the lease; or

(b) subsequently adopts the lease.

2000, c.L-5.1, s.139.

Action for recovery of land in case of default

140 A lessor may bring an action for the recovery of land against a lessee in default.

2000, c.L-5.1, s.140.

Termination of lease

141(1) Lawful re-entry and recovery of possession of leased land by a lessor or the lessor's assignee, by a legal proceeding, terminates the lease.

(2) Termination of a lease pursuant to subsection (1) does not release the lessee from his or her liability with respect to the breach of any covenant committed before the termination.

2000, c.L-5.1, s.141.

Shortform lease

142(1) Any lease may refer to the prescribed shortform covenants, and those shortform covenants may be identified in the prescribed manner.

TAB 10

1997 CarswellOnt 3744
Ontario Court of Appeal

Pompeani v. Bonik Inc.

1997 CarswellOnt 3744, [1997] O.J. No. 4174, 104 O.A.C. 149, 13 R.P.R. (3d) 1, 35 O.R. (3d) 417, 74 A.C.W.S. (3d) 887

Marzio Pompeani, Plaintiff/Appellant and Bonik Inc. (Bonik Incorporated), Bokrica Inc. and Ray M. Realty Inc., Defendants/Respondents

Highland Park Management Ltd., Plaintiff/Respondent, and Cross-Appellant and Marzio Pompeani, Bonik Incorporated and Bokrica Inc., Defendants/Appellant, Respondents and Cross-Appellants

Osborne, Abella and Charron JJ.A.

Heard: March 13, 1997
Judgment: October 15, 1997
Docket: CA C13681, C14265

Proceedings: reversing (1992), 27 R.P.R. (2d) 313 (Ont. Gen. Div.)

Counsel: *Robert J. McComb* and *Dermot P. Nolan*, for the appellant.
George W. Barycky, for the respondent.

Subject: Property

Headnote

Sale of land --- Completion of contract — Time of performance — Time of the essence
Vendor unilaterally reduced frontage of land sold to purchaser — Vendor committed anticipatory breach — Purchaser was relieved of duty to tender and entitled to damages.
Sale of land --- Remedies — Damages — Failure to close — Vendor unable to close
Vendor unilaterally reduced frontage of land sold to purchaser — Vendor committed anticipatory breach — Purchaser was not required to tender, and entitled to lost profit.
Sale of land --- Agreement of purchase and sale — Interpretation of contract — Particular terms — Land
Vendor unilaterally reduced frontage of land sold to purchaser — Subject of agreement comprised lots conforming with dimensions in contract — Provisions were specific, clear and unambiguous — Vendor was in breach of contract.
Sale of land --- Completion of contract — Tender — Duty to tender — Anticipatory breach
Vendor unilaterally reduced frontage of land sold to purchaser — Vendor committed anticipatory breach — Purchaser was relieved of duty to tender, and entitled to damages.
The appellant purchaser entered into an agreement to purchase townhouse lots as set out in a draft subdivision plan attached to the agreement. The plan showed the frontage and precise area of the lots. In order to rezone other lands, the vendor unilaterally reduced the frontage of the lots sold to the purchaser, and registered a new subdivision plan. When the purchaser found out, he objected, but was left unanswered. The purchaser brought an action for specific performance. The action was dismissed, the trial judge finding that the subject matter of the agreement comprised lands upon which a certain number of townhouses could be built, with the exact dimensions being unimportant. He also found that the purchaser was not ready, willing and able to close and that his failure to tender was fatal. The purchaser appealed.
Held: The appeal was allowed.

The subject matter of the agreement comprised lots conforming to the frontage dimensions set out in the plan annexed to the agreement. The provisions concerning the land were specific, clear, and unambiguous. The vendor did not make good title, and was in breach of the agreement.
By its conduct, the vendor impliedly repudiated the agreement, and committed an anticipatory breach. The purchaser was relieved of his obligations under the contract, and was allowed to pursue damages without the need to tender. Since the vendor knew that he intended to build townhouses, the purchaser's lost profits were considered, and damages were assessed at $350,000.

APPEAL by purchaser from dismissal of claim reported at (1992), 27 R.P.R. (2d) 313 (Ont. Gen. Div.).

The judgment of the court was delivered by *Osborne J.A.*:

1 In this action the purchaser, a builder, contended that the vendor breached an agreement under which it agreed to sell 16 townhouse building lots and other land, in Stoney Creek, Ontario to him. After a 12-day trial, Borkovich J. dismissed the purchaser's action and the purchaser now appeals from that judgment. The purchaser contends that by its conduct the vendor evinced an intention not to close the agreement of purchase and sale. The vendor's conduct includes its unilateral and undisclosed decision to reduce the size of 12 of the 16 townhouse lots and the failure of its solicitor to prepare a draft deed and statement of adjustments and, on the instructions of the vendor, respond to correspondence from the purchaser's solicitor.

The Facts

2 On February 22, 1988, the respondent Bonik Inc. entered into an agreement to purchase certain lands referred to in a draft of subdivision from the registered owner of those lands, Dundas/Branthaven Estates Inc. The deal was to close on June 1, 1988. Bonik Inc. assigned the agreement to Bokrica Inc. and in June 1988 Bokrica became the registered owner of the lands. At trial, it was agreed that both Bonik and Bokrica were bound by the agreement. In these reasons, I will refer to the appellant purchaser as "Pompeani" and to the respondent vendor as "Bonik".

3 On March 22, 1988, Pompeani entered into an agreement with Bonik to purchase part of the lands that Bonik had agreed to buy from Dundas/Branthaven. The land Bonik agreed to sell to Pompeani included 16 townhouse lots about which I will say more shortly.

4 Pompeani agreed to pay $1,362,000 for the lands that he purchased. He paid a $65,600 deposit and agreed to pay a further $181,200 in cash or by certified cheque on closing, subject to the usual adjustments. He also agreed to give a mortgage back at prime plus 1.5% to account for the balance of the purchase price. The mortgage was due 14 months from the date of closing. Schedule A to the agreement (also referred to in the agreement as "Appendix A") stipulated that "the closing date shall be within ten (10) days from the date that building permits become obtainable."

5 The property was referred to in the agreement as being "as per plan." Appendix A described the property as follows: "The Property herein shall be as per attached Schedule "B" defined as Block "A" Townhouses and lot No. 56 to 71 inclusive street townhouses." It is common ground that Schedule B (referred to in the agreement as Appendix B) is a draft plan that sets out the two parcels that Bonik agreed to sell and Pompeani agreed to buy (Block A, and the 16 townhouse lots in direct issue on this appeal).

6 The plan annexed to the agreement shows the frontage of some, but not all, of lots 56 to 71. I will refer to that aspect of the plan later. For now I simply note that the plan is to scale (1:1000) and that it sets out the precise area of both the 16 townhouse lots (0.36 hectares/0.89 acres) and Block A (1.95 hectares/4.82 acres).

7 Once Bonik accepted Pompeani's offer to purchase the 16 townhouse lots, Pompeani commenced plans for wall to wall townhouses that were designed to fit on each of lots 56 to 71.

8 The agreement required Bonik to proceed with steps required under the *Planning Act* in these terms:

35 There is no dispute that Bonik unilaterally reduced the frontage dimensions of 12 of the 16 lots and as a result, the total area of the land in issue and that it made no attempt to register the plan after it had been approved. But there is more. Bonik's solicitor, acting throughout on Bonik's instructions, ignored repeated correspondence from Pompeani's solicitor. He did not respond to the letter of requisitions dated August 1, 1989 or a subsequent letter dated August 9, 1989 reminding him of the letter of requisitions. Similarly, Bonik's solicitor did not respond to a letter of August 10, 1989 from Pompeani's solicitor suggesting an abatement in the purchase price to account for the reduction in the frontage dimensions of lots 56 to 71. Nor did Pompeani receive a response to his solicitor's letter of September 20, 1989 which sought an answer to the letter of requisitions and warned that failure to respond would be treated as an anticipatory breach.

36 The record reveals that the last written communication from Bonik's solicitor to Pompeani's solicitor was in August 1988, over one year before Bonik contended Pompeani should have closed the deal. Further, Bonik's solicitor did not submit a draft deed and statement of adjustments, or advise Pompeani's solicitor how Bonik wanted to take the mortgage back referred to in the agreement. In addition, he made no attempt to identify a particular time or place for closing the deal.

37 According to the evidence of Pompeani's solicitor, Bonik's silence in face of Pompeani's repeated correspondence was only broken long enough for it to state that it was not happy about the flip and that it would close if Pompeani turned over the profits from the flip. Obviously, Bonik was not entitled under the agreement to the profits from the flip in return for closing.

38 On the trial judge's view of the contract, it was open to Bonik (with or without notice to Pompeani) to change the lot sizes of any or all of the 16 lots so long as Bonik could convey 16 lots on which Pompeani could build some kind of townhouse. It seems to me that this ignores Pompeani's reasonable expectations, and as I have said, the provisions of the agreement that the parties chose to make. In my opinion, Pompeani agreed to pay, $1,362,000, not for any 16 townhouse lots and Block A, but for the lots as set out on the plan that both Pompeani and Bonik agreed would be used to identify what land was being bought and sold. I see no purpose in attempting to label the breach as a breach of condition on the one hand or a breach of warranty on the other. In my view, Bonik's breach of the agreement justified the termination of the agreement. In addition, in my opinion, by its conduct, Bonik committed an anticipatory breach of the agreement. I will now deal with that issue.

(c) Anticipatory Breach and the Failure to Tender

39 An anticipatory breach occurs where one party to a contract repudiates the contract before performance is due: *Roy v. Kloepfer Wholesale Hardware & Automotive Co.*, [1952] 2 S.C.R. 465 (S.C.C.).

40 In *Cehave N.V. v. Bremer Handelsgesellschaft mbH* (1975), [1976] 1 Q.B. 44 (Eng. C.A.), at pp. 59, Denning M.R. defined anticipatory breach in this way:

> When one party, before the day when he is obliged to perform his part, declares in advance that he will not perform it when the day comes, or by his conduct evinces an intention not to perform it, the other may elect to treat his declaration or conduct as a breach going to the root of the matter and to treat himself as discharged from further performance...

41 Professor Waddams referred to anticipatory breach in his text, *The Law of Contracts*, 3rd ed. paras. 613 and 614 in this way:

> Repudiation can be by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.* that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right.
>
> The innocent party is not, however, obliged to bring the action immediately. The party can continue to press for performance and bring the action only when the promised performance fails to materialize. It has been said in many cases that there is an option to "accept" the repudiation and sue at once or to ignore it and press for performance, and that an unaccepted repudiation is of no consequence. [Footnotes omitted.]

See also Perell, *Agreements of Purchase and Sale*, at p. 30; *McCallum v. Zivojinovic* (1977), 16 O.R. (2d) 721 (Ont. C.A.).

42 An anticipatory breach discharges the innocent party of its obligations under the contract and allows it to pursue damages without the need to tender: *Bethco Ltd. v. Clareco Canada Ltd.* (1985), 52 O.R. (2d) 609 (Ont. C.A.); *McCallum v. Zivojinovic, supra*, at 723.

43 Although there is no evidence that Bonik expressly repudiated the agreement, there is substantial evidence of an implied repudiation. As I noted earlier, the agreement contained the following provision requiring Bonik to obtain *Planning Act* compliance:

> Provided this agreement shall be effective to create an interest in the property only if the subdivision control provisions of the Planning Act are complied with by Vendor on or before completion and Vendor hereby covenants to proceed diligently and at his expense to obtain any necessary consent on or before completion. [Emphasis added.]

44 The agreement imposed an express obligation on Bonik "to proceed diligently" to secure *Planning Act* approval so that the plan attached to the agreement could be registered. As I have said, that plan was approved on April 12, 1988. From that point on, Bonik made no attempt to register that plan. Instead, without notice to Pompeani, he registered a different plan (62N-623) which reduced the lot size of 12 of the 16 townhouse lots.

45 I think that, taken cumulatively, Bonik's actions in abandoning the plan made part of the agreement, securing the registration of the new plan, ignoring correspondence from Pompeani's solicitor for over a year before the date of closing, demanding the profits from the flip in return for closing and failing to submit a draft deed or statement of adjustments would lead a reasonable purchaser to believe that the vendor would not honour its obligations under the agreement. Accordingly, I think that Bonik impliedly repudiated the agreement before the date of closing, thus relieving Pompeani of his obligations under the agreement and entitling him to damages. I do not think that in the circumstances Pompeani was obligated to tender.

(d) Damages

46 In my opinion, Pompeani is entitled to damages for the loss he suffered as a result of the breach. In light of the fact that Bonik knew that Pompeani was purchasing lots on which to build townhouses for sale, I agree with the trial judge that Pompeani's damages should take into account his loss of profits on the sale of the townhouses: see *Laredo Development Ltd. v. I.R. Capital Corp.* (1991), 17 R.P.R. (2d) 11 (B.C. S.C.); aff'd (1993), 35 R.P.R. (2d) 251 (B.C. C.A.).

47 Losani, whose evidence the trial judge accepted, testified at trial and submitted a report that addressed Pompeani's damages. In his evidence, he considered Pompeani's loss of profits as of the date the parties thought the deal was to close (September 1989). Losani's evidence supports the trial judge's conclusion that Pompeani's lost profits were $350,000. Pompeani took no issue with the trial judge's assessment of damages and Bonik did not cross-appeal from it. Accordingly, I see no reason not to accept the trial judge's finding that the loss of the deal resulted in a $350,000 loss to Pompeani.

Disposition

48 I would allow the appeal, with costs, set aside the judgment at trial and in its place enter judgment for the appellant for $350,000 and his costs of the action. The appellant is entitled to the immediate return of his $65,600 deposit, with interest.

Appeal allowed.

TAB 11

2004 BCSC 1033
British Columbia Supreme Court

Café Orca v. Cashline Inc.

2004 CarswellBC 1815, 2004 BCSC 1033, [2004] B.C.J. No. 1643, 132 A.C.W.S. (3d) 891, 48 B.L.R. (3d) 228

Café Orca and Javad Hassani (Plaintiffs) and Cashline Inc. (Defendant)

Ross J.

Heard: June 23-24, 2004
Judgment: August 5, 2004
Docket: Vancouver S036080

Counsel: Javad Hassani for himself
E. Lilac Bosma for Defendant

Subject: Contracts; Civil Practice and Procedure

Headnote

Contracts --- Construction and interpretation — Words and phrases — General principles

Plaintiff entered into agreement with defendant to purchase automatic banking machine and to retain services of defendant as network service provider for period of five years — Defendant operated as intermediary between merchants such as plaintiff who placed bank machines on their properties and Interac system — Agreement provided that plaintiff would receive surcharge fee of $1.50 from defendant for each "bona fide" transaction conducted using the machine — Defendant took position that it was not required to remit surcharge fee to plaintiff with respect to American customers using machine as defendant did not receive any surcharge in relation to transactions by those customers as they were on Cirrus system — Plaintiff brought action for damages for breach of contract — Action allowed — Agreement clearly provided that plaintiff was to receive surcharge fee for each bona fide transaction — Bona fide transaction was not defined term but there was no suggestion in agreement that transactions carried out by American customers using Cirrus system were not bona fide transactions — For purposes of agreement bona fide transactions were completed transactions — No basis existed in language of agreement for limitation proposed by defendant — Defendant was confusing question of payment that it was entitled to receive from third parties with question of payment that it was contractually bound to make to plaintiff — Defendant could have contracted to pay surcharge fee to plaintiff in relation to all bona fide transactions except those involving American Cirrus customers or to pay surcharge fee only in those cases in which such fees were payable to defendant but it did not do so.

Contracts --- Performance or breach — Breach — Fundamental breach — What constitutes

Plaintiff entered into agreement with defendant to purchase automatic banking machine and to retain services of defendant as network service provider for period of five years — Defendant operated as intermediary between merchants such as plaintiff who placed bank machines on their properties and Interac system — Agreement provided that plaintiff would receive surcharge fee of $1.50 from defendant for each "bona fide" transaction conducted using the machine — Defendant took position that it was not required to remit surcharge fee to plaintiff with respect to American customers using machine as defendant did not receive any surcharge in relation to transactions by those customers as they were on Cirrus system — Plaintiff received revenue from surcharges amounting to $14,356.60 — Surcharges for American Cirrus transactions would have amounted to additional $3,199.50 — Plaintiff treated agreement as repudiated by defendant and brought action for damages for breach of contract — Defendant brought counterclaim for damages for lost revenue — Action allowed; counterclaim dismissed — Plaintiff was entitled to treat contract as at end — Breach was fundamental — Magnitude of fees not paid to plaintiff in relation to American Cirrus customers was such as to frustrate commercial purpose of contract.

ACTION for damages for breach of contract; COUNTERCLAIM by defendant for damages for lost revenue.

***Ross J.*:**

Introduction

1 The plaintiff, Javad Hassani, entered into a contract with the defendant, Cashline Inc., by which he agreed to purchase an automatic banking machine ("ABM") from Cashline, and to retain the services of Cashline as Network Services Provider for a period of five years. A dispute arose between the parties with respect to the compensation to be paid to Mr. Hassani pursuant to the agreement. Ultimately, Mr. Hassani elected to treat the agreement as at an end and sued for damages. Cashline issued a counterclaim, denying any breach and asserting, in the alternative, that if there was a breach it was not a fundamental breach entitling Mr. Hassani to treat the contract as repudiated. Cashline therefore sued for damages representing its lost revenue over the balance of the agreement.

Facts

2 Mr. Hassani is the proprietor of a small business called Café Orca. The Café is located in the lobby of the Hampton Inn Hotel, at 101 Robson Street, Vancouver, British Columbia, near B.C. Place. On January 2, 2002, Mr. Hassani entered into an agreement in writing with the defendant, Cashline Inc., in relation to an automatic banking machine (the "Agreement").

3 Pursuant to the Agreement, Mr. Hassani purchased one ABM from Cashline for $7,803.30. Mr. Hassani assumed the responsibility to provide a dedicated 110V power source to the site as well as a dedicated phone jack.

4 The Agreement provided that Mr. Hassani would be responsible for all operating expenses including a communication line, long distance charges, maintenance and repair, terminal consumables, insurance and power. Mr. Hassani was responsible for maintaining the cash supply or float, which in this case amounted to $10,000. He agreed to keep the terminal powered, supplied with funds and transaction paper and connected to a telephone line so that the ABM would be constantly available for use by customers.

5 Clause 6 provides:

> 6. The Purchaser hereby retains Cashline as Network Service Provider to provide terminal maintenance and network servicing for a term of five (5) years from the date hereof.

6 In addition, Mr Hassani agreed to pay fees to Cashline for maintenance and repair services.

7 The interpretation of Clauses 10 and 11 form the crux of the dispute. These clauses provide:

> 10. The Surcharge Fee chargeable to customers of the Terminal is $1.50. The Purchaser may not raise the Surcharge Fee without the prior written consent of Cashline. Cashline will apply an administration fee for a Surcharge Fee change (see "Schedule C").
>
> 11. The Purchaser shall receive the Surcharge Fee of $1.50 for each bona fide Terminal transaction.

8 Mr. Hassani contends that the Agreement calls for him to receive a fee from Cashline of $1.50 for each bona fide or approved transaction. Cashline submits that it is not required to remit the $1.50 fee with respect to American customers using the Cirrus platform because Cashline does not receive any surcharge in relation to the transactions of these customers.

9 Cashline operates as an intermediary between the merchants and others who place an ABM on their property and the "switch" to the Interac system. Patrick Grove, the President of Cashline, described the function of the "switch". The role of the "switch" is to facilitate transactions, providing a flow of information from the ABM to Interac and from there to the correct financial institution, then back to the ABM.

Analysis

28 The first issue is whether Cashline is in breach of the Agreement. Mr. Hassani submits that the Agreement provides that he is to receive a $1.50 surcharge fee with respect to each bona fide terminal transaction. It was his submission that the qualification "bona fide" referred to transactions other than where the card was refused or the transaction not completed in which case no surcharge fee would arise. Thus, it was his submission that the Agreement provides that he is to receive a payment of $1.50 for each approved or completed transaction.

29 Cashline submits that the Agreement does not support this interpretation. It is Cashline's submission that the plaintiff's proposed construction amounts a contractual warranty that a surcharge fee will be payable by each customer. Cashline submits that the Agreement provides that the reference to "the Surcharge Fee" is to those circumstances in which a surcharge fee is payable by the customer.

30 Cashline submits that because the American Cirrus customers do not pay a surcharge, Mr. Hassani is not entitled to receive any compensation in relation to transactions by those customers.

31 It is my conclusion that the plain reading of the Agreement supports the construction proposed by Mr. Hassani. Clauses 10 and 11 deal with the consideration that Mr. Hassani is to receive. Clause 11 provides that the Purchaser, [Mr. Hassani], shall receive [from Cashline] "the Surcharge Fee of $1.50 for each bona fide transaction".

32 "Bona fide transaction" is not a defined term; however, there is no suggestion that the Cirrus transactions as a category are not bona fide transactions. "Bona fide" is defined in the Oxford dictionary as meaning genuine or real. I find that bona fide transactions for purposes of the Agreement are approved or completed transactions. Mr. Hassani is not entitled to receive a fee with respect to transactions that did not complete, for example, where the card was refused. He is entitled to receive a fee from Cashline with respect to each bona fide transaction.

33 I find that there is no basis in the language of the Agreement of the limitation proposed by Cashline. Indeed, there is no mention whatsoever of Cirrus customers.

34 Cashline's submissions with respect to the construction of the Agreement confuses the question of the payment that Cashline is entitled to receive from third parties, a matter of contractual relations between itself and the third parties, with the question of the payment that it is contractually bound to make to the Purchaser, in this case Mr. Hassani, pursuant to the Agreement.

35 Of course Cashline could have contracted to pay surcharge fees to the Purchaser only in those cases in which such fees were payable to Cashline, or to pay surcharge fees in relation to all bona fide transactions except those involving American Cirrus customers, but it has not done so in this Agreement.

36 I do not find that there is any ambiguity in the Agreement with respect to this issue. However, if there is any ambiguity, it should be resolved in favour of Mr. Hassani. Cashline was the author of the Agreement. The parties were not on equal footing in that Cashline had knowledge of the technical matters in relation to the organization of Interac transactions, in particular in relation to the rules adopted with respect to Cirrus transactions. It chose not to share that knowledge with Mr. Hassani.

37 In the result, I find that the terms of the Agreement required Cashline to pay a surcharge fee of $1.50 to Mr. Hassani for each bona fide or approved transaction, including the transactions of American customers using the Cirrus platform. Cashline was in breach of the Agreement in failing to pay Surcharge Fees with respect to the Cirrus clients. Mr. Hassani is entitled to recover damages in the amount of $3,199.50 plus interest.

Fundamental Breach

38 The next issue is whether the breach was of a fundamental term, such as to justify Mr. Hassani in treating the contract as repudiated by Cashline.

39 The test was stated by Wallace JA, speaking for the court, in *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349 (B.C. C.A.), at 358 as follows:

> The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract, thereby entitling the innocent party to be relieved from future performance.

40 Therefore, the proper inquiry is whether, in all of the circumstances, Cashline's refusal to pay fees to Mr. Hassani in relation to the American Cirrus customers demonstrated a refusal to perform the contract or a breach that frustrated the commercial purpose of the contract.

41 The question is one of degree. Mr. Hassani was investing a substantial amount of capital both in relation to the one time expenses involved in the purchase of the machine and the site preparation and the ongoing expenses, in particular the provision of the $10,000 float. In addition, he was providing his labour to keep the machine constantly available for use by customers. The commercial purpose of the contract must be assessed in relation to the return on this investment of labour and capital. It is against that backdrop that the magnitude of the breach must be considered.

42 Table 1 summarizes the number of approved transactions, surcharge paid, Cirrus transactions and the surcharge not paid:

TABLE 1

Month	Approved Transactions	Surcharge Paid	Cirrus	Surcharge Not Paid
January 02	237	358.50	38	57.00
February 02	647	969.00	53	79.50
March 02	337	510.00	129	193.50
April 02	482	723.00	68	102.00
May 02	449	673.50	149	223.50
June 02	502	754.50	160	240.00
July 02	563	844.50	212	318.00
August 02	408	613.50	195	292.50
September 02	537	808.50	126	189.00
October 02	668	1,002.00	101	151.50
November 02	579	868.50	87	130.50
December 02	467	700.50	63	94.50
January 03	534	801.00	102	153.00
February 03	736	1,104.00	88	132.00
March 03	761	1,141.50	90	135.00
April 03	730	1,096.50	123	184.50
May 03	569	856.50	220	330.00
June 03	365	547.50	129	193.50
TOTAL:	**9571**	**14,373.00**	**2,133**	**3,199.50**

43 I have concluded that the magnitude of the fees not paid to Mr. Hassani in relation to the American Cirrus customers in the circumstances was such magnitude as to frustrate the commercial purpose of the contract. Accordingly, I find that the breach was of fundamental. Mr. Hassani was entitled to treat the contract as at an end. The counterclaim is, therefore, dismissed.

44 Given the conclusion I have reached with respect to the contract, it is not necessary to consider the alternative argument with respect to negligent misrepresentation.

45 This matter was conducted pursuant to Rule 66. Mr. Hassani is entitled to his costs as stipulated by that Rule.

TAB 12

1999 CarswellOnt 3171
Supreme Court of Canada

Guarantee Co. of North America v. Gordon Capital Corp.

1999 CarswellOnt 3171, 1999 CarswellOnt 3172, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60, [2000] I.L.R. I-3741, 126 O.A.C. 1, 15 C.C.L.I. (3d) 1, 178 D.L.R. (4th) 1, 247 N.R. 97, 39 C.P.C. (4th) 100, 49 B.L.R. (2d) 68, 91 A.C.W.S. (3d) 796

Guarantee Company of North America, Appellant v. Gordon Capital Corporation, Respondent and Chubb Insurance Company of Canada and Laurentian General Insurance Company Inc., Respondents

L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache JJ.

Heard: June 17, 1999
Judgment: October 15, 1999
Docket: 26654

Proceedings: reversing (1998), 157 D.L.R. (4th) 643 (Ont. C.A.); reversing (1997), 32 O.R. (3d) 428 (Ont. Gen. Div.)

Counsel: *Kenneth W. Scott, Q.C.*, *James D. Patterson* and *Sharon C. Vogel*, for appellant.
Thomas G. Heintzman, Q.C., *R. Paul Steep* and *Darryl A. Cruz*, for respondent, Gordon Capital Corporation.
Jamieson Halfnight, *Glynis Evans* and *Ian H. Fraser*, for respondents, Chubb Insurance Company of Canada and Laurentian General Insurance Company Inc.

Subject: Insolvency; Civil Practice and Procedure; Contracts; Insurance

Headnote

Bankruptcy

Limitation of actions --- Actions in contract or debt — Actions on insurance policies — When time begins to run

Investment dealer brought action against insurer for payment under fidelity insurance contract — Insurer brought successful motion for summary judgment dismissing action — Motions judge held that action was not brought within 24 months of discovery of loss, as required by insurance contract — Appeal by dealer allowed — Court of appeal held that where insurer repudiates contract, insured is excused from affirmative future obligations contained within contract, including limitation period — Appeal by insurer allowed — Motions judge did not err in determining that case was proper one for summary judgment — No policy reason exists to limit construction approach to fundamental breach to exclusion clauses alone — Under construction approach, limitation period in insurance contract survived wrongful rescission of contract — Intention of parties was that limitation clause was to include process of bringing a claim against insurer in circumstances of contractual breach — It would not be unconscionable, unfair, unreasonable or otherwise contrary to public policy to uphold intention of parties.

Insurance --- Actions on policies — Practice and procedure — Miscellaneous issues

Investment dealer brought action against insurer for payment under fidelity insurance contract — Insurer brought successful motion for summary judgment dismissing action — Motions judge held that action was not brought within 24 months of discovery of loss, as required by insurance contract — Appeal by dealer allowed — Court of appeal held that where insurer repudiates contract, insured is excused from affirmative future obligations contained within contract, including limitation period — Appeal by insurer allowed — Motions judge did not err in determining that case was proper one for summary judgment — No policy reason exists to limit construction approach to fundamental breach to exclusion clauses alone — Under construction approach, limitation period in insurance contract survived wrongful rescission of contract — Intention of parties was that limitation clause was to include process of bringing a claim against insurer in circumstances of contractual breach — It would not be unconscionable, unfair, unreasonable or otherwise contrary to public policy to uphold intention of parties.

Prescription des actions --- Action en matière de contrat ou de créance — Actions relatives à des polices d'assurance — Quand le délai commence à courir

Maison de courtage de valeurs mobilières a intenté une action en paiement contre l'assureur, en vertu d'une police d'assurance contre les détournements — Compagnie d'assurance a présenté une motion visant à obtenir un jugement sommaire rejetant l'action et elle a obtenu gain de cause — Juge des requêtes a conclu que l'action n'avait pas été intentée dans les 24 mois suivant la découverte du sinistre, tel qu'exigé par le contrat d'assurance — Pourvoi formé par la maison de courtage a été accueilli — Cour d'appel a jugé que lorsque le contrat a été résilié par l'assureur, l'assuré est libéré de ses obligations futures, incluant le délai de prescription — Pourvoi formé par l'assureur a été accueilli — Juge des requêtes n'a pas commis d'erreur en jugeant que le dossier était suffisant pour rendre un jugement sommaire — Aucune raison de principe de restreindre aux seules clauses d'exclusion la façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation — Selon la méthode d'interprétation, les délais de prescription contractuels survivent à la résiliation injustifiée du contrat — Intention des parties était d'inclure un processus de réclamation contre l'assureur en cas de rupture du contrat — Il ne serait pas inique, injuste, déraisonnable ou par ailleurs contraire à l'ordre public de respecter l'intention des parties concernant l'application du délai de prescription contractuel.

Assurance --- Actions relatives à des polices — Pratique et procédure — Questions diverses

Maison de courtage de valeurs mobilières a intenté une action en paiement contre l'assureur, en vertu d'une police d'assurance contre les détournements — Compagnie d'assurance a présenté une motion visant à obtenir un jugement sommaire rejetant l'action et elle a obtenu gain de cause — Juge des requêtes a conclu que l'action n'avait pas été intentée dans les 24 mois suivant la découverte du sinistre, tel qu'exigé par le contrat d'assurance — Pourvoi formé par la maison de courtage a été accueilli — Cour d'appel a jugé que lorsque le contrat a été résilié par l'assureur, l'assuré est libéré de ses obligations futures, incluant le délai de prescription — Pourvoi formé par l'assureur a été accueilli — Juge des requêtes n'a pas commis d'erreur en jugeant que le dossier était suffisant pour rendre un jugement sommaire — Aucune raison de principe de restreindre aux seules clauses d'exclusion la façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation — Selon la méthode d'interprétation, les délais de prescription contractuels survivent à la résiliation injustifiée du contrat — Intention des parties était d'inclure un processus de réclamation contre l'assureur en cas de rupture du contrat — Il ne serait pas inique, injuste, déraisonnable ou par ailleurs contraire à l'ordre public de respecter l'intention des parties concernant l'application du délai de prescription contractuel.

An investment dealer entered into a fidelity insurance contract with its insurer, which covered dishonest and fraudulent acts committed by the dealer's employees. The dishonest borrowings of an employee led to a loss to the dealer of approximately $90,000. The dealer submitted a proof of loss to the insurer. The insurer repudiated the insurance contract, stating that the dealer had made a material misrepresentation in its application for the insurance contract. In its application, the dealer had indicated that customer accounts would be reviewed on a monthly basis by a partner, officer or other designated employee not involved with the relevant account. The proof of loss filed by the dealer indicated that the accounts which led to the loss were under the sole responsibility of the dishonest employee and were not subject to review. The dealer denied the validity of the rescission, and brought an action against the insurer. The insurer brought a successful motion for summary judgment dismissing the action. The motions judge held that the action was not brought within 24 months of the discovery of the loss, as required by the insurance contract. The motions judge held that even if the rescission was wrongful, it did not prevent the insurer from relying on the limitation provision in the contract. The dealer brought an appeal, claiming that the insurer was not entitled to rely on the limitation period contained within the insuring contract after having repudiated the contract. The appeal was allowed. The court of appeal held that where an insurer repudiates a contract, the insured is excused from affirmative future obligations contained within the contract, including limitation periods. The insurer brought an appeal.

Held: The appeal was allowed.

All that was required under the insurance contract for discovery of loss were sufficient facts to cause a reasonable person to assume that a loss of a type covered by the contract would be incurred. The loss did not have to be conclusively determined to be covered in order for discovery to occur. The motions judge did not err in determining that the case was a proper one for summary judgment. The motions judge inferred that it could reasonably be assumed that a loss of the type covered by the contract had occurred in July 1991, as the dealer knew that its employee had acted fraudulently and the dealer had already incurred interest charges in respect of a $90,000 loan to meet its regulatory capital obligations. The undisputed facts in the case strongly supported this inference. The dealer's filing of a notice of loss was a strong indication that the dealer reasonably assumed that a loss covered by the contract had been or would be incurred. The motions judge's conclusion that the affidavits filed on the motion did not raise a credibility issue sufficient to require a trial was not unreasonable, particularly since the true

test of discoverability is an objective one. On a proper reading of the contract, a loss of the type covered was simply a loss resulting from employee dishonesty with the presumption that the manifest intent of such behaviour was personal gain. The relevant provision in the contract excluded the requirement of actual loss and thus defeated the dealer's argument that loss must be incurred for the limitation period to commence. There was no legal issue to be resolved at trial.

For the purposes of the summary judgment motion, the insurer agreed to proceed on the basis that its rescission of the contract was wrongful. The issue, therefore, was whether the wrongful rescission precluded the insurer from relying on the contractual limitation period. There is no principled distinction between clauses excluding liability and those setting out the applicable limitation periods. The courts should respect the bargain made by the parties in both cases. There is no policy reason to limit the construction approach to fundamental breach to exclusion clauses alone. Under the construction approach, the limitation period in the contract survived the wrongful rescission of the contract. Commercial reality was the best indicator of the contractual intention of the parties. If the time limitation clause could not be invoked by the insurer, once the insurer had taken steps to enforce the contractual provision permitting rescission on the basis of a purported misrepresentation by the dealer, it would lead to an absurd result. The insurer would be placed in the untenable position of subjecting itself to a longer statutory limitation period than would otherwise apply in circumstances where coverage had been denied for other reasons. Commercial reality could not accommodate the implication that the insurer agreed to a bargain whereby it would be exposed to a longer period of uncertainty concerning future claims from an insured who has purportedly engaged in misrepresentation than one who has complied with all of the contractual terms. The intention of the parties was that the limitation clause was to include the process of bringing a claim against the insurer in circumstances of contractual breach, whether fundamental or otherwise. The parties were sophisticated commercial actors, and were both represented by counsel. It would not be unconscionable, unfair, unreasonable or otherwise contrary to public policy to uphold the intentions of the parties concerning the operation of the contractual limitation period.

Une maison de courtage en valeurs mobilières avait conclu, avec son assureur, un contrat d'assurance qui fournissait une protection contre les actes malhonnêtes ou frauduleux commis par ses employés. Par la suite, elle a subi une perte d'environ 90 000 $ en raison d'emprunts non autorisés effectués par un de ses employés. La maison de courtage a soumis une preuve de sinistre à l'assureur, mais celui-ci a résilié le contrat au motif que la maison de courtage avait fait de fausses déclarations sur des faits importants dans sa demande de police. Dans cette demande, la maison de courtage avait indiqué que les comptes clients feraient l'objet d'une vérification mensuelle par un associé, un dirigeant ou un autre employé désigné n'ayant rien à voir avec le compte concerné. Dans sa preuve de sinistre, la maison de courtage a indiqué que les comptes ayant entraîné la perte relevait uniquement de la responsabilité de l'employé malhonnête et n'étaient pas sujets à révision. La maison de courtage a contesté la validité de la résiliation de la police et a intenté une action contre l'assureur. Ce dernier a déposé, avec succès, une requête pour jugement sommaire en rejet d'action. Le juge ayant entendu la requête a conclu que l'action n'avait pas été intentée à l'intérieur du délai de 24 mois suivant la connaissance du sinistre, comme le contrat d'assurance le prévoyait. Il a statué que même si la résiliation était injustifiée, cela n'avait pas pour effet d'empêcher l'assureur d'invoquer la disposition relative à la prescription stipulée dans le contrat. La maison de courtage a porté cette décision en appel, arguant que l'assureur ne pouvait être admis à invoquer le délai de prescription prévu dans le contrat d'assurance après avoir résilié le contrat. La Cour d'appel a accueilli l'appel, estimant que lorsqu'un assureur résilie un contrat, l'assuré est libéré de ses obligations futures stipulées au contrat, y compris celles qui concernent les délais de prescription. L'assureur a formé un pourvoi à l'encontre de cette décision.

Arrêt: Le pourvoi a été accueilli.

Tout ce que le contrat d'assurance exigeait en ce qui concernait la découverte d'un sinistre consistait en l'existence de faits suffisants pour amener une personne raisonnable à supposer qu'un sinistre du genre visé par la police pouvait survenir. Il n'était pas nécessaire de décider péremptoirement que le sinistre était visé par la police pour qu'il y ait découverte. Le juge ayant entendu la requête n'a commis aucune erreur en décidant que l'affaire donnait ouverture à un jugement sommaire. Il a conclu que l'on pouvait raisonnablement supposer qu'un sinistre du genre couvert par la police s'était produit en 1991, soit au moment où la maison de courtage avait appris que son employé avait agi frauduleusement et où elle avait dû payer des intérêts sur un prêt de 90 000 $ qu'elle avait contracté pour satisfaire aux obligations réglementaires en matière de capitalisation. En l'espèce, les faits non contestés étayaient fortement cette conclusion. Le dépôt d'un avis de sinistre par la maison de courtage constituait une indication convaincante que cette dernière supposait raisonnablement qu'un sinistre visé par la police était survenu ou surviendrait. La décision du juge ayant entendu la requête selon laquelle les déclarations sous serment produites au soutien de la requête ne soulevaient pas une question de crédibilité nécessitant la tenue d'un procès n'était pas déraisonnable, particulièrement

à la lumière du fait que le véritable critère de la possibilité de découvrir est un critère objectif. Selon une juste interprétation de la police, un sinistre du genre visé correspondait simplement au sinistre résultant de la malhonnêteté d'un employé qui avait présumément l'intention manifeste de réaliser un gain personnel. La disposition pertinente de la police excluait la nécessité d'établir un sinistre réel et faisait donc échec à la prétention de la maison de courtage selon laquelle le délai de prescription ne commençait à courir qu'au moment où le sinistre était survenu. Il n'existait aucune question de droit à trancher dans le cadre d'un procès.

Pour que la requête pour jugement sommaire soit entendue, l'assureur a accepté qu'il soit tenu pour pour acquis que sa résiliation du contrat n'était pas fondée en droit. Par conséquent, la question consistait à déterminer si la résiliation injustifiée du contrat par l'assureur avait eu pour effet d'empêcher celui-ci d'invoquer le délai de prescription prévu dans la police. Il n'existe aucun principe établissant une distinction entre les dispositions qui excluent la responsabilité et celles qui fixent un délai de prescription. Dans les deux cas, les tribunaux devraient respecter le contrat intervenu entre les parties. Il n'existe, en principe, aucune raison de restreindre aux seules clauses d'exclusions la façon d'aborder l'inexécution fondamentale sous l'angle de l'interprétation. Suivant cette méthode, le délai de prescription prévu au contrat survit à la résiliation injustifiée. La réalité commerciale constituait le meilleur indicateur de l'intention des parties au contrat. Refuser à l'assureur, après qu'il ait pris les mesures pour rendre exécutoire la clause du contrat permettant la résiliation fondée sur les déclarations apparemment inexactes de la maison de courtage, d'invoquer le délai de prescription entraînerait un résultat absurde. L'assureur se trouverait alors dans la position intenable de s'assujettir lui-même à un délai de prescription légal plus long que celui qui s'appliquerait par ailleurs en cas de refus d'indemnisation pour d'autres motifs. La réalité commerciale était incompatible avec ce qu'impliquait l'argument selon lequel l'assureur aurait accepté par contrat de se voir exposer à une plus longue période d'incertitude en ce qui concerne les réclamations futures d'un assuré qui aurait présumément fait une déclaration inexacte qu'en ce qui concerne celles d'un assuré ayant respecté toutes les modalités du contrat. Les parties voulaient que la clause portant sur la prescription s'applique à l'engagement d'une action contre l'assureur à la suite d'une inexécution de contrat, que celle-ci soit fondamentale ou autre. Les parties étaient des acteurs commerciaux avisés et étaient toutes deux représentées par des avocats. Il ne serait pas irrationnel, injuste, déraisonnable ou par ailleurs contraire à l'ordre public de respecter l'intention des parties concernant l'application du délai de prescription contractuel.

APPEAL by insurer from judgment reported at (1998), 157 D.L.R. (4th) 643, 108 O.A.C. 46, [1998] I.L.R. I-3555, 38 O.R. (3d) 563, 3 C.C.L.I. (3d) 202 (Ont. C.A.), allowing dealer's appeal from judgment reported at (1997), 33 B.L.R. (2d) 310, 32 O.R. (3d) 428, 31 O.T.C. 325 (Ont. Gen. Div.), granting insurer's motion for summary judgment dismissing dealer's action.

POURVOI formé par l'assureur à l'encontre de l'arrêt publié à (1998), 157 D.L.R. (4th) 643, 108 O.A.C. 46, [1998] I.L.R. I-3555, 38 O.R. (3d) 563, 3 C.C.L.I. (3d) 202 (C.A. Ont.), accueillant le pourvoi de la maison de courtage contre le jugement publié à (1997), 33 B.L.R. (2d) 310, 32 O.R. (3d) 428, 31 O.T.C. 325 (Div. Gén. Ont.), accueillant la requête de l'assureur demandant un jugement sommaire rejetant l'action de la maison de courtage.

The judgment of the court was delivered by *Iacobucci, Bastarache JJ.*:

1 This appeal deals with the appropriateness of using summary judgment proceedings and with the issue of whether a contractual limitation period survives a wrongful rescission of the contract in dispute. On February 17, 1997, O'Brien J. of the Ontario Court (General Division), sitting as a motions judge, granted summary judgment in favour of the Guarantee Company of North America ("Guarantee"). The judgment declared that Gordon Capital Corporation ("Gordon") had failed to commence legal proceedings for recovery of a loss under Financial Institution Bond No. 401642 (the "Bond") within 24 months from the discovery of "facts which would cause a reasonable person to assume that a loss of a type covered by this bond has been or will be incurred," pursuant to section 3 of the Bond. The Court of Appeal of Ontario set aside the judgment. It determined that Guarantee was precluded from relying on section 3 because it had wrongfully rescinded the said Bond; it also determined that the question of when a loss within the meaning of the Bond was discovered was a triable issue and should be left for determination at trial.

2 There are therefore two issues before this Court. The first is whether the Court of Appeal should have interfered with the motion judge's determination that the record was sufficient to deal with Guarantee's summary judgment motion; the second

or details of loss may not then be known"; this is also inconsistent with Gordon's argument that the loss must be incurred. It specifies that the limitation runs from the first evidence establishing discovery.

35 We agree that there is no legal issue to be resolved at trial. The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding. The motion judge found that the undisputed facts met the definition of discovery of loss under the Bond and that a reasonable person would have assumed that they were sufficient to establish that a loss of a type covered by the Bond had been or would be incurred. The Court of Appeal did not provide sufficient reasons on this issue for us to comment. It did not describe the factual disputes in the case, except to say that the interest paid on the loan of $90,000,000 before June 26, 1991 may not have been a covered loss. As mentioned earlier, this last comment is inconsistent with the fact that the Bond does not require that facts known by the insured be ultimately proved to relate to an actual recoverable loss. With regard to the alleged uncertainty of the term "loss," the Court of Appeal agreed with O'Brien J. We are also of the view that no issue for trial has been established in this regard.

36 We would therefore conclude that the motions judge committed no error in determining that this was a proper case for summary judgment. Gordon has not met the evidentiary burden to show there is a genuine issue for trial.

(2) Was Guarantee Precluded from Relying on the Limitations Clause in Section 5(d) of the Bond by Reason of Its Rescission of the Bond?

37 For the purposes of bringing a summary motion, Guarantee agreed to proceed on the basis that its rescission of the Bond was wrongful. Accordingly, the issue to be determined on the motion was the legal question of whether wrongful rescission precluded Guarantee from relying on the contractual limitation period contained in the Bond as a defence to Gordon's claim for coverage.

38 Given both parties' assumption that Guarantee's rescission was wrongful, it is not necessary to address the effect of the contract's limitations period assuming a valid rescission. However, we believe it is worthwhile, both as background and to eliminate some apparent confusion, to address the distinction between rescission and repudiation. This done, we will turn to the question of whether a limitations clause can survive a wrongful rescission.

(a) The Distinction Between Rescission and Repudiation

39 A fundamental confusion seems to exist over the meaning of the terms "rescission" and "repudiation." This confusion is not a new one, as it has plagued common law jurisdictions for years. Rescission is a remedy available to the representee, *inter alia*, when the other party has made a false or misleading representation. A useful definition of rescission comes from Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (U.K. H.L.) at p. 781:

> Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties *in status quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into.

See similarly G. H. L. Fridman, *The Law of Contract in Canada* (3rd ed. 1994), at p. 807.

40 Repudiation, by contrast, occurs "by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands Ltd.* ([1923] 4 D.L.R. 751 (British Columbia P.C.)), that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right" (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "'remains in being for the future on both sides. Each [party] has a right to sue for damages for *past or future breaches*'" (emphasis in original): *Cheshire, Fifoot & Furmston's Law of Contract* (12th ed. 1991), by M.P. Furmston at p. 541. If, however, the non-repudiating

party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

41 So much is relatively clear. Problems have arisen, however, from misuse of the word "rescission" to describe an accepted repudiation. In *Langille v. Keneric Tractor Sales Ltd.*, [1987] 2 S.C.R. 440 (S.C.C.) at p. 455, Wilson J., writing for the Court, addressed the distinction as follows:

> The modern view is that when one party repudiates the contract and the other party accepts the repudiation the contract is at this point terminated or brought to an end. The contract is not, however, rescinded in the true legal sense, i.e., in the sense of being voided *ab initio* by some vitiating element. The parties are discharged of their prospective obligations under the contract as from the date of termination but the prospective obligations embodied in the contract are relevant to the assessment of damages: see *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.), and *Moschi v. Lep Air ServicesLtd.*, [1973] A.C. 331, [1972] 2 All E.R. 393 (H.L.). [Emphasis added.]

See similarly Waddams, *supra*, at para. 629; Furmston, *supra*, at p. 287, note 12; G.H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 341; S. Williston, *A Treatise on the Law of Contracts*, (3rd ed. 1970), by W.H.E. Jaeger, vol. 12, § 1454A, at p. 13; *Sail Labrador Ltd. v. Navimar Corp.* (1998), [1999] 1 S.C.R. 265 (S.C.C.) at para. 31 and 50.

42 However, merely clarifying the distinction between rescission and an accepted repudiation does not end the discussion. Since "rescission" has frequently been used to describe an accepted repudiation, courts must be sensitive to the potential for misuse. To that end, courts must analyse the entire context of the contract and give effect, where possible, to the intent of the parties. If they intended "rescission" to mean "an accepted repudiation," then the contract should be interpreted as such. For example, in *Mills v. S.I.M.U. Mutual Insurance Assn.*, [1970] N.Z.L.R. 602 (New Zealand C.A.), the court held that a clause stating that in the event of false statements the policy "shall be void," was in fact a repudiation clause. Crucial to the court's reasoning in that case was the fact that the clause in question provided for forfeiture of premiums. Turner J. therefore concluded, at p. 609, that

> the policy does not provide that the consequences of an untrue statement shall be that the policy shall be deemed void *ab initio*, as if it had never come into existence, for the premium is to be forfeited ... I therefore construe the clause to mean that an untrue statement shall entitle the respondent to repudiate liability under the policy, while keeping the premium.

Of course, contrary to the facts in this appeal, the actual term "rescission" was not used in *Mills*. Nonetheless, we must always examine whether the use of the word rescission is indeed consistent with the parties' intent.

43 Before turning to the issue of intent, however, one must determine whether rescission is even available. As Treitel notes regarding the law in England, *supra*, at p. 347,

> Before the Misrepresentation Act it was clear that a person could rescind a contract for a misrepresentation which did *not* form part of the contract; but it was doubtful whether this right to rescind survived where the misrepresentation was later incorporated into the contract as one of its terms. [Emphasis in original.]

However, the *Misrepresentation Act 1967* (U.K.), 1967, c. 7, s. 1, cleared up that question in England, providing that "a person shall be entitled to rescind notwithstanding that the misrepresentation has become a term of the contract" (Treitel, *supra*, at p. 347).

44 In Canada, the issue is somewhat less clear. The state of the law is best summarized by Waddams, *supra*, at para. 427:

> If the [misrepresentation] is a term of the contract ... the mistaken party is entitled to damages as for breach of contract. Whether the party is further entitled to set aside the transaction and demand restitution of the contractual benefits transferred will depend upon ... whether the breach is "substantial" or "goes to the root of" the contract.

A breach that is "substantial" or "goes to the root of" the contract is often also described as a material breach; see, for example, Fridman, *supra*, at p. 293: "A misrepresentation is a misstatement of some fact which is material to the making or inducement of

TAB 13

Anger & Honsberger Law of Real Property, 3rd Edition

Anger & Honsberger Law of Real Property, 3rd Ed. § 7:31

Anger & Honsberger Law of Real Property, 3rd Edition |
Anne Warner La Forest

Part II. Estates

Chapter 7. Leaseholds
Anne Warner La Forest

VI. Termination

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§ 7:31. Forfeiture Generally

Legal Topics

A forfeiture may arise and the tenancy thereby determine by the breach of a condition which stipulates the cesser of the term upon the occurrence of a prescribed event, or of a covenant that is made conditional by the terms of the lease, and by the non-payment of rent in certain cases. A breach of condition on which the tenancy expressly has been made to depend gives the lessor the right to avoid a lease and re-enter without an express proviso for re-entry. The lessor can only re-enter on a breach of a covenant when the right has been expressly provided for in the lease or when the right has been given by statute. A provision in a lease requiring the lessee to do or not do a certain thing will in general be construed as a covenant unless the word “condition” in some form is used or implied.

A general rule of interpretation of forfeiture clauses is that courts will always lean towards a strict construction and, thus, plaintiffs seeking to

TAB 14

2002 SKQB 96
Saskatchewan Court of Queen's Bench

Regina Airport Authority v. Lumsden Aero Ltd.

2002 CarswellSask 140, 2002 SKQB 96, 112 A.C.W.S. (3d) 357,
218 Sask. R. 110, 45 C.E.L.R. (N.S.) 173, 50 R.P.R. (3d) 114

Regina Airport Authority (Applicant) and Lumsden Aero Ltd. (Respondent)

Lumsden Aero Ltd. (Applicant) and Regina Airport Authority (Respondent)

Hunter J.

Judgment: March 14, 2002
Docket: Regina Q.B.G. 2833/01, Q.B.G. 1868/01

Counsel: *L.D. Andrychuk*, *Q.C.*, for Regina Airport Authority
Norman Colhoun, for Lumsden Aero Ltd.

Subject: Property; Environmental; Civil Practice and Procedure; Corporate and Commercial

Headnote

Landlord and tenant --- Overholding — Action for possession

Applicant airport authority ran airport on federal land — Respondent company, LA Ltd., carried on crop dusting business in own hanger and had ground lease with applicant — Lease effectively banned use of mixing and loading chemicals on airport site — Applicant's maintenance manager noticed evidence of spills of liquids and empty containers outside respondent's hanger and near catch basin that connected to local creek — Applicant expressed concern to LA Ltd. about spills and warned that if pollution was not addressed, ground lease could be terminated — Federal environmental authorities became involved, catch basin was pumped out and samples taken which indicated high levels of substances toxic to fish — Applicant gave LA Ltd. formal notice of default — LA Ltd. denied that its activities were source of any pollution and refused to refrain from mixing chemicals on site — Applicant applied for writ of possession — Application granted — On all evidence LA Ltd. was using leased site for non-permitted use of mixing chemicals, was source of contaminants in catch basin and had not complied with Fisheries Act by allowing contaminants to pollute water in creek — Applicant therefore had right to terminate lease, having given all proper notices of default — Fact that LA Ltd. had made no effort to present containment plan for small spills and continued to deny it was polluting made termination only effective remedy — Fisheries Act, R.S.C. 1985, c. F-14.

Landlord and tenant --- Forfeiture and re-entry — Relief against forfeiture — Grounds for relief

Applicant airport authority ran airport on federal land — Respondent company, LA Ltd., carried on crop dusting business in own hanger and had ground lease with applicant — Lease effectively banned use of mixing and loading chemicals on airport site — Applicant's maintenance manager noticed evidence of spills of liquids and empty containers outside respondent's hanger and near catch basin that connected to local creek — Applicant expressed concern to LA Ltd. about spills and warned that if pollution was not addressed, ground lease could be terminated — Federal environmental authorities became involved, catch basin was pumped out and samples taken which indicated high levels of substances toxic to fish — Applicant gave LA Ltd. formal notice of default — LA Ltd. denied that its activities were source of any pollution and refused to refrain from mixing chemicals on site — When applicant applied for writ of possession, LA Ltd. counterclaimed for relief from forfeiture — Relief from forfeiture was denied — LA Ltd. was polluting creek and applicant had right to terminate lease — LA Ltd. had breached four clauses of lease and breaches were not just technical breaches — Given warnings and notice LA Ltd. was given, breaches were intentional, persistent and substantial and had caused environmental contamination to applicant's property — Applicant could be exposed to risk of both prosecution for environmental offences and incurring costs of clean up — Nothing in evidence indicated that if LA Ltd. was allowed to continue activities, situation would improve.

Environmental law --- Statutory protection of environment — Environmental offences — Discharge of pollutants into environment — Water — Miscellaneous pollutants

Applicant airport authority ran airport on federal land — Respondent company, LA Ltd., carried on crop dusting business in own hanger and had ground lease with applicant — Lease effectively banned use of mixing and loading chemicals on airport site — Applicant's maintenance manager noticed evidence of spills of liquids and empty containers outside respondent's hanger and near catch basin that connected to local creek — Applicant expressed concern to LA Ltd. about spills and warned that if pollution was not addressed, ground lease could be terminated — Federal environmental authorities became involved, catch basin was pumped out and samples taken which indicated high levels of substances toxic to fish — Applicant gave LA Ltd. formal notice of default — LA Ltd. denied that its activities were source of any pollution and refused to refrain from mixing chemicals on site — Applicant applied for writ of possession — Application granted — On all evidence LA Ltd. was using leased site for non-permitted use of mixing chemicals, was source of contaminants in catch basin and had not complied with Fisheries Act by allowing contaminants to pollute water in creek — Applicant therefore had right to terminate lease, having given all proper notices of default — Fact that LA Ltd. had made no effort to present containment plan for small spills and continued to deny it was polluting made termination only effective remedy — Fisheries Act, R.S.C. 1985, c. F-14.

APPLICATION by airport authority for writ of possession; COUNTER-APPLICATION by tenant for relief from forfeiture.

***Hunter J.*:**

1 The applicant, Regina Airport Authority ("RAA"), applied by motion pursuant to ss. 50(1) and 52(2) of *The Landlord and Tenant Act*, R.S.S. 1978, c. L-6, as am. (the "Act") for a writ of possession and to postpone the notice of motion by the respondent, Lumsden Aero Ltd. ("LA") for relief from forfeiture (Q.B. No. 1868 of 2001). At the return date of the motion, the chamber judge directed a summary hearing because of the conflicts in the affidavit evidence. Section 50(1) of the Act reads as follows:

> **50**(1) Where a tenant after his lease or right of occupation, however created, has expired or been determined, either by the landlord or by the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses or neglects upon demand made in writing to go out of possession of the land demised to him or which he has been permitted to occupy, his landlord may apply by notice of motion to a judge of Her Majesty's Court of Queen's Bench for Saskatchewan sitting at the judicial centre nearest to which the land or part of the land is situated for an order for a writ of possession directed to the sheriff acting at the judicial centre nearest to which the land or part of the land is situated commanding him forthwith to place the landlord in possession of the land.

2 RAA claims that LA is in breach of the following clauses of under the lease (Exhibit P-4):

> **3. COMPLIANCE WITH REGULATIONS**
>
> (1) The Lessee shall in all respects abide by and comply with all applicable lawful rules, regulations and by-laws of the Federal Government, Provincial Government, Municipal Government or any other governing body whatsoever and with all local police, health, or fire regulations or by-laws, in any manner affecting the said land.
>
> . . .
>
> **6. PURPOSE**
>
> The said land shall be used as a site for a hangar (hereinafter referred to as "the said building") and shall be used for aircraft parking and storage, maintenance and repairs, flight training, aircraft rentals, aircraft charters and underground fuel receiving and storage for receiving, storing, dispensing and handling Aviation Fuel and the said land and the said building shall be used for no other purpose or purposes whatsoever.
>
> . . .
>
> **14. CARE, CUSTODY AND CONTROL OF SUBSTANCES AND MATERIALS**

102 The results of the water sample taken by Clifton on July 13, 2001, were consistent with the results in the AMEC report and appear in Appendix "C".

103 Kent acknowledged that LA is a potential source of the contaminants found in the catch basin but he was not prepared to conclude that LA was the only source, just one source. As Kent noted, if one looks at the soil sampling in the chemical handling area that such could be a source and if there is a drainage pathway then the boundary for the source found on the tarmac would be the drainage area. The final receptor would be living organisms which may be affected.

104 Kent watched the video (Exhibit P-49) and he observed that he saw lots of fluid go onto the tarmac as a result of LA's operations. He also observed that the fluids were in motion where there was sufficient liquid and did flow toward the area of the catch basin. Kent said that depending on the mass of chemicals that were hitting the tarmac and the amount of liquid that he saw as a result of the LA operations and using the assumptions that: (a) LA is the only permanent tenant on the LA site for the past twelve years; (b) LA uses chemicals with active ingredients that were found in the water samples; and, (c) LA has a chemical handling area which is approximately 50 feet uphill from the catch basin, that given the contents found in the hose from a single sample and the amount of spillage seen in the video from the hose, together with the above three assumptions, Kent agreed that LA was most likely a contributor to the contaminants in the catch basin. His hesitation in being more definitive about LA as the source of the contaminant was his concern that there may be other possible sources of contaminants which could drain into the catch basin and of which he was unaware. However, he was prepared to agree that if there were no other sources of the contaminants then it is probable that LA is the source of the contaminants in the catch basin.

105 Of greatest concern to Kent was the lack of herbicide detected on the tarmac and yet it existed in measurable quantities in the water sample in the catch basin. In his view, this points to other sources of contaminants other than LA's operation.

106 As can be seen from all the evidence, LA had been on this property since 1990 and throughout that whole time it has actively carried on a crop spraying business. Colhoun estimates that he has sprayed about a million gallons of mixed chemical from that site since 1990. He agrees that in the past 12 years no one else has likely been involved in flying that much chemical from anywhere on the RAA property.

107 From the baseline environmental study (Exhibit D-31) prepared by Transport Canada, there was an awareness that LA was an aviation company that provided services including crop dusting. In reference to the operation it states as follows at para. 5.14.1 " . . . aircraft maintenance is conducted in the hangar area, while the office space is used for administrative duties. In addition, Skynorth fuels their own airplanes".

108 There is no indication that there was any knowledge on the part of Transport Canada of the extent to which LA stored, mixed, handled and loaded aircraft with chemical on the airport site. No evidence was called from which I might infer that Transport Canada was aware of the extent and the particulars of the handling of chemicals by LA at the airport site.

109 Therefore, from 1990 until June of 2000, when Forest commenced employment with RAA, LA appears to have been able to handle chemicals at that site in any way it saw fit. It was only when Forest, who is by reason of his background and training, much more alert to environmental issues, that an issue was raised with respect to the extensive use of chemicals and the manner in which chemicals were handled by LA on the RAA property. Unfortunately, the lack of protective clothing, gloves and masks used by LA employees in the handling of chemicals is testimony to the casual attitude that LA has toward the handling of these agricultural chemicals.

110 On all the evidence, I find that RAA only became aware of the extent to which LA mixed, stored, handled and loaded chemicals on the RAA lease property in 2000. Because of the location of the storm sewer catch basin and the drainage elevation from the LA lease property area to the storm sewer catch basin, the site used by LA is unsuitable for the storage, mixing, handling and loading of chemicals. It would require significant improvements to the property area so that any small spills of liquid could be contained completely and removed from the property by a disposal truck and disposed of as a hazardous waste. Since 2000, RAA has been trying to determine through water and soil samples whether the contamination in the storm sewer catch basin is the result of the operation of LA.

111 Further, Environment Canada has carried out its own independent investigation and has warned that these premises are not suitable for the mixing, handling and loading of chemicals on the aircraft for the crop dusting business because of the proximity to the catch basin and the release of toxic substances which eventually flow into fish bearing waters.

112 Since July, 2001, RAA has requested that LA discontinue its use of the RAA premises for storing, mixing, handling and loading of chemicals on the aircraft. Colhoun and LA have refused to comply with this request.

113 The first basis for termination of the lease by RAA is the alleged violation of clause 6. The permitted uses are "aircraft parking and storage, maintenance and repairs, flight training, aircraft rentals, aircraft charters and underground fuel receiving and storage for receiving, storing, dispensing and handling Aviation Fuel". Perhaps more importantly, clause 6 expressly prohibits use of the land and buildings for any other purpose "whatsoever". Further, clause 6 is very specific that Aviation fuel may be received stored, dispensed and handled. The words mixing, handling, storage and loading of chemicals are not found in clause 6.

114 Colhoun takes the position that the word "charter" as used in clause 6 is broad enough to encompass the words "mix, handle, store and load agricultural chemicals". His position is that farmers charter his plane for aerial crop spraying and that since charter is a permitted us, this is all he is doing.

115 The word "charter" may mean to hire an aircraft for a particular purpose. That does not include that the premises can be used for the mixing, handling and loading of agricultural chemicals which are toxic to aquatic life. Colhoun says he uses other areas of his operation at times for the storage, mixing and handling of chemicals. It is clear that one of his competitors, Royco, has a portable mixing and handling facility so that he can perform the task of mixing and handling the chemical and loading it onto his aircraft right on the farmer's land who has chartered his aircraft for that purpose.

116 I find on all of the evidence that clause 6 does not permit LA to mix, store, handle and load agricultural chemicals and expressly prohibits activities not specified therein. Accordingly, LA is using the RAA property for a non-permitted use. Hence, LA is in breach of clause 6 of the lease and RAA has the right to terminate the lease for this breach.

117 The second allegation of breach of the lease relates to clause 14. This clause expressly prohibits a lessee from spilling, discharging or permitting to be spilled or discharged any deleterious, noxious, contaminated or poisonous substances onto airport lands or into airport sewer systems, storm drains or surface drainage facilities.

118 What is clear from all of the evidence is that the site of the LA premises is not suitable for the handling, mixing and loading of agricultural chemicals because spillages of liquid with even the smallest amount of the chemical may wash into the storm sewer catch basin because there is a slope downhill from the area where the chemicals are mixed and loaded to the storm sewer catch basin. There is no way to effectively prevent these spills from eventually reaching the catch basin given the present design of the site and the manner in which LA operates its business.

119 This is confirmed by the dye testing done by Environment Canada. Also, the surveillance done by Environment Canada indicates the quantity of spillage that occurs on an ordinary day of LA's business operations. Even the smallest amounts of residue contained in the liquids can, with the correct conditions, eventually reach the storm sewer catch basin. Compounding numerous small spills of contaminants over multiple years may eventually result in toxic quantities of the contents being washed to Wascana Creek.

120 It is apparent from the surveillance conducted by Environment Canada that there are a lot of little spills of liquid which occur during the loading of the aircraft with water and chemical. There are numerous little discharges of liquid onto the tarmac on a daily basis in the normal course of LA's operation. It is clear that LA makes no effort whatsoever to wipe up and/or contain these little spills in any way because Colhoun is absolutely convinced in his own mind that the liquid is only water and does not contain any residue of the agricultural chemicals he uses in his business.

TAB 15

Most Negative Treatment: Reversed
Most Recent Reversed: Romspen Investment Corp. v. Woods Property Development Inc. | 2011 ONCA 817, 2011 CarswellOnt 14462, 14 R.P.R. (5th) 1, 286 O.A.C. 189, 85 C.B.R. (5th) 21, 346 D.L.R. (4th) 273, 210 A.C.W.S. (3d) 302 | (Ont. C.A., Dec 22, 2011)

2011 ONSC 3648
Ontario Superior Court of Justice

Romspen Investment Corp. v. Woods Property Development Inc.

2011 CarswellOnt 2380, 2011 ONSC 3648, [2011] O.J. No. 1163,
200 A.C.W.S. (3d) 118, 4 R.P.R. (5th) 53, 75 C.B.R. (5th) 109

In the Matter of Section 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, as Amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990 C. C.43, as Amended

Romspen Investment Corporation (Applicant) v. Woods Property Development Inc. and TDCI Holdings Inc. (Respondents)

H.J. Wilton-Siegel J.

Heard: October 25, 2010; November 8, 2010; December 2, 2010
Judgment: March 17, 2011
Docket: CV-08-00007543-00CL

Counsel: Harvin Pitch for Receiver, SF Partners Inc.
David P. Preger for Romspen Investment Corporation, 2204604 Ontario Inc.
Craig A. Mills for Home Depot Canada Inc.

Subject: Property; Corporate and Commercial; Insolvency; Estates and Trusts; Restitution; Contracts

Headnote

Real property --- Mortgages — Priorities — Between types of creditors — Miscellaneous

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — Sale was conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease — H Inc. commenced construction of store on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage, and receiver was appointed — 220 Inc. was owned and controlled by R Corp. — Receiver brought motion seeking approval of agreement of purchase and sale between receiver and 220 Inc. regarding sale of Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — With respect to priorities, R Corp. had interest in Property that ranked prior to H Inc.'s interest under H Agreement and ground lease by way of subrogation to extent of monies refinanced under R Mortgage plus interest — R Corp. had actual notice of H Agreement, but not ground lease, at time of execution and registration of R Mortgage — R Corp. had interest in Property that ranked prior to H Inc.'s interest under H Agreement and ground lease by operation of s. 93(3) of Land Titles Act to extent of all monies secured under R Mortgage — H Inc. failed to establish as undisputed fact that R Corp. consented to H Agreement or ground lease such that R Mortgage was subordinated to either or both of these instruments.

Real property --- Mortgages — Priorities — Between types of creditors — Registered mortgagee and equitable interest holder

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — Sale was conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease — H Inc. commenced construction of store (H store) on H Lands — R Corp. refinanced earlier mortgages and advanced further funds,

securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage, and receiver was appointed — 220 Inc. was owned and controlled by R Corp. — Receiver brought motion seeking approval of agreement of purchase and sale between receiver and 220 Inc. regarding sale of Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — With respect to priorities, R Mortgage had priority over any equitable lien in favour of H Inc. arising as result of construction of H store on Property — Fact that R Corp. would obtain value of H store was not, by itself, sufficient to determine issue of priority of H Inc.'s lien — H Inc. failed to identify any other equitable consideration that justified imposition of prior lien in absence of R Corp.'s consent to construction of H store — H Inc. failed to show R Corp. consented to construction of H store on H Lands in circumstances that it understood, or should reasonably have understood, H Inc. would have prior lien over H Lands to extent of value of such improvement.

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Mortgages in favour of R Corp. were registered against property owned by W Inc. (Property) — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands), with sale conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease — H Inc. commenced construction of store on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage — Receiver brought motion for approval of sale agreement between receiver and 220 Inc., owned and controlled by R Corp., for Property, and order vesting Property free of claims of H Inc. — H Inc. brought cross-motion — Motion granted in part; cross-motion dismissed — R Corp.'s interest in Property ranked ahead of H Inc.'s to extent of monies secured under R Mortgage or to extent of monies secured under earlier R Corp. mortgages in existence at date of H Agreement plus interest — R Mortgage had priority over any equitable lien of H Inc. arising as result of construction of store — H Inc. failed to establish as undisputed fact that R Corp. consented to H Agreement, ground lease or store construction in manner intended to affect its rights in Property — No equity in H Inc.'s interest in Property — Equities favoured R Corp., so receiver entitled to order permitting sale on basis that it vested out H Inc. interests — Market might have improved since receiver's effort to market Property — Court could not consider approval of sale agreement until receiver conducted sales process on basis that purchaser would be entitled to acquire Property free of any claim of H Inc.

Real property --- Mortgages — Right of subrogation

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — Sale was conditional upon severance of H Lands — H Inc. chose not to register H Agreement or notice of ground lease — H Inc. commenced construction of store on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage, and receiver was appointed — 220 Inc. was owned and controlled by R Corp. — Receiver brought motion seeking approval of agreement of purchase and sale between receiver and 220 Inc. regarding sale of Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — R Corp. had subrogated claim in amount of monies outstanding under earlier R Corp. mortgages at time of their refinancing by means of R Mortgage, plus interest at rates provided under earlier mortgages — R Corp.'s subrogated interest in Property in respect of amounts outstanding under earlier R Corp. mortgages at time of execution of H Agreement ranked prior to H Inc.'s interest in H Lands under H Agreement and ground lease — R Corp. was entitled to assert subrogated claim against Property in priority to that of H Inc. based on principles of unjust enrichment.

Real property --- Registration of real property — Improvements made under mistake of title — Requirements for relief — Mistaken belief

W Inc. owned property (Property) — Mortgages were registered against Property in favour of R Corp. — H Inc. and W Inc. entered into purchase and sale agreement (H Agreement) and ground lease regarding portion of Property (H Lands) — H Inc. commenced construction of store (H store) on H Lands — R Corp. refinanced earlier mortgages and advanced further funds, securing total financing by mortgage (R Mortgage) registered on title to Property — W Inc. defaulted on R Mortgage — Receiver brought motion for approval of sale agreement between receiver and 220 Inc., which was owned and controlled by R Corp., for Property, and order vesting Property free of any claims of H Inc. — H Inc. brought cross-motion for various relief regarding Property — Motion granted in part; cross-motion dismissed — H Inc. was not entitled to lien sought under s.

37(1) of Conveyancing and Law of Property Act (CLPA) in amount of value by which Property had been improved as result of construction of H store — At best, H Inc. had unregistered equitable agreement to purchase H Lands, and that was subject to important qualification — H Agreement provided it would only be effective to create interest in land if provisions of Planning Act were complied with, and that could not occur until severance of H Lands occurred — H Inc. did not have sufficient interest in land under H Agreement to assert claim under s. 37(1) of CLPA — As to ground lease, language of s. 37(1) of CLPA appeared to require belief that lien claimant was owner of relevant property — Court was not provided with any case law that supported proposition that leasehold interest was sufficient interest to obtain relief under s. 37(1) of CLPA, and there was some authority to contrary.

MOTION by receiver for approval of agreement of purchase and sale regarding certain property, and order vesting property free of any claims of company; CROSS-MOTION by company for various relief relating to property.

***H.J. Wilton-Siegel J.*:**

1 On this motion SF Partners Inc. (the "Receiver") seeks approval of an agreement of purchase and sale dated October 13, 2009 between the Receiver and 2204604 Ontario Inc. (the "Purchaser") (the "Sale Agreement") regarding the sale of a property known municipally as 50 High Street, in the Town of Collingwood, (the "Property") and an order in connection with the completion of such sale vesting in the Purchaser all of the assets of Woods Property Development Inc. ("Woods"), the owner of the Property, free of any claims of Home Depot of Canada Inc. ("Home Depot").

2 By a cross-motion, Home Depot seeks an order that it is entitled to purchase a portion of the Property defined below as the "Home Depot Lands" pursuant to the Home Depot Agreement (as defined below) or to a lease defined below as the "Ground Lease" or, alternatively, that it is entitled to a lien pursuant to section 37 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34 (the "CLPA") or in equity that ranks prior to the Romspen Mortgage (as defined below) and, accordingly, should not be affected by any court approval of the transaction contemplated by the Sale Agreement.

Background

The Parties

3 Woods is an Ontario corporation that is the owner of the Property.

4 Romspen Investment Corporation ("Romspen") is a secured lender to Woods and a sister corporation, TDCI Holdings Inc. ("TDCI"), which is the owner of another property in the Town of Collingwood (the "Raglan Property"). The lending arrangements between Romspen and Woods/TDCI are described below. Wesley Roitman ("Roitman") is the chief financial officer of Romspen and the person at Romspen principally responsible for the Woods/TDCI loan arrangements.

5 Holborn Property Investments Inc. ("Holborn") was a proposed purchaser of the Property under the Holborn Sale Agreement (as defined below). Holborn no longer claims an interest in the Property and is no longer a party to these proceedings. The priority of its interest under the Holborn Sale Agreement was the subject of earlier litigation. The judgment of the Court in that litigation was reported as *Holborn Property Investments Inc. v. Romspen Investment Corp.*, [2008] O.J. No. 5722 (Ont. S.C.J.) (the "Holborn Judgment").

6 The Receiver was appointed the interim receiver of all assets, undertakings and properties of Woods and TDCI by order of this Court dated November 25, 2008 (the "Receivership Order").

7 The Purchaser is an Ontario corporation that is owned and controlled by Romspen.

8 Landex Holdings Inc. ("Landex") is an Ontario corporation that owns property immediately to the south of the Property. Landex has entered into a joint venture with the Purchaser to develop the Property should the Purchaser acquire the Property pursuant to the Sale Agreement.

The Property

Does the Court Have the Authority to Grant the Requested Relief?

63 The first issue is whether the Court has the authority to issue an order granting the requested relief. Home Depot makes two arguments that it does not. It says that a court-appointed receiver is not entitled to evict a tenant merely because it would be advantageous to do so. It also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. I will address each issue in turn.

Authority of the Court to Issue A "Vesting Out" Order in Respect of a Leasehold Interest

64 Home Depot relies on the following cases in support of its position that the Court cannot order the Receiver to sell the Property free and clear of the interest of Home Depot in the Home Depot Lands and, in particular, free and clear of the Ground Lease: *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.*, [2004] B.C.J. No. 46 (B.C. S.C.) at paras. 12-14; *Capital Funds (I.A.C.) Ltd. v. Park Marine Apartments Ltd.*, [1967] B.C.J. No. 132 (B.C. S.C.) at paras. 9-10; and *Winick v. 1305067 Ontario Ltd.*, [2008] O.J. No. 695 (Ont. S.C.J. [Commercial List]) at para. 15.

65 These decisions do not articulate an absolute and unqualified rule that the Court lacks the authority to vest out a leasehold interest. Instead, they mandate that a receiver take into consideration the equities of the positions of the various parties involved. The principle is well summarized by Ground J. in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at para. 19 as follows:

> I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc. v. Kitwanga Lumber Co.* (2005), 75 D.L.R. (4th) 328, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.

The same conclusion was expressed by Gill J. in *Capital Funds*, *supra* in his reference to the fiduciary obligation of a court-appointed receiver to all the parties involved in a contest.

66 Accordingly, I have proceeded on the basis that the Court has the authority to grant the relief requested provided it is appropriate to do so after reviewing the equitable considerations supporting the respective positions of the parties.

67 I would note, as well, that the cases relied upon by Home Depot do not provide much assistance with respect to the equitable considerations to be taken into account in the present proceeding inasmuch as the circumstances in those decisions were very different.

68 *Coast Capital Savings*, *supra* involved residential tenancies which were not registrable and for which the tenants had prepaid the rental for the year. It is also unclear from the incomplete recitation of the facts whether the mortgagee seeking the relief was likely to be repaid or not; the references of the trial judge to the obligation of a court-appointed receiver to protect the goodwill of a business suggests that there may have been other subsequent encumbrancers with an interest in the preservation of the existing tenancies.

69 In *Capital Funds*, it was established that the tenant had paid considerable amounts for rent and for renovations to the property in respect of a commercial tenancy.

70 In *Winick*, *supra*, Pepall J. considered the issue in the context of the requirement in *Soundair*, *supra* that the Court address whether there has been unfairness in the working out of the sale process. In that case, the purchaser had agreed to acquire the

TAB 16

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11,
306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days

after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to

sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.
Personal property security --- Statutory liens — Miscellaneous

APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter. [1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-

Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor. [2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value. [3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample

time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;
>
> (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
>
> (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an

encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters'" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property. [5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

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

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

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

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one

> is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) [6].

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report"). [7]

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009. [8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

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

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.

> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the

circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests. [9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction. [10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated,

so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a

vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

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