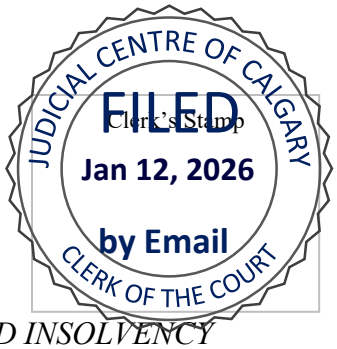
Com- Jan 14, 2026



COURT FILE NUMBER	B301-276975
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF BLUE SKY RESOURCES LTD.

DOCUMENT **REPLY BRIEF OF THE APPLICANT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART I - INTRODUCTION

1. This Reply Brief is filed by Canadian Natural in reply to the Responding Written Submissions of Alberta Energy, served January 9, 2025 (the "**AE Submissions**"). Capitalized terms used but not defined herein have the meanings given to such terms in the CNRL Brief.[1]

PART II - REPLY ARGUMENT

A. NGRRs

2. Alberta Energy argues that Canadian Natural omits reference to section 2 of the NGRRs in the CNRL Brief and that this omission somehow fundamentally undermines Canadian Natural's analysis.[2] Section 2 of the NGRRs is not referenced in the CNRL Brief because reference to this section creates a circular argument. Section 2 of the NGRRs preserves the liability of lessees to the extent provided in a PNG Lease and the NGRRs. The PNG Leases provide for royalty compensation to be paid in accordance with the MMA. Canadian Natural's analysis of the MMA and the NGRRs with respect to liability for royalty compensation is as discussed in the CNRL Brief. Section 2 of the NGRRs does not alter either the existence or scope of this liability; it simply preserves it to the extent otherwise established.

3. Alberta Energy continues to make the issue in this Application the liability of lessees for the Blue Sky Royalty Arrears. That is not, and has never been, the issue. As stated in Canadian Natural's Application:

> Importantly, the issue before this Court is <u>not</u> whether Alberta Energy is entitled to recover the Blue Sky Royalty Arrears from registered lessees. It is entitled to do so pursuant to section 20(2.1) of the MMA. However, this right does not give Alberta Energy permission to circumvent, and elect not to participate in, the NOI Proceedings. Like all other stakeholders, Alberta Energy is subject to the "single proceeding model" in the NOI Proceedings.[3]

4. With respect to Alberta Energy's submissions regarding the specific provisions of the 2009 NGRR and the 2017 NGRR:

(a) Alberta Energy submits that section 15 of the 2009 NGRR and section 16 of the 2017 NGRR do not establish liability for royalty compensation, notwithstanding

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[1] Brief of Canadian Natural Resources Limited, served January 5, 2026 and filed January 6, 2026 ("**CNRL Brief**").

[2] AE Submissions at overview and para 33.

[3] Application of Canadian Natural, filed November 27, 2025 at para 16.

that the section heading is "Liability for royalty compensation".[4] Headings are an important structural feature in the interpretation of a statute;[5] and

(b) Alberta Energy submits that section 15 of the 2009 NGRR and section 16 of the 2017 NGRR only state that royalty compensation is payable in accordance with the respective regulation, but do not point to any other provision of the regulations addressing the payment of royalty compensation.[6]

5. At its core, Alberta Energy's position appears to be that the MMA and NGRRs exist in a vacuum separate and apart from the customs and practices of the industry governed thereunder. The transfer of liability for royalty compensation to the owner under the NGRRs could not, according to Alberta Energy, be a reflection of the structure of the oil and gas industry in Alberta in which working interest partners own, and enjoy the benefit of, the natural gas production giving rise to the royalty. Nor could the existence of liability in the owner's (or its nominee's) royalty account under the NGRRs reflect the tying of right and obligation together with respect to the natural gas production. Alberta Energy rejects the interpretation of the NGRRs that aligns with, and reflects the structure, customs, and practices of the Alberta oil and gas industry.

6. However, as noted by the Alberta Court of Appeal in *Brick Protection Corporation v. Alberta (Provincial Treasurer)*, "[t]he Legislature must be presumed to legislate with reference to what actually occurs in the real world, not to theoretical nonexistent possibilities."[7] The legislature is presumed to have knowledge of practical affairs. It understands commercial practices and is familiar with the problems its legislation is meant to address.[8] The interpretation of the MMA and NGRRs that aligns with industry practice and customs is clearly preferable to one that does not.

B. Section 20(2.1) of the MMA

7. Alberta Energy argues that Canadian Natural fails "to mention the second half of section 20(2.1) of the MMA" and that Canadian Natural's citation to section 20(2.1) "is incomplete and

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[4] AE Submissions at paras 29 and 31.

[5] Ruth Sullivan, The Construction of Statutes, 7th ed, (Markham, Ont: LexisNexis, 2022) ("**Sullivan on Statutes**") at §14.05. **[TAB 1]**

[6] AE Submissions at para 31.

[7] *Brick Protection Corporation v. Alberta (Provincial Treasurer),* 2011 ABCA 214 at para 18. **[TAB 2]**

[8] Sullivan on Statutes at §8.02. **[TAB 1]**

wholly ignores section 20(2.1)(b)."[9] Canadian Natural cites to the full text of section 20(2.1) of the MMA at paragraph 38 of the CNRL Brief.

8. Section 20(2.1) of the MMA does *not* establish joint and several liability. Nowhere in section 20(2.1) is the word "several". Where the legislature seeks to impose joint and several liability, it does so explicitly.[10] In fact, the legislature often uses both terms within the same legislation, clearly demonstrating an awareness of the legal distinction between the terms. For example, in the *Environmental Protection and Enhancement Act*, section 215 provides that "all persons named in the [enforcement] order are jointly responsible for carrying out the terms of the order and are jointly and severally liable for payment of the costs of doing so."[11]

9. There is no merit to Alberta Energy's suggestion that the legislature established joint liability by name, but established several liability not by name, but by listing some (but not all) of the characteristics of several liability. Such an interpretation defies the modern approach to statutory interpretation. There is nothing grammatical or ordinary about this interpretation.

10. Section 20(2.1)(a) of the MMA provides that lessees are "jointly responsible". It establishes joint liability. Section 20(2.1)(b) of the MMA then provides a limited modification to the common law position regarding joint liability by permitting Alberta Energy to obtain judgment against other lessees notwithstanding a previous judgment for, or release of, an individual lessee. A statutory modification to common law principles is not uncommon. The article cited by Alberta Energy lists three examples of such modifications in British Columbia with respect to joint liability, including the following:

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[9] AE Submissions at paras 18, 22, 42.

[10] See, for example, *Business Corporations Act*, RSA 2000, c B-9, at s. 15.2(1), which establishes that the liability of shareholders in an unlimited liability corporation is "unlimited in extent and joint and several in nature," and ss. 118 and 119, which establishes circumstances in which directors are jointly and severally liable to the corporation or employees. See also*: Franchises Act*, RSA 2000, c F-23 at section 12; *Securities Act*, RSA 2000, c S-4 at sections 203(0.1)(10) and (13.1), 204(7) and (8), 205(8) and (10.1), 207(8), 211.06(3); *Employment Standards Code*, RSA 2000, c E-9 at sections 81 and 112; *Contributory Negligence Act*, RSA 2000, c C-27 at section 2(2).

[11] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 at section 215. See also section 11(2) of the *Partnership Act*, RSA 2000, c P-3 which provides that, "[e]ach partner in a firm is liable jointly with the other partners for debts and obligations of the firm", while section 15 in turn establishes joint and several liability for specified obligations: "each partner is liable jointly with the partner's co partners and also severally for everything for which the firm while the partner is a partner in it becomes liable under section 13 or 14." See also section 15(5) *Business Corporations Act*, RSA 2000, c B-9 which permits a party to a pre-incorporation contract to apply to the Court for an order "fixing obligations under the contract as joint or joint and several."

> The common law position has been altered by the *Law and Equity Act*, which provides as follows:
>
> 48. (2) The obtaining of an order against any one person jointly liable does not release any other jointly liable who have been sued in the proceeding, whether the others have been served with process or not.[12]

11. Section 20(2.1)(b) is the Alberta equivalent with respect to PNG Leases. Lessees are jointly liable for obligations under a PNG Lease. The characteristics of such joint liability are subject to a limited statutory modification under section 20(2.1)(b) of the MMA. Such limited modification does not transform the joint liability into something different; it simply provides a limited modification to its usual characteristics.

12. Alberta Energy's submission that section 20(2.1) should be given a "fair, large and liberal construction" is equally unsupportable. Justice Romaine has already considered, and rejected, this submission with respect to section 91.1 of the MMA, a provision which both Alberta Energy and Canadian Natural agree is analogous to section 20(2.1) of the MMA.[13]

13. Contrary to Alberta Energy's submissions, Terra Energy is not distinguishable from the current case.[14] Justice Romaine determined that the royalty arrears in *Terra Energy* were contingent based on the same principles of statutory interpretation relied on in the current case, including that section 91.1, as a statutory exemption to general law principles of third party liability, must be interpreted and applied narrowly. Her conclusion on the contingency of the royalty arrears was based on these principles – not vice versa.

14. Further, and in any event:

(a) the Supreme Court of Canada has repeatedly confirmed that, as noted by Justice Romaine in *Terra Energy*, a statutory exception (like sections 20(2.1) and 91.1 of the MMA) should not be construed more widely than is necessary to fulfil the values which support it.[15] It is settled law; and

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[12] LRC Report at s. 2(c). **[CNRL Brief at Tab 20; AE Submissions at Tab 14]**

[13] AE Submissions at paras 57 and 60.

[14] AE Submissions at para 40.

[15] *Terra Energy* at para 78 **[CNRL Brief at Tab 10]**; *Barrette* at para 32 **[CNRL Brief at Tab 9]**; *Air Canada v. British Columbia*, 1989 CanLII 95 (SCC), [1989] 1 SCR 1161 at p. 94 **[TAB 3]**; *National Trust Co. v. Mead*,

(b) section 10 of the *Interpretation Act* relied on by Alberta Energy qualifies the need to give legislation a "fair, large and liberal construction" with the requirement that such construction "best ensures the attainment of its objects" – a requirement wholly consistent with Justice Romaine's holding in *Terra Energy* that section 91.1 (and, by extension, section 20(2.1)) should be construed only as widely as is necessary to fulfill the value (i.e. the objects) that support it.

15. The remainder of Alberta Energy's submissions on joint and several liability either have no evidentiary basis or are contradicted by the evidence. In particular:

(a) Alberta Energy submits that "[s]ince 2003, the MMA has enforced joint and several liability against lessees."[16] There is no evidentiary support for this statement, nor is any cited. To date, Alberta Energy has been unsuccessful in both cases before this Honourable Court with respect to the imposition of liability on lessees under the MMA – *Terra Energy* and *Bellatrix*;

(b) Alberta Energy submits that "[f]or more than twenty years the standard form of Crown Lease has expressly incorporated these provisions, which are well known to industry."[17] Again, there is no evidentiary support for this statement, nor is any cited. None of the five PNG Leases exhibited to the Lunn Affidavit or the two PNG Leases exhibited to the Taljit Affidavit contains any express reference to section 20(2.1) of the MMA or to joint and several liability; and

(c) Alberta Energy submits that "[t]he Hansard accompanying the inclusion of section 20(2.1) in the MMA indicates that section 20(2.1) was added to the MMA for the express purpose of statutorily codifying joint and several liability of lessees."[18] Nowhere in the Hansard is such statement made. To the contrary, the two references to liability in the Hansard state: "[t]his bill will codify ***joint*** liability of Crown leases" and "[i]t codifies ***joint*** liability so that the Crown will not have to argue the

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[1990] S.C.J. No. 76, [1990] 2 S.C.R. 410 at para. 26 **[TAB 4]**; *Waldick v. Malcolm*, [1991] S.C.J. No. 55, [1991] 2 S.C.R. 456 at para 48 **[TAB 5]**.

[16] AE Submissions at para 52.

[17] AE Submissions at para 52.

[18] AE Submissions at para 58.

> common-law precedents in every case where a lessee defaults on a royalty payment."[19]

C. Insolvency Law Matters

16. Canadian Natural's reply to the AE Submissions on the stay of proceedings, the single proceeding model and the insolvency process generally (including the collection of cure costs) is limited to the three points below. Otherwise, Canadian Natural relies on its submissions in the CNRL Brief.

17. First, Alberta Energy submits that it is not fully protected because certain of the Blue Sky Royalty Arrears arise under PNG Leases where Blue Sky holds a working interest but not a registered interest and so no transfer of the PNG Lease will be sought. It asserts that Canadian Natural's argument on this point is "inaccurate", while ignoring the fact that it changed its evidence on this issue by filing the Supplemental Affidavit of Wayne Taljit *five days after* Canadian Natural served the CNRL Brief.[20] Mr. Taljit's evidence prior to January 9, 2025 was that Blue Sky was a registered lessee on all the PNG Leases at issue in the Default Notice.

18. Regardless of (yet another) shifting position by Alberta Energy, nothing about the foregoing changes Alberta Energy's risk. The relief sought by Canadian Natural has always been clear:

> Alberta Energy is precluded from collecting any payments related to the Blue Sky Royalty Arrears until such time as the Stay is terminated or expires, following which Alberta Energy is entitled to proceed in the normal course to recover any Blue Sky Royalty Arrears relating to petroleum and natural gas leases ("PNG Leases") remaining in the Blue Sky estate, which have not been assigned to a purchaser in the NOI Proceedings, and which are not otherwise payable as "cure costs" pursuant to the terms of an Approval and Vesting Order, Reverse Vesting Order or such further or other order as may be granted by the Court in the NOI Proceedings.[21]

The limited scope of the relief sought is similarly echoed in the Ovintiv Letter and in the Bench Brief of Cenovus. This is not an "industry vs. Alberta Energy" situation. No one is trying to come

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[19] Alberta, Legislative Assembly, Alberta Hansard, Legislature 25, Session 3 (2003-2004), (March 27, 2003) at 795 and (May 5, 2003) at 1430. [Emphasis added] **[AE Submissions at Tab 13]**

[20] AE Submissions at paras 64 to 67; Supplemental Affidavit of Wayne Taljit, sworn January 8, 2026 and served January 9, 2026.

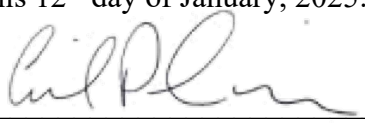
[21] Application of Canadian Natural, filed November 27, 2025 at para 1(a)(iii).

up with "sophisticated attempts…to avoid the payment of Crown Royalties."[22] Canadian Natural has paid $22.6 billion in royalties over the past five years.[23] Like in *Terra Energy* and in *Bellatrix*, the issue is one of process and requiring Alberta Energy to fulfill its mandate within the confines of the MMA and the BIA.

19. Second, Alberta Energy argues that Canadian Natural "omits to mention that Alberta Energy was successful in obtaining leave to appeal" in *Bellatrix*.[24] Canadian Natural hasn't omitted this fact. A copy of Justice Feth's decision is attached as Exhibit DD to the Lunn Affidavit. Each of Spartan Delta and Canadian Natural conceded before Justice Feth that the issues were of significance to the practice and that the appeal would not unduly hinder the CCAA proceedings (as it had concluded more than three years prior). Accordingly, the only issue before the Court was whether the appeal was *prima facie* meritorious which, as argued by Alberta Energy, is a "very low threshold" as the Court must only be satisfied that the appeal is not frivolous, and that the likelihood of success is not extremely low. [25]

20. Third, Alberta Energy submits that "[t]he frequency with which Alberta Energy's involvement has been required in protracted legal proceedings such as *CLEO* and *Spartan Delta* [i.e. *Bellatrix*] aptly demonstrates that the transfer requirement does not guarantee recovery."[26] The "frequency" is two cases. The "protracted legal proceedings" were a two-hour hearing before Justice Feasby in *CLEO* and a half day hearing before Justice Gill in *Bellatrix*. Both were matters that proceeded expediently on the commercial list.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2025:



Osler, Hoskin & Harcourt LLP
Counsel for Canadian Natural

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[22] AE Submissions at para

[23] Lunn Affidavit at para 5.

[24] AE Submissions at para 68.

[25] *Edmonton Regional Airports Authority v Lynx Air Holdings Corporation*, 2024 ABCA 380 at para 8. **[TAB 6]**

[26] AE Submissions at para 74.

TABLE OF AUTHORITIES

TAB 1

[1] Presumption of knowledge

The Construction of Statutes, 7th Ed.

Ruth Sullivan

The Construction of Statutes, 7th Ed. (Sullivan) > CHAPTER 8 Textual Analysis > PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED > § 8.02 Presumed Knowledge and Competence

CHAPTER 8 Textual Analysis

PART 1 PRESUMPTIONS ABOUT HOW LEGISLATION IS DRAFTED

§ 8.02 Presumed Knowledge and Competence

[1] Presumption of knowledge

The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts[1] and with mastery of existing law, common law and the *Civil Code of Québec* as well as ordinary statute law, and the case law interpreting statutes.[2] The legislature is also presumed to have knowledge of practical affairs.[3] It understands commercial practices and the functioning of public institutions, for example, and is familiar with the problems its legislation is meant to address. In short, the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation.[4]

Even if the presumption of knowledge is not often discussed by the courts it is implicit in the interpretive rules and techniques on which they rely. For example, a mastery of language is presupposed by the ordinary meaning rule while knowledge of practical affairs is presupposed by purposive analysis and in some cases by consequential analysis. A knowledge of law is presupposed by the presumption that the legislature does not intend to change existing law or to violate international law.

Logically, the substance of what the legislature is presumed to know must be knowledge that was available to it at the time the legislation was enacted. The legislature is not presumed to know the future. To determine the mischief at which a statute was aimed, for example, the courts look to material conditions existing at the time of enactment. In practice, however, courts often assume, in the absence of evidence to the contrary, that the knowledge available to the interpreting court is the knowledge relied on by the enacting legislature.

Footnote(s)

1 In *Willick v. Willick*, [1994] S.C.J. No. 94, [1994] 3 S.C.R. 670 (S.C.C.), L'Heureux-Dubé J. wrote, at 699: "An integral aspect of discovering Parliamentary intention is the precept that Parliament must be taken to be aware of the social and historical context in which it makes its intention known." See also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] S.C.J. No. 53, 2011 SCC 53 at para. 45 (S.C.C.); *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] S.C.J. No. 58, [2006] 2 S.C.R. 846 at paras. 82-83 (S.C.C.); *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 at paras. 25-26 (S.C.C.).

[1] Presumption of knowledge

2 In *2747–3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919 at para. 238 (S.C.C.), L'Heureux-Dubé J. wrote: "It must be presumed that the Quebec legislature had knowledge of all the relevant law." See also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., [2016] S.C.J. No. 47, 2016 SCC 47 at para. 78 (S.C.C.); *Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), [2011] S.C.J. No. 53, 2011 SCC 53 at para. 45 (S.C.C.); *ATCO Gas and Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 at para. 59 (S.C.C.); *R. v. Clarke*, [2013] O.J. No. 94, 2013 ONCA 7 at para. 20 (Ont. C.A.), affd [2014] S.C.J. No. 100 (S.C.C.); *Triad Gestco Ltd. v. Canada*, [2012] F.C.J. No. 1274, 2012 FCA 258 at para. 56 (F.C.A.).

3 See, for example, *R. v. St. Pierre*, [1995] S.C.J. No. 23, [1995] 1 S.C.R. 791 at para. 61 (S.C.C.), where Iacobucci J. noted, that "... Parliament can be assumed to have known that blood alcohol levels constantly change". See also *R. v. Ahmad*, [2011] S.C.J. No. 6, 2011 SCC 6 at para. 31 (S.C.C.): "We must presume that Parliament was aware of the possibility that proceedings would be needlessly stayed if the trial judge was denied access to material that could not be disclosed for valid reasons of state secrecy."

4 *Donovan v. Mccain Foods Limited*, [2004] N.J. No. 70, 2004 NLCA 12 at paras. 37-38 (N.L.C.A.).

End of Document

[2] Uses of headings

The Construction of Statutes, 7th Ed.

Ruth Sullivan

The Construction of Statutes, 7th Ed. (Sullivan) > CHAPTER 14 The Components of Legislation > § 14.05 Headings

CHAPTER 14 The Components of Legislation

§ 14.05 Headings

[2] Uses of headings

The arrangement of headings and subheadings within an enactment helps reveal its structure. In well drafted legislation, headings (together with titles and marginal notes) operate as an outline of the legislation, indicating the relationship of divisions, parts, sections and provisions within the overall scheme. In *Saint John (City) v. Charlebois*, for example, Charron J. considered headings to be an important structural feature and relied on them to justify her analysis of New Brunswick's *Official Languages Act* (OLA). She wrote:

> [T]he OLA groups under various headings different areas of activity or services which fall under the purview of the public administration of the province and imposes specific language obligations under each heading....[1]

The chief use of headings is to cast light on the purpose or scope of the provisions to which they relate. They function much as long titles do in relation to the Act as a whole. In *R. v. Lohnes*,[2] a heading was relied on to narrow the scope of s. 175(1)(a) of the *Criminal Code* which made it an offence to cause a disturbance in or near a public place. The issue was whether the word "disturbance" included mental or emotional disturbance or was limited to overt, publicly exhibited disorder. In opting for the narrower interpretation, the Supreme Court of Canada relied on many factors, including the heading. McLachlin J. wrote:

> ... headings and preambles may be used as intrinsic aids in interpreting ambiguous statutes. Section 175(1)(*a*) appears under the section "Disorderly Conduct". Without elevating headings to determinative status, the heading under which s. 175(1)(*a*) appears supports the view that Parliament had in mind, not the emotional upset or annoyance of individuals, but disorder and agitation which interferes with the ordinary use of a place.[3]

In *R. v. Zundel*,[4] headings were relied on to help establish the purpose of s. 181 of the *Criminal Code*, prohibiting the publication of false news. After noting that the original purpose of this prohibition was to preserve political harmony by preventing false allegations against those in positions of power, McLachlin J. wrote:

> ... in the 20th century, Parliament removed the offence from the political "Sedition" section of the *Code* and placed it in the "Nuisance" section, suggesting that Parliament no longer saw it as serving a political purpose. It is to be further noted that it does not appear in that part of the *Criminal Code* dedicated to "Offences Against the Person and Reputation", in which both the hate propaganda and defamatory libel provisions appear....
>
> ... Such an objective [to combat hate propaganda and racism] hardly seems capable of being described as a "nuisance", the rubric under which Parliament has placed s. 181....[5]

In *R. v. Kelly*, the heading was relied on to justify the Court in adopting a somewhat unusual meaning of the word "corruptly" in s. 426 of the *Criminal Code*. This section made it an offence to "corruptly" bribe an agent. Given the inherently corrupt character of offering bribes, the question for the Court was what effect to give to the word "corruptly". Cory J. wrote:

> The interpretation of corruptly as secretly or without disclosure reinforces the aim of s. 426 to preserve the integrity of the agent-principal relationship. It is as well supported by the heading "Secret Commission" which precedes this section. It is the secrecy of the benefit and not the benefit itself which constitutes the essence of the offence. The appellant Kelly argued that the words in the heading are merely marginal notes, and as such should not be considered when interpreting the words in the section. I cannot agree with that contention. *R. v. Wigglesworth* ... makes it clear that it is appropriate to consider the statutory heading and the history of a section as an aid in interpreting the aim of a section.[6]

Footnote(s)

1 [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563 at para. 16 (S.C.C.). See also *Barreau du Québec v. Quebec (Attorney General)*, [2017] S.C.J. No. 56, 2017 SCC 56 at para. 28 (S.C.C.); *Manitoba Hydro-Electric Board v. Consumers' Association of Canada (Man.) Inc. et al.*, [2012] M.J. No. 1, 2012 MBCA 1 at paras. 66-69 (Man. C.A.); *Berhad v. Canada*, [2005] F.C.J. No. 267 at paras. 47-49 (F.C.A.).

2 [1992] S.C.J. No. 6, [1992] 1 S.C.R. 167 (S.C.C.).

3 *R. v. Lohnes*, [1992] S.C.J. No. 6, [1992] 1 S.C.R. 167 at para. 23 (S.C.C.). See also *R. v. Meyers*, [2019] S.C.J. No. 18, 2019 SCC 18 at para. 32 (S.C.C.); *Canada (Attorney General) v. Thouin*, [2017] S.C.J. No. 46, 2017 SCC 46 at para. 29 (S.C.C.); *Skoke-Graham*, [1985] S.C.J. No. 6, [1985] 1 S.C.R. 106 at paras. 37-42 (S.C.C.); *Ambrosi v. British Columbia (Attorney General)*, [2014] B.C.J. No. 588, 2014 BCCA 123 at paras. 54-55 (B.C.C.A.); *Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.*, [2011] O.J. No. 4510, 2011 ONCA 645 at paras. 37-38 (Ont. C.A.); *Phillips v. Robinson*, [1982] P.E.I.J. No. 81, 133 D.L.R. (3d) 189 at 194-196 (P.E.I.C.A.).

4 [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.).

5 *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 at paras. 48-49 (S.C.C.). See also *Re Peters and District of Chilliwack*, [1987] B.C.J. No. 1968, 43 D.L.R. (4th) 523 at 527-528 (B.C.C.A.): although the court did not feel free to rely on the headings, it nonetheless "looked at the sections in groups within parts" to draw inferences about the legislative scheme.

6 *R. v. Kelly*, [1992] S.C.J. No. 53, [1992] 2 S.C.R. 170 at para. 46 (S.C.C.). See also *Rockert v. R.*, [1976] O.J. No. 2359, 74 D.L.R. (3d) 457 at 458 (Ont. C.A.), revd on other grounds [1978] S.C.J. No. 27, [1978] 2 S.C.R. 704 (S.C.C.).

TAB 2

In the Court of Appeal of Alberta

Citation: Brick Protection Corporation v. Alberta (Provincial Treasurer), 2011 ABCA 214

Date: 20110721
Docket: 1003-0091-AC
Registry: Edmonton

2011 ABCA 214 (CanLII)

Between:

The Brick Protection Corporation

Respondent
(Plaintiff)

- and -

Her Majesty the Queen as Represented by the Provincial Treasurer of Alberta, and the Provincial Treasurer of Alberta

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Robert Graesser

Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice Costigan

Reasons for Judgment Reserved of
The Honourable Mr. Justice Graesser

Appeal from the Judgment by
The Honourable Mr. Justice J.J. Gill
Dated the 19th day of March, 2010
Filed the 22nd day of March, 2010

respondent is not popularly known as an insurance company, and is not part of the known and very well-established insurance industry.

[18] In deciding whether a certain business is "insurance", we must give some weight to actual practices and commercial reality. The Legislature must be presumed to legislate with reference to what actually occurs in the real world, not to theoretical nonexistent possibilities. That is doubly so when the new taxing legislation expressly refers to an existing well-known industry plus its regulation. (Once again, I refer to Holmes' adage.)

[19] Where a document refers to "the business of x", its content is set by what people now engaged in that business (industry) typically actually do and not do. It is not set by former practices, nor by the court's idea of what in theory the word "x" means. So holds the Supreme Court of Canada in ***Russo v. Field*** [1973] SCR 466, 34 DLR (3d) 704. One could look at constitutional law, but the analogies require adjustment, and so become complex and weaker.

[20] The insurance industry is neither new, small, nor infinitely varied. It has existed for a great many centuries, and in many respects it is highly traditional and conventional. Types of insurance and most policy wordings resemble each other to an extraordinary degree, even on different continents. To see that, one only needs to glance over *Lloyd's Law Reports*, or any big textbook on insurance law.

[21] One other factor is suggestive. The warranty business in issue here is not discussed in the *Insurance Act*, nor in any of the textbooks on insurance law. I have particularly combed the monumental *Couch on Insurance* 3d and can find nothing dealing with the substance of product warranties. (Some auto warranties may be expressly included in Alberta legislation, but that is only in the **later** 1994 Regs.) Yet the *Insurance Act* and those texts categorize and describe in detail a considerable number of distinct established types of insurance. And extended-warranty companies have been common in Alberta (and presumably many other places) for at least 25 years, probably longer. (On property damage insurance, see Part G below.)

E. Definitions of "Insurance"

[22] Could the reference to the *Insurance Act* in the taxing Act (s. 86(1)(d)) mean that the Court is to look to definitions in the *Insurance Act*? That may not be a safe assumption, for reasons discussed in Part D above. But if that assumption were pursued, where would it lead? One finds that the *Insurance Act* defined "insurance" as meaning

> the undertaking by one person to indemnify another person against loss or liability for loss in respect of certain risk or peril to which the object of the insurance might be exposed, or to pay a sum of money or other thing of value on the happening of a certain event.
>
> – *Insurance Act*, R.S.A. 1980, c. I-5, s. 1(k.1)

2011 ABCA 214 (CanLII)

TAB 3

1989 CarswellBC 67
Supreme Court of Canada

Air Can. v. B.C.

1989 CarswellBC 67, 1989 CarswellBC 706, [1989] 1 S.C.R. 1161, [1989] 1 T.S.T. 2126, [1989] 4 W.W.R. 97, [1989] B.C.W.L.D. 1598, [1989] C.L.D. 891, [1989] S.C.J. No. 44, 2 T.C.T. 4178, 36 B.C.L.R. (2d) 145, 41 C.R.R. 308, 59 D.L.R. (4th) 161, 95 N.R. 1, J.E. 89-785, EYB 1989-66982

AIR CANADA and PACIFIC WESTERN AIRLINES LTD. v. R. in Right of BRITISH COLUMBIA et al.; R. in Right of BRITISH COLUMBIA and ATTORNEY GENERAL OF BRITISH COLUMBIA v. AIR CANADA et al.

Beetz, McIntyre, Lamer, Wilson, Le Dain [*], La Forest and L'Heureux-Dubé JJ.

Heard: June 8-10, 1988
Judgment: May 4, 1989
Docket: Nos. 20079, 20082, 20085

Counsel: *D.M.M. Goldie, Q.C., W.S. Martin, C.F. Willms* and *R.G. Berrow*, for appellant Air Canada.
W.G. Baker and *P.G. Voith*, for appellants Canadian Pacific Airlines Ltd. and Pacific Western Airlines Ltd.
E.R.A. Edwards, Q.C., and *J.J. Arvay, Q.C.*, for respondents province of British Columbia et al.
E. Goldberg and *G. Sholtack*, for intervener Attorney General for Ontario.
M. Jolin, for intervener Attorney General of Quebec.
R.M. Endres, for intervener Attorney General of Nova Scotia.
R.P. Burns, for intervener Attorney General for New Brunswick.
D. Blevins and *S.J. Pierce*, for intervener Attorney General of Manitoba.
R.G. Richards, for intervener Attorney General for Saskatchewan.
H. Kushner, for intervener Attorney General for Alberta.
F.G. Crockett, for intervener Attorney General of Newfoundland.

Subject: Constitutional; Public; Civil Practice and Procedure; Restitution; Provincial Tax
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.a Prejudgment interest
XXII.22.a.i Entitlement to
Constitutional law
VI Distribution of legislative powers
VI.3 Areas of legislation
VI.3.d Taxation
VI.3.d.ii Provincial taxes
Constitutional law
VI Distribution of legislative powers
VI.3 Areas of legislation
VI.3.d Taxation
VI.3.d.iv Miscellaneous

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Ignorantia Juris in the Supreme Court of Canada" (1983), 17 Univ. of B.C. L. Rev. 233. But how would a court determine this? Among other complications is the fact that what can make recovery against the state impractical is the length of time during which an invalid tax has been collected. Equitable laches could be brought into service, but these ordinarily involve some discernible act of acquiescence to trigger their operation. The obvious remedy is a period of limitations, but it would be inappropriate for courts at this late date of legal development to define such periods which, to be effective, may have to differ from one type of tax to another.

92 Professor Birks has argued that the dominant value should be respect for the principle that there should be no taxation without parliamentary sanction, and so the general rule should favour recovery: see Peter Birks, Introduction to the Law of Restitution, p. 294. Even Professor Birks, however, concedes that "Where there is a serious danger that public finances will be disrupted it may be necessary to limit or exclude a right to restitution" (at p. 298). I agree that the value he favours is worthy of protection, but in the context of taxes exacted through unconstitutional statutes in light of the other policies outlined above, I am not willing to give it the dominant status that Birks would accord it.

93 All in all, I have become persuaded that the rule should be against recovery of ultra vires taxes, at least in the case of unconstitutional statutes. It seems best to function from the basis of that rule with exceptions where the relationship between the state and a particular taxpayer resulting in the collection of the tax are unjust or oppressive in the circumstances. However, this case does not call for departure from the general rule. The tax levied in this case, though unconstitutional, comes close to raising a mere technical issue. Had the statute been enacted in proper form, there would have been no difficulty in exacting the tax as actually imposed. Though specific evidence was not led on this point, were recovery to be allowed, the airlines would receive a windfall, and fiscal chaos could well result. Many others could well bring suit, for this is a general tax applying to all purchases of gasoline in the province. It is true that many of these would not be in a position to establish their claims but it would be odd if this factor were taken into account since its general effect would be to favour the strong against the weak. Finally, there is not the element of discrimination, oppression or abuse of authority which would warrant recovery.

94 This rule against the recovery of unconstitutional and ultra vires levies is an exceptional rule, and should not be construed more widely than is necessary to fulfil the values which support it. Chief among these are the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it either on the same, or on a new generation of taxpayers, to finance the operations of government. Though the drawing of lines is always difficult, I am persuaded that this rule should not apply where a tax is extracted from a taxpayer through a misapplication of the law. Thus, where an otherwise constitutional or intra vires statute or regulation is applied in error to a person to whom on its true construction it does not apply, the general principles of restitution for money paid under a mistake should be applied, and, subject to available defences and equitable considerations discussed earlier, the general rule should favour recovery. In exceptional cases public policy considerations may require a contrary holding, but those exceptional cases do not justify extending the general rule of non-recovery of unconstitutional or ultra vires levies. As Professor Palmer has noted (The Law of Restitution, vol. III, at p. 247):

> The effect of restitution in dislocating the fiscal affairs of the governmental unit in such isolated instances of mistake is nothing like it would be where many payments have been made under a tax law which is unconstitutional or invalid for some other reason.

In my view no distinction should be drawn between those cases which would traditionally be considered as mistakes of fact, as for example where a tax assessment is based on a misapprehension of the facts which attract the tax, or where an error has been made in calculation, and those cases where the taxing statute is construed in error so as to impose liability on a party not liable on the true construction of the statute. In both cases recovery should be available.

95 If recovery in all cases is to be the general rule, then that is best achieved through the route of statutory reform. If there are limits to the extent to which, because of the *Amax* principle, a legislature may limit recovery of taxes by a taxpayer who is at law entitled to recoup them, there would appear to be no limit to the legislature providing for their recovery. This could take into account the types of variables already mentioned, the nature of the tax, the amounts involved, the times within which a claim may be made, the situation of those who are in a position to recoup themselves from others, and so on. Considerable

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TAB 4

1990 CarswellSask 165
Supreme Court of Canada

National Trust Co. v. Mead

1990 CarswellSask 412, 1990 CarswellSask 165, [1990] 2 S.C.R. 410, [1990] 5 W.W.R. 459, [1990] S.C.J. No. 76, 112 N.R. 1, 12 R.P.R. (2d) 165, 22 A.C.W.S. (3d) 578, 71 D.L.R. (4th) 488, 87 Sask. R. 161, J.E. 90-1177, EYB 1990-67931

NATIONAL TRUST COMPANY v. MEAD, REMAI FINANCIAL CORP. and REMAI CONSTRUCTION (1981) INC.

Lamer C.J.C., Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

Heard: February 23, 1990
Judgment: August 16, 1990
Docket: No. 21157

Counsel: *W.G. Turnbull*, for appellant.
D.A. Canham, for respondents.

Subject: Property; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Contracts

XIII Novation

Real property

VIII Mortgages

VIII.11 Action on the covenant

VIII.11.b Enforcement of covenant

VIII.11.b.i Restrictions

VIII.11.b.i.B Statutory restrictions

VIII.11.b.i.B.1 Corporate mortgagor

Headnote

Mortgages --- Action on covenant — Enforcement of covenant — Restrictions — Statutory restrictions — Corporate mortgagor

Mortgages — Action on covenant to pay — Personal judgment — Availability — Statutory restrictions — Corporate mortgagor waiving statutory protection against enforcement of covenant to pay — Provincial statute permitting only corporate mortgagors to waive protection and such waiver binding corporation's "successors and assigns" — Individual assuming mortgage — Assumption agreement including waiver of statutory protection — Individual mortgagor defaulting — Individual not becoming "successor" or "assign" to corporate mortgagor — Statute releasing individual from obligation to pay under personal covenant.

Mortgages — Mortgage contracts — Assumption — Corporate mortgagor waiving statutory protection against enforcement of covenant to pay — Provincial statute permitting only corporate mortgagors to waive protection and such waiver binding corporation's "successors and assigns" — Individual assuming mortgage — Assumption agreement including waiver of statutory protection — Individual mortgagor defaulting — Individual not becoming "successor" or "assign" to corporate mortgagor — Statute releasing individual from obligation to pay under personal covenant. "assign" to corporate mortgagor — Statute releasing individual from obligation to pay under personal covenant.

Contracts — Novation — Corporate mortgagor waiving statutory protection against enforcement of covenant to pay — Provincial statute permitting only corporate mortgagors to waive protection — Individual assuming mortgage — Assumption agreement including waiver of statutory protection and preserving mortgagee's remedies against both corporate mortgagor and individual mortgagor — Original mortgage containing "no prejudice" clause — Mortgagee's conduct in discontinuing action

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26 Section 40 of the Act was enacted through a series of amendments to the statute between 1953 and 1961. The purpose in permitting corporate borrowers to waive the protection provided under the Act was, in my view, aptly described by Malone J. in *Disney Farms Ltd. v. C.I.B.C.*, [1984] 5 W.W.R. 285 at 287-88 (Sask. Q.B.):

> Since 1965 the Limitation of Civil Rights Act [R.S.S. 1965, c. 103, s. 27] has permitted bodies corporate to waive the entire provisions thereof. A similar waiver provision is also found in the Saskatchewan Land Contracts (Actions) Act, R.S.S. 1978, c. L-3 [s. 5]. In my opinion, the purpose of these provisions is to facilitate corporate financing that otherwise may not be available if lenders could not realize upon their security on default by a corporate borrower. I am also of the opinion that the provisions of the Limitation of Civil Rights Act were primarily intended to benefit and protect individuals, as distinct from limited companies, who usually are more sophisticated in the management of their affairs and require larger amounts of capital to maintain their operations.

I think it is clear that the policy concerns animating the protection of individuals from personal liability for mortgage deficiencies are not particularly compelling when applied to corporations. The meaning to be attributed to the provisions of the Act should reflect these policy concerns. Thus, any exception to the principle in s. 2 that individual mortgagors be insulated from personal liability should be construed as narrowly as possible.

27 Turning to s. 40(2) of the Act, the provision states that if a corporation waives its protection, that waiver binds all successors and assigns "notwithstanding anything in this Act". When used in reference to corporations, a "successor" generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation. In terms of s. 40(2) of the Act, it is understandable that a new corporation should be bound by the waiver of the old one since the new one is essentially supplanting the old one in all respects. Indeed, restricting the meaning of "successor" in s. 40(2) to other corporations makes sense in light of the policy driving the Act. In my view, the application of the s. 40(2) exception to "successors" was only intended to ensure liability on the personal covenant of a corporation which steps into the shoes of the original corporate mortgagor. It is apparent that Mead is not a "successor" to Remai here.

28 The word "assign" has, of course, a broader meaning. An "assign" is anyone to whom an assignment is made and presumably, but for the specific reference to "successors", would include both individuals and corporations. As between mortgagors, an assignment would be an agreement between the original mortgagor and his purchaser by which the latter would assume the mortgage debt in exchange for valuable consideration. Section 2(2)(*b*) of the Act specifically extends the protection of s. 2 to assignees of purchasers, whereas s. 40(2) binds assigns of corporations who have waived s. 2 "notwithstanding anything in this Act". This would presumably include individual assigns of corporate mortgagors. It is my view, however, that the purpose of this exception is to protect mortgagees who extend mortgages to corporations on condition that the latter provide a personal covenant and who then find that the corporation has unilaterally (and without the mortgagee's consent) assigned the mortgage to an individual on whom the personal covenant would not otherwise be binding under the Act. It is those "assigns" who must be bound by the personal covenant of the original corporate mortgagor if the mortgagee is to have the protection contemplated by the section. This situa tion would arise where there is an assignment of the mortgage from a corporate mortgagor to an individual without an assumption agreement between the individual mortgagor and the mortgagee.

29 Where the mortgagee (in this case National Trust) has entered into an assumption agreement with the new mortgagor, however, the concern about the mortgagee's rights being unfairly defeated simply does not arise. National Trust was completely free in the present case to decide whether or not to let Mead assume the mortgage from Remai. If it saw itself as exposed to an undue risk if it could not sue on the personal covenant to recover a deficiency on the mortgage debt, it was at liberty to refuse to enter into the assumption agreement with Mead. It is noteworthy that while s. 2(2)(*a*)-(*d*) extends the protection of the Act to circumstances of assignment, extension or assumption of a mortgage, s. 40(2) only binds successors and *assigns* to a waiver by a corporate body. There is no evidence on the record indicating whether Remai assigned its mortgage to Mead. Even if it had, however, the fact that Mead also assumed the mortgage by way of assumption agreement with National Trust entitles him to the benefit of s. 2(2)(*d*) which in turn is not subject to the waiver exception under s. 40(2). Remai's exercise of its waiver under s. 40 of the Act does not therefore bind Mead.

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TAB 5

1991 CarswellOnt 766
Supreme Court of Canada

Waldick v. Malcolm

1991 CarswellOnt 766, 1991 CarswellOnt 1020, [1991] 2 S.C.R. 456, [1991] R.R.A. 560, [1991] S.C.J. No. 55, 125 N.R. 372, 27 A.C.W.S. (3d) 922, 3 O.R. (3d) 471 (note), 3 O.R. (3d) 471, 47 O.A.C. 241, 83 D.L.R. (4th) 114, 8 C.C.L.T. (2d) 1, J.E. 91-1054, EYB 1991-67619

MARVIN MALCOLM, ROBERTA MALCOLM, BETTY STAINBECK and HARRY HILL v. NORMAN EDWARD WALDICK and JANET MARIE WALDICK

La Forest, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

Heard: February 26, 1991
Judgment: June 27, 1991
Docket: Doc. No 21781

Counsel: *Earl A. Cherniak, Q.C.*, and *Kirk F. Stevens*, for appellants.
R. Keith Simpson and *Robert S. Fuller*, for respondents.

Subject: Torts
Related Abridgment Classifications
Civil practice and procedure
XX Trials
XX.5 Jury trial
XX.5.i Functions of judge and jury
XX.5.i.iv Miscellaneous
Torts
XV Negligence
XV.4 Contributory negligence
XV.4.c Proof of contributory negligence
XV.4.c.ii Duty of care
XV.4.c.ii.B Pedestrians
Torts
XV Negligence
XV.8 Defences
XV.8.e Volenti non fit injuria
XV.8.e.ii Voluntary acceptance of risk
Torts
XIX Specific forms of liability
XIX.2 Occupiers' liability
XIX.2.b Duties and obligations
XIX.2.b.v Statutory duty
Torts
XIX Specific forms of liability
XIX.2 Occupiers' liability
XIX.2.c Particular situations
XIX.2.c.vi Ice and snow

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section has consistently been held to require more than a mere knowledge of the risk by the plaintiff: see, for example, *Bunker v. Charles Brand & Son Ltd.*, [1969] 2 Q.B. 480, [1969] 2 All E.R. 59 at p. 65 [All E.R.], per O'Connor J. and *White v. Blackmore*, [1972] 2 Q.B. 651, [1972] 3 All E.R. 158 (C.A.), at p. 164 [All E.R.], per Denning M.R.

45 The goals of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe. The occupier may, however, wish to put part of his property "off limits" rather than to make it safe, and in certain circumstances that might be considered reasonable. Where no such effort has been made, as in the case at Bar, the exceptions to the statutory duty of care will be few and narrow. As Professor Victor Di Castri states in his book *Occupiers' Liability* (Vancouver: Burroughs & Co., 1980), at p. 229: "It may be assumed the words 'willingly accepted' will not be given a liberal interpretation. ... It would seem the defence will be difficult to sustain in view of the high standard of evidence [of voluntariness] required." In the course of these remarks, Professor Di Castri cites from the decision of Laskin J. (as he then was) in *Mitchell v. Canadian National Railway Co.*, [1975] 1 S.C.R. 592, 6 N.S.R. (2d) 440, 46 D.L.R. (3d) 363, 1 N.R. 344, and includes an extract at p. 617 [S.C.R.] which, to my mind, is relevant to the question before us:

> I regard it as wrong in principle to dissolve a duty of care that arises on the facts of a case merely because the person to whom the duty is owed knows that he may be exposing himself to some danger, and especially so when there is applicable apportionment legislation.

Of course, such apportionment legislation exists in Ontario, and, indeed, is at the core of the third ground of appeal in the instant case.

46 As Blair J.A. noted, several recent decisions of this Court have clarified the volenti doctrine and its place in the current state of the law of torts. In *Dubé v. Labar*, supra, at p. 658 [S.C.R.], Estey J. reduced the scope of the volenti defence, holding that it will only arise

> [W]here the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise ... only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.
>
> Common sense dictates that only rarely will a plaintiff genuinely consent to accept the risk of the defendant's negligence.

47 Wilson J. further emphasized the exceptional and somewhat anachronistic nature of volenti in light of the current trends in the law of torts. She said at p. 1202 [S.C.R.] of *Crocker v. Sundance Northwest Resorts Ltd.*, supra:

> Since the *volenti* defence is a complete bar to recovery and therefore anomalous in an age of apportionment, the courts have tightly circumscribed its scope. It only applies in situations where the plaintiff has assumed both the physical and the legal risk involved in the activity.

48 In my view, the Legislature's intention in enacting s. 4(1) of the Act was to carve out a very narrow exception to the class of visitors to whom the occupier's statutory duty of care is owed. This exception shares the same logical basis as the premise that underlies volenti, i.e., "that no wrong is done to one who consents. By agreeing to assume the risk the plaintiff absolves the defendant of all responsibility for it": per Wilson J. in *Crocker*, supra, at p. 1201. Rare may be the case where a visitor who enters on premises will fully know of and accept the risks resulting from the occupier's non-compliance with the statute. To my mind, such an interpretation of s. 4(1) accords best with general principles of statutory interpretation, is more fully consonant with the legislative aims of the Act, and is consistent with tort theory generally.

49 Both Austin J. and Blair J.A. were of the view that Waldick did not consent to the legal risk, or waive any legal rights that might arise from the negligence of the Malcolms. I agree with their disposition of this ground of appeal, and conclude that Waldick is not barred from recovery by the operation of s. 4(1) of the Act.

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TAB 6

In the Court of Appeal of Alberta

Citation: Edmonton Regional Airports Authority v Lynx Air Holdings Corporation, 2024 ABCA 380

Date: 20241122
Docket: 2401-0244AC
Registry: Calgary

2024 ABCA 380 (CanLII)

Between:

Edmonton Regional Airports Authority, Halifax International Airports Authority, The Calgary Airport Authority, Vancouver Airport Authority, and Winnipeg Airports Authority Inc.

Applicants

- and -

Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air

Respondents

Reasons for Decision of
The Honourable Justice Jane A. Fagnan

Application for Permission to Appeal

Reasons for Decision of
The Honourable Justice Jane A. Fagnan

2024 ABCA 380 (CanLII)

[1] The applicant airport authorities seek permission to appeal the decision published as: ***Greater Toronto Airports Authority v Lynx Air Holdings Corporation***, 2024 ABKB 514. Permission to appeal is required under s 13 of the *Companies' Creditors Arrangement Act*, RSC 1985 c C-36 and Rule 14.5(1)(f) of the *Alberta Rules of Court*, Alta Reg 124/2010.

[2] The applicants and 1263343 Alberta Inc dba Lynx Air are parties to a Memorandum of Agreement between the Air Transport Association of Canada, Signatory Air Carriers, and Certain Airports which governs the collection and remittance of airport improvement fees. Those fees are charged to all departing air passengers by the airport authorities to fund capital expenditure projects relating to the respective airports for the benefit of the public. Pursuant to the Memorandum of Agreement, air carriers like Lynx collect the fees from departing passengers and subsequently remit them on a monthly basis to the airport authorities.

[3] On February 22, 2024, Lynx obtained an initial order pursuant to the CCAA. At that time, it was $4 million in arrears on its remittance of airport improvement fees to the applicants. On May 24, 2024, the applicants filed an application seeking an order declaring that the unremitted fees owed to the applicants were subject to an express, implied, or constructive trust. The Greater Toronto Airports, who had a separate agreement with Lynx, filed a similar application. The King's Bench justice determined that no trust was created between the applicants and Lynx in relation to the fees. She determined that the Toronto airports' agreement did create a trust.

[4] The applicants seek leave to appeal on the grounds that the justice erred in the contractual interpretation of relevant provisions in the Memorandum of Agreement and, alternatively, erred in failing to impose a constructive trust.

[5] The test for permission to appeal under s 13 requires "serious and arguable grounds that are of real and significant interest to the parties": ***Bellatrix Exploration Ltd v BP Canada Energy Group ULC***, 2020 ABCA 178 at para 16. The following are relevant considerations:

(a) Is the point on appeal of significance to the practice?

[6] I am satisfied that the interpretation of this industry wide agreement is of significance to the practice. The Memorandum of Agreement has been in place since 1999 and applies to many signatory air carriers and airports. The appeal relates to fees paid by travelers which are intended to be used by airport authorities to maintain and improve the airport facilities for the benefit of the public.

(b) Is the point raised of significance to the action itself?

[7] The issue raised is one of significance to the applicants. The Calgary Airport Authority, in particular, is owed over $2 million. Further, the matter is of precedential significance as the Memorandum of Agreement continues to govern the relationship between numerous carriers and airports across the country.

(c) Is the appeal *prima facie* meritorious or, on the other hand, is it frivolous?

[8] The "not frivolous" standard is a very low threshold. The parties have expounded upon their arguments at length in their written and oral submissions. Having considered those arguments, I am satisfied that the grounds put forward by the applicants are not frivolous.

(d) Will the appeal unduly hinder the progress of the action.

[9] The liquidation of Lynx has been completed. The funds in question are being held in the Monitor's trust account and are accruing interest. The Monitor's mandate has been extended to January 31, 2025. There are a number of unrelated continuing matters which have yet to be finalized. Counsel for the applicants advises that the primary secured creditor, Indigo, who was owed over $90 million in principal and over $20 million in interest and costs, has received $87 million since the CCAA filing. Indigo has not conveyed any concerns regarding delay. I am satisfied that the appeal will not unduly hinder the progress of the action.

[10] Permission to appeal is granted.

Application heard on November 20, 2024

Reasons filed at Calgary, Alberta
this 22nd day of November, 2024

Fagnan J.A.

2024 ABCA 380 (CanLII)

Appearances:

K.L. Fellowes, KC
A. Bell
for the Applicants

T. Gelbman
J.L. Treleaven
for the Respondents

2024 ABCA 380 (CanLII)