Court of Appeal File No. COA-23-OM-0314
Court File No. CV-18-608978-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BRIDGING FINANCE INC., AS AGENT FOR 2665405 ONTARIO LIMITED

Applicant
(Respondent on Appeal)

- and –

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents
(Appellants on Appeal)

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(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

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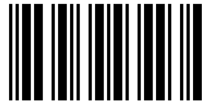

TAB1

COURT OF APPEAL FOR ONTARIO

CITATION: Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited, 2012 ONCA 569
DATE: 20120905
DOCKET: M40742 & M40925 (C54560)

2012 ONCA 569 (CanLII)

Weiler, Blair and Rouleau JJ.A.

In the Matter of the Bankruptcy of Matthew David Moore, of the City of Brampton in the Regional Municipality of Peel, Province of Ontario

BETWEEN

The Superintendent of Bankruptcy

Respondent/
Applicant (Appellant)

and

<u>407 ETR Concession Company Limited</u> and Matthew David Moore

Moving Party/
Respondent (<u>Respondents</u>)

J.T. Curry and Andrew Parley, for the respondent 407 ETR Concession Company Limited

Liz Tinker, for the appellant

Heard: May 16, 2012

Rouleau J.A.:

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Introduction

[1] The court is being called upon to rule on two motions. The first is a motion by 407 ETR Concession Company Limited (407 ETR) to quash the notice of appeal delivered by the Superintendent of Bankruptcy (Superintendent) on the basis that the Superintendent does not have the standing necessary to appeal the decision.

[2] In the event that 407 ETR's motion to quash is successful, the Superintendent seeks leave to appeal and an extension of time to bring the motion for leave.

[3] 407 ETR opposes leave being granted on the basis that the Superintendent was not a party to the underlying dispute, a dispute that has since settled, and there is no basis in law for granting such leave.

[4] The outcome of these motions turns on the proper interpretation of ss. 5(4)(a) and 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

Facts

[5] Matthew David Moore (Moore) made an assignment in bankruptcy in November 2007. At the time he had accumulated a debt to 407 ETR of approximately $35,000 in unpaid toll charges.

[6] On June 21, 2011, Deputy Registrar Donaldson made an order granting Moore an absolute discharge from bankruptcy. Moore then sought to obtain valid vehicle permits for two cars. Section 22(4) of the *Highway 407 Act, 1998*, S.O. 1998, c. 28, prevents the Registrar from validating or issuing permits where 407 tolls remain unpaid. Accordingly, the Registrar of Motor Vehicles refused to validate or issue the permits because of the unpaid tolls

[7] Moore brought a motion returnable before a registrar in bankruptcy seeking a declaration that his debt to 407 ETR was released pursuant to his absolute discharge from bankruptcy. Both 407 ETR and the Superintendent were served with notice of the motion.

[8] Registrar Mills heard the motion on September 8, 2011. Through inadvertence 407 ETR did not appear. Nor did the Superintendent. The Superintendent explained that, based on past experience, such motions were usually granted or settled.

[9] The registrar allowed Moore's motion granting an order that: (i) Moore's discharge on June 21, 2011 released him from all claims provable in bankruptcy, including the debt of 407 ETR; and (ii) directing the Ministry of Transportation to issue licence plates to Moore upon payment of the usual licensing fees.

[10] Upon becoming aware of the registrar's order, 407 ETR took steps to have it set aside. It brought a motion in the Superior Court, rather than before a

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registrar in bankruptcy.[1] 407 ETR did not give the Superintendent notice of its motion. Moore consented to the motion, which was granted by the motion judge on October 6, 2011.

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[11] Moore subsequently amended his motion and filed it with the Superior Court. He moved for the same relief he had sought before the registrar. He also sought a declaration to prevent 407 ETR from using s. 22(4) of the *Highway 407 Act* to stop him from obtaining a vehicle permit.

[12] Additionally, he served 407 ETR and the Attorneys General of Canada and Ontario with a notice of constitutional question. He maintained that the refusal to validate or issue a vehicle permit under the provincial legislation engaged four conflicts with the *BIA* and that s. 178(2) of the *BIA* provides that an order of discharge releases the bankrupt from all claims provable in bankruptcy.

[13] On October 25, 2011, the motion judge dismissed Moore's motion. He concluded that there was no operational conflict between s. 22 of the *407 Highway Act* and s. 178(2) of the *BIA*. As a result, he declined to grant the relief sought by Moore.

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[1] The Superintendent suggested that 407 ETR made a deliberate choice to move before a judge of the Superior Court instead of a registrar in bankruptcy. It referred to the bankruptcy of Dean Robert Oliver where 407 ETR failed to appear on a similar motion through inadvertence. In response to a later consent motion brought by 407 ETR to set aside the order obtained, Registrar Nettie advised 407 ETR that although he would allow the consent motion to set aside the order, "such an inadvertence will not be excused in the future".

[14] The Superintendent did not receive notice of any of the proceedings before the motion judge, including the constitutional question. It learned of these proceedings after the motion judge's decision dismissing Moore's motion on its merits.

[15] On November 4, 2011, the day before the end of the appeal period, the Superintendent intervened in this proceeding by serving and filing a notice of appeal. It relied on ss. 5(4)(a) and 193(c) of the *BIA* as its authority to do so. Later that day, Moore advised the Superintendent that he no longer intended to appeal the decision as he had received a "very, very attractive offer" to settle from 407 ETR.

[16] On November 17, 2011, 407 ETR brought a motion to quash the Superintendent's notice of appeal. It took the position that the Superintendent lacks standing to bring an appeal as it was not a party to the proceeding below. Further, if the Superintendent were to request leave, leave should not be granted.

[17] The Superintendent took the position that leave was not required to appeal the motion judge's decision. However, out of an abundance of caution, it brought a motion requesting leave pursuant to s. 193(e) of the *BIA* and/or the court's inherent jurisdiction and sought an extension of time to do so.

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Issues

[18] The issues raised by these motions are as follows:

1. Does the Superintendent have standing to appeal the order of the motion judge as of right?; and
2. If the Superintendent does not have standing as of right:

   (a) Can the Superintendent appeal the motion judge's decision with leave of the court?

   (b) Should an extension of time for serving and filing a notice of motion requesting leave to appeal be granted?; and

   (c) Should leave to appeal be granted?

Analysis

(1) Does the Superintendent have standing to appeal the order of the motion judge as of right?

[19] An appeal from a decision or order made in proceedings instituted under the *BIA* is governed by the *BIA* and the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (*BIA* rules), not by the *Courts of Justice Act*, R.S.O. 1990, c. C-43, and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[20] *BIA* rule 31(1) provides that an appeal to a court of appeal referred to in s. 183(2) of the *BIA* (which includes the Court of Appeal for Ontario) must be made by filing a notice of appeal at the office of the Registrar of the court appealed

from. In the case of Ontario, the court appealed from is the Superior Court of Justice. The appeal must be filed within ten days of the order or decision appealed from.

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[21] The Superintendent relies on the broad power granted by s. 5(4)(a) of the *BIA*, as providing it with a right of appeal to this court even where it did not participate in the proceedings at the first instance and none of the original parties are appealing. I do not agree that s. 5(4)(a) grants the Superintendent that right.

[22] The section allows the Superintendent to "intervene in any matter or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto". Although the section gives the Superintendent a broad power to intervene, the ability to do so is restricted to a proceeding in "court".

[23] "Court" is defined in s. 2 of the *BIA*. Except in certain noted sections, it "means a court referred to in subsection 183(1) or (1.1)". Sections. 183(1) and (1.1) list the provincial and territorial trial courts, including the Superior Court of Ontario. The Court of Appeal for Ontario, or any other appellate court for that matter, is notably absent from the list. The scope of intervention by the Superintendent contemplated by s. 5(4)(a)is thus limited to the trial courts, and not the courts of appeal.

[24] The Superintendent further argues that even if s. 5(4)(a) only allows interventions in the Superior Court, technically, its intervention in this proceeding was filed in the Superior Court within the requisite ten day appeal period. Pursuant to *BIA* rule 31(1), the notice of appeal is to be filed with the Superior Court, not the Court of Appeal. After filing it is transmitted to the Court of Appeal. As a result, the Superintendent contends that the intervention was made before the matter had left the Superior Court.

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[25] I would not give effect to this submission. Although *BIA* rule 31(1) provides for the filing of the notice of appeal in the Superior Court, the appeal is taken to the Court of Appeal for Ontario. For all intents and purposes, it is a proceeding taken in the Court of Appeal. It is the Court of Appeal and not the Superior Court that has authority over the proceeding, including the appropriate parties and any proposed interveners.

[26] The Superintendent, therefore, has no standing to bring an appeal to this court as of right. However, that does not dispose of the matter. The Superintendent argues that it has standing to appeal the motion judge's decision with leave of the court.

(2)(a) Can the Superintendent appeal the motion judge's decision with leave of the court?

[27] Section 193 of the *BIA* provides for statutory rights of appeal and reads as follows:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) If the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) From the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) In any other case by leave of a judge of the Court of Appeal.

[28] The Superintendent argues that s. 193(e) is a catch all provision allowing for the possibility of an appeal in any case that does not otherwise fall under s. 193(a) to (d). Section 193(e) is, therefore, broad enough to permit this court to grant leave and allow the Superintendent to appeal from the motion judge's decision even though it was not a party thereto.

[29] 407 ETR argues that absent a statutory right of appeal, there is no inherent jurisdiction in this court to hear the appeal. 407 ETR submits that s. 193(e) of the *BIA*, does not give this court jurisdiction to grant the leave to appeal sought and has no application in this case.

[30] I agree with the Superintendent's submission. Subsections 193(a-d) grant automatic rights of appeal. Subsection (e), however, is distinct from the preceding sections in that it is discretionary. The wording gives the court broad

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discretion. It provides that in any case where leave is granted, other than those listed in (a-d), “an appeal lies to the Court of Appeal from any order or decision of a judge of the court”.

[31] Although we have not been referred to a reported case where a court of appeal granted leave to the Superintendent where it was not a party in the lower court proceedings, I see nothing in the section that prevents us from doing so. Indeed, reading the provision in the context of the statutory scheme and, in particular, the unique position of the Superintendent, necessitates this conclusion.

[32] Even where the Superintendent does not intervene as a party in the Superior Court, its statutory position is such that it is not a true stranger to the proceedings. The Superintendent holds a unique position with respect to bankruptcy proceedings. It is the chief government official appointed by the Governor in Council charged with supervising the administration of “all estates and matters to which this Act [the *BIA*] applies”: *BIA*, s. 5(2).

[33] To allow the Superintendent to fulfill this role, the *BIA* gives it the power to intervene in any *BIA* proceedings in the Superior Court as if it were a party: *BIA*, s. 5(4). To guide the exercise of that authority, the Superintendent has established an intervention program that has, as its objective:

> identify[ing] those situations in which the Superintendent or a representative of the Superintendent should

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> intervene in the administration of certain cases by applying to the courts *to ensure that the integrity of the insolvency process is maintained.* This may involve cases … where matters of public policy are concerned: Frank Bennett, *Bennett on Bankruptcy*, 14th ed. (Toronto: CCH, 2009), at p. 1471. [Emphasis added.]

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[34] Intervention at first instance is therefore crucial to the important role of the Superintendent in maintaining the integrity of the bankruptcy and insolvency system. It follows that in certain exceptional circumstances, for example, where a decision is made to which the Superintendent was not a party, Parliament must have intended that it be permitted to seek the leave of this court to appeal from that decision.

[35] That said, where the Superintendent relies on s. 193(e) to appeal a decision to which it was not a party at first instance, leave to appeal should only be granted in exceptional circumstances and in accordance with the factors the court relies on when exercising its inherent jurisdiction to grant leave to a non-party, as set out in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, at p. 594. That is, the applicant should be able to show:

(a) that its interest was not represented at the proceeding;

(b) that it has an interest which will be adversely affected by the decision;

(c) that it is, or can be, bound by the order;

(d) that it has a reasonably arguable case; and

(e) that the interests of justice in avoiding a multiplicity of proceedings would be served by the grant of leave.

[36] In my view, these factors provide a helpful guide to determine when the Superintendent has established exceptional circumstances justifying the granting of leave under s. 193(e) where it has not intervened in the proceedings below.

[37] I therefore conclude that s. 193(e) of the *BIA* permits this court to grant the Superintendent leave to appeal from a lower court decision to which it was not a party where it can establish exceptional circumstances, and meet the standard test that any party must meet to obtain leave of the court.

(2)(b) Should an extension of time for serving and filing a notice of motion requesting leave to appeal be granted?

[38] Before deciding whether the Superintendent should be granted leave in this case, there is the question of the timing of its motion. The decision the Superintendent seeks to appeal was issued October 25, 2011. The Superintendent's notice of appeal was served and filed November 4, 2011. The notice of motion seeking leave to appeal, however, was not filed until January 17, 2012, after the Superintendent became concerned that leave may in fact be required. By this time, the motion was out of time.

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[39] In my view, the extension of time ought to be granted. It is well established that in deciding whether to extend the time to appeal or seek leave, the court will consider:

a) whether the person formed an intention to appeal within the relevant period;

b) the length of the delay and the explanation for the delay;

c) any prejudice to the respondent;

d) the merits of the appeal; and

e) whether the justice of the case requires it.

See *Rizzi v. Mavros*, 2007 ONCA 350, 85 O.R. (3d) 401, at para. 16.

[40] In this case, the Superintendent formed the intention to appeal within the relevant ten day appeal period, as demonstrated by the timely service and filing of its notice of appeal. It has also provided a satisfactory explanation for the delay in bringing the motion for leave. The Superintendent originally believed, and still believes, that it had the right to intervene pursuant to ss. 5(4)(a) and 193(c) of the *BIA* and did not require leave to appeal After reviewing the respondent's factum, it determined that it was prudent to request leave as an alternative argument and did so in a timely fashion.

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[41] There is no indication of any prejudice to 407 ETR as a result of the timing of this motion. 407 ETR knew early on that the Superintendent was appealing and knew the basis of that appeal. Further, since 407 ETR and Moore have settled their dispute, the timing of the appeal does not delay any receipt of funds.

[42] As to the merits of the appeal and the justice of the case, there are a number of alleged errors of law raised by the Superintendent.

[43] The Superintendent submits that the motion judge mischaracterized key elements of the bankruptcy and insolvency system, and the interplay between section 22(4) of the *Highway 407 Act* and s. 178(2) of the *BIA*. It further argues that the motion judge's statement that the first goal of the bankruptcy system is the equitable distribution of the assets of a bankrupt among the estate's creditors runs contrary to the Supreme Court of Canada's decision in *Husky Oil Operations Ltd. v. Minister of National Revenue,* [1995] 3 S.C.R. 453, at para. 7.

[44] Additionally, the Superintendent has an interest that may be adversely affected in the sense that the decision has the potential to seriously impact the bankruptcy and insolvency system. Arguably, it creates a new class of debts that can be enforced after bankruptcy over and above those set out in s. 178(1) of the *BIA*. With respect to the impact on 407 ETR alone, the Superintendent explains that since 2007, the number of bankrupts and proposals debtors in Ontario who list 407 ETR as a creditor exceeds 6,000.

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[45] These issues are significant and at the very least constitute arguable grounds for an appeal. There is, therefore, good reason to grant the extension sought by the Superintendent.

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(2)(c) Should leave to appeal be granted?

[46] The remaining question then, is whether this is an appropriate case in which to grant leave to appeal. In my view, even though it was not a party to the proceedings below, the Superintendent has demonstrated that the answer must be yes.

[47] Generally speaking, the factors to be considered on an application for leave to appeal are:

a) whether the point of appeal is of significance to the practice;

b) whether the point raised is of significance to the action itself;

c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

See *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.); *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279, (B.C.C.A.); *Norbourg Groupe financier inc. (Syndic de),* 2006 QCCA 752, 33 C.B.R. (5th) 144; *Medical International Technologies (MIT Canada) Inc. v. V. & G. International Licensing Corp.*, 2010 QCCA 1826, [2010] Q.J. No. 10209; *Re Pope & Talbot Ltd.*, 2011 BCCA 326, 21 B.C.L.R. (5th) 270.

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[48] However, as Armstrong J.A. noted in *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005), 198 O.A.C. 27, at paras. 19-20, there is no stringent test for determining whether to grant leave to appeal pursuant to s. 193(e) of the *BIA*. There is a variety of factors to consider depending on the circumstances of the case. Armstrong J.A. highlighted the prominence of two such factors: the existence of arguable grounds of appeal and issues of significance to the bankruptcy practice that ought to be considered and addressed by the Court of Appeal.

[49] As previously discussed, the Superintendent has established that the appeal is not without merit and the issues raised are significant to the bankruptcy practice. It has therefore satisfied the standard test for obtaining leave applicable to all parties. The second part of the equation is whether the Superintendent has demonstrated that this is an exceptional case so as to justify granting leave to appeal notwithstanding its absence as a party at first instance. In my view, it has.

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[50] This is not a case where the Superintendent made a conscious decision not to intervene at first instance. In the present case, the Superintendent was deprived of the opportunity to exercise its discretionary power to intervene in the Superior Court proceeding because it never received notice of the setting aside of the registrar's order, or Moore's amended notice of motion and notice of constitutional question. All of these issues were before the motion judge and would ordinarily have attracted the attention of the Superintendent, who would likely have intervened.

[51] Unaware of the proceedings, however, the Superintendent did not intervene. Its interests, thus, went unrepresented. And, as discussed above, the unique interests of the Superintendent – regarding the integrity of the bankruptcy and insolvency system – were, at least arguably, adversely affected. It is worth emphasizing that the interests of the Superintendent are not identical to those of the bankrupt. They are much broader and of a systemic nature. It is therefore no answer to say that the Superintendent's interests were represented below through the submissions of Moore.

[52] The Superintendent is not bound by the order of the motion judge in that it is required to take, or refrain from taking, some action. However, in so far as the motion judge made findings that dictate how certain debts are to be treated under the *BIA*, the Superintendent is bound by those findings in its supervision of the bankruptcy regime. Further, as discussed above, the Superintendent has an

arguable case that the motion judge's decision is the product of a misapprehension of the bankruptcy and insolvency system and its relationship with the *Highway 407 Act*. The Superintendent is also concerned that the decision appears to run counter to the interpretation given to s. 178(2) by the court is Saskatchewan in the recent decision of *Gorguis v. Saskatchewan Government Insurance*, 2011 SKQB 132, [2011] 6 W.W.R. 372, a decision presently under appeal.

[53] Finally, given the broader importance of the issues raised on this appeal and, specifically the concern that the decision of the motion judge may result in a conflict between how s. 178(2) of the *BIA* is interpreted in Ontario and in Saskatchewan, it is in the interests of justice to allow the Superintendent to pursue them before this court, rather than to leave the law in a state of uncertainty until such time as the issue arises in another proceeding.

[54] The importance of the arguable issues in the proposed appeal, combined with the inability of the Superintendent to respond to them at first instance brings this case within the narrow category of exceptional cases where leave to appeal ought to be granted to the Superintendent despite that it was not a party at first instance. I would therefore grant the Superintendent's application for leave to appeal.

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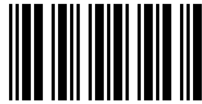
Conclusion

[55] The Superintendent's application for an extension of time to file its notice of motion seeking leave to appeal the motion judge's decision is granted, as is its application for leave to appeal that decision. Because I agree with 407 ETR's submission that the Superintendent did not have a right to appeal, I would normally grant the relief sought and strike the appeal. However, as I am granting the Superintendent's application for leave, no useful purpose would be achieved by requiring the filing of a fresh notice of appeal. Costs of both motions are reserved to the panel hearing the appeal.

Released: Sept. 5, 2012
"KMW"

"Paul Rouleau J.A."
"I agree K.M. Weiler J.A."
"I agree R.A. Blair J.A."



TAB2

Business Development Bank of Canada v. Pine Tree Resorts Inc. et al. [Indexed as: Business Development Bank of Canada v. Pine Tree Resorts Inc.]

Ontario Reports

Court of Appeal for Ontario,

Blair J.A. (in Chambers)

April 29, 2013

115 O.R. (3d) 617 | 2013 ONCA 282

2013 ONCA 282 (CanLII)

Case Summary

Bankruptcy and insolvency — Practice and procedure — Appeals — Second mortgagee appealing order granting first mortgagee's application for appointment of receiver over mortgagor's assets — Second mortgagee wishing to exercise its rights under s. 22 of Mortgages Act — Leave to appeal required as appeal did not fall within s. 193(a) or s. 193(c) of Bankruptcy and Insolvency Act ("BIA") — Test for leave to appeal under s. 193(e) of BIA being whether proposed appeal raises issue of general importance to practice in bankruptcy/ insolvency matters or to administration of justice generally, is prima facie meritorious and would not unduly hinder progress of bankruptcy/insolvency proceedings — Proposed appeal not satisfying those criteria — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 — Mortgages Act, R.S.O. 1990, c. M.40, s. 22.

BDC held security for the money owed to it by Pine Tree by way of a first mortgage and general security agreements. Romspen was the second mortgagee. Both mortgages were in default. Romspen wished to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act* to put BDC's mortgage in good standing and take over the sale of the property. It proposed to pay all arrears of principal and interest, together with BDC's costs, expenses and outstanding realty taxes, but did not propose to repay HST arrears, which constituted a default under the BDC security documents. BDC applied successfully for the appointment of a receiver over the Pine Tree's assets. Pine Tree and Romspen sought to appeal that order. Romspen intended to argue that it was entitled to exercise its [page618] rights under s. 22 of the *Mortgages Act* as the arrears of HST did not jeopardize BDC's security because they were a subsequent encumbrance, and therefore it was not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22.

Held, leave to appeal should be denied.

Leave to appeal under s. 193(*e*) of the *Bankruptcy and Insolvency Act* was required. The appeal did not involve "future rights" within the meaning of s. 193(*a*). Section 193(*c*) did not apply as an order appointing a receiver did not bring into play the value of the property. In determining whether to grant leave to appeal under s. 193(*e*), the court will look to whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly

hinder the progress of the bankruptcy/ insolvency proceedings. In this case, the application judge's considerations were entitled to great deference and, in any event, were purely factual and case-specific and did not give rise to any matters of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. Moreover, Romspen's s. 22 argument was not *prima facie* meritorious. Finally, all parties agreed that the property in question had to be sold, and there was a need for the sale to proceed expeditiously. Interfering with the timeliness of that process could potentially impact on the success of the sale. Leave to appeal should not be granted.

Baker (Re) (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580, 83 O.A.C. 351, 31 C.B.R. (3d) 184, 53 A.C.W.S. (3d) 933 (C.A., in Chambers); *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 1845, 198 O.A.C. 27, 10 C.B.R. (5th) 201, 139 A.C.W.S. (3d) 10 (C.A., in Chambers); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A., in Chambers); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.); *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395, 30 C.B.R. (3d) 90, 52 A.C.W.S. (3d) 957 (C.A., in Chambers), **consd**

Other cases referred to

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of), [1997] A.J. No. 869, 206 A.R. 295, 48 C.B.R. (3d) 171, 73 A.C.W.S. (3d) 727 (C.A., in Chambers); *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 1999 ABCA 255, 244 A.R. 103, 12 C.B.R. (4th) 186; *Century Services Inc. v. Brooklin Concrete Products Inc.* (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A., in Chambers); *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135, 71 O.A.C. 56, 25 C.B.R. (3d) 210, 47 A.C.W.S. (3d) 242 (C.A., in Chambers); *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.); *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315, 135 D.L.R. (3d) 76, 25 R.P.R. 97 (C.A.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 [as am.], (*a*), (*c*), (*e*)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.]

Mortgages Act, R.S.O. 1990, c. M.40, s. 22, (1) [page619]

APPEAL from an order appointing a receiver.

Milton A. Davis, for appellants Pine Tree Resorts Inc. and 1212360 Ontario Limited.

David Preger, for appellant Romspen Investment Corporation.

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Harvey Chaiton, for respondent Business Development Bank of Canada.

Endorsement of **BLAIR J.A.** (in Chambers): —

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Overview

[1] On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited (together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

[2] Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

[3] For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

[4] BDC is owed approximately $2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately $4.3 million.

[5] The inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements. [page620]

[6] Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the notice of power of sale for redemption.

[7] Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

[8] Pine Tree supports Romspen's plan because it involves re-opening the inn for the upcoming summer season and attempting to sell the property on a going-concern basis. BDC

rejects this option as unrealistic because it views the inn's operations as being an irretrievably losing proposition.

[9] Romspen argued before the application judge -- and argues here as well -- that it was entitled to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40 to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses and outstanding realty taxes. However, it does not propose to repay approximately $250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

[10] In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centrepiece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

[11] On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the [page621] mortgage and -- where there are unperformed covenants -- performing those covenants as well.

Is Leave to Appeal Necessary?

[12] In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, [1997] A.J. No. 869, 206 A.R. 295 (C.A., in Chambers).

[13] The portions of s. 193 of the *BIA* relied upon by Romspen and Pine Tree are the following:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (*a*) if the point at issue involves future rights;
>
> . . . . .
>
> *(c)* if the property involved in the appeal exceeds in value ten thousand dollars;
>
> . . . . .
>
> *(e)* in any other case by leave of a judge of the Court of Appeal.

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[14] Neither (*a*) nor (*c*) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

[15] "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.), at para. 17. See, also, *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 1845, 10 C.B.R. (5th) 201 (C.A., in Chambers).

[16] Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

[17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(*c*). As [page622] noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

[18] In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The test

[19] In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(*e*). As he noted, at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

[20] One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.). It asks the following questions:

(i) Is the point appealed of significance to the practice as a whole?

(ii) Is the point raised of significance in the action itself?

(iii) Is the appeal *prima facie* meritorious?

(iv) Will the appeal unduly hinder the progress of the action?

[21] These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 ("*CCAA*"), although their application has not been confined to those types of cases.

[22] A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395 (C.A., in Chambers), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or [page623] (c) involves an obvious error, causing prejudice for which there is no remedy.

[23] Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(*e*) of the *BIA*: see, in addition to *R.J. Nicol*, for example, *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135 (C.A., in Chambers); and *Century Services Inc.*

[24] This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A., in Chambers); and *Baker (Re)*, (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580 (C.A., in Chambers). These factors echo the criteria set out in *Power Consolidated.*

[25] In *Baker (Re)*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded, at p. 381 O.R., that the *R.J. Nicol* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol* and the *Power Consolidated* criteria -- without apparently distinguishing between them -- as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

[26] Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this court.

[27] I take from this brief review of the jurisprudence that, while judges of this court have tended to favour the *R.J. Nicol* test in the past, there has been a movement towards a more expansive and flexible approach more recently -- one that incorporates the *Power Consolidated* notions of overall importance to [page624] the practice area in question or the administration of justice as well as some consideration of the merits.

[28] That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the

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following are the prevailing considerations in my view. The court will look to whether the proposed appeal

(a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;

(b) is *prima facie* meritorious, and

(c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[30] It is apparent these considerations bear close resemblance to the *Power Consolidated* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/ insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

[31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my [page625] view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

[32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

[33] The *Power Consolidated* criteria are the criteria applied by this court in determining whether leave to appeal should be granted in restructuring cases under the *CCAA*: see *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A., in Chambers), Feldman J.A., at para. 15; and *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 244 A.R. 103 (C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both *CCAA* and *BIA* insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the test in the circumstances

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[34] I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

[35] First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case-specific, and do not give rise to any matters of general significance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

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[36] I would not grant leave to appeal on those grounds.

[37] The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its first-ranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission [page626] is the argument that the outstanding HST arrears -- although a default in the observance of a covenant under the BDC mortgage -- could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

[38] I have serious reservations about the likelihood of success of this submission on appeal.

[39] Romspen relies upon the jurisprudence of this court establishing that a mortgagor -- and therefore, a subsequent mortgagee -- is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315 (C.A.). The problem is that Romspen has not offered to put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a $250,000 covenant -- payment of the outstanding HST arrears.

[40] For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act*,[1] and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case. [page627]

[41] I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

[42] Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

[43] There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

[44] For the foregoing reasons, I decline to grant leave to appeal.

Disposition

[45] There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the *BIA*. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances. The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

[46] No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

Application dismissed.

Notes

1 Section 22(1) provides:

22(1) Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

(*a*) at any time before sale under the mortgage: or

(b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

(Emphasis added)

It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

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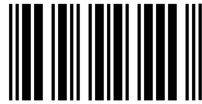

TAB3

COURT OF APPEAL FOR ONTARIO

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp.,
2023 ONCA 219
DATE: 20230329
DOCKET: M54133 (COA-23-CV-0215)

2023 ONCA 219 (CanLII)

Brown, Trotter and Paciocco JJ.A.

BETWEEN

KingSett Mortgage Corporation

Applicant
(Respondent/Responding Party)

and

30 Roe Investments Corp.

Respondent
(Appellant/Responding Party)

Mark Dunn, for the moving party Receiver, KSV Restructuring Inc.

Mervyn Abramowitz and Lou Brzezinski, for the responding party 30 Roe Investments Corp.

Richard Swan, for the respondent KingSett Mortgage Corporation

Darren Marr, for the Canadian Imperial Bank of Commerce

Raymond Zar, acting in person in his capacity as a guarantor of the responding party's debt

Heard: March 27, 2023

On appeal from the orders of Justice Jana Steele of the Superior Court of Justice, dated February 7, 2023.

REASONS FOR DECISION

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I. OVERVIEW

[1] The court-appointed receiver, KSV Restructuring Inc., moves for: (i) an order quashing the February 23, 2023 appeal initiated by the respondent debtor, 30 Roe Investments Corp. ("30 Roe"), from the two February 7, 2023 approval and vesting orders made by Steele J. (the "Approval Orders"); (ii) alternatively, an order expediting the appeal; (iii) in the further alternative, an order denying 30 Roe leave to appeal the Approval Orders under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"); and (iv) in the further alternative, an order pursuant to *BIA* s. 195 lifting any automatic stay of the proceedings.

[2] The Approval Orders authorized the Receiver to complete sale transactions for two of the nine units owned by 30 Roe at the Minto 30 Roe condominium building, specifically units PH04 and PH09.

[3] Although the agreements for purchase and sale of those two units between the receiver and the purchasers contemplated an end of February closing, amending agreements filed in the motion record extended the closing dates for both transactions to the end of this week, Friday, March 31, 2023.

[4] A personal guarantor of the company's indebtedness, Raymond Zar, who is also the principal of 30 Roe, opposes the Receiver's motion.

II. KEY EVENTS CONCERNING THE RECEIVERSHIP

[5] The events leading up to the appointment of a receiver over 30 Roe were described by this court in its decision quashing the company's appeal from the May 9, 2022 Receivership Order: 2022 ONCA 479.

[6] Since that time, the Receiver obtained from McEwen J. a July 18, 2022 Sale Process Approval Order, which authorized the Receiver to proceed with an individual-unit sales process described in s. 4.0 of its First Report (the "July Sales Order"). In approving that marketing and sales approach, McEwen J. rejected 30 Roe's submission that the nine units should "be sold en masse, essentially as an income producing hospitality-type of model akin to a hotel." No appeal was taken from the July Sales Order.

[7] McEwen J. subsequently authorized the Receiver to change listing agents for the sale of the units in his December 14, 2022 order (the "December Sales Order"). No appeal was taken from the December Sales Order.

[8] Earlier this year, the Receiver negotiated sale agreements for PH04 and PH09. The Receiver provided details of the events leading up to those agreements, including the listing history for the two units, in s. 4.0 of its Third Report dated January 26, 2023. In s. 4.5 of that report, the Receiver addressed the debtor's continued insistence that the nine units be sold as a block. In s. 4.5(6) the Receiver stated: "Based on its own review of the information

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available to it, the Receiver continues to believe there is no merit to the suggestion that the Units could be sold as a going concern hospitality business for a premium relative to the individual resale value of the Units".

[9] The Receiver moved before Steele J. for approval of the two sale transactions.

[10] The day before the return of that motion, 30 Roe filed an affidavit from Mr. Zar that repeated the company's criticism of the Receiver's plan to market the units individually. Mr. Zar contended that individual sales would not realize the units' optimum value. He deposed, at paras. 12 and 13 of his affidavit, that an income approach was more suitable for determining the aggregate value of the units (which he described as a business). Mr. Zar deposed that he valued the units on a "going concern" basis at approximately $12.476 million as of February 6, 2023.

[11] Steele J. was not persuaded by Mr. Zar's personal valuation and advocacy of an *en bloc* sale. She noted in her February 7, 2023 endorsement that:

- McEwen J. had rejected the "same argument" when he made the July Sales Approval Order;
- The Receiver had asked 30 Roe several times for evidence supporting the debtor's view that a going concern sale would be preferable but 30 Roe did not provide such information; and

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- The Receiver challenged the reliability of the valuation proffered by Mr. Zar, observing that 30 Roe had not provided up-to-date financial statements or information about the market for the type of business it contended was operated using the nine condominium units.

[12] Steele J. was satisfied that the criteria enumerated by this court in *Royal Bank of Canada v. Soundair Corporation* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.) had been met. She approved the two sale transactions and granted the Approval Orders.

[13] On February 23, 2023, 30 Roe served a notice of appeal from the Approval Orders (the “Notice of Appeal”).

III. PROCEDURAL ISSUES

[14] Before dealing with the relief sought by the Receiver in its notice of motion, we wish to recount several procedural issues raised by Mr. Zar during this appeal.

[15] On the initial return of the motion on Monday, March 27, 2023 before a slightly differently constituted panel, Mr. Zar asked Lauwers J.A. to recuse himself from the panel. The previous week, Lauwers J.A. had heard and denied a motion by 30 Roe’s counsel of record, Blaney McMurtry LLP, to remove itself from the record: 2023 ONCA 196. Lauwers J.A. acceded to Mr. Zar’s request and recused himself. As a result, one of the scheduled duty judges, Brown J.A., joined the panel.

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[16] Upon the resumption of the hearing before the reconstituted panel, Mr. Zar requested a 24-hour adjournment of the hearing to permit the filing of a responding factum. By way of background, on Friday, March 24, 2023, Blaneys had sent a letter to the court advising that "our client has instructed us to not to file any responding material" on the Receiver's motion to quash. As a result, no responding materials were before the panel.

[17] When this correspondence was brought to Mr. Zar's attention, he orally changed his instructions to Blaneys in open court. Mr. Zar wanted Blaneys to make submissions on behalf of 30 Roe as they were still on the record. Counsel from Blaneys was not prepared to do so.

[18] From the interaction between counsel from Blaneys and Mr. Zar, it was clear to the panel that a complete breakdown had occurred between the law firm and its client. In those circumstances, the panel had no confidence that if we were to compel Blaneys to make submissions, Mr. Zar as the principal of 30 Roe or on his own behalf would accept the adequacy or appropriateness of those submissions or their faithfulness to instructions he had given Blaneys. Consequently, we informed Mr. Zar that we would not call on Blaneys but would hear submissions from him on behalf of 30 Roe.

[19] We advised Mr. Zar that if he wished to file with our court registrar a draft respondent's factum that he was holding in his hands, we would have the registrar

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make copies for the panel so that we could review it before the continuation of the hearing. We granted Mr. Zar a 30-minute adjournment to decide whether he would file the factum and send electronic copies to the other parties. We thereupon recessed for 30 minutes.

[20] Upon resuming, the panel learned that Mr. Zar had not filed a factum for the panel's consideration or provided copies to the other parties.

[21] Instead, Mr. Zar requested that Brown J.A. recuse himself because, according to Mr. Zar, some familial relationship created a conflict of interest. When questioned, Mr. Zar was not prepared to name the person who allegedly had some familial relationship with Brown J.A. that might create a conflict. Consequently, the panel called on the moving party Receiver's counsel to make his submissions on the motion.

[22] When the panel called upon Mr. Zar to make responding submissions, he advised that a medical condition of his was making it difficult for him to formulate submissions. The panel offered, and Mr. Zar accepted, a 10-minute recess to allow him to collect his thoughts. Upon reconvening, argument of the motion proceeded to its conclusion, with the panel taking the matter under reserve.

[23] Throughout the hearing Mr. Zar took the position that the submissions he made were solely in his capacity as a guarantor of the corporate debt of 30 Roe

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and not on behalf of the company, although the substance of his submissions certainly conveyed a response by the debtor corporation to the Receiver's motion.

IV. ANALYSIS

The Receiver's motion to quash

[24] Although in a factum filed on a provisional execution motion below 30 Roe agreed that an appeal in the matter could only proceed with leave, apparently it "walked back" that admission during the course of argument. Consequently, we will examine whether in the specific circumstances of this case an appeal as of right lies under s. 193 from the Approval Orders.

[25] Consideration of the Receiver's motion to quash must begin with an examination of the order sought to be appealed and the grounds of appeal pleaded by 30 Roe in its Notice of Appeal.

[26] The Approval Orders follow the form of standard Commercial List approval and vesting orders: they approve the sale transactions; authorize the Receiver to execute the sale agreements "with such minor amendments as the Receiver may deem necessary" and to "execute such additional documents as may be necessary or desirable for the completion" of the transactions; and provide that upon the delivery of a Receiver's Certificate all of the debtor's right, title, and interest in the purchased units shall vest absolutely in the purchaser free and clear from all security interests. The Approval Orders make no provision for the distribution of

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the sale proceeds. Pursuant to para. 12 of the initial Receivership Order, the Receiver must deposit those funds into an account and hold the monies "to be paid in accordance with the terms of this Order or any further Order of this Court."

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[27] The grounds of appeal advanced by 30 Roe in its Notice of Appeal reflect the debtor's repeatedly expressed view that the nine units should be sold *en bloc*, not individually. The Notice of Appeal alleges that:

- the Receiver ought not to have marketed the units as separate properties;
- the evidence on the motion was clear that the units were part of a larger commercial "Enterprise", a term 30 Roe and Mr. Zar use to describe a hospitality business they contend the nine units collectively supported;
- the failure to market the units for sale together led to a marked diminution in the value of the Enterprise;
- the motion judge "failed to appreciate the entire concept of the Enterprise and the loss in value of the Enterprise, if the Units were sold off separately";
- the motion judge failed to apply the *Soundair* test "as the Units ought not to have been marketed or offered for sale in the first place"; and
- the motion judge "failed to find that the marketing and offering of the Units for sale here, on their own, would not be in the best interests of the creditors or other stakeholders here."

[28] The Notice of Appeal states that 30 Roe has an appeal as of right pursuant to *BIA* ss. 193(a)-(c). We shall consider each provision.

[29] As to *BIA* s. 193(a), 30 Roe's Notice of Appeal from the Approval Orders does not raise any "point in issue [that] involves future rights". The narrow scope of the concept of future rights was described in *Business Development Bank of*

Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at para. 15: "'Future rights' are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future".

[30] In the present case, the Notice of Appeal challenges the Approval Orders on the basis of the methodology, or procedure, followed by the Receiver for the unit sale process and alleged commercial disadvantages caused by that process. 30 Roe's appeal concerns rights that presently exist, not ones that may be exercised in the future. Consequently, the appeal of the Approval Orders does not engage *BIA* s. 193(a).

[31] Under *BIA* s. 193(c), an appeal as of right lies "if the property involved in the appeal exceeds in value ten thousand dollars." There is no dispute that the sale price for both units exceeds $10,000. However, the jurisprudence on *BIA* s. 193(c), as summarized by this court in *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228, at paras. 36-39, identifies three types of orders that do not fall within the ambit of that section:

- an order that does not result in a loss or does not "directly involve" property exceeding $10,000 in value;
- an order that does not bring into play the value of the debtor's property; or
- an order that is procedural in nature.

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[32] To determine whether an order sought to be appealed falls within *BIA* s. 193(c), a court must analyze the economic effect of the order: *Hillmount*, at para. 41. As stated in *Hillmount*, at para. 42:

> What is required in any consideration of whether the appeal of an order falls within *BIA* s. 193(c) is a critical examination of the effect of the order sought to be appealed. Such an examination requires scrutinizing the grounds of appeal that are advanced in respect of the order made below, the reasons the lower court gave for the order, and the record that was before it. The inquiry into the effect of the order under appeal therefore is a fact-specific one; it is also an evidence-based inquiry, which involves more than merely accepting any bald allegations asserted in a notice of appeal: *Bending Lake* [*infra*], at para. 64. [*MNP Ltd. v. Wilkes*, 2020 SKCA 66, 449 D.L.R. (4th) 439] concurs on this point, holding, at para. 64, that the loss claimed must be "sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal," a point repeated in the subsequent chambers decision in *Re Harmon International Industries* [*Inc.*, 2020 SKCA 95, 81 C.B.R. (6th) 1], at para. 32.

[33] In the present case, the Approval Orders authorized the Receiver to proceed with sale transactions for two units. Section 4.0 of the Receiver's Third Report detailed the listing history (including listing prices) for both units. Unredacted copies of the negotiated agreements of purchase and sale were provided to the debtor and were before the motion judge. No evidence was put before the motion judge that the sale prices for both transactions were unreasonable or not reflective of prevailing market conditions. Accordingly, there was no basis to suggest that

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approval of the two transactions would result in a "loss" of value for the properties when compared to available market prices.

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[34] Instead, 30 Roe sought to oppose the sale transactions by repeating the "*en bloc* sale" argument it had made at the time of the July Sales Order but which McEwen J. had rejected. On its face, the evidence 30 Roe filed before Steele J. carried virtually no weight, consisting as it did of a bald assertion by Mr. Zar about the possible value of an *en bloc* transaction that was not supported by an independent valuation and was advanced against a history of 30 Roe refusing requests by the Receiver for financial information about the "Enterprise".

[35] Moreover, the position taken by 30 Roe before Steele J. amounted to a collateral attack on the July and December Sales Orders, which it had not appealed. 30 Roe repeated its *en bloc* arguments before McEwen J. in December and then before Steele J., taking the position that it had "reserved" its right to object to future sales on the basis that an *en bloc* sale would generate more value. That unilateral reservation of rights did not alter the legal effect of the July and December Sales Orders under which the court authorized the Receiver to market and sell the units individually, which the Receiver did.

[36] By failing to appeal and set aside the July and December Sales Orders, 30 Roe lost the legal basis to advance an argument that the Approval Orders would create a loss of value by reason of the individual-unit marketing and sales

methodology used by the Receiver as compared to an "*en bloc*" sales process. It was the July Sales Order, not the Approval Orders, that put in jeopardy any difference in value of the property that might arise from an "individual-unit" sales approach as compared to an "*en bloc*" sales approach. Given that 30 Roe's Notice of Appeal asserts no other basis on which to reverse the Approval Orders, in the circumstances of this case its appeal from the Approval Orders does not fall within the ambit of *BIA* s. 193(c).

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[37] Finally, 30 Roe's appeal does not fall within the ambit of *BIA* s. 193(b), which provides an appeal as of right "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings." The jurisprudence has consistently interpreted *BIA* s. 193(b) as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings" as the provision concerns "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings: see *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 32.

[38] As mentioned, by failing to appeal and set aside the July and December Sales Orders, 30 Roe lost the legal basis to advance an argument that the Approval Orders – or subsequent approval orders for other individual units – would create a loss of value by reason of the individual-unit marketing and sales

methodology used by the Receiver. Further, subsequent motions by the Receiver for the approval of sale transactions for other units will be decided upon the evidence related to those sale transactions, not the transactions for PH04 and PH09 authorized by the Approval Orders.

[39] For these reasons, we conclude that 30 Roe's appeal does not fall within the ambit of *BIA* ss. 193(a)-(c). Accordingly, we quash its appeal.

Leave to appeal

[40] Although 30 Roe did not file a notice of motion seeking leave to appeal the Approval Orders pursuant to *BIA* s. 193(e), it did seek such alternative relief in its Notice of Appeal. As well, several of the submissions made by Mr. Zar during the hearing dealt with elements of the leave to appeal test. Accordingly, we will consider whether leave should be granted to 30 Roe to appeal the Approval Orders.

[41] In considering whether to grant leave to appeal an order under *BIA* s. 193(e) a court will look to whether the proposed appeal: (i) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address; (ii) is *prima facie* meritorious; and (iii) would unduly hinder the progress of the bankruptcy/insolvency proceedings: *Pine Tree Resorts*,

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at para. 29; *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 3.

[42] 30 Roe's proposed appeal does not raise an issue of general importance, based as it is on the fact-specific sales process approved in its receivership. Its proposed appeal is not *prima facie* meritorious: as discussed, it amounts to nothing more than a collateral attack on the July and December Sales Orders. Finally, its appeal would unduly hinder the progress of the receivership. Granting leave to appeal probably would put in jeopardy the pending closings of the sales of PH04 and PH09. 30 Roe has not filed any evidence of equivalent or superior offers for those two units or of its present ability to satisfy the claims of its creditors. One therefore is left with the distinct impression that its attempt to appeal the Approval Orders is nothing more than a delay tactic.

[43] For these reasons, we deny 30 Roe leave to appeal the Approval Orders.

Lifting the automatic stay

[44] Since we have quashed 30 Roe's appeal and denied it leave to appeal, there is no need to consider the Receiver's alternative request for an order lifting the automatic stay under *BIA* s. 195.

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V. DISPOSITION

[45] For the reasons set out above, we grant the Receiver's motion. The appeal of 30 Roe from the Approval Orders is quashed. We deny 30 Roe leave to appeal the Approval Orders.

[46] The Receiver is entitled to seek its costs of this motion when it applies in the ordinary course for the approval of the supervising judge below of its activities and accounts.

"David Brown J.A."
"Gary Trotter J.A."
"David M. Paciocco J.A."

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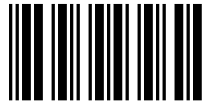

TAB4

COURT OF APPEAL FOR ONTARIO

CITATION: B&M Handelman Investments Limited v. Drotos, 2018 ONCA 581
DATE: 20180625
DOCKET: M49307 (C65474)

Paciocco J.A. (Motion Judge)

In the Matter of the Bankruptcy of Christine Drotos, of the City of Toronto, in the Province of Ontario

BETWEEN

B&M Handelman Investments Limited, Flordale Holdings Limited, M. Himel Holdings Inc., 1530468 Ontario Ltd., Maxoren Investments, and Sheilaco Investments Inc.

Applicants (Responding Party)

and

Christine Drotos

Respondent

Eric Golden, for the moving party, Rosen Goldberg Inc.

P. James Zibarras, Leslie Dizgun, and Caitlin Fell, for the responding party, World Finance Corporation

David Preger, for the responding party, B&M Handelman Investments Limited

Adam J. Wygodny, for the responding party, Money Gate Investment Corp.

Miranda Spence, for the purchaser, Frederic P. Kielburger

Heard: June 13, 2018

On a motion for directions and leave to appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated June 1, 2018.

Paciocco J.A.:

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OVERVIEW

[1] Rosen Goldberg Inc. is the receiver (the "Receiver") of property known municipally as 4 Birchmount Avenue, Toronto (the "Birchmount Property"). At all material times, the Birchmount Property was registered to Ms. Christine Drotos (the "Debtor").

[2] On June 1, 2018, Dunphy J. made an Approval and Vesting Order approving the Receiver's sale of the Birchmount Property (the "Order"). The Order authorizes the transfer of the Birchmount Property to Mr. Frederic P. Kielburger (the "Purchaser") free and clear of all mortgages.

[3] On June 7, 2018, World Finance Corporation ("World Finance"), a mortgagee of the Birchmount Property, filed a notice of appeal challenging the Order. In its notice of appeal, World Finance asserts that its appeal was as of right pursuant to s. 193(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). In the alternative, it sought leave to appeal the Order pursuant to s. 193(e).

[4] If World Finance was appealing as of right, the Order would have automatically been stayed pending World Finance's appeal pursuant to *BIA*, s. 195. This stay would have prevented the Receiver from completing the sale of the Birchmount Property, which was set to close on June 14, 2018.

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[5] On June 11, 2018, the Receiver brought the instant motion on an urgent basis seeking directions regarding World Finance's appeal. The Receiver took the position that s. 193(b) did not apply and that no leave to appeal should be granted under s. 193(e). The Receiver sought an order declaring that the Order was not stayed by World Finance's notice of appeal and approving the closing of the sale on June 14, 2018.

[6] After denying an adjournment motion brought by World Finance, I abridged the time for service and heard the Receiver's motion on June 13, 2018. At the conclusion of the hearing, I held that World Finance does not have an appeal as of right pursuant to s. 193(b). I denied leave to appeal pursuant to s. 193(e). And I also approved the sale pursuant to the Order. I indicated that reasons for my decision would follow in writing. These are my reasons.

THE RECEIVERSHIP AND THE APPLICATION FOR THE APPROVAL AND VESTING ORDER

[7] The Birchmount Property is a partially constructed 12,900 square-foot home located in the Scarborough Bluffs neighborhood. At all material times, the Birchmount Property was vacant, in need of repairs, and unfit for occupancy. There were three mortgages on title

[8] The first mortgagee, Pillar Capital Corporation ("Pillar"), claims that as of May 29, 2018 it was owed $2,534,582.27 under its mortgage.

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[9] The second mortgage is held by a group of corporations comprising the applicants in the proceedings below. B&M Handelman Investments Limited ("B&M") is one of the second mortgagees. It claims that as of June 11, 2018, $1,164,755.78 was owing under the second mortgage, excluding legal fees.

[10] The third mortgage is held 69.9% and 30.1% by World Finance and Money Gate Mortgage Investment Corporation ("Money Gate"), respectively. World Finance alleges that the total amount owing under this third mortgage was approximately $6.7 million as of May 14, 2018.

[11] On April 10, 2018, B & M applied, pursuant to BIA s. 243(1), for the appointment of a receiver. On April 13, 2018, the requested Appointment Order was made, appointing the Rosen Goldberg Inc. as receiver over the Debtor's lands and premises, including the Birchmount Property.

[12] The Appointment Order contains the usual Model Order clauses granting the Receiver the power to engage consultants and appraisers, market the property, and negotiate the terms and conditions of sale. The Appointment Order also permits the Receiver to report to, meet with, and discuss with affected Persons (as defined in the Appointment Order) "as the Receiver deems appropriate" and to share information subject to confidentiality terms. It permits the Receiver to sell the Birchmount Property with court approval and to apply for

a vesting order to convey the property to a purchaser free and clear of encumbrances.

[13] After obtaining the Appointment Order, the Receiver secured an appraisal of the Birchmount Property which set the value at $3.2 million. The Receiver considered different sale options and determined that an MLS listing process was the optimal method. After reviewing various listing proposals, it entered into a 90-day listing agreement with Chris Kelos of Re/Max Corbo & Kelos Realty Ltd. ("Kelos"). Kelos listed the Birchmount Property on the MLS on April 30, 2018 at a sale price of $3.8 million.

[14] On May 3, 2018, an unconditional offer to purchase for $2.5 million was submitted. The Receiver did not accept this offer.

[15] On May 8, 2018, the Receiver received an unconditional offer to purchase from the Purchaser. Following negotiations, the Purchaser increased his offer to $3.45 million, an amount higher than the appraised value. Nonetheless, it was evident that insufficient proceeds of sale would be generated by this offer to fully retire the encumbrances. In fact, B&M would suffer a shortfall and World Finance would recover nothing. The Receiver accepted this offer subject to court approval.

[16] The Receiver then brought an application before Dunphy J. in the instant Debtor's bankruptcy proceedings, seeking approval of the sale of the Birchmount

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Property. At the same time, the Receiver also applied for approval of the sale of four other properties from the separate bankruptcy proceeding of Comfort Capital. The sale approvals raised similar issues, but the two bankruptcies involve different debtors and different subsequent mortgagees. World Finance claims to be interested in both of the bankruptcies. Although the Receiver brought both applications at the same time, no formal consolidation order was made linking or joining the two applications. The form of receivership order in both cases is effectively identical.

[17] With respect to the instant Debtor's bankruptcy proceedings, the parties disputed who had the authority to speak in respect of the third mortgage on the Birchmount Property. World Finance appeared and opposed the Receiver's application. Money Gate appeared and supported the Receiver's position.

[18] World Finance's key complaint before Dunphy J. was that the Receiver failed to consult World Finance about the sale and marketing process and the listing price. In its view, had the Receiver discharged its duty, a higher purchase price would have resulted. In support of its assertion that the property was undervalued, World Finance relied on the opinion of a realtor who states that he would have listed the Birchmount Property at between $4 million to $4.5 million, and would not have accepted an offer of $3.4 million.

THE DECISION OF DUNPHY J.

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[19] Dunphy J. granted the Order respecting the Birchmount Property. He considered the criteria in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), [1991] O.J. No. 1137 and the procedure adopted by the Receiver in selling the property:

> …In each case, the first step the Receiver took was to seek appraisals. These are a necessary pre-condition to a Receiver having a sense of what the property being marketed is worth. The Receiver obtained two appraisals in respect of the High Point property, one appraisal in respect of the Bridge property, one appraisal for the Loyalist property, two for the Caldwell property, and one for the Birchmount property.
>
> The Receiver also consider [*sic*] how best to market these properties. In considering that question, the Receiver had to have regard to the state of these properties. At least two of them were in a very challenging state […] The Birchmount property is a partially constructed shell with a roof that has a hole in it and has become a home for wild animals.
>
> Among other things, the Receiver also had to consider the carrying costs of these properties in terms of accrued reality [*sic*] taxes, which are in arrears on many of the properties, and the state of the market and other relevant considerations.
>
> After considering the matter, the Receiver determined that proceeding to market through the MLS process was the optimal process to follow in relation to the five properties that are the subject matter of these motions.
>
> The Receiver also considered possible listing agents and in considering that question looked at the experience of the brokers considered, looked at their experience in the areas, considered their recommendations as to listing price and considered that in relation to appraisals…

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> […]
>
> In the case of the B&M receivership, which is to say the Birchmount property, an information package was prepared, there were online and advertising and email blasts, open houses, newspaper coverage was arranged…

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[20] Justice Dunphy concluded that fair market value had been obtained. He referred to the realtor’s opinion of value that World Finance relied upon to support its position that a higher value could be obtained, stating that while this report had some helpful comments, it did “not have any solid valuation evidence that I can attach weight to in it.” Justice Dunphy concluded that the Receiver’s business judgment had been applied and informed by the appraisals responsibly sought.

[21] He applied the *Soundair* principles to the argument that the Receiver failed to consult World Finance. He was not prepared to accept the criticism that the Receiver acted too quickly. In his view, the MLS marketing process was designed to obtain offers as soon as reasonably practicable and in each case multiple offers were received. Nor was Dunphy J. persuaded that the Receiver failed to consider the interests of all parties. He stated:

> There has been some confusion about who those other parties are and how much their claims are. Who is entitled to speak for them has also been an issue in this case. Ultimately, however, the interests of all of the parties is the same. Their interest is in obtaining the highest and best price reasonably available.

[22] Justice Dunphy dismissed the specific complaint that World Finance ought to have been consulted on the marketing process and given a greater degree of input, concluding as follows:

> This objection runs into a number of factual walls. Firstly, the appraisals were obtained in this case and they were available to the creditors if they chose. The receivership order allowed the Receiver to share information with creditors subject to appropriate NDAs. At least some of the stakeholders did obtain the appraisals and signed NDAs. I cannot say that this was not available to others. Nobody in this case contacted the Receiver until the time came to begin the process of seeking court approval, which does not speak well for the level of interest they had in seeking to shape the process.

THE ISSUES

[23] The issues on this motion are: (1) whether the proposed appeal of the Order is as of right pursuant to s. 193(b);[1] and (2) alternatively, whether leave to appeal should be granted pursuant to s. 193(e). If the appeal is not as of right, and leave is not appropriate, the Receiver asks this court to approve the sale to the Purchaser, as provided for in the agreement of purchase and sale.

[24] Section 193 of the *BIA* provides, in relevant part:

---

[1] While World Finance raised the potential application of s. 193(c) in its factum, it did not seek to rely on that subsection in oral argument. In any event, reliance on that subsection would not have been tenable given World Finance's emphasis on process-related errors: *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 54.

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> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> […]
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> […]
>
> (e) in any other case by leave of a judge of the Court of Appeal.

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ANALYSIS

(1) Subsection 193(b) does not apply

[25] World Finance contends that it has the right to appeal the Order under s. 193(b). It claims that any order made in connection with its appeal of the Approval and Vesting Order related to the Birchmount Property will likely affect other cases of a similar nature relating to Approval and Vesting Orders made in the Comfort Capital bankruptcy.

[26] World Finance contends that although there are two separate bankruptcies involved, in substance the application to approve the sale of the five properties was only one bankruptcy proceeding within the meaning of s. 193(b). It notes that the Receiver brought the applications together before the same judge. Each application raised the same course of conduct by the Receiver. And one set of

reasons was provided. World Finance argues that it would be met with an issue estoppel argument if it raises the same issues in subsequent proceedings to approve vesting orders on other properties. It contends that s. 193(b) should be interpreted purposively, giving World Finance an appeal as of right so that it is not left, unfairly, without an avenue to challenge the Order.

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[27] First, I do not agree that s. 193(b) should be interpreted in the expansive manner that World Finance submits. In *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173, at para. 20, Tulloch J.A. described the “clear direction in recent case law in favour of a narrow construal of the rights to appeal in ss. 193(a) to (d) of the *BIA*”, citing *Re En Route Imports Inc.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. This “narrow construal” is incompatible with World Finance’s position, and there are good reasons for it.

[28] In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 49, Brown J.A. explained that initially the *BIA* provided only for appeals as of right. The inclusion in 1949 of a leave to appeal provision removed the need for a broad interpretive approach to ss. 193(a) to (d). More importantly, the appeal as of right provisions should be read harmoniously with the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which

requires leave for all appeals from orders made under the statute.[2] Reading s. 193's appeal as of right subsections narrowly avoids disharmony between the two insolvency regimes.

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[29] In *Bending Lake*, Brown J.A. explained at para. 32 that s. 193(b) applies where there is a real dispute that is likely to affect another case in the <u>same</u> bankruptcy proceedings. The Order that World Finance proposes to appeal was made in the instant Debtor's bankruptcy and pertains only to this bankruptcy proceeding. The fact that the outcome of the proposed appeal could affect cases arising out of the Comfort Capital bankruptcy is insufficient to give rise to an appeal as of right. There is no appeal as of right in this case under s. 193(b).

[30] Second, this outcome does not operate to unfairly deny World Finance an opportunity to challenge the Order that it says will likely affect other cases it will be involved in. This is because a party whose interest are likely to be affected in other case of a similar nature arising in other bankruptcy proceedings can move to protect those interests by seeking leave to appeal, where an appeal as of right is not available. Where leave is warranted in the circumstances, it will be granted.

[31] I turn, then, to World Finance's alternative position that leave to appeal should be granted under s. 193(e) in this case.

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[2] See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 24, where a majority of the Supreme Court held that the *BIA* and the *CCAA* should be read harmoniously to the extent possible.

(2) Leave to appeal should not be granted

[32] The granting of leave to appeal under s. 193(e) is discretionary and contextual. The test for leave described by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, was adopted by a panel of this court in *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697, at para. 3. The proposed appeal must:

> a) raise an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this [c]ourt should therefore consider and address;
>
> b) be *prima facie* meritorious; and
>
> c) [not] unduly hinder the progress of the bankruptcy/insolvency proceedings.

[33] As Doherty J.A. noted in *Ravelston Corp. (Re)*, [2005] O.J. No. 5351 (C.A.), 24 C.B.R. (5th) 256, at para. 28, the leave inquiry should begin with some consideration of the merits of the proposed appeal, for if the appeal cannot possibly succeed, "there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal."

[34] World Finance argues that its proposed appeal is *prima facie* meritorious. It contends that the Receiver failed to consider World Finance's interests, and that the process used was unfair because the Receiver did not consult with

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World Finance on the marketing process, or the price at which the Birchmount Property would be listed. It urges that Dunphy J. misapplied the *Soundair* principles in finding otherwise.

[35] Specifically, World Finance claims that Dunphy J. erred in law when finding that the Receiver had considered World Finance's interests by assuming that all parties had the same interest, namely, obtaining a higher sale price. It further submits that he erred in law in finding the process to have been fair by considering irrelevant or improper explanations for the Receiver's failure to consult with World Finance about the marketing process and listing price.

[36] In my view, World Finance's grounds of appeal are not legitimately arguable points. They do not present a realistic possibility of success and therefore lack *prima facie* merit.

[37] First, there is no reasonable prospect that fault could be found in Dunphy J.'s conclusion that, in seeking the highest and best price reasonably available, the Receiver was considering the shared interest of all of the parties. World Finance's argument that, as a fulcrum creditor, it had unique interests in the marketing strategy and list price that were not considered has no traction. Marketing strategy and list price are means to an end, namely, achieving the highest and best price reasonably available, the very thing that Dunphy J. considered.

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[38] World Finance's claim that Dunphy J. considered irrelevant and improper explanations for the Receiver's failure to consult directly with World Finance about the marketing and listing price for the Birchmount Property is also without merit.

[39] World Finance has not presented any authority for the proposition that a receiver has a positive obligation to consult with subsequent mortgagees as to a particular sales process and the listing price.

[40] Indeed, the Appointment Order in this case expressly permits the Receiver to report to, meet with, and discuss with affected Persons "as the Receiver deems appropriate" and to share information subject to confidentiality terms. The Receiver had discretion under the order to proceed as it did.

[41] Moreover, even if a general duty to consult applied in this case, Dunphy J. was clearly entitled to come to the decision he did, for the reasons he expressed.

[42] As he pointed out, in this case there was confusion as to the secured creditors' true identities and who represented their interests. There were also fraud allegations at play, which explained why the Receiver was not more proactive in its dealings with certain creditors. Moreover, those creditors previously showed a low level of interest in seeking to shape the process. In these circumstances, Dunphy J. found that making the appraisals available to those creditors who chose to consult them was sufficient.

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[43] None of these factors are irrelevant or improper considerations. Dunphy J. was entitled to consider them. As Blair J.A. pointed out in *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), [2004] O.J. No. 2744, at para. 23, courts exercise considerable caution when reviewing a sale by a court-appointed receiver and will interfere only in special circumstances. Moreover, defence is owed to the decision Dunphy J. made: 22.

[44] Finally, I accept the Receiver's submission that World Finance's proposed appeal lacks merit for the simple reason that even if the Birchmount Property were to sell for the amount World Finance claims it could have achieved, World Finance would still receive nothing. World Finance's process-based complaint is therefore an idle appeal. There is no material wrong it can complain of.

[45] Even if World Finance's proposed appeal had *prima facie* merit, I still would have denied leave to appeal, as neither of the other two leave to appeal requirements are satisfied.

[46] World Finance's proposed appeal does not raise an issue that is of general importance to the practice in bankruptcy matters or to the administration of justice as a whole. It is a fact-specific dispute about the propriety of this particular sale transaction.

[47] In my view, granting leave to appeal would also unduly hinder the bankruptcy proceeding. If the sale was delayed, additional interest and costs

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payable on the first mortgage would have continued to accrue, serving only to further denude the second mortgagee's position.

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[48] Moreover, the agreement of purchase and sale provided specific timelines for the obtaining of court approval and for the closing of the sale. It permitted postponement of the closing date for only 60 days after the original closing date. The sale transaction was originally scheduled to close on June 11, 2018 and was postponed until June 14, 2018. If leave to appeal had been granted, the additional delay required for the disposition of the appeal could have resulted in the loss of this transaction.

[49] Accordingly, I denied leave to appeal pursuant to s. 193(e).

[50] I granted the Receiver's request to approve the sale under the agreement of purchase and sale because Dunphy J. found that the Receiver made efforts to obtain the best price and achieved the offer to purchase after considering the interests of all parties in a fair process that had integrity. Moreover, postponement of the sale would have created the prejudice described above.

DISPOSITION

[51] For these reasons, I granted the Receiver's motion. I declare that World Finance does not have an appeal as of right pursuant to s. 193(b) and hold that leave to appeal pursuant to s. 193(e) of the *BIA* should not be granted. The

Order approving the closing of the sale to the Purchaser on June 14, 2018 is also approved.

[52] Costs are assessed by a judge of the Superior Court of Justice, Commercial List in insolvency proceedings. I will not interfere with that judge's discretion to do so, and therefore will make no costs order relating to the costs claimed by the Receiver and B&M.

[53] Money Gate was not served with the motion but appeared and exercised its right of standing, as its interests were at stake. World Finance will pay costs, on a partial indemnity basis, to Money Gate in the amount of $2,000, inclusive of HST and disbursements.

[54] The Purchaser also requested nominal costs. It did not play an active role in the proceedings. In my view, a costs award in favour of the purchaser is not warranted so I decline to make one.

Released: June 25, 2018 ("D.M.P.")

"David M. Paciocco J.A."

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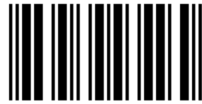

TAB5

Court of Appeal for Ontario
Ravelston Corp. (Re)
Date: 2005-11-10

Docket: CA M33075, CA M33076, CA M33049, CA C44249

Alan H. Mark, Edward Greenspan for Conrad Black

Robert Staley for Hollinger International Inc.

Derek Bell for Hollinger Inc.

Alex MacFarlane for R.S.M. Richter Inc.

Doherty J.A.:

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I

[1] The receiver, R.S.M. Richter Inc. ("Richter") seeks an order quashing an appeal brought by Lord Conrad Black ("Black") as of right from the order of Farley J. Black resists the motion to quash and, by way of alternative, seeks leave to appeal the order of Farley J. Black's application for leave to appeal need be considered only if Richter successfully quashes Black's appeal.

[2] I would hold that Black does not have a right of appeal and would quash his appeal. I would refuse leave to appeal.

II

[3] In April 2005, Ravelston Corporation Limited ("RCL") was placed into receivership in proceedings taken under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*") and the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*"). Richter was appointed receiver/monitor with wide powers to manage the affairs of the company. In making the order, Farley J. indicated that Black and others had resigned as officers and directors of RCL and that the objective of the proceedings was to place RCL (and associated entities) under the control of a court appointed officer:

> The draft orders are to be adjusted to make it absolutely clear that the old guard (Black and Radier — and any other officer and director including Messrs. White and Boultbee) are "out" — out in the sense of not being able to, directly or indirectly, pull any of the strings and that Richters as an officer of the court, responsible to the court and the stakeholders of the applicants, is "in" — in in the sense of being able to pull all the strings and thereby direct the fortunes, business and affairs of the applicants.

[4] Richter has filed a series of reports with the Superior Court summarizing its activities since April 2005. Various stakeholders have raised issues before Farley J. and

he has made several orders in the course of his ongoing supervision of the insolvency proceedings.

[5] On August 18, 2005, a federal grand jury in Chicago, Illinois indicted RCL and others on fraud charges. RCL has no assets or place of business in the United States. It is currently engaged in civil litigation in Illinois. In its Ninth Report filed on September 16, 2005, Richter outlined the issues raised by the criminal proceedings against RCL in federal court in the United States and advised Farley J. that it needed more time to formulate recommendations as to what steps, if any, RCL should take in response to the indictment.

[6] On September 28, 2005, Richter filed its Tenth Report with Farley J. That report contains a detailed examination of the legal, practical and "special" considerations that Richter had evaluated in formulating RCL's proposed response to the criminal charges in the United States federal court. Richter concluded that it should accept service of the summons in the criminal proceedings on RCL's behalf, voluntarily appear in those proceedings and plead not guilty to the charges. Richter set out several reasons for its recommendation. It then moved before Farley J. for an order allowing it to accept service of the summons, appear in the U.S. federal court, and enter a not guilty plea on behalf of RCL. Richter was supported on the motion by various stakeholders, including Hollinger International Inc. and Hollinger Inc. Black, whose control over RCL had been terminated by the receivership, but who remained a shareholder and creditor, opposed the receiver's motion. His was the only opposition.

[7] On the motion, counsel for Black argued that under the terms of the relevant American "long arm" statute, RCL could not be served with a criminal summons because RCL had no place of business in the United States. Counsel further contended that absent proper service of the summons on RCL, the U.S. federal court had no jurisdiction to proceed against RCL. Counsel urged Farley J. to find that it could not be in the best interests of any of the RCL stakeholders for RCL to attorn to the federal court's jurisdiction, thereby opening itself to potential additional criminal charges and massive penalties, when under the applicable American statute, the American criminal court could not exercise jurisdiction over RCL absent attornment.

[8] The Tenth Report prepared by Richter was the only material before Farley J. on the motion. As I understand the submissions before Farley J., no objection was taken to the facts outlined in the report or the relevance of the various factors identified by Richter in reaching its conclusion as to the appropriate response by RCL to the American indictment.

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[9] Farley J. made the order sought by Richter. In doing so, he said:

> The Receiver has had the opportunity of a thorough analysis, assisted by its Canadian counsel, but importantly by its U.S. counsel, and it has concluded that on balance it would be appropriate to attorn and plead not guilty; and further that that would be the right and proper thing to do and that it would likely be to the advantage of the estate. I see no reason to quarrel with or second guess that considered analysis …

[10] Black appealed the order of Farley J. He relied on s. 193(a) of the *BIA,* which provides a right of appeal from an order "if the point at issue involves future rights". Alternatively, if s. 193(a) was inapplicable, Black applied for leave to appeal under s. 193(e) of the *BIA.*

[11] Pursuant to s. 195 of the *BIA,* the filing of the Notice of Appeal stayed the order under appeal. If Black is found not to have a right of appeal, but is granted leave to appeal, the granting of leave also stays the order. RCL has not yet attorned to the jurisdiction of the U.S. federal criminal court.

III

The motion to quash

[12] Richter, supported by Hollinger Inc. and Hollinger International Inc., argues that the order of Farley J. does not involve future rights and therefore does not provide an automatic right of appeal pursuant to s. 193 (a). If Richter's submission is correct, the appeal must be quashed for want of jurisdiction.

[13] In addition to a right of appeal where the issue "involves future rights" under s. 193(a), ss. 193(b), (c) and (d) provide a right of appeal in a variety of other circumstances. Black does not rely on any of these provisions and I need not set them out here. There does not appear to be any unifying principle underlying the situations in which an appeal lies as of right via s. 193 of the *BIA.*

[14] The specific rights of appeal granted under s. 193 of the *BIA are* combined with s. 193(e), which provides for appeals where leave is granted by a judge of the Court of Appeal. Leave may be granted from any order made under the *BIA* on any ground.

[15] By combining limited specific rights of appeal with a broad power to appeal with leave, s. 193 of the *BIA* both allows access to the appeal court on meritorious appeals and limits the availability of multiple appeals in ongoing insolvency proceedings where those appeals would inevitably delay and fracture the proceedings.

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[16] The *BIA* does not provide any definition of the phrase "future rights". As with any exercise in statutory interpretation, the words must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act: *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex* (2002), 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

[17] Earlier cases such as *Amalgamated Rare Earth Mines Ltd. (No. 2), Re* (1958), 37 C.B.R. 228 (Ont. C.A.) that would give the phrase "future rights" a "wide and liberal interpretation" are inconsistent with the contemporary approach to statutory interpretation. These cases also take the interpretation of "future rights" from earlier insolvency cases. Those earlier cases were, however, interpreting insolvency legislation that did not grant any right of appeal from orders made in insolvency proceedings, but only provided for appeal with leave from specific orders, including orders "involving future rights". It was within the context of statutory provisions that provided only a limited right of appeal with leave that the courts gave a wide and generous reading to the phrase "future rights". Any other reading could have closed the appeal court door on many meritorious appeals. Under the scheme of appeals set out in the present *B1A,* there is no need to give the phrase "future rights" a broad meaning to ensure that meritorious appeals can be heard.[1]

[18] The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal: *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at 242; *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.), at 84. Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights: *Simonelli v. Mackin* (2003), 320 A.R. 330 (Alta. C.A. [In Chambers]) at paras. 9-11 (C.A., Wittmann J.A. in chambers); *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) at paras. 11-12 (Ont. C.A., Armstrong J.A. in chambers); *Devcor Investment Corp., Re* (2001), 277 A.R. 93 (Alta. C.A.) at para. 7 (C.A., Picard J.A. in chambers).

[19] A definition of the phrase "future rights" appears in the judgment of McGillivray C.J.A. in *Elias v. Hutchison* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), at 100-101:

[1] The earlier insolvency legislation which provided for leave to appeal from orders involving future rights was in issue in *Clarke v. Union Fire Insurance Co.* (1886), 13 O.A.R. 268 (Ont. C.A.), at 294 -95; *J. McCarthy & Sons Co., Re* (1916), 32 D.L.R. 441 (Ont. C.A.), at 442 -43. Those cases were in turn cited with approval in cases such as *Amalgamated Rare Earth Mines Ltd. (No. 2), Re, supra,* without reference to the important difference in the rights of appeal created by the relevant legislation.

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> A right in a legal sense exists when one is entitled to enforce a claim against another or to resist the enforcement of a claim advanced by another. A present right exists presently: a future right is inchoate in that while it does not now exist, it may arise in the future. For the adjective "future" to have any meaning, it cannot refer to that which presently exists. …
>
> To give "future" the meaning that includes that which a litigant may obtain by success in litigation in the future is to say that a right of appeal exists in all cases. Any claim advanced is, in that sense, a future right to a judgment which does not yet exist. It would seem to me for para, (a) of s. 163 [now 193] to have any meaning that it must refer to rights which could not at the present time be asserted but which will come into existence at a future time
>
> [emphasis added].

Elias has been repeatedly cited with approval in various appellate courts: see e.g. *TFP Investments Inc. (Trustee of) v. Singhal* (1991), 44 O.A.C. 234 (Ont. C.A.), at 236 (Catzman J.A. in chambers).

[20] Black does not argue that the order of Farley J. involves the future rights of RCL. That order directs RCL to attorn to the jurisdiction of the American court and to plead not guilty to the outstanding indictment. RCL clearly had the right to appear in answer to the criminal allegations and enter a plea after the grand jury had returned the indictment against RCL. The order of Farley J. does not affect RCL's future rights, but rather tells RCL how it should exercise its present rights.

[21] Counsel for Black also does not argue that his future rights are affected by the order.

[22] Counsel does argue that the future rights of the American prosecutor (the U.S. Attorney) who Farley J. has held to be a stakeholder in the insolvency proceedings, are affected by the order. Counsel contends that the U.S. Attorney presently has no right to proceed against RCL in the U.S. criminal proceedings, but that an order directing RCL to attorn would give the U.S. Attorney the right to proceed against RCL in the future.

[23] The order of Farley J. may impact on the right of the U.S. Attorney to proceed against RCL, but it does not involve any future right of the U.S. Attorney. The U.S. Attorney's rights against RCL, including its right to proceed if RCL attorns to the jurisdiction, existed when Farley J. made his order. His order may remove an impediment to the U.S. Attorney's proceeding against RCL, but that does not make the U.S. Attorney's right to proceed a future right. I would analogize this to a situation where a litigant needs leave to pursue a civil proceeding in the insolvency context. An order granting leave does

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not create the right to sue which existed all along, but merely removes an impediment to the exercise of that right: see *Simonelli, supra,* at paras. 9-11.

[24] As I have rejected the submission that the order of Farley J. involves the future rights of the U.S. Attorney, I need not decide whether Black can rely on the future rights of another stakeholder to gain a right of appeal. I leave that question for another day.

[25] The order of Farley J. does not involve future rights. The appeal must be quashed.

IV

The leave to appeal application

[26] Having concluded that Black has no right of appeal, I turn to his application for leave to appeal. In seeking leave, Black argues that Farley J.'s exercise of his discretion directing RCL to attorn to the jurisdiction of the American court was based on a misinterpretation of the relevant American statute. He contends that the proper interpretation of that statute raises a significant legal question upon which leave to appeal should be granted under s. 193(e) of the *BIA.*

[27] As indicated above, s. 193(e) permits leave to appeal from any order on any issue that the court determines warrants leave to appeal. There are no statutory criteria governing the granting of leave. Appellate courts, using different formulations, have identified various factors that should be addressed when deciding whether to grant leave under s. 193(e) of the *BIA.* The cases recognize, however, that the granting of leave to appeal is an exercise in judicial discretion that must be case-specific, and cannot be completely captured in any single formulation of the relevant criteria: see e.g. *Baker, Re* (1995), 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]), at 381 (C.A., Osborne J.A. in chambers); *Fiber Connections Inc. v. SVCM Capital Ltd., supra,* at para. 19; *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.,* [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]) (C.A., Feldman J.A. in chambers).

[28] The inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal.

[29] A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the

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court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.

[30] In *Canadian Airlines Corp., Re* (2000), 261 A.R. 120 (Alta. C.A. [In Chambers]) at para. 35, Wittmann J.A. (in chambers) was faced with an application for leave under the *CCAA.* He referred to earlier cases which had listed four criteria for the granting of leave, one of which was that "the appeal is *prima facie* meritorious". He described the necessary merits inquiry in this way:

> … There must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

[31] I think the same level of merits inquiry is warranted on an application for leave to appeal under the *BIA.* I would describe an appeal which raises an apparent error in law or apparent palpable and overriding factual error as an appeal that has a realistic possibility of success.

[32] The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has *prima facie* merit. I do not reach those other considerations on this motion.

[33] Black's proposed appeal focuses on two aspects of the reasons of Farley J. He submits that Farley J. erred in holding that the applicable U.S. federal legislation contemplated service of a summons in a criminal matter on RCL even though RCL had no assets or a place of business in the United States. Black also contends that at most, Farley J. should have directed Richter to enter an appearance in the federal court in the United States solely for the purpose of contesting the jurisdiction of that court. An appearance limited to the jurisdictional issue would have permitted RCL to determine whether in fact the American court had jurisdiction without attorning to that jurisdiction.

[34] The federal prosecutor's right to effect service of a summons on RCL in Canada was canvassed in Richter's Tenth Report:

> The Receiver has been unable to determine the existence of any U.S. judicial decision that confirms the effectiveness of service of a summons outside the United States. Given the language of the Federal Rules of Criminal Procedure 4(c) (Fed. R. Crim. P. 4(c)), the uncertainty of the language of the MLAT [Mutual Legal Assistance

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> in Criminal Matters Treaty], the absence of any apparent practice of serving an originating process for criminal prosecution under the MLAT, and the lack of any U.S. caselaw to support effective service *ex juris* of an originating criminal process, it appears to the Receiver that the U.S. Attorney's Office would have significant difficulty effecting service, in Canada, on the Receiver or RCL
>
> [emphasis added]. …

[35] Richter did not put forward a definitive interpretation of the relevant U.S. legislation. Nor did it rest its advice that RCL should attorn to the U.S. federal jurisdiction on its interpretation of any American legislation. Richter referred to the possibility of service under the legislation, and to several other possible ways that a U.S. federal court might find that it had jurisdiction over RCL. Richter concluded that the question of the court's criminal jurisdiction over RCL raised several difficult legal issues that would have to be litigated to be resolved. Richter believed that the litigation would be lengthy and expensive and the outcome uncertain.

[36] Richter did not limit its analysis to the possible bases upon which the U.S. prosecutor might successfully assert that the U.S. federal court had jurisdiction over RCL. Richter considered practical factors including the benefits that might inure to RCL through cooperation with the U.S. authorities. Richter also addressed what it called "special circumstances" that arose because of Richter's status as a court appointed receiver. When referring to these "special considerations", Richter observed:

> A receiver has a further duty to consider and respect the interests of comity between this Honourable Court and the U.S. Court, and the public's interest in the administration of justice generally.

[37] Black argues that Farley J. misconstrued the American legislation that provides for the service of a summons on a corporation in a criminal matter. Black contends that on a plain reading of the statute and its accompanying commentary, it is crystal clear that since RCL had no place of business in the United States, it could not be served with a summons requiring it to appear in a criminal proceeding in federal court in the United States. Black maintains that Farley J. found that RCL could be served under the relevant statute and that this led him to accept Richter's recommendation that RCL should attorn to the American jurisdiction.

[38] Farley J. did not decide whether RCL could be served with a summons under the relevant American legislation. He referred to counsel for Black's interpretation of the legislation and identified what he considered to be weaknesses in the argument advanced by counsel. He did not ultimately accept or reject counsel's contention.

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[39] It was unnecessary for Farley J. to come to any conclusion as to the proper meaning of the American legislation. He based the exercise of his discretion on the absence of any reason to "quarrel with or second guess" Richter's analysis. That analysis included, but was not limited to, Richter's assessment of the U.S. Attorney's ability to effectively summons RCL in answer to the charges. Farley J. did not make the order he did because he was satisfied that RCL could be properly summonsed under the American legislation, but because he was satisfied that Richter had done its job as the court appointed receiver and there was no reason for the court to interfere with Richter's judgment as to RCL's best course of conduct.

[40] Receivers do not often have to decide whether to attorn to the criminal jurisdiction of a foreign court on behalf of those in receivership. While the specific decision Richter had to make was an unusual one, it was not essentially different from many decisions that receivers must make. Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. Richter's Tenth Report demonstrates that it fully analyzed the situation at hand before arriving at its decision as to RCL's best course of conduct.

[41] The second argument made by Black that Farley J. should have at least limited RCL's appearance to a challenge of the American federal court's jurisdiction fails for the same reason as his first argument. Richter was aware of this option. The determination that RCL should attorn and plead not guilty reflected its considered opinion that RCL had much to lose should it engage in and ultimately lose a jurisdictional fight with the U.S. Attorney. Richter also properly took into account its court appointed status in deciding against a jurisdictional battle with the U.S. Attorney. Finally, Richter weighed the views expressed by other stakeholders, particularly Hollinger Inc. and Hollinger International, the

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principal stakeholders. All stakeholders save Black wanted RCL to attorn to the American jurisdiction.

[42] I see no viable argument that Farley J. erred in principle in the exercise of his discretion. There is no realistic possibility that Black could succeed on appeal were leave to appeal granted. I would refuse leave to appeal.

V

Conclusion

[43] I would quash the appeal brought by Black and refuse leave to appeal.

[44] The successful parties, Richter, Hollinger Inc., and Hollinger International, are entitled to their costs on a partial indemnity basis. As the two motions were closely related, one order of costs is appropriate. Counsel for the successful parties will have five days from the release of these reasons to provide written submissions of no more than five pages. Black will have five days from receipt of those submissions to respond with written submissions of no more than five pages.

S. Borins J.A.:

I agree

H.S. LaForme J.A.:

I agree

Application granted.

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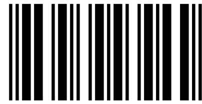

TAB6

2011 ONCA 713
Ontario Court of Appeal [In Chambers]

Kaiser, Re

2011 CarswellOnt 12822, 2011 ONCA 713, [2011] O.J. No. 6223,
209 A.C.W.S. (3d) 223, 285 O.A.C. 275, 84 C.B.R. (5th) 269

In the Matter of the Bankruptcy of Morris Kaiser of the City of Toronto in the Province of Ontario

Morris Kaiser, a Bankrupt (Applicant) and Soberman Inc., Trustee in Bankruptcy of the Estate of Morris Kaiser (Respondent)

E.A. Cronk J.A.

Heard: October 18, 2011
Judgment: November 14, 2011
Docket: CA M40462

Proceedings: refusing leave to appeal *Kaiser, Re* (2011), 2011 ONSC 4877, 2011 CarswellOnt 8304 (Ont. S.C.J. [Commercial List])

Counsel: Melvyn L. Solmon, Cameron J. Wetmore for Applicant
Neil Rabinovitch, Milton A. Davis for Respondent

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
  XVII.6 Discovery and examinations
    XVII.6.d Evidentiary issues
      XVII.6.d.iii Privilege
        XVII.6.d.iii.B Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
  XVII.9 Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous
Bankrupt was assigned into bankruptcy — Lawyer for trustee had been involved in proceedings against bankrupt for several years, and was currently representing creditor L in action against others who had acted for bankrupt in litigation — In course of proceedings trustee signed document purporting to waive privilege of bankrupt — Bankrupt brought motion to remove counsel for trustee and to nullify waiver of privilege — Motion for removal of counsel dismissed, motion regarding waiver allowed — Bankrupt brought application for leave to appeal — Application dismissed — Bankrupt had not satisfy test for leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act — Trustee had sworn that there was no conflict, that counsel had not preferred L's interests over those of trustee, and that bankrupt's largest creditors, together with trustee, wished counsel to continue as counsel to trustee.
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proceedings trustee signed document purporting to waive privilege of bankrupt — Bankrupt brought motion to remove counsel for trustee and to nullify waiver of privilege — Motion for removal of counsel dismissed, motion regarding waiver allowed — Bankrupt brought application for leave to appeal — Application dismissed — Bankrupt had not satisfy test for leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act — Trustee had sworn that there was no conflict, that counsel had not preferred L's interests over those of trustee, and that bankrupt's largest creditors, together with trustee, wished counsel to continue as counsel to trustee.

Table of Authorities

Cases considered by *E.A. Cronk J.A.*:

Colville-Reeves v. Canadian Home Publishers Inc. (2002), 2002 CarswellOnt 546, [2002] O.T.C. 124 (Ont. S.C.J. [Commercial List]) — referred to

Dugas, Re (2003), 2003 NBQB 197, 2003 CarswellNB 203, (sub nom. *Dugas (Bankrupt), Re)* 261 N.B.R. (2d) 315, 685 A.P.R. 315, 41 C.B.R. (4th) 168, 32 C.P.C. (5th) 69 (N.B. Q.B.) — referred to

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 163 — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(c) — considered

s. 193(e) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

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APPLICATION by bankrupt for leave to appeal from judgment reported at *Kaiser, Re* (2011), 2011 ONSC 4877, 2011 CarswellOnt 8304 (Ont. S.C.J. [Commercial List]), which refused to order removal of law firm as counsel of record for trustee in bankruptcy.

***E.A. Cronk J.A.*:**

1 This is a motion for leave to appeal to this court from the order of Newbould J. of the Superior Court of Justice, In Bankruptcy, dated August 16, 2011, refusing to order the removal of a law firm as counsel of record for a trustee in bankruptcy.

I. Background

2 The applicant, Morris Kaiser ("Kaiser"), was adjudged bankrupt on October 17, 2009. The respondent, Soberman Inc. (the "Trustee"), was appointed trustee of the bankrupt estate.

3 For more than a decade, Milton Davis ("Davis"), a partner in the law firm of Davis Moldaver LLP, has acted as counsel in various legal proceedings against or involving Kaiser. Specifically, since the spring of 1999, Davis has acted as counsel for approximately 20 individual or corporate litigants in more than 14 actions against Kaiser or his interests. By reason of these professional engagements, Davis has gained considerable knowledge of Kaiser as a litigant.

4 Davis, through Davis Moldaver LLP, also acts for the Trustee in the Kaiser bankruptcy.

5 As set out in an affidavit sworn by Kenneth Tessis ("Tessis") of the Trustee's offices on July 14, 2010, as a result of Davis' extensive experience with Kaiser, the Trustee regards Davis Moldaver LLP as "the best suited law firm to be acting on behalf of the Trustee" in the Kaiser bankruptcy.

6 Representatives of three of Kaiser's largest creditors — Bernie Ghert, Lautec Properties Inc. ("Lautec") and the Canada Revenue Agency — serve as inspectors in Kaiser's bankruptcy. It is undisputed that each of these creditors has "unequivocally" advised the Trustee of their desire to have Davis Moldaver LLP continue to act for the Trustee in the Kaiser bankruptcy.

7 It is against this general background that this leave to appeal motion must be understood.

(1) Removal Motion

8 In the summer of 2011, Kaiser moved for an order removing Davis Moldaver LLP as counsel of record for the Trustee (the "Removal Motion"). As relevant to this leave motion, Kaiser alleged on the Removal Motion that Davis Moldaver LLP was in a conflict position because: (1) while acting for the Trustee, Davis was also acting for Lautec; and (2) in breach of obligations that Kaiser claimed are owed to him by Davis and the Trustee (in particular, the alleged duty to protect Kaiser's right to solicitor-client privilege), Davis advised and permitted the Trustee to take steps that preferred Lautec's interests over those of the Trustee and the Kaiser estate.

9 By order dated August 16, 2011, the motion judge dismissed the Removal Motion and awarded costs to the Trustee.

(2) Leave to Appeal Motion

10 Kaiser seeks leave to appeal from the motion judge's order dismissing his request for a removal order. If leave be granted, he also seeks an order expediting the appeal.

11 Section 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") provides for an appeal as of right to the Court of Appeal from any order or decision of a judge in bankruptcy in limited circumstances as set out in ss. 193(a) to (d). Under s. 193(e), leave of a judge of the Court of Appeal is required to appeal to this court "in any other case".

12 Thus, the preliminary issue on this motion is whether leave to appeal the motion judge's decision to this court is required.

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13 In his notice of motion, Kaiser seeks leave to appeal, "if leave is required", pursuant to s. 193(e) of the BIA. Kaiser previously filed a Notice of Appeal and Amended Notice of Appeal in which he invoked ss. 193(a) and (c) and, "if necessary", s. 193(e) of the BIA as the jurisdictional basis for appealing the motion judge's decision to this court.

14 In both his leave motion materials and his oral submissions, Kaiser took the position that leave to appeal under s. 193(e) is not required. At the same time, he also expressly sought leave to appeal under s. 193(e) of the BIA. He advanced no argument regarding an appeal as of right under any of ss. 193(a) to (d) of the BIA. Leave to appeal was the only relief sought on the motion, apart from an expedited appeal date.

15 Argument of the leave motion proceeded on the basis that s. 193(e) of the BIA applies in the circumstances. It is the Trustee's position that s. 193(e) is engaged, that leave to appeal to this court is required, and that leave should be denied given the history of this matter, as outlined below.

16 I am not persuaded that Kaiser's proposed appeal from the motion judge's decision falls within any of the appeal as of right categories set out in s. 193 of the BIA. [1] Nor, as I have said, did Kaiser urge a contrary conclusion. I therefore proceed on the basis that leave to appeal to this court is required under s. 193(e) of the BIA.

II. Governing Legal Principles

17 The jurisprudence of this court indicates that a flexible approach should be applied to the factors to be considered on a motion for leave under s. 193(e) of the BIA. As Armstrong J.A. of this court explained in *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) (in chambers), at para. 19, "There is a variety of factors to consider depending upon the circumstances presented to the court." These factors include: (1) whether the judgment at issue appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy; (2) whether the point of the appeal is of significance to the practice or to the action itself; (3) whether the appeal is *prima facie* meritorious or frivolous; and (4) whether the appeal will unduly prejudice the progress of the action: see *Fiber Connections Inc.*, *per* Armstrong J.A., at para. 15; *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]) (in chambers), *per* Feldman J.A., at para. 9. The relevant factors to consider will vary according to the circumstances of each case.

18 One factor that is considered in all cases where leave to appeal under s. 193(e) of the BIA is sought is whether the proposed appeal is *prima facie* meritorious. In assessing the merits of a leave to appeal motion under this provision, the court's inquiry is informed by the principle of deference owed to a commercial court judge. Absent demonstrable error, an appeal court will not interfere. See *Ravelston Corp., Re*, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]), (in chambers), *per* Borins J.A., at paras. 11-12; *Fiber Connections Inc.* , *per* Armstrong J.A., at paras. 15-19; *GMAC Commercial Credit*, *per* Feldman J.A., at para. 9.

19 In addition, where the order sought to be appealed from is discretionary, as in this case, this court has recognized that leave will not be granted unless the matter is of importance either to the administration of justice generally or to the respective rights of the parties to the litigation: *Fiber Connections Inc.* , *per* Armstrong J.A., at para. 15; *GMAC Commercial Credit*, *per* Feldman J.A., at paras. 9 and 14; *Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd.* (1992), 22 C.B.R. (3d) 291 (B.C. C.A.) (in chambers), *per* Southin J.A., at para. 21.

20 Given the nature of the order sought to be appealed, Kaiser's leave motion is also informed by those principles that govern the court-ordered removal of a litigant's counsel of record. These principles were relevant to the motion judge's discretionary decision to deny the relief sought by Kaiser. They are also a relevant consideration in assessing the merits of Kaiser's proposed appeal.

21 As the motion judge properly noted, "A litigant should not be deprived of counsel of its choice without good cause. See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.)." For this reason, Canadian courts exercise the highest level of restraint before interfering with a party's choice of counsel. Where such discretionary, equitable relief is invoked, there

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must be a possibility of real mischief should a removal order be refused. The test is whether a fair-minded and reasonably informed member of the public would conclude that counsel's removal is necessary for the proper administration of justice: see for example, *MacDonald Estate*; *Zawadzki v. Matthews Group Ltd.* (1998), 18 C.P.C. (4th) 373 (Ont. Gen. Div.); *Colville-Reeves v. Canadian Home Publishers Inc.* (2002), 111 A.C.W.S. (3d) 1202 (Ont. S.C.J. [Commercial List]) [*Colville-Reeves v. Canadian Home Publishers Inc.* (2002), 2002 CarswellOnt 546 (Ont. S.C.J. [Commercial List])]; *Lautec Properties Inc. v. Barzel Windsor (1984) Inc.* (2002), 26 C.P.C. (5th) 131 (Ont. S.C.J. [Commercial List]).

III. Discussion

22 In my opinion, it cannot be said that Kaiser's appeal is *prima facie* meritorious. Far from it.

23 Kaiser sought discretionary, equitable relief of a type that is granted only sparingly and with great caution — the involuntary removal of counsel chosen by a client in the face of the client's opposition to the removal. That relief was denied by the motion judge for clear and cogent reasons. On the motion judge's findings, the requested relief was sought for improper and tactical, rather than legitimate, reasons. This factor alone tells strongly against granting equitable relief. Further, in all the circumstances, I do not regard any of the issues sought to be raised on appeal as important either to the administration of justice generally or to the rights of the parties.

24 I therefore conclude that Kaiser has failed to satisfy the test for leave under s. 193(e) of the BIA. I note, in particular, the following.

25 First, the record suggests that Kaiser has a demonstrated history of initiating proceedings, including removal motions, for purely strategic reasons. His motive for bringing the Removal Motion, which was a central issue before the motion judge, bears directly on the merits of his proposed appeal.

26 The motion judge declined to exercise his discretion in favour of granting the requested removal order in part because he concluded that the Removal Motion had been brought "for tactical purposes to try to delay actions by the [T]rustee [to recover Kaiser's assets for the estate]". In his view, the Removal Motion was "completely miscast". These conclusions are firmly grounded in the evidentiary record.

27 The record reveals that the Removal Motion was not Kaiser's first attempt to secure Davis' removal as counsel of record in proceedings against Kaiser or his interests. In 2002, Kaiser moved for an order removing Davis as counsel of record in 14 related actions. In dismissing that motion, Epstein J., then of the Superior Court of Justice, concluded that: (1) the motion was brought for an improper, tactical purpose; (2) the moving parties knew that such an order would cause delay and inconvenience; and (3) the evidence before her did not support the allegations of misconduct advanced against Davis: *Lautec Properties Inc.*, at paras. 42-45. These were serious findings of impropriety by Kaiser. Justice Epstein put it this way, at para. 46: "[T]he case made out in support of the relief sought ... was like a blanket heavily patterned with strong animus toward Mr. Davis and woven together with speculation and conjecture."

28 Further, Kaiser had attempted in the past, without success, to secure a removal order against Davis' predecessor — also a senior member of the litigation bar in Toronto — as counsel of record for parties opposite in interest to Kaiser. On that removal motion as well, Kaiser alleged serious professional wrongdoings by the involved counsel, allegations that were later found to be wholly groundless.

29 Moreover, it is uncontested that Kaiser previously sued Davis for conspiracy, but adduced no evidence to support this serious claim when the matter proceeded to arbitration. The experienced arbitrator, a former judge of the Superior Court of Justice, held that there was no evidentiary basis for any criticism of Davis and that the allegations against him were "unfounded and persistent". He awarded costs to Davis and others on a substantial indemnity scale.

30 This troublesome history of improperly-motivated litigation strongly supports the motion judge's conclusion in this case that removal motions "appear to be part of Mr. Kaiser's *modus operandi*" and that Kaiser holds a clear *animus* towards Davis. Kaiser's pattern of advancing serious unfounded allegations of professional improprieties against counsel opposite and

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of initiating ill-founded removal motions, raises a sharp red flag, necessitating close scrutiny of the merits of any proposed appeal from the motion judge's ruling on the Removal Motion.

31 Second, the record also indicates that Kaiser, in numerous ways, has declined to co-operate with the Trustee and has sought to frustrate the disclosure of his financial resources and assets and the efficient administration of his bankrupt estate by the Trustee.

32 The motion judge held that Kaiser, "who has an obligation to the trustee to assist in locating assets belonging to the bankrupt estate", was "taking every opportunity to refuse to provide information that could assist the trustee". This finding was not challenged during argument of the leave motion. Nor is it attacked by Kaiser in his Notice of Appeal or Amended Notice of Appeal as a factual finding tainted by palpable and overriding error.

33 Again, there was considerable evidence before the motion judge to support this finding. Consider the following:

> (1) the Trustee provided evidence on the Removal Motion that although Kaiser claimed to be impecunious at the time of his bankruptcy, he engaged in a lifestyle, both *before and after* the date of his bankruptcy, that belied this claim. This included evidence of frequent gambling trips to the United States, the loss of significant funds at gambling tables during these trips and numerous cash withdrawals on credit cards belonging to or controlled by a third party (who is suspected by the Trustee to be complicit in Kaiser's efforts to conceal his assets) at or near various casinos;
>
> (2) it was also the Trustee's uncontradicted evidence on the Removal Motion that the Trustee has not been able "to determine much regarding Kaiser's affairs", that a motion is pending to determine the source of funds being used by Kaiser to finance this litigation, that Kaiser appears to have structured his affairs "in such a way as to have [a third party act] as a 'straw man' — thereby shielding his funds from the Trustee and his creditors" and, further, that Kaiser appears to have "access to funds, which he did not have before, the source of which is unknown to the Trustee, to pay for his various family, living and day-to-day expenses";
>
> (3) on his examination conducted under s. 163 of the BIA, Kaiser or his counsel objected to approximately one-half of the questions asked on the ground of privilege. Yet, in the opinion of the motion judge following a review of the relevant questions, most, if not all, the refusals related to factual matters in respect of which a privilege claim could not be advanced; and
>
> (4) on June 30, 2011, Kaiser was cross-examined in respect of the pending Removal Motion. The motion judge noted that every question asked of Kaiser regarding his affairs was objected to, as being irrelevant to the Removal Motion.

34 In part on the basis of these facts, Tessis indicated in his affidavit sworn on behalf of the Trustee in response to the Removal Motion that, in the Trustee's opinion, the Removal Motion was brought "to deflect attention from the fact that [Kaiser] seems to have access to significant sums of money which he has not disclosed to the Trustee".

35 The foregoing circumstances militate in favour of the conclusion that the Removal Motion and, arguably, this associated leave motion, are merely the latest steps taken by Kaiser to delay and impede the expeditious and efficient administration of his bankrupt estate. At the very least, they provide a solid foundation for the motion judge's decision to deny discretionary equitable relief of the type sought by Kaiser. They also undercut Kaiser's contention that his proposed appeal from that decision is meritorious or of significance either to the parties or to commercial bankruptcy practice in general.

36 Finally, a word about the merits of the specific proposed grounds of appeal identified by Kaiser. To be blunt, I consider the merits of the identified grounds to be highly dubious.

37 Kaiser raised numerous grounds of appeal in his Amended Notice of Appeal. However, during oral argument of this motion, these grounds became more focused.

38 Kaiser's principal complaint is that Davis, while acting as counsel for the Trustee, also acted for Lautec, one of Kaiser's major creditors. Kaiser seeks to renew his argument on appeal, advanced before the motion judge, that Davis' dual engagement

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as counsel placed him and Davis Moldaver LLP in a conflict position, that Davis allegedly abused his role as counsel to the Trustee and breached alleged duties to Kaiser by advising the Trustee to take steps that favoured Lautec's interests over those of the Trustee and Kaiser, and that, by so doing, Davis exposed Davis Moldaver LLP "to an influence that impaired its professional judgment in respect of the Kaiser bankruptcy".

39 At the heart of this complaint is a written waiver document dated February 10, 2010, prepared by Davis and executed by the Trustee (the "Waiver"), pursuant to which the Trustee purported to waive Kaiser's solicitor-client privilege and authorized certain solicitors to disclose information that might otherwise have been subject to that privilege.

40 In the main, Kaiser contends that Davis, as counsel for the Trustee, owed a duty to Kaiser to protect his solicitor-client privilege. Kaiser invokes the professional standards set out in the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (the "Rules"), in support of his claim that Davis breached this duty by drafting and arranging for the execution and subsequent use of the Waiver for the benefit of Lautec in breach of Kaiser's right to solicitor-client privilege. Kaiser describes the Waiver as an "unlawful, misleading and prejudicial document", the preparation and use of which was "a misuse of the process and powers of the BIA".

41 These arguments were raised before the motion judge and fully addressed by him in his reasons on the Removal Motion. He rejected Kaiser's claims of any impropriety by the Trustee, Davis or Davis Moldaver LLP generally and, in particular, in respect of the Waiver. I see no reviewable error in this ruling.

42 Kaiser argued before the motion judge, and seeks to re-argue on appeal, that duties are owed directly by a trustee in bankruptcy's counsel to the bankrupt. In support of this proposition, he relies on *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572 (Ont. S.C.J.), aff'd (2004), 69 O.R. (3d) 183 (Ont. C.A.) and *Dugas, Re*, 2003 NBQB 197, 41 C.B.R. (4th) 168 (N.B. Q.B.), and various of the Rules.

43 The Rules do not appear to have been raised before the motion judge. The motion judge considered the above-mentioned cases cited by Kaiser and declined to follow them, preferring instead to adopt his own prior reasoning on this issue in *Turbo Logistics Canada Inc. v. HSBC Bank Canada* [2009 CarswellOnt 5929 (Ont. S.C.J. [Commercial List])], 2009 CanLII 55292. *Turbo* involved yet another solicitor-removal motion brought by counsel who act for Kaiser on this motion, albeit against another law firm in an unrelated proceeding. In *Turbo*, after considering the decisions in *Engels* and *Dugas*, the motion judge said, at para. 16:

> I cannot agree with the notion that counsel for a trustee in bankruptcy, or for a court-appointed receiver, normally owes any duty to the creditors of the bankrupt or debtor under a court-appointed receiver. The obligation of a solicitor is to his or her client. The fact that the solicitor is an officer of the court does not change that. It is the trustee in bankruptcy or the court-appointed receiver that owes a fiduciary duty to the creditors or other stakeholders. To suggest that the lawyer advising the trustee in bankruptcy or the court-appointed receiver owes a duty to those creditors or other stakeholders would, amongst other things, lay the solicitor open to actions at the hands of the creditors of the trustee in bankruptcy or court-appointed receiver for failure to properly carry out the lawyer's obligations to those creditors or stakeholders. This is not the law and would make no sense. A solicitor giving advice to a client, whether the client is a trustee in bankruptcy or court-appointed receiver or otherwise, is responsible to the client to give proper advice to the client. It is the client, and not the solicitor, that owes duties to creditors and other stakeholders in the case of a trustee in bankruptcy or courtappointed receiver.

See also *Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.*, 2011 ONSC 3945, 79 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

44 I see no error in the motion judge's reasoning on this issue or in the proposition that it is the trustee in bankruptcy, as principal, rather than his or her solicitor, as agent, who owes direct legal duties to the creditors of a bankrupt or the bankrupt. Nor do I read the Rules now cited by Kaiser as undermining this conclusion.

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45 I reject Kaiser's contention that his proposed appeal raises "an important question of law for which there are conflicting authorities in Ontario", namely, whether a trustee's counsel owes direct legal duties to a bankrupt and, if so, the scope of those duties.

46 *Engels* is the only Ontario decision cited by Kaiser that is said to be contrary to the motion judge's ruling on this issue. *Engels* was concerned primarily with whether the bankrupt in that case was bound by a common law non-solicitation restriction following the sale by a trustee in bankruptcy of a book of business to a third party. It was in this context that the trial judge in *Engels* commented on the duties of trustees in bankruptcy and the obligation of the trustee and its counsel to act fairly and neutrally in the conduct of the administration of a bankrupt estate.

47 In any event, it is not in every instance in which potentially conflicting decisions exist that leave to appeal to this court is warranted. The issue has now been addressed squarely in two recent Superior Court decisions — *Turbo* and *Manufacturers Life*. In both cases, the notion of duties of counsel of the type urged by Kaiser was rejected.

48 Perhaps more importantly, on the motion judge's findings, neither Davis nor Davis Moldaver LLP breached any obligations to Kaiser.

49 The motion judge considered, and rejected, Kaiser's contention that the drafting, execution and use of the Waiver required the removal of Davis Moldaver LLP as the Trustee's counsel. In my view, this conclusion is overwhelmingly supported by the record.

50 First, the Waiver was prepared following the numerous privilege-based refusals by Kaiser on his BIA s. 163 examination, described above. Although Davis sent the Waiver to Kaiser's previous solicitors, he did not, in fact, request the disclosure of privileged information by those solicitors. In addition, it is uncontroverted that no privileged information was obtained as a result of the Waiver. Thus, regardless of the propriety of the Waiver, no prejudice was occasioned to Kaiser by its creation, execution or use.

51 Second, the motion judge granted a declaration, without opposition from the Trustee, that the Waiver was "null, void and of no effect".

52 Third, the motion judge accepted the Trustee's argument that the issue of the Waiver, and the attempt to invoke it as a basis for the removal of Davis Moldaver LLP as counsel for the Trustee, was part of a continuing effort to protect Kaiser from having to provide information to the Trustee.

53 Fourth, and importantly, the record indicates that Kaiser instructed his counsel to object to Davis' representation of the Trustee about one month *before* the Waiver was signed. Thus, Kaiser's reliance on the Waiver to support the Removal Motion was an 'after-the-fact' stratagem.

54 Fifth, the motion judge, as he was entitled to do, accepted the Trustee's evidence that the Waiver was used in an effort to trace funds that the Trustee has grounds to believe either emanated from Kaiser or from persons who hold money at his behest. He also accepted that at least part of the funds at issue may have been applied to reduce the debt owed to Lautec, one of Kaiser's largest creditors. The reduction of this debt, if it occurred, could only have decreased the amount of Lautec's claim in the bankruptcy and, consequently, increased the funds potentially available for recovery by Kaiser's other creditors. In these circumstances, the Trustee had a legitimate interest in attempting to trace the funds in question.

IV. Disposition

55 I end where I began. It bears repeating that none of the Trustee or Kaiser's major creditors and estate inspectors has voiced any objection to the representation of the Trustee by Davis and his law firm. Nor have they voiced any concern about Davis' conduct or a conflict of interest arising from the fact that Davis acts for both Lautec and the Trustee.

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56 To the contrary, the Trustee has sworn that there is no conflict, that Davis has not preferred Lautec's interests over those of the Trustee, and that Kaiser's largest creditors, together with the Trustee, wish Davis to continue as counsel to the Trustee. The Trustee's position was succinctly stated in Tessis' affidavit on the Removal Motion:

> [I]t would be a disservice to the creditors and bankruptcy estate and ultimately a large and expensive impediment to the smooth administration of this bankruptcy if [Davis Moldaver LLP] was to be removed as solicitor of record.

57 Accordingly, for the reasons given, I conclude that Kaiser has not satisfied the test for leave to appeal under s. 193(e) of the BIA. The leave motion is dismissed.

V. Costs

58 The Trustee is entitled to its costs of this motion. I have now received and reviewed the parties' written submissions concerning costs. The Trustee seeks its costs of the leave motion on a full indemnity basis, in the sum of $21,521.48. The Trustee argues that this motion, like the Removal Motion, was tactical in nature and designed to further delay the proper administration of Kaiser's bankrupt estate. Consequently, the Trustee says that the dismissal of the leave motion should attract a costs award on the full indemnity scale.

59 Kaiser submits that his leave motion was reasonable and justified. He argues that, based on the decisions in *Engels* and *Dugas*, he had a legitimate legal foundation on which to object to Davis Moldaver LLP's continuing representation of the Trustee. He argues that the costs of the leave motion should be fixed in the amount of $5,000.

60 The Trustee emphasizes that the motion judge awarded costs to the Trustee in the amount of $50,000 — almost the entire amount of the Trustee's full indemnity costs ($53,758.76). In large part, that award was based on the motion judge's conclusion that the Removal Motion was misconceived and tactical in nature. He viewed the Removal Motion as merely one more effort by Kaiser to "stone wall" the Trustee's efforts to ascertain and realize on Kaiser's assets for the benefit of his bankrupt estate.

61 I have strong suspicions that, like the Removal Motion, Kaiser's leave motion was brought for tactical reasons. That said, the record before me does not clearly establish an improper purpose in the decision to seek leave to appeal.

62 I therefore conclude that the Trustee is entitled to its partial indemnity costs of the leave motion. Contrary to Kaiser's submission, I regard the amount of $14,200, inclusive of disbursements and all applicable taxes, as an appropriate award of partial indemnity costs in this case and I so order. I decline to grant any other relief in respect of the Trustee's costs of this motion.

Application dismissed.

Footnotes

1 For example, s. 193(a) of the BIA provides for an appeal as of right "if the point at issue involves future rights". The proposed appeal concerns the motion judge's discretionary ruling refusing to order the removal of Davis Moldaver LLP as ongoing counsel of record for the Trustee. Kaiser has no existing, let alone future, right to dictate the Trustee's choice of counsel. I do not regard the Trustee's selection of counsel as implicating Kaiser's "future rights". Similarly, it is difficult to see how s. 193(c) of the BIA is engaged in this case. That provision applies "if the property involved in the appeal" exceeds $10,000 in value.

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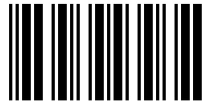

TAB7

CITATION: Ravelston Corporation Limited (Re) 2007 ONCA 268
DATE: 20070413
DOCKET: M34868 (C46730)

COURT OF APPEAL FOR ONTARIO

BORINS J.A. (IN-CHAMBERS)

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE RAVELSTON CORPORATION LIMITED AND RAVELSTON MANAGEMENT INC.

AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.O. 1985, c. B-3, AS AMENDED, AND THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

George S. Glezos and Bryce Rudyk, for the applicant Conrad Black.

Alex L. MacFarlane and Tushara Weerasooriya, for the respondent, RSM Richter Inc. Interim Receiver for Ravelston Corporation Limited and Ravelston Management Inc.

Matthew P. Gottlieb and Davit D. Akman, for the respondent, Hollinger Inc.

Robyn M. Ryan Bell, for the respondent, Sun-Times Media Group, Inc.

Heard: March 22, 2007

On appeal from the order of Justice Peter A. Cumming of the Superior Court of Justice dated February 15, 2007.

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BORINS J.A.

I

[1] Pursuant to the orders of Farley J. of April 20, 2005 and May 18, 2005, RSM Richter Inc. ("Richter") was appointed receiver and manager and interim receiver of the property, assets and undertaking of what is referred to in these proceedings as the Ravelston Companies, including the Ravelston Corporation Limited ("RCL"), Ravelston Management Inc. ("RMI") and Argus Corporation Limited ("Argus"). On April 20, 2005 the court also issued an order granting RCL and RMI protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and appointing Richter as the monitor.

[2] Initially, Farley J. was the supervisory judge in this complex and long-term insolvency. The current supervisory judge is Cumming J. From the outset of its appointment as receiver, Richter has regularly filed reports with the court detailing the steps that it has taken in fulfilling its mandate, asking that the court approve each report and the recommendations contained in it and, frequently, asking the court's approval to take a particular step or to follow a particular course of action.

[3] The motion before Cumming J., giving rise to this motion for leave to appeal, emanated from Richter's Nineteenth Report recommending the preparation of a report (the "Payments Report") setting out a factual account of the monies received by, and the distributions made by, RCL, RMI and Angus during the respective periods January 3, 1997 to April 20, 2005, July 3, 2002 to April 20, 2005, and January 1, 1999 to April 30, 2005. Pursuant to Richter's motion for authorization to complete and file the Payments Report with the Superior Court of Justice, on January 12, 2007 Cumming J. ordered Richter to complete the Payments Report, provided that it would not be filed or disseminated to any party until further order of the Superior Court. Pursuant to a further motion brought by Richter, on February 15, 2007, Cumming J. ordered Richter to file the Payments Report with the Superior Court. The Payments Report contains data as to payments made by RCL, RMI and Argus to corporate officers of these companies, including Conrad Black, who is a defendant in ongoing criminal proceedings in the United States District Court in Chicago. Before Cumming J., only Lord Black opposed the filing of the Payments Report.

[4] Lord Black subsequently moved under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") for leave to appeal Cumming J.'s order of February 15, 2007 to the Court of Appeal. On March 22, 2007 I dismissed Black's motion with reasons to follow. These are my reasons.

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II

[5] In its Nineteenth Report, Richter indicated that on December 14, 2006 the United States Attorney's Office ("USAO") asked it to prepare and provide a schedule of payments, including salaries, bonuses and dividends, made by the Ravelston Companies to Lord Black and others between January, 1998 and January, 2004. The USAO is a stakeholder in the Ravelston estate, as is Lord Black. A number of other stakeholders have also requested similar information from Richter. Before Cumming J., and before this court, Lord Black contended that because on its filing the Payments Report would become a public document and available to all stakeholders, including the USAO, the information contained in the Report may assist the prosecution in the ongoing criminal proceedings. He contended that there may be unfairness in the use of the information revealed by the Payments Report. Lord Black, therefore, submitted that the Report should not be filed until the conclusion of the criminal proceedings against him.

[6] In his reasons, reported at [2007] O.J. No. 536 (S.C.J.), Cumming J. pointed out at para. 26 that in the normal course of events the Payments Report would be filed with the court by the receiver when it is completed, to be used by the receiver in administering the estate, and to be used by all stakeholders in assessing their positions and in making representations to the receiver. At para. 27, Cumming J. stated that Lord Black had not provided any evidence that the filing of the Payments Report would be to his prejudice as a financial stakeholder having an economic interest in the Ravelston estate. To this I would add that Lord Black has also failed to provide any evidence that the filing of the Payments Report would prejudice the fairness of his criminal trial. As Cumming J. correctly observed, the possible use by the prosecution of any information contained in the Report as evidence against Black is a consideration for the United States District Court in Chicago.

[7] In rejecting Black's attempt to seal the Report, at para. 33 Cumming J. stated:

> It is the personal interest of Lord Black at stake in the criminal proceedings which results in his request to delay the release of the Payments Report. The Receiver submits that such a personal interest, as opposed to an economic interest, is beyond the Receiver's area of proper consideration in the administration of the estate. The Receiver is not obliged to protect the interests of stakeholders which are unrelated to the administration of a debtor's estate, such as the interest of a stakeholder to avoid alleged prejudice in criminal proceedings. The Receiver's role is to make business decisions in the best interests of the estate after a careful cost/benefit analysis and the weighing of competing interests. *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)

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[8] In the opinion of Cumming J., the receiver's decision to provide the Payments Report and to file it with the court as relevant information for the benefit of the stakeholders was "within the bounds of reasonableness". At para. 47, he added:

> [A]n Order sealing the Payment Report until the close of Lord Black's criminal trial would be inappropriate. There is not any social value established on evidence by Lord Black which is of superordinate importance to the rights of the public to open access to court records and the interest of the estate's stakeholders to proceed unimpeded with the receivership. There is a strong presumption against any order that restricts public access to court proceedings or records that must be met by an applicant before a sealing order may properly issue. *R. v. Toronto Star Newspapers Ltd.*, [2005] 2 S.C.R. 188.

III

[9] In his motion for leave to appeal, Lord Black submits that Cumming J. committed two errors: (1) he erred in his duty to supervise the receiver to ensure that it met its fiduciary duty to all stakeholders to act in an even-handed manner; and (2) he erred in his understanding of the principle of comity and failed to consider the prejudice to Lord Black, a Canadian resident, arising from the use of the Payments Report in the American criminal proceedings against Lord Black.

[10] Lord Black contends that his proposed appeal raises issues significant to bankruptcy practice for which there is no guidance, including the extent and nature of the court's role in supervising the work of a court-appointed receiver whose interests, which are adverse to a major stakeholder, conflict with his duties to act in an even-handed manner, and the appropriate conduct of the receiver where it has consequences to stakeholders beyond the Canadian border. Lord Black also contends that granting leave to appeal will not hinder the administration of the receivership as the receiver conceded in submissions before Cumming J. that there is no need to file the Payments Report now for any reason relating to the administration of the receivership.

IV

[11] As Armstrong J.A. noted, at para. 15 of *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A.) there appears to be a "measure of confusion" in respect to the test for leave to appeal under s. 193(e) of the BIA. However, the caselaw is clear that one factor that is considered in all cases is whether the appeal is *prima facie* meritorious, a factor that Armstrong J.A. relied on in *SVCM*. See, *e.g.*, *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol* (1995), 30 C.B.R. (3d) 90 (Ont. C.A.); *Re Baker* (1995), 22 O.R. (3d) 376 (C.A.); *GMAC Commercial Credit Corp. of Canada v.*

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TCT Logistics Inc., [2003] O.J. No. 5761 (C.A.); *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.). Similarly, this factor is also considered by the court in applications seeking leave to appeal under s. 193(e) from orders made under the CCAA: *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (C.A.).

[12] *Ravelston*, supra, is a helpful example of the need for a *prima facie* meritorious appeal as the starting point in the application of the test under s. 193(e). If the proposed appeal is found to be *prima facie* meritorious, the court must then consider whether the other elements of the test have been met. At paras. 27-32 of *Ravelston*, Doherty J.A. provided this helpful guidance:

> As indicated above, s. 193(e) permits leave to appeal from any order on any issue that the court determines warrants leave to appeal. There are no statutory criteria governing the granting of leave. Appellate courts, using different formulations, have identified various factors that should be addressed when deciding whether to grant leave under s. 193(e) of the BIA. The cases recognize, however, that the granting of leave to appeal is an exercise in judicial discretion that must be case-specific, and cannot be completely captured in any single formulation of the relevant criteria: [Citations omitted.]
>
> The inquiry into whether leave to appeal should be granted must, however, begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal.
>
> A leave to appeal application is not the time to assess, much less decide, the ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.
>
> In *Re Canadian Airlines Corp.* (2000), 261 A.R. 120 at para. 35 (C.A.), Wittmann J.A. (in chambers) was faced with an

> application for leave under the CCAA. He referred to earlier cases which had listed four criteria for the granting of leave, one of which was that "the appeal is prima facie meritorious." He described the necessary merits inquiry in this way:
>
> > … There must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.
>
> I think the same level of merits inquiry is warranted on an application for leave to appeal under the BIA. I would describe an appeal which raises an apparent error in law or apparent palpable and overriding factual error as an appeal that has a realistic possibility of success.
>
> The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has prima facie merit. I do not reach those other considerations on this motion.

V

[13] As I have indicated, Lord Black's proposed appeal focuses on two aspects of the reasons of Cumming J. He submitted that Cumming J. failed to act fairly and even-handedly in preferring the interests of the other stakeholder, USAO to his interests, thereby possibly prejudicing his right to a fair trial in the American criminal proceedings. Second, he contends that Cumming J. erred in his understanding of the principles of comity. In my view, neither of the proposed grounds of appeal is *prima facie* meritorious.

[14] There are two important principles that this court has endorsed in considering whether leave to appeal should be granted in bankruptcy and CCAA proceedings. In *Ravelston Corp. (Re)*, [2007] O.J. No. 749 at para. 3 (C.A.), the court stated: "It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere." In

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Ravelston Corp. (Re) (2005), 24 C.B.R. (5th) 256 at para. 40 (Ont. C.A.), Doherty J.A. stated: "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all the stakeholders, the court will support the receiver's decision." These principles, necessarily, inform the determination of whether the proposed appeal is *prima facie* meritorious.

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[15] Turning to the first proposed ground of appeal, as Cumming J. said, the Payments Report is a necessary and normative analysis and part of the receiver's fiduciary duties in determining the financial situation of the bankrupt's estate. It will permit the stakeholders to learn and better understand the historical transactions of the insolvent business. Moreover, the motion judge found that the receiver had considered all relevant interests relating to the administration of the Ravelston estate in its decision to complete the Payments Report and to file it with the court. The interests that are relevant are those that are economic in nature, involving the debtor's assets, property and undertaking.

[16] Lord Black has raised no competing economic interest to delay the filing of the Payments Report on its completion. Therefore, Cumming J. was correct in finding that his interest in avoiding possible prejudice in the American criminal proceedings was not a relevant interest to be weighed by the receiver in fulfilling its mandate to make business decisions in the best interests of the estate. Lord Black's alleged interest is not related to the administration of, or his economic interest in, the Ravelston estate. His sole interest in seeking to prevent the disclosure of the Payments Report is in his capacity as defendant in the American criminal proceedings.

[17] It is noteworthy that Lord Black presented no evidence that the filing of the Payments Report would prejudice him in his capacity as a stakeholder having an economic interest in the Ravelston estate. Nor did he adduce any evidence that the filing of the Report would prejudice his right to a fair trial in the criminal proceeding. In my view, this is not surprising as it is difficult to understand how any relevant information in the Payments Report introduced in evidence by the United States Attorney could prejudice Lord Black's right to a fair trial. There is nothing unfair in the prosecution's introduction of relevant and admissible evidence against a defendant in a criminal trial.

[18] I see no viable argument that Cumming J. erred in principle in the exercise of his discretion in approving the filing of the Payments Report. The proposed appeal has no realistic possibility of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error. In other words, Cumming J. made no apparent error in law or apparent palpable and overriding error of fact in his supervision of the receiver.

[19] As for the second proposed ground of appeal, Lord Black contends that Cumming J.'s misapprehension of the principle of comity caused him to refuse to

consider the prejudice to him from the use of the Payments Report by the USAO. In my view, this contention is also untenable.

[20] The motion judge's comments in respect to comity were general in nature. He stated that comity requires that each society, and its courts, must recognize and respect the legal processes of the courts of other societies, and that, accordingly, it would be for the United States District Court to determine the admissibility of any information contained in the Payments Report that the prosecution may seek to introduce against Lord Black in his criminal trial. Cumming J. was never asked to rule on any foreign law or procedure, nor was evidence of a foreign law or procedure introduced. He made it clear at para. 25 that "[t]he issue as to whether the Payments Report is to be filed in this Court is, of course, a mater for this Court alone". He properly recognized that there was nothing improper in the receiver voluntarily providing the information in the Payments Report to the USAO, especially where the information may be relevant to the administration of justice.

[21] I see no viable argument that Cumming J. erred in principle in his comments on the principle of comity. The proposed appeal has no realistic chance of success if leave to appeal were granted as it raises no apparent error in law or palpable and overriding factual error.

VI

[22] I would confirm the order that I made at the close of argument on March 22, 2007 refusing Lord Black's motion for leave to appeal the order of Cumming J. to this court. The parties have agreed that the successful responding parties should have their costs, and have agreed on the amount of costs as follows: RSM Richter Inc. – $5,000; Hollinger Inc. – $2,500; Sun-Times Media Group, Inc. – $1,500. All costs include disbursements and GST.

RELEASED: April 13, 2007 "SB")

"S. Borins J.A."

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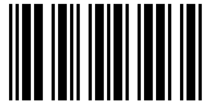

TAB8

COURT OF APPEAL FOR ONTARIO

CITATION: Mundo Media Ltd. (Re), 2022 ONCA 607
DATE: 20220822
DOCKET: M53436

2022 ONCA 607 (CanLII)

Thorburn J.A. (Motion Judge)

In the Matter of Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

BETWEEN

Royal Bank of Canada

Applicant

and

Mundo Media Ltd., Mundo Inc., 2538853 Ontario Ltd., 2518769 Ontario Ltd., 2307521 Ontario Inc., 36 Labs, LLC., Active Signal Marketing, LLC, Find Click Engage, LLC, FLI Digital, Inc., Mundo Media (US), LLC, M Zone Marketing Inc., Appthis Holdings, Inc., Movil Wave S.A.R.L., Mundo Media (Luxembourg) S.A.R.L., and Mogenio S.A.

Respondents

Matthew P. Gottlieb, Bradley Vermeersch and Xin Lu (Crystal) Li, for the moving party SPay Inc.

Scott McGrath, Rachel Nicholson and Stuart Clinton, for the responding party Ernst & Young Inc., solely in its capacity as the court-appointed receiver of Mundo Media Ltd. and its subsidiaries

Heard: July 25, 2022 by video conference

ENDORSEMENT

2022 ONCA 607 (CanLII)

OVERVIEW

[1] The issue to be decided on this motion is whether the moving party, SPay Inc. (“SPay”), should be granted leave to appeal the motion judge’s decision not to stay the receiver’s motion for judgment.

[2] On April 9, 2019, Mundo Media Ltd. (“Mundo”) was placed in receivership by the Ontario Superior Court of Justice pursuant to s. 243 of the *Bankruptcy and Insolvency Ac*t, R.S.C. 1985, c. B-3, as amended (the “*BIA*”). The responding party, Ernst & Young Inc., is the court-appointed receiver and manager of all assets belonging to Mundo and its subsidiaries (the “receiver”).

[3] The receiver brought a motion for an order directing SPay to pay US$4,124,000 to Mundo for a number of unpaid invoices, pursuant to contractual agreements between Mundo and SPay or its predecessor. These agreements were signed in 2017, prior to the receivership.

[4] SPay sought to stay the receiver’s motion on the basis that the agreements contain an international commercial arbitration clause which requires all disputes to be resolved by arbitration in New York pursuant to New York law.

[5] The motion judge refused SPay’s request. He held that the arbitration provisions in the agreements were rendered inoperative by the “single proceeding model” in Ontario.

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[6] The single proceeding model applies to insolvency proceedings. This model favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings. A creditor "who cannot claim to be a 'stranger to the bankruptcy', has the burden of demonstrating 'sufficient cause'" to have the proceedings fragmented across multiple jurisdictions: *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 76.

[7] The motion judge held that SPay is not a "stranger" to the insolvency proceeding as it will seek to set off some or all of the monies owing to Mundo. As such, it is part of the single proceeding model.

[8] SPay claims that the proposed appeal should be allowed to proceed as it meets the three-prong test for granting leave to appeal: (i) there is a real prospect of success as SPay is a stranger to the bankruptcy and its set-off does not render it an interested party to the proceeding; (ii) the proposed appeal involves an issue of public importance that will provide guidance to receivers, third parties and insolvency courts in addressing the enforceability of international arbitration agreements with third parties where a defence of set-off is raised by the third party; and (iii) the short time required to hear the appeal will not prejudice the receiver.

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[9] The receiver claims the chances of success are unlikely as SPay’s intended set-off of Mundo’s single largest account receivable is in substance a claim such that it should be part of one proceeding along with all other creditors of Mundo, as contemplated by the single proceeding model. The receiver further claims that this appeal does not involve a matter of general importance; rather, the decision below is rooted in the motion judge’s specific findings of fact, to which deference is owed. Moreover, the receiver claims that allowing the motion for leave to appeal would result in undue delay and additional costs.

[10] For the reasons that follow, the motion for leave to appeal is dismissed.

BACKGROUND FACTS

[11] The moving party, SPay, is a sports management technology company incorporated in Delaware and headquartered in Texas. It provides an integrated technology platform for sports league management, payment administration, sports recruiting, event support and sponsorship.

[12] Mundo is an advertising technology company that provided online marketing services to clients. It carried on business in Canada, the United States and Luxembourg.

[13] In or around March 2017, Mundo began to provide SPay’s predecessor, Stack Media, Inc. with services, the terms of which were set out in a Publisher

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Agreement and a Maintenance and Support Agreement, both executed in July 2017. Each agreement contains an identical arbitration clause which requires all disputes, including the arbitrability of the dispute, to be determined by arbitration in New York. The substantive law of the contracts is New York law.

[14] On April 9, 2019, as a result of Mundo's substantial decline in revenue, the Superior Court of Justice appointed the receiver. The receiver was authorized to take all necessary steps to collect Mundo's accounts receivable.

[15] The receiver claims that SPay owed Mundo US$4,124,000 as of the date of the appointment order. According to the receiver, this is Mundo's biggest account receivable.

[16] SPay claims that certain amounts were incurred by Stack Media Inc. before SPay bought that corporation's assets, and that the remaining amount owing, if any, would be set off against the amount that Mundo owes to SPay. SPay has not commenced any set-off proceedings against Mundo.

[17] On May 10, 2021, after making efforts to collect the account receivable for two years, the receiver brought a motion directing SPay to pay Mundo US$4,124,000. The receiver filed no evidence on the motion.

[18] On June 30, 2021, SPay moved to stay the receiver's motion in favour of arbitration in New York pursuant to the arbitration clauses in the agreements and

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the *UNCITRAL Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended on July 7, 2006 (the "*UNCITRAL Model Law*"). The *UNCITRAL Model Law* is incorporated by reference in the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 (the "*ICAA*"), giving it the force of law in Ontario: s. 5.

[19] The *ICAA* requires the court to refer a matter to arbitration upon a party's request, unless there are grounds on which the court should refuse the stay. A stay must be granted unless there is some cogent reason to ignore the express terms of the arbitration clause, such as "the agreement is null and void, inoperative or incapable of being performed": *ICAA*, at Schedule 2, art. 8.

[20] The motion judge framed the substantive issue to be determined on the motion as follows:

> [D]oes the fact that claims by and against Mundo are being administered by the court-appointed Receiver in insolvency proceedings in Ontario under the BIA mean that the arbitration agreements between SPay and [Mundo] are rendered null and void, inoperative or incapable of being performed? The answer to this question, in my view, turns on the applicability of the single proceeding model to the circumstances of this case.

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[21] SPay argued that the single proceeding model is only meant to centralize claims by creditors *against* a debtor, not claims *by* a debtor against third parties. SPay filed expert evidence that under New York law the arbitration clauses in the agreements would be enforced even if the plaintiff was bankrupt, and that a receiver is generally bound by arbitration agreements executed prior to an appointment order. SPay claimed that it was not a creditor, as a set-off is a defence rather than a claim against the debtor. As such, SPay asserted that the single proceeding model should not apply to it.

THE MOTION JUDGE'S REASONS

[22] There was no dispute that the receivership proceedings were properly commenced in Ontario, or that the receiver's claim related to monies owed to Mundo and the prosecution of proceedings to recover same.

[23] The motion judge held that it would be impracticable to have an arbitrator in New York decide the question of whether a receiver appointed by an Ontario court is bound by an arbitration clause in the context of insolvency proceedings. The motion judge explained that the receiver is an officer of the Ontario court and answers only to that court.

[24] The motion judge then addressed whether the arbitration clauses in the agreements were rendered null and void, inoperative or incapable of being

performed by virtue of the single proceeding model. He noted that "the single proceeding model … is not strictly limited to claims against a debtor; it also applies to claims advanced by the debtor against a third party." He further noted that, in cases where the third party is not a stranger to the bankruptcy, courts have invoked the single proceeding model to allow a claim by a debtor against a third party to be commenced in the jurisdiction where the bankruptcy occurred, referring to *Re: Essar Steel Algoma Inc. Et al,* 2016 ONSC 595, 33 C.B.R. (6th) 313, at para. 31, and *Montréal, Maine & Atlantic Canada Co.*, 2013 QCCS 5194, at para. 29.

[25] The motion judge held that the "determining factor" in deciding whether a party is a stranger to the proceeding "is the degree of connection of the claim to the insolvency proceedings."

[26] The motion judge held that SPay was not a stranger to the proceeding because: (i) the receiver was seeking to realize on a significant Mundo asset for the benefit of all creditors; (ii) SPay "intends to assert … its own claim against Mundo by way of the defence of set-off"; and (iii) "nothing turns on whether the money SPay claims to be owed under the Publisher Agreement is a counterclaim or set-off. It is in substance a claim against Mundo."

[27] For these reasons, on April 26, 2022, the motion judge dismissed the motion to stay the receiver's claim to collect against SPay, holding as follows:

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> Requiring the Receiver to commence arbitration proceedings in New York would be unfair to Mundo's creditors and inconsistent with the object of the BIA to, among other things, enhance efficiency and consistency and avoid the chaos and inefficiency of multiple proceedings and of potentially sending the Receiver "scurrying to multiple jurisdictions".

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THE TEST TO BE MET ON LEAVE TO APPEAL

[28] SPay requires leave of this court to pursue an appeal pursuant to s. 193(e) of the *BIA*. Sections 193(a)-(d) of the *BIA* provide that an appeal lies to the Court of Appeal from an order of the court in specified scenarios, barring which there is no automatic right to appeal. Instead, leave to appeal may be granted by a judge of the Court of Appeal "in any other case", pursuant to s. 193(e) of the *BIA*. Thus, leave is required in this case and a single judge of this court can determine whether leave should be granted.

[29] On a motion for leave to appeal under s. 193(e) of the *BIA*, the moving party must satisfy three criteria, as set out by Blair J.A. in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

[30] First, the proposed appeal must be *prima facie* meritorious; that is, the proposed appeal must raise "legitimately arguable points … so as to create a realistic possibility of success on the appeal": see *Ravelston Corp. (Re)* (2005), 24

C.B.R. (5th) 256 (Ont. C.A.), at para. 29. This can include a finding that the decision "(a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy": *Pine Tree Resorts*, at para. 31. Of course, this assessment needs to be conducted against the backdrop of s. 243 of the *BIA*, which has been interpreted to give supervising judges a broad mandate to resolve issues in bankruptcy: see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at paras. 57-58. Commercial list judges with experience in insolvency proceedings are alive to the legal and business realities faced by debtors, creditors and the receiver, and substantial deference is therefore owed to their decisions: see *Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 138 O.R. (3d) 373, at para. 84, leave to appeal refused, [2017] S.C.C.A. No. 238, referring to *Royal Crest Lifecare Group Inc. (Re)* (2004), 181 O.A.C. 115 (C.A.), at para. 23, leave to appeal refused, [2004] S.C.C.A. No. 104, and *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at paras. 97-99.

[31] Second, the proposed appeal must raise an issue or issues of general importance.

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[32] Third, the proposed appeal must not unduly delay the progress of the proceedings: *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONCA 581, 95 C.B.R. (6th) 240, at para. 37, citing *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, 90 C.B.R. (6th) 39, at para. 12, *Pine Tree Resorts, at para. 29, and McEwen (Re)*, 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

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ANALYSIS AND CONCLUSION

[33] In determining whether SPay's proposed grounds of appeal are *prima facie* meritorious, the first question is whether the motion judge erred in holding that, as a matter of law, the issue of arbitrability should be decided by the motion judge rather than an arbitrator.

[34] SPay claims that, as a general rule, mandatory arbitration provisions shall apply absent "very clear language" to the contrary: *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.), at p. 266; see also *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 84-85, and *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. (4th) 179, at para. 34, citing *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921, at para. 11.

[35] However, the receiver is appointed by the court and the receiver's authority emanates solely from the court order. As a matter of law therefore, only the court can determine the receiver's powers and obligations, which includes determining whether the receiver has the authority to prosecute the debt through the single proceeding model.

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[36] The court must therefore assess the limits on the receiver's powers pursuant to the court order, including whether the presence of an arbitration clause precludes the receiver from asserting claims by the debtor against third parties not involved in the insolvency proceeding under the agreement in which that clause is found: see *Canada (Attorney General) v. Reliance Insurance Co.* (2007), 87 O.R. (3d) 42 (S.C.), at pp. 51-54; *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 175 D.L.R (4th) 703, at para. 33, leave to appeal requested but application for leave discontinued, [1999] S.C.C.A. No. 381.

[37] Moreover, although article 8 of Schedule 2 to the *ICAA* requires a stay in favour of the arbitration agreement, the legislation expressly provides room for courts to "find[] that the agreement is … inoperative". This express carve-out, read in conjunction with the broad discretion that courts exercise under s. 243 of the *BIA* in supervising bankruptcy matters, enables bankruptcy courts to preclude the operation of the *ICAA* by virtue of the operation of the single proceeding model.

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[38] As such, I find the first ground of the proposed appeal is not *prima facie* meritorious.

[39] The second ground of the proposed appeal is whether SPay is a stranger to the insolvency proceeding such that the arbitration between the debtor (Mundo) and the third party (SPay) should be permitted to proceed. As noted by the motion judge, “The answer to this question, in my view, turns on the applicability of the single proceeding model to the circumstances of this case.”[1]

[40] The single proceeding model is a judicial construct used to group all claims against a debtor. The objective of the single proceeding model is to bring efficiency to the insolvency process and maximize returns for the benefit of all creditors: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22, citing Roderick J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), at pp. 2-3; *Rompsen Investment Corporation*, at para. 70.

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1 The receiver also argued before the motion judge that the decision in *Petrowest Corporation v. Peace River Hydro Partne*rs, 2020 BCCA 339, 43 B.C.L.R. (6th) 8, leave to appeal granted and appeal heard and reserved January 19, 2022, [2021] S.C.C.A. No. 30, was dispositive of SPay’s motion. The motion judge considered that decision and said that he was “not persuaded by the logic and reasoning” in it. After noting that the decision was under appeal at the Supreme Court of Canada, and that he was not bound by it, he declined to follow it. Neither party has resurrected an argument that relies on *Petrowest* and, as such, I make no comment on its applicability to this case.

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[41] The advantages of the single proceeding model were outlined by Deschamps J. in *Century Services*, at para. 22:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, … the *BIA* allow[s] a court to order all actions against a debtor to be stayed while a compromise is sought. [Emphasis added.]

[42] In *Essar Steel*, at paras. 31 and 33, Newbould J. outlined the considerations to be taken into account when applying the single proceeding model to third parties:

> [In this case, the] issues are completely interwoven and it would make no sense to require [the applicants] to litigate its claim against [the moving parties] in the United States when [the moving parties'] claim against [the applicants] must be dealt with in this Court in Ontario. The claim of [the applicants] against [the moving parties] is an asset of the applicants to be dealt with in this Court.
>
> …
>
> For the single control model to apply, the [third party] … must not be a stranger to the insolvency proceedings. [Emphasis added; footnotes omitted.]

See also: *Montréal, Maine & Atlantic Canada Co.*, at para. 29.

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[43] SPay claims that it is a stranger to this proceeding because: (i) it has not filed a claim against Mundo; and (ii) it proposes to assert a set-off rather than make a claim. A set-off is a defence, SPay submits, and there is no suggestion that the monies SPay claims it is owed exceed the amount payable by SPay to Mundo. SPay states that it does not intend to issue a claim against Mundo, file a proof of claim or receive a distribution from the estate: see *P.I.A. Investments Inc. v. Deerhurst Ltd. Partnership* (2000), 20 C.B.R. (4th) 116 (Ont. C.A.), at para. 32; *Thorne v. College of the North Atlantic*, 2022 NLCA 31, at para. 15.

[44] SPay does not dispute that, had it commenced an action against Mundo, SPay would then be a creditor subject to the single proceeding model.

[45] The question then is, what difference does it make, if any, that the third party seeks to reduce or eliminate the amount payable to the debtor by way of a set-off but does not issue a claim seeking those same monies from the debtor?

[46] Canadian jurisprudence distinguishes between a set-off defence and a claim, and further, between legal and equitable set-off: *P.I.A. Investments Inc.*, at para 32. However, the form of a proceeding may be less significant in the context of bankruptcy as the treatment of the bankrupt estate's largest account receivable is inextricably interwoven with the bankruptcy proceeding.

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[47] As noted by Zarnett J.A. of this court, “Although equitable set-off is a defence, ... [i]t is a way of raising, as a defence, a plaintiff’s liability to take into account a loss it occasioned to the defendant in reduction of the plaintiff’s claim. It is often referred to as a ‘claim for equitable set-off’”: *3113736 Canada Ltd. v. Cozy Corner Bedding Inc.*, 2020 ONCA 235, 150 O.R. (3d) 83, at para. 37.

[48] It would seem therefore that the format of the proceeding is not determinative. The fact that a claim is made by a third party by way of a set-off to recover monies from a debtor may be of great significance to all creditors in the single proceeding model; this is particularly so where the debtor’s largest account receivable is at stake. To approach this matter differently would defeat the purpose of the “single proceeding model”, which is intended to “avoid the inefficiency and chaos” of a decentralized receivership process: *Century Services*, at para. 22.

[49] In this case, SPay is a third party to the insolvency proceeding, but is also Mundo’s largest debtor. The receiver claims that SPay owes Mundo US$4,124,000 as of the date of the appointment order. SPay’s proposed set-off may, if successful, eliminate all debt owing by SPay to Mundo.

[50] SPay is not a stranger to bankruptcy because the outcome of its proposed set-off will determine both the amount of Mundo’s single biggest account receivable and the size of the bankrupt’s estate, thereby affecting all other

creditors. As noted by the Supreme Court, the most significant debtor of a bankrupt estate is "[f]ar from being a 'stranger' to the bankruptcy": *Sam Lévy*, at para. 49.

[51] Whether SPay initiates a claim or claims a set-off, it will inevitably step into the shoes of Mundo's creditor, and should therefore be treated in the same way as all other unsecured creditors under a single proceeding. The form of proceeding does not change SPay's substantive role in this regard as a creditor of Mundo. SPay should not be entitled to use the form of proceeding to obtain priority where none is otherwise warranted as this would violate the basic principle of equal treatment in bankruptcy. As noted by the motion judge, if SPay's dispute with Mundo is not brought within the single proceeding model, the purpose of this model, to avoid the chaos and inefficiency of a decentralized receivership process, would be defeated.

[52] I appreciate that the single proceeding model is typically used as a 'shield' to protect debtors from having to defend claims in multiple proceedings or jurisdictions, rather than as a 'sword' to enable receivers to pursue claims against a third party. However, I see nothing in the jurisprudence precluding this result. On the contrary, the motion judge identified two decisions – *Essar Steel* and *Montréal, Maine & Atlantic Canada Co.* – which employed the single proceeding model in the very manner contested by the moving party. The motion judge's decision is

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also in keeping with the purpose of the single proceeding model as outlined by the Supreme Court in *Century Services* – to promote efficiency and maximize returns for creditors – and accords with the jurisprudence that parties should not be allowed to contract out of the single proceeding model where one party may make claims that will seriously adversely affect all creditors. I see no principled reason for drawing the distinction urged by the moving party.

[53] I note that the motion judge did not state that set-offs always, or even often, render a third party part of the single proceeding model. Rather, he held that "claims by a debtor against a third party *may* be required to be heard in the insolvency proceedings", and that "[t]he determining factor is the degree of connection of the claim to the insolvency proceedings". The "dominating considerations" for the motion judge in this case were that "the Receiver is seeking to realize on a significant Mundo asset for the benefit of all creditors and that SPay intends to assert, in whatever forum is ordered, its own claim against Mundo by way of the defence of set-off."

[54] Therefore, the motion judge's conclusions rest on findings of fact about the specific situation in which these parties find themselves, having regard to the vast amount of this account receivable relative to Mundo's other debtors. The motion judge's findings of fact, upon which he based his decision that there is a strong

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connection between SPay's dispute with Mundo and the receivership, are findings to which deference is owed.

[55] For these reasons, I do not find that the second proposed ground of appeal is *prima facie* meritorious.

[56] SPay certainly articulates issues that may be characterized as issues of some importance, namely: (i) when the single proceeding model renders an arbitration clause in an international commercial agreement inoperative; (ii) when a party is a "stranger" to the single model proceeding; and (iii) whether a determination of arbitrability by an arbitrator would be impracticable. Nonetheless, in this case, I see no error in the motion judge's articulation of the law. More importantly, on this point, the issues of concern raised by SPay are really about the application of the law to the specific facts in this case, and are not necessarily issues of more general importance. This is especially true in light of the infrequency with which these issues arise, as evidenced by the scarcity of available jurisprudence with comparable facts.

[57] Moreover, allowing the appeal to proceed would result in undue delay, additional litigation costs and deterioration of the assets of the receivership. The receiver has been trying to pursue its largest account receivable since May 24, 2019, after dealing with multiple counsel purporting to act for SPay. The receiver

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served its motion record on May 10, 2021. Since then, there have been other delays as a result of limited court resources, flowing in part from the COVID-19 pandemic.

[58] For these reasons, the motion for leave to appeal is dismissed. Costs of this motion are awarded to the responding party in the amount of $15,000, as agreed upon by the parties.

[59] I would like to thank counsel for their excellent advocacy.

"J.A. Thorburn J.A."

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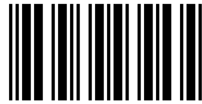

TAB9

COURT OF APPEAL FOR ONTARIO

CITATION: Potentia Renewables Inc. v. Deltro Electric Ltd., 2019 ONCA 779
DATE: 20191002
DOCKET: C65744

Tulloch, Roberts and Miller JJ.A.

BETWEEN

Potentia Renewables Inc.

Applicant (Respondent)

and

Deltro Electric Ltd.

Respondent (Appellant)

Fred Platt and Michael Mazzuca, for the appellant

George Benchetrit and Aryan Ziaie, for the respondent

Heard: June 5, 2019

On appeal from the order of Justice Thomas J. McEwen of the Superior Court of Justice, dated July 27, 2018, with reasons reported at 2018 ONSC 3437.

ROBERTS J.A.:

[1] The appellant, Deltro Electric Ltd., appeals from the order that it repay to the respondent, Potentia Renewables Inc., the amount in Canadian currency sufficient to purchase $2 million USD and that, failing repayment, a receiver be appointed over the appellant's assets, undertakings and property.

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[2] For the reasons that follow, I would dismiss the appeal.

A. BACKGROUND FACTS AND PROCEDURAL HISTORY

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[3] As this appeal turns on the application judge's interpretation of documents exchanged between the parties and the procedural underpinnings of the proceedings initiated by them, it is useful to set out a brief summary of the background facts and procedural history.

[4] The respondent's application was one of three proceedings arising out of the parties' failed business relationship in relation to the development of a ground-mount solar project in Barbados ("the Barbados project") and an unrelated renewable energy project in the Dominican Republic. The other two proceedings were actions that the respondent and appellant instigated against each other. The application judge was appointed to case manage these proceedings on the Commercial List of the Superior Court of Justice in Toronto.

[5] The application judge determined that the appellant, as part of a group of related companies, controlled by Mr. Del Mastro, referenced as the "Deltro Group of Companies", had entered into a number of obligations with the respondent to finance and complete the Barbados project, as largely memorialized in the letter of intent ("LOI") dated May 15, 2016, and the amendment to the letter of intent ("ALOI") and General Security Agreement ("GSA") dated November 15, 2016. In accordance with those agreements, the respondent advanced $2 million USD in

two tranches to the appellant: $500,000 USD under the LOI and $1.5 million USD pursuant to the ALOI and GSA.

[6] By its counsel's letter on behalf of the "Deltro Group of Companies", dated January 28, 2017, the appellant advised the respondent that as a result of the latter's alleged misconduct in relation to an unrelated solar project in the Dominican Republic, "Deltro is no longer under any contractual or other obligation to sell, assign, transfer, notify or deliver any interests in any project under any agreement between the parties." In its counsel's responding letter of February 6, 2017, the respondent denied the allegations of misconduct but accepted the appellant's repudiation of all agreements, including the Barbados project, and demanded repayment of the $2 million USD that it had advanced.

[7] In its counsel's subsequent correspondence of February 23, 2017, the appellant advised that it had obtained final approval of the Barbados project, as required under the parties' agreements, and demanded that the GSA be discharged. Responding by its counsel's letter of February 28, 2017, the respondent did not accept that the appellant provided proper proof of the requisite final approval and advised that, in any event, it was not obligated to discharge the GSA in light of the appellant's repudiation that the respondent had accepted.

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[8] Taking the position that final approval had not been achieved and that the appellant had repudiated the LOI and ALOI, the respondent brought an application seeking the appointment of a receiver, as well as a declaration of the appellant's indebtedness and corresponding judgment.

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The application judge's decisions

[9] The application judge rejected the appellant's argument that final approval of the Barbados project had been obtained and concluded that the appellant had breached and repudiated its obligations and was therefore required to repay the respondent the equivalent of $2 million USD. In the event that the appellant failed to make payment within 30 days, the application judge appointed KSV Kofman Inc. ("KSV") as an interim receiver over the appellant's assets and undertakings for 30 days to determine if "a sensible plan of repayment" could be made, failing which, the respondent would be entitled to have KSV appointed as receiver of all the appellant's property. The appellant did not repay the amounts ordered and KSV became receiver to ensure payment was made.

[10] The appellant asked the application judge to re-open the application, arguing that the appellant could not have repudiated the LOI because it was not a party to it; and the appellant had not breached the ALOI because final approval of the Barbados project had been obtained, in support of which the appellant

tendered as fresh evidence the affidavits of two former Barbadian ministerial officials.

[11] The application judge refused to re-open the application. He precluded the appellant from raising the new argument that it was not a party to the LOI. He also rejected the fresh evidence, holding that it was, at best, equivocal as to whether final approval had been obtained, and would not therefore have changed the outcome of the application.

B. ISSUES

[12] The appellant pursued the following issues on the hearing of the appeal:

1. The application judge had no jurisdiction to grant any of the relief requested on the application and should have directed it proceed to trial with the other two actions that were ordered to be heard together.

2. The application judge erred in finding that the appellant had failed to obtain final approval of the Barbados project and had repudiated the ALOI, and in failing to admit fresh evidence and re-open the application on this issue.

3. The application judge erred in finding that the appellant had repudiated and breached the LOI to which it was not a party, and in failing to re-open the application on this issue.

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[13] The appellant relied on its factum for the other discrete issues raised on this appeal, namely: the application judge erred in appointing KSV as receiver and in limiting KSV's liability as receiver to gross negligence or wilful misconduct.

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C. ANALYSIS

(i) The application judge's jurisdiction

[14] The appellant submits that the application judge should not have allowed the proceeding to be commenced by application as it was not authorized under r. 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The appellant also argued that the application judge lacked jurisdiction to appoint a receiver under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that allows only for interlocutory orders to be granted. Moreover, no recourse could be had to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 that permits the appointment of a receiver where the debtor is insolvent because, as the application judge found, the appellant was not insolvent.

[15] I would not accept these submissions.

[16] The application was properly brought under r. 14 of the *Rules of Civil Procedure.* While, in accordance with r. 14.06(3), the respondent should have stated the rule or statute under which the application is brought, this is a procedural, not a substantive, requirement. Its omission does not invalidate an

application that otherwise complies in substance with r. 14.02: see r. 2.01 of the *Rules of Civil Procedure*.

[17] Here, the substance of the application was in respect of a matter under r. 14.05(3)(d): "the determination of rights that depend on the interpretation of a … contract or other instrument". This included the interpretation of the LOI, ALOI and GSA, about which there were no issues of credibility that required a trial to resolve. Rule 14.05(3)(g) permitted the respondent's request for a "declaration", "the appointment of a receiver" and damages, as "other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application".

[18] Moreover, there was no need for the respondent or the application judge to resort to s. 101 of the *Courts of Justice Act* or s. 243 of the *Bankruptcy and Insolvency Act*, for authority to appoint a receiver. Article 6.1(l) of the GSA specifically allows the respondent to "appoint, by an instrument in writing delivered to the [appellant], a receiver, manager or a receiver and manager (a "Receiver") … or institute proceedings in any court of competent jurisdiction for the appointment of a Receiver", upon the appellant's default.

[19] As a result, the application judge had jurisdiction to hear and determine the respondent's application and to grant the requested relief.

(ii) Final approval of the Barbados project

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[20] It is common ground that according to the LOI, the second progress payment of $1.5 million USD was payable by the respondent when the final formal zoning and site approval by the Barbados Town and Country Planning for the Barbados project was obtained. The dispute between the parties as to whether final approval had been obtained led them to enter into the ALOI and the GSA to secure the second progress payment.

[21] There is also no dispute that the ALOI provided that the appellant could keep the second progress payment if, within 12 months of the date of the disbursement, final approval was granted by the Barbados Town and Country Planning Office or any other Barbados governmental body with the authority to grant the final approval. But, if final approval was not obtained within this 12-month period, the ALOI stipulated that the respondent "shall have the right (but not the obligation) to demand full and immediate repayment" of the $1.5 million USD progress payment. Following full repayment, the GSA would be discharged.

[22] The appellant does not dispute that if final approval were not obtained within the stipulated period, it would be obliged to make the $1.5 million USD repayment. However, it maintains that the application judge made palpable and overriding errors in his interpretation of the various letters and affidavits of the former Barbadian ministers which, according to the appellant, established that final approval had been granted. The application judge erred, according to the appellant, in failing to admit the fresh evidence of the ministers' affidavits and in

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failing to reopen the application. As a result, the appellant argues, the GSA should have been discharged and there was no obligation to repay the $1.5 million USD progress payment.

[23] I disagree.

[24] First, it was open to the application judge to conclude that the documents proffered by the appellant, including the proposed fresh evidence, fell far short of demonstrating that final approval had been granted. His interpretation was reasonable and is owed deference on appeal. Moreover, he was not obliged to accept the fresh affidavits of the former Barbadian ministers or re-open the application.

[25] It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. Appellate courts should defer to the trial judge who is in the best position to decide whether, at the expense of finality, fairness dictates that the trial be reopened. Further, the case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at paras. 60-61.

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[26] I see no error in the application judge's refusal to re-open the application based on the fresh evidence of the former ministers' affidavits. As already noted, his conclusion that the fresh evidence would not have affected the outcome was reasonable. There is no basis to interfere with it.

[27] Further and in any event, as the application judge found, regardless if final approval were ultimately obtained, that approval came too late because it followed the appellant's clear repudiation of the ALOI by its counsel's January 28, 2017 letter and the respondent's equally clear acceptance of its repudiation. Upon the respondent's acceptance of the appellant's repudiation, the appellant's obligation to obtain final approval, among other obligations, came to an end but its obligation to repay $1.5 million USD arose.

[28] I would therefore reject this ground of appeal.

(iii) Did the appellant repudiate the LOI?

[29] Nor do I accept the appellant's argument that the application judge erred in finding that the appellant had repudiated the LOI when, according to the appellant, it was not a party to that agreement. Accordingly, the application judge was not required, as the appellant submits, to re-open the application to correct any error or to prevent a miscarriage of justice.

[30] With respect to the appellant's request to re-open the application, the application judge concluded:

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> The argument now advanced by Deltro was available when the matter first appeared before me. I have, however, reviewed my Reasons, the documents Deltro produced for this motion, and considered Deltro's argument. I see no basis to change the relevant findings in my Reasons. This is particularly so in light of Deltro's admission at this motion that the January 28, 2017, letter sent by counsel for the "Deltro Group of Companies" to Potentia included both/either Deltro and DGL.

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[31] As the application judge correctly observed, prior to its request to re-open the application, the appellant had never advanced the position that it was not a party to the LOI. Indeed, the artificial and technical distinction that the appellant now advocates for is not supported by the evidence or its pleadings. Rather, the appellant's correspondence with the respondent, its pleadings, and the appellant's supporting affidavits on the application establish that the appellant consistently represented itself and operated as part of an integrated group of related companies of which Mr. Del Mastro is the directing mind and will, and which was a party to the LOI.

[32] In particular, in its statement of defence and counterclaim to the action commenced by the respondent, the appellant does not differentiate itself from the other members of the "Deltro Group of Companies". Instead, the appellant describes itself in para. 4 as a company that "together with its related companies, conducts business development, financing, construction, and operations of renewable energy projects … throughout the Caribbean". Importantly, in para. 6

of its statement of defence and counterclaim, the appellant expressly admits that it entered into the LOI:

> In response to Paragraphs 4 and 5 of the Statement of Claim, [the appellant] admits that it entered into … the [LOI] … with [the respondent], the former with respect to the Barbados Project.

[33] This admission formed the basis for the appellant's claim for damages in paras. 25 to 28 of its counterclaim "related to [the respondent's] breach of contract of the [LOI] … for the greater of the expectation interest that [the appellant] would have reasonably expected to receive under the [LOI] but for [the respondent's] breach or in the alternative [the appellant's] reliance interest for funds it has expended in reliance of the said agreement".

[34] The appellant has never sought to withdraw its admission, amend its pleadings or withdraw its counterclaim.

[35] As a result, I see no error in the application judge's refusal to re-open the application.

[36] Given the application judge's finding that the appellant had repudiated the LOI, it was reasonable for him to determine that ss. 7 and 12 of the LOI are of no assistance to the appellant. As the application judge stated: "Deltro cannot accept Potentia's money, repudiate the agreement, and then rely on a clause from the very same agreement as justification for keeping the money". I see no error in the application judge's conclusion.

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(iv) KSV's appointment as Receiver and the exclusion of liability

[37] The appellant submits that the application judge erred in appointing KSV as receiver because it has a conflict of interest given its ongoing professional relationship with the respondent's counsel in other receivership matters. Further, the appellant submits that the application judge erred in limiting the receiver's liability to gross negligence or wilful misconduct in the formal order.

[38] I would not give effect to these submissions. In my view, both these decisions represented a reasonable exercise of the application judge's discretion as a case management judge of the Commercial List of the Ontario Superior Court of Justice in Toronto.

[39] Absent reviewable error, deference must be shown to the reasonable case management decisions of the highly specialized judges who sit on the Commercial List: see *Western Larch Limited v. Di Poce Management Limited*, 2013 ONCA 722, 117 O.R. (3d) 561, at para. 16. Established in 1991, the Commercial List of the Ontario Superior Court of Justice specializes in the hearing and case management of only commercial law cases, including receiverships. Matters on the Commercial List are governed by a Practice Direction that sets out special procedures specifically adopted for the hearing of matters on the Commercial List. The Practice Direction anticipates that the same judge who determines a substantive component of a proceeding will continue to

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hear all substantive matters. It is also expected that the proceeding shall be subject to a form of case management. See: *Consolidated Practice Direction Concerning the Commercial List*, effective July 1, 2014.

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[40] With that context in mind, I turn first to the appointment of KSV as receiver. I see no error in the exercise of the application judge's discretion to appoint KSV. There is no dispute that KSV was qualified to act as receiver. Moreover, KSV was independent; it had no connection with the respondent or the appellant. The fact that KSV has worked professionally with the respondent's counsel on other unrelated matters does not raise a disqualifying conflict or prevent it from complying with its professional obligations to the court. As the application judge reasonably observed, it is not unusual for professional law and accounting firms specializing in insolvency matters to have had previous or ongoing professional relationships. Finally, it must be recalled that KSV, as the court-appointed receiver, is an officer of the court, accountable to the court and all interested parties, including the appellant: see *Jethwani v. Damji*, 2017 ONSC 1702, at para. 8.

[41] With respect to the application judge's limitation of the receiver's liability in the receivership order, I similarly see no basis for appellate intervention.

[42] The provisions of the receivership order, with which the appellant takes issue, are standard provisions that form part of the model receivership order

prescribed by the Commercial List Users' Committee for the use of practitioners and the court. While not bound by them, counsel is expected to use the model orders developed by the Users' Committee as templates for the draft orders they put before the Court, appropriately adapted as the particular circumstances of each case require, with suggested revisions black-lined. This follows the direction in para. 57 of Part XVIII of the Practice Direction: "[t]he prior preparation of draft orders for consideration by the court at the end of a hearing will greatly expedite the issuance of orders. Where relevant model orders have been approved by the Commercial List Users' Committee, a copy of the draft order blacklined to the model order and indicating all variations sought from the model order must be filed."

[43] The theory and approach behind the recommended model orders promote the Commercial List's purposes of efficiency, expediency and uniformity in commercial law matters, while recognizing that any model order serves only as a guide and must be tailored to suit the circumstances of each case before the court. While model orders are extremely useful to parties and the court, they are only tools and must be treated with care. They are not mandatory. Not every provision in the model orders will be suitable in every case. A judge must always appropriately exercise discretion to determine what provisions are reasonable in the circumstances.

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[44] For ease of reference, I have highlighted the impugned provisions in the text of para. 20 of the order, reproduced below:

> THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, **save and except for any gross negligence or wilful misconduct on its part**, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. [Emphasis added.]

[45] The appellant objected to these provisions on the basis that there was no reason to limit the receiver's liability beyond negligence as the ordinary standard of liability to gross negligence or wilful misconduct. The application judge did not accept this submission and determined, in the circumstances of this case, that it was appropriate to include the standard limiting provisions of the model order.

[46] In my view, the application judge's decision was reasonable. The application judge understood that he was not obliged to limit the receiver's liability to gross negligence or wilful misconduct. He did not indicate that he was obliged to follow the model order or that the model order was determinative. Rather, he properly exercised his discretion to include the impugned provisions based on the circumstances of the case before him.

[47] Why then was it reasonable in this case to include the limited liability shield for the receiver?

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[48] It is a fair inference, in my view, that, without it, KSV may have refused to act as receiver in the circumstances of this case. A qualified receiver considering accepting an appointment can legitimately take into account whether the limited liability shield will be in place, as contemplated in the model order, to allow for the proper and orderly conduct of the receivership and avoid unnecessary and unjustified proceedings. As observed in the explanatory notes for the 2004 version of the model receivership order:

> the Receiver is not a legitimate target for the competing creditors…. [A] gross negligence floor has been continued as the standard of culpability in order to limit the ability of creditors or the debtor from seeking to mount a challenge to the reasonableness of every exercise of the Receivers' discretion.

[49] The reasonable expectation of a limited liability shield is also reflected in the respondent's engagement letter to BDO, the proposed predecessor receiver, which provided that it would indemnify the receiver for all liabilities incurred in connection with the receivership, "excepting only any liabilities … that arise out of a wrongful act of [the receiver] which is proven to have been committed by it wilfully or out of gross negligence".

[50] While it may not be appropriate or required in all cases, KSV's limited liability permits the orderly execution of its duties without the concern that it will be subject to needless litigation, especially in the circumstances of this case, with a recalcitrant debtor who has already objected to KSV's appointment. Recall

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KSV's mandate in this case: while the scope of its powers is broad, its narrow purpose is to ensure payment of the $2 million USD debt to the respondent, which the appellant has steadfastly refused to pay notwithstanding its liability under the LOI, ALOI and GSA. The limitation of KSV's liability to gross negligence and wilful misconduct lessens the likelihood that the appellant will interfere with the completion of the receiver's mandate.

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[51] That said, the limitation of its liability does not mean that KSV can act with impunity. KSV is a court-appointed receiver whose conduct of the receivership is subject to the court's scrutiny in which process the appellant will actively participate.

[52] As a result, I see no basis to interfere with the provisions of the application judge's order that limit the receiver's liability to gross negligence and wilful misconduct.

D. DISPOSITION

[53] For these reasons, I would dismiss the appeal.

[54] In accordance with the provisions of the GSA, the respondent is entitled to its full indemnity costs that I would fix in the amount of $50,000, inclusive of disbursements and applicable taxes.

Released: "MT" OCT 02, 2019

"L.B. Roberts J.A."
"I agree. M. Tulloch J.A."
"I agree. B.W. Miller J.A."

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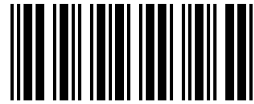

TAB10

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19-A-38, 19-A-39, 19-A-40,
19-A-41, 19-A-42, 19-A-44,
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Raincoast Conservation Foundation, Living Oceans Society, Chief Ron Ignace and Chief Rosanne Casimir, on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation, Squamish Nation, Coldwater Indian Band, Federation of British Columbia Naturalists carrying on business as BC Nature, Tsleil-Waututh Nation, Stz'uminus First Nation, Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose, City of Vancouver, Shxw'ōwhámel First Nation, Olivier Adkin-Kaya, Nina Tran, Lena Andres, Rebecca Wolf Gage and **Upper Nicola Band** (*Applicants*)

v.

The Attorney General of Canada, Trans Mountain Pipeline ULC and **Trans Mountain Corporation** (*Respondents*)

and

Attorney General of Alberta (*Intervener*)

Indexed as: Raincoast Conservation Foundation v. Canada (Attorney General)

Federal Court of Appeal, Stratas J.A.—Ottawa, September 4, 2019.

Energy — Twelve consolidated motions for leave to commence judicial review of Order in Council (P.C. 2019-0820) dated June 18, 2019, whereby Governor in Council approving Trans Mountain Pipeline expansion project for second time — Applicants alleging in particular that Governor in Council's decision approving project substantively unreasonable; that Crown failed to adequately consult with indigenous peoples, First Nations — While express text of National Energy Board Act not indicating when to grant leave after Governor in Council deciding matter, Court must decide whether leave warranted in accordance with Act, s. 55(1) — Under various legislative schemes, party must show "fairly arguable case" that warrants

19-A-35, 19-A-36, 19-A-37,
19-A-38, 19-A-39, 19-A-40,
19-A-41, 19-A-42, 19-A-44,
19-A-45, 19-A-46, 19-A-47
2019 CAF 224

Raincoast Conservation Foundation, Living Oceans Society, Chef Ron Ignace et Chef Rosanne Casimir, pour leur propre compte et au nom de tous les membres de Stk'emlupsemc Te Secwepemc de la Nation Secwepemc, Nation Squamish, Bande indienne Coldwater, Federation of British Columbia Naturalists faisant affaire sous la raison sociale BC Nature, Tsleil-Waututh Nation, Stz'uminus First Nation, Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Première Nation Squiala, Tzeachten, Yakweakwioose, Ville de Vancouver, Shxw'ōwhámel First Nation, Olivier Adkin-Kaya, Nina Tran, Lena Andres, Rebecca Wolf Gage et **Bande Upper Nicola** (*demandeurs*)

c.

Le procureur général du Canada, Trans Mountain Pipeline ULC et **Trans Mountain Corporation** (*défendeurs*)

et

Le procureur général de l'Alberta (*intervenant*)

Répertorié : Raincoast Conservation Foundation c. Canada (Procureur général)

Cour d'appel fédérale, juge Stratas, J.C.A.—Ottawa, 4 septembre 2019.

Énergie — Il s'agissait de douze requêtes regroupées en autorisation de déposer des demandes de contrôle judiciaire d'un décret (C.P. 2019-0820) daté du 18 juin 2019, par lequel le gouverneur en conseil a approuvé le projet d'agrandissement du réseau de Trans Mountain pour la seconde fois — Les demandeurs ont allégué plus particulièrement que la décision du gouverneur en conseil d'approuver le projet était fondamentalement déraisonnable et que la Couronne a manqué à son obligation de consulter adéquatement les peuples autochtones et les Premières Nations — Le libellé de la Loi sur l'Office national de l'Énergie ne dit pas expressément quand il y a lieu d'accorder l'autorisation, mais une fois que le gouverneur en conseil a pris

full review of administrative decision — Federal Court of Appeal previously striking down Governor in Council's first approval of project in Tsleil-Waututh Nation v. Canada (Attorney General) — While Court not requiring that all work, consultation be redone, Court requiring targeted work, further meaningful consultation to be performed to address specific flaws found in first approval of project — Main issue whether motions for leave satisfying leave requirements because establishing "fairly arguable" case — Specifically, whether Governor in Council's decision approving project substantively unreasonable; whether Crown failing to adequately consult with indigenous peoples, First Nations — Central issues applicants raising grouped into four categories: alleged conflict of interest and bias; environmental issues and substantive reasonableness; issues relating to consultation with Indigenous peoples and First Nations; remaining miscellaneous issues — Submission that decision of Governor in Council vitiated by bias, conflict of interest not passing "fairly arguable case" test; no evidence supporting submission — Arguments on environmental issues also could not meet threshold of "fairly arguable" case — In Tsleil-Waututh Nation, many arguments about environmental effects of project either made or could have been made but were not — Most of environmental points applicants now raising not fairly arguable because falling into one of these categories; barred by doctrines against relitigation — – Applicants also failing to show that such arguments could practically change outcome since Governor in Council would still conclude project, on balance, in public interest — As to issues on adequacy of consultation with Indigenous people/First Nations, two sets of arguments not passing "fairly arguable" standard: (1) those involving applicants' dissatisfaction, disagreement with outcome of consultation process, asserted right to exercise veto over project; (2) those on adequacy of consultation previously raised, decided in Tsleil-Waututh Nation or that could have been raised but were not — Doctrines against relitigation now applying to bar these points — However, some issues advanced concerning adequacy of consultation in fact meeting "fairly arguable" standard for leave; in particular, argument that Canada's duty to consult in Phase III of consultation process, as Court had previously ordered when project first approved, carried out inadequately given poor quality, hurried nature of further consultation — Finally, to extent remaining miscellaneous issues existed and not fitting into four categories of issues set, none of them meeting "fairly arguable" standard — Six motions allowed.

sa décision, la Cour doit décider si l'autorisation est justifiée en application de l'art. 55(1) de la Loi — Divers régimes légaux indiquent qu'une partie doit invoquer des arguments « raisonnablement défendables » qui justifient le contrôle intégral de la décision administrative — La Cour d'appel fédérale a infirmé la décision initiale du gouverneur en conseil portant approbation du projet dans l'arrêt Tsleil-Waututh Nation c. Canada (Procureur général) — Elle n'a pas exigé que tous les travaux et les consultations soient repris à neuf, mais elle a exigé la reprise de certains travaux et la tenue de véritables consultations supplémentaires pour pallier les lacunes précises relevées dans l'approbation initiale du projet — Il s'agissait principalement de savoir si les requêtes en autorisation satisfaisaient aux critères d'une autorisation parce qu'elles établissaient l'existence d'une « cause raisonnablement défendable » — Plus particulièrement, il s'agissait de savoir si la décision du gouverneur en conseil d'approuver le projet était fondamentalement déraisonnable et si la Couronne a manqué à son obligation de consulter adéquatement les peuples autochtones et les Premières Nations — Les principales questions que soulevaient les requêtes des demandeurs ont été regroupées sous quatre rubriques : conflits d'intérêts et partialité; préoccupations environnementales et décision fondamentalement déraisonnable; consultation des peuples autochtones et des Premières Nations; autres questions diverses — L'argument selon lequel la décision du gouverneur en conseil était viciée en raison de la partialité et de l'existence de conflits d'intérêts n'était pas « raisonnablement défendable »; aucune preuve n'est venue appuyer cet argument — Les arguments sur les préoccupations environnementales ne satisfaisaient pas non plus au critère des arguments « raisonnablement défendables » — Dans l'affaire Tsleil-Waututh Nation, nombre d'arguments sur l'incidence environnementale du projet ont été présentés ou auraient pu l'être, mais ils ne l'ont pas été — La plupart des préoccupations environnementales que soulevaient les demandeurs en l'espèce n'étaient pas raisonnablement défendables, car elles appartenaient à l'une ou l'autre de ces catégories et elles étaient irrecevables par application des doctrines empêchant la remise en cause — En outre, les demandeurs n'ont pas réussi à démontrer que ces arguments mèneraient pratiquement à une issue différente, puisque le gouverneur en conseil arriverait quand même à la conclusion que le projet était, tout compte fait, dans l'intérêt public — En ce qui concerne les questions se rapportant aux consultations inadéquates des peuples autochtones et des Premières Nations, deux arguments sur la qualité des consultations n'étaient pas « raisonnablement défendables » : 1) ceux qui portaient sur l'insatisfaction des demandeurs à l'égard de l'issue des consultations et leur opposition à cette issue, et le droit invoqué d'opposer un veto au projet; 2) ceux portant sur la qualité des consultations, qui avaient été soulevés et tranchés dans l'affaire Tsleil-Waututh Nation ou qui auraient pu être soulevés et qui ne l'ont pas été — Les doctrines empêchant la remise en cause sont venues parer à ces arguments — Cependant, certaines questions soulevées sur la qualité des consultations ont satisfait à la norme de la

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cause « raisonnablement défendable » à laquelle l'autorisation est subordonnée; plus particulièrement, l'argument selon lequel l'obligation du Canada de consulter à la phase III du processus de consultation, ainsi que la Cour l'avait ordonné lorsque le projet a été approuvé la première fois, avait été exécutée de façon inadéquate en raison de la piètre qualité de ces consultations et de la hâte avec laquelle elles ont été tenues — Enfin, dans la mesure où il existait des questions diverses et où celles-ci n'entraient pas dans le champ des quatre rubriques énumérées précédemment, aucune d'entre elles n'était « raisonnablement défendable » — Six requêtes ont été accueillies.

These were 12 consolidated motions for leave to commence applications for judicial review of an Order in Council (P.C. 2019-0820) dated June 18, 2019, whereby the Governor in Council approved the Trans Mountain Pipeline expansion project for the second time. Before consolidation, 12 sets of parties wanted to challenge the approval by starting applications for judicial review. In their motions, the applicants alleged in particular that the Governor in Council's decision approving the project was substantively unreasonable and that the Crown failed to adequately consult with indigenous peoples and First Nations.

Il s'agissait de 12 requêtes regroupées en autorisation de déposer des demandes de contrôle judiciaire d'un décret (C.P. 2019-0820) daté du 18 juin 2019, par lequel le gouverneur en conseil a approuvé le projet d'agrandissement du réseau de Trans Mountain pour la seconde fois. Avant ce regroupement, 12 groupes de parties souhaitaient contester la décision portant approbation au moyen de demandes de contrôle judiciaire. Dans leurs requêtes, les demandeurs ont allégué plus particulièrement que la décision du gouverneur en conseil d'approuver le projet était fondamentalement déraisonnable et que la Couronne avait manqué à son obligation de consulter adéquatement les peuples autochtones et les Premières Nations.

The express text of the *National Energy Board Act* does not indicate when to grant leave. Under the Act, during the process of project approvals, recourse to the judicial system is forbidden. After the Governor in Council has decided the matter, recourse is potentially available but is not automatic nor as of right. The Court must decide whether leave is warranted in accordance with subsection 55(1) of the Act. Leave requirements to this Court can be found under various legislative schemes, some of which suggest that a party seeking leave must show a "fairly arguable case" that warrants a full review of the administrative decision. This "fairly arguable" standard was described in *Lukacs v. Swoop Inc.* (F.C.A.). When applying the "fairly arguable" standard under section 55 of the Act, three ideas must be kept in mind, including the fulfillment of the gatekeeping function; the role of deference; and practicality matters. In applying this standard, the Federal Court of Appeal struck down the Governor in Council's first approval of the project in *Tsleil-Waututh Nation v. Canada (Attorney General)*. In so doing, the Court did not require all the work and consultation leading up to the Governor in Council's approval to be redone but only required targeted work and further meaningful consultation to be performed to address specific flaws that led to the quashing of the first approval.

Le libellé de la *Loi sur l'Office national de l'Énergie* ne dit pas expressément quand il y a lieu d'accorder l'autorisation. Aux termes de la Loi, il est interdit d'ester en justice pendant le déroulement du processus d'approbation des projets. Une fois que le gouverneur en conseil a pris sa décision, il est éventuellement possible d'intenter un recours, mais ce recours n'est pas présenté d'office ni de plein droit. La Cour doit décider si l'autorisation est justifiée en application du paragraphe 55(1) de la Loi. Les dispositions qui obligent une partie à obtenir l'autorisation de se pourvoir devant la Cour sont prévues dans différents régimes légaux, dont certains indiquent qu'une partie sollicitant l'autorisation doit invoquer des arguments « raisonnablement défendables » qui justifient le contrôle intégral de la décision administrative. La norme de la « cause raisonnablement défendable » a été décrite dans l'arrêt *Lukács c. Swoop Inc.* (C.A.F.). Lorsqu'il s'agit d'appliquer la norme de la « cause raisonnablement défendable » à une affaire intéressant l'article 55 de la Loi, il importe de garder à l'esprit trois notions, à savoir la fonction de gardien judiciaire, le rôle de la déférence et l'importance de l'aspect pratique. Dans l'application de cette norme, la Cour d'appel fédérale a infirmé la décision initiale du gouverneur en conseil portant approbation du projet dans l'arrêt *Tsleil-Waututh Nation c. Canada (Procureur général)*. Elle n'a pas exigé que tous les travaux et les consultations ayant mené à l'approbation par le gouverneur en conseil soient repris à neuf. Elle a exigé seulement la reprise de certains travaux et la tenue de véritables consultations supplémentaires pour pallier les lacunes précises qui avaient mené à l'annulation de l'approbation initiale.

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The main issue was whether the motions for leave to start applications for judicial review satisfied the leave requirements because they established a “fairly arguable” case. Specifically, it had to be determined whether the Governor in Council’s decision approving the project was substantively unreasonable and whether the Crown failed to adequately consult with indigenous peoples and First Nations.

Held, six of the twelve motions should be allowed.

The central issues raised in the applicants’ motions were grouped into four categories: alleged conflict of interest and bias, environmental issues and substantive reasonableness, issues relating to the consultation with Indigenous peoples and First Nations, and remaining miscellaneous issues.

Various applicants submitted that the decision of the Governor in Council was vitiated by bias and a conflict of interest because after the first approval decision, the Government of Canada, through a corporate vehicle, acquired the respondent Trans Mountain and now owns the project. However, this submission did not pass the “fairly arguable case” test. It suffered from a fatal flaw being that the Governor in Council, the decision maker in this case, is not the Government of Canada and does not own the project. More fundamentally, section 54 of the Act requires the Governor in Council to decide whether to approve a project regardless of who owns it. The Act does not disqualify the Governor in Council from discharging this responsibility based on ownership of the project. The Act prevails over any common law notions of bias and conflict of interest. In the evidentiary record before the Court, there was no evidence to support this submission.

The applicants’ arguments on the environmental issues also could not meet the threshold of a “fairly arguable case”. In *Tsleil-Waututh Nation*, many arguments about the environmental effects of the project either were made or could have been made but were not. Most of the environmental points the applicants now raised were not fairly arguable because they fell into one of these categories and were barred by the doctrines against relitigation. Moreover, in attempting to meet the standard of “fairly arguable”, the applicants had to show that their arguments could practically change the outcome and on this they failed. The Governor in Council found that compelling public interest considerations clearly outweighed the adverse environmental effects. The decisive and emphatic nature of the Governor in Council’s reasons set out in the Order in Council led inexorably to the conclusion that if the matters raised by the applicants at issue were placed in a further new report given to the Governor in Council, the Governor

Il s’agissait principalement de savoir si les requêtes en autorisation de présenter des demandes de contrôle judiciaire satisfaisaient aux critères d’une autorisation parce qu’elles établissaient l’existence d’une « cause raisonnablement défendable ». Plus particulièrement, il s’agissait de savoir si la décision du gouverneur en conseil d’approuver le projet était fondamentalement déraisonnable et si la Couronne a manqué à son obligation de consulter adéquatement les peuples autochtones et les Premières Nations.

Jugement : Six des douze requêtes doivent être accueillies.

Les principales questions que soulevaient les requêtes des demandeurs ont été regroupées sous quatre rubriques : conflits d’intérêts et partialité; préoccupations environnementales et décision fondamentalement déraisonnable; consultation des peuples autochtones et des Premières Nations; autres questions diverses.

Divers demandeurs ont prétendu que la décision du gouverneur en conseil était viciée en raison de la partialité et de l’existence de conflits d’intérêts parce que, après l’approbation initiale, le gouvernement du Canada, par le truchement d’une société, a acheté la défenderesse Trans Mountain, de sorte que le projet lui appartient maintenant. Toutefois, cet argument n’était pas « raisonnablement défendable ». Il était entaché d’un vice fatal, à savoir que le gouverneur en conseil, l’organe décisionnel en l’espèce, n’est pas le gouvernement du Canada et il n’est pas propriétaire du projet. Il existait une raison encore plus fondamentale : l’article 54 de la Loi oblige le gouverneur en conseil à décider d’approuver ou non un projet, sans égard à l’identité du propriétaire. La Loi ne déshabilite pas le gouverneur en conseil à s’acquitter de cette responsabilité selon l’identité du propriétaire du projet. La Loi l’emporte sur les principes de common law relatifs à la partialité et aux conflits d’intérêts. Dans le dossier dont la Cour était saisie, les arguments portant sur la partialité et les conflits d’intérêts n’étaient pas étayés par la preuve.

Les arguments des demandeurs sur les préoccupations environnementales ne satisfaisaient pas non plus au critère des arguments « raisonnablement défendables ». Dans l’affaire *Tsleil-Waututh Nation*, nombre d’arguments sur l’incidence environnementale du projet ont été présentés ou auraient pu l’être, mais ils ne l’ont pas été. La plupart des préoccupations environnementales que soulevaient les demandeurs en l’espèce n’étaient pas raisonnablement défendables, car elles appartenaient à l’une ou l’autre de ces catégories et elles étaient irrecevables par application des doctrines empêchant la remise en cause. En outre, pour que leurs arguments soient « raisonnablement défendables », les demandeurs devaient démontrer qu’ils mèneraient pratiquement à une issue différente, et ils ont échoué à cet égard. Le gouverneur en conseil était d’avis que les importantes considérations d’intérêt public l’emportaient haut la main sur le risque de préjudice écologique. Les motifs dont était assorti le décret du gouverneur en conseil, décisifs et

in Council would still conclude the project was, on balance, in the public interest and would still approve it.

Regarding the issues relating to the adequacy of the consultation with Indigenous peoples and First Nations, two sets of arguments on this issue did not pass the "fairly arguable" standard. These arguments involved the applicants' dissatisfaction and disagreement with the outcome of the consultation process and an asserted right to exercise a veto over the project as well as those points concerning, in particular, the adequacy of consultation that were previously raised and decided in *Tsleil-Waututh Nation* or that could have been raised but were not. The doctrines against relitigation now applied to bar these points. Nevertheless, some issues advanced concerning the adequacy of consultation did meet the "fairly arguable" standard for leave. In particular, the Court in *Tsleil-Waututh Nation* found that Canada had not discharged its duty to consult in Phase III of the consultation process. As a result, the Court quashed the approval of the project and required more work to be done in Phase III of the consultation process. In the following months, further consultation took place to that end. Many of the Indigenous and First Nation applicants now alleged that the poor quality and hurried nature of this further consultation rendered it inadequate. Whether the further consultation process was adequate was unclear and a future panel of the Court would have to decide on its adequacy.

Finally, regarding the remaining miscellaneous issues, to the extent that they existed and did not fit into the four categories previously stated, none of them met the "fairly arguable" standard.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].
Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, **s. 52**.
Federal Courts Rules, SOR/98-106, r. 110.
National Energy Board Act, R.S.C., 1985, c. N-7, ss. 52(11), 53(8), 54, 55.
Order in Council P.C. 2018-1177.
Order in Council P.C. 2019-378.

catégoriques, menaient inexorablement à la conclusion que, si les questions soulevées par les demandeurs figuraient dans un autre rapport qui serait présenté au gouverneur en conseil, ce dernier arriverait quand même à la conclusion que le projet était, tout compte fait, dans l'intérêt public et l'approuverait.

En ce qui concerne les questions se rapportant aux consultations inadéquates des peuples autochtones et des Premières Nations, deux arguments sur la qualité des consultations n'étaient pas « raisonnablement défendables ». Certains demandeurs ont soulevé leur insatisfaction à l'égard de l'issue des consultations et leur opposition à cette issue et ont invoqué le droit d'opposer un veto au projet, et nombre de questions portant, plus particulièrement, sur la qualité des consultations, qui avaient été soulevées et tranchées dans l'affaire *Tsleil-Waututh Nation*, ou qui auraient pu être soulevées, mais ne l'ont pas été. Les doctrines empêchant la remise en cause sont venues parer à ces arguments. Quoi qu'il en soit, certaines questions soulevées sur la qualité des consultations ont satisfait à la norme de la cause « raisonnablement défendable » à laquelle l'autorisation est subordonnée. Plus particulièrement, la Cour dans l'arrêt *Tsleil-Waututh Nation* était d'avis que le Canada ne s'était pas acquitté de son obligation de consulter à la phase III du processus de consultation. Par conséquent, la Cour a infirmé la décision portant approbation du projet et a exigé des travaux supplémentaires dans le cadre de la phase III du processus de consultation. Au cours des mois qui ont suivi, d'autres consultations ont eu lieu à cette fin. Nombre des demandeurs autochtones et des Premières Nations ont prétendu que la piètre qualité des consultations supplémentaires et la hâte avec laquelle elles ont été tenues rendaient celles-ci inadéquates. La question de savoir si les consultations supplémentaires étaient adéquates n'appelait pas une réponse claire, et une formation de juges de la Cour devrait être appelée à se prononcer sur cette question.

Enfin, en ce qui concerne les questions diverses, dans la mesure où de telles questions existaient et où elles n'entraient pas dans le champ des quatre rubriques énumérées précédemment, aucune d'entre elles n'était « raisonnablement défendable ».

LOIS ET RÈGLEMENTS CITÉS

Charte canadienne des droits et libertés, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44].
Décret C.P. 2018-1177.
Décret C.P. 2019-378.
Décret C.P. 2019-0820.
Loi canadienne sur l'évaluation environnementale (2012), L.C. 2012, ch. 19, **art. 52**.
Loi sur les espèces en péril, L.C. 2002, ch. 29.

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Order in Council P.C. 2019-0820.
Species at Risk Act, S.C. 2002, c. 29.

CASES CITED

FOLLOWED:

Gitxaala Nation v. Canada, 2016 FCA 187, [2016] 4 F.C.R. 418, leave to appeal to S.C.C. refused, [2017] 1 S.C.R. xvi; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3, [2018] 3 C.N.L.R. 205, leave to appeal to S.C.C. refused, 38379 (2 May 2019).

APPLIED:

Lukács v. Swoop Inc., 2019 FCA 145.

CONSIDERED:

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511.

REFERRED TO:

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Maple Lodge Farms Ltd. v. Canada (Food Inspection Agency)*, 2017 FCA 45, 411 D.L.R. (4th) 175; *League for Human Rights of B'Nai Brith Canada v. Canada*, 2010 FCA 307, [2012] 2 F.C.R. 312; *R. v. Gladstone*, [1996] 2 S.C.R. 723, (1996), 137 D.L.R. (4th) 648; *R. v. Nikal*, [1996] 1 S.C.R. 1013, (1996), 133 D.L.R. (4th) 658; *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 FCA 89, 16 C.E.L.R. (4th) 1; *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216, 436 D.L.R. (4th) 596; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682, [2016] 1 C.N.L.R. 207, affd 2017 BCCA 58, 94 B.C.L.R. (5th) 232; *West Moberly First Nations v. British Columbia (Energy and Mines)*, 2014 BCSC 924, 76 Admin. L.R. (5th) 223; *Canada v. Kabul Farms Inc.*, 2016 FCA 143, 13 Admin. L.R. (6th) 11.

Loi sur l'Office national de l'énergie, L.R.C. (1985), ch. N-7, art. 52(11), 53(8), 54, 55.
Règles des Cours fédérales, DORS/98-106, règle 110.

JURISPRUDENCE CITÉE

DÉCISIONS SUIVIES :

Nation Gitxaala c. Canada, 2016 CAF 187, [2016] 4 R.C.F. 418, autorisation de pourvoi à la C.S.C. refusée, [2017] 1 R.C.S. xvi; *Tsleil-Waututh Nation c. Canada (Procureur général)*, 2018 CAF 153, [2019] 2 R.C.F. 3, autorisation de pourvoi à la C.S.C. refusée, 38379 (2 mai 2019).

DÉCISION APPLIQUÉE :

Lukács c. Swoop Inc., 2019 CAF 145.

DÉCISION EXAMINÉE :

Nation haïda c. Colombie-Britannique (Ministre des forêts), 2004 CSC 73, [2004] 3 R.C.S. 511.

DÉCISIONS CITÉES :

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 R.C.S. 27; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Stemijon Investments Ltd. c. Canada (Procureur général)*, 2011 CAF 299; *Robbins c. Canada (Procureur général)*, 2017 CAF 24; *Maple Lodge Farms Ltd. c. Canada (Agence d'inspection des aliments)*, 2017 CAF 45; *Ligue des droits de la personne de B'Nai Brith Canada c. Canada*, 2010 FCA 307, [2012] 2 R.C.F. 312; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *Bigstone Cree Nation c. Nova Gas Transmission Ltd.*, 2018 CAF 89; *Première Nation Squamish c. Canada (Pêches et Océans)*, 2019 CAF 216; *Ktunaxa Nation c. Colombie-Britannique (Forests, Lands and Natural Resource Operations)*, 2017 CSC 54, [2017] 2 R.C.S. 38; *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781; *Merchant Law Group c. Canada Agence du revenu*, 2010 CAF 184; *JP Morgan Asset Management (Canada) Inc. c. Canada (Revenu national)*, 2013 CAF 250, [2014] 2 R.C.F. 557; *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682, [2016] 1 C.N.L.R. 207, conf. par 2017 BCCA 58, 94 B.C.L.R. (5th) 232; *West Moberly First Nations v. British Columbia (Energy and Mines)*, 2014 BCSC 924, 76 Admin. L.R. (5th) 223; *Canada c. Kabul Farms Inc.*, 2016 CAF 143.

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AUTHORS CITED

Canada Gazette, Part I, Vol. 153, No. 25, 22 June 2019.

TWELVE CONSOLIDATED MOTIONS for leave to commence applications for judicial review of an Order in Council (P.C. 2019-0820) dated June 18, 2019, whereby the Governor in Council approved the Trans Mountain Pipeline expansion project for the second time. Six motions allowed.

WRITTEN REPRESENTATIONS

Dyna Tuytel and *Margot Venton* for applicants Raincoast Conservation Foundation and Living Oceans Society.
Sarah D. Hansen and *Megan Young* for applicants Chief Ron Ignace and Chief Rosanne Casimir, on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation.
F. Matthew Kirchner and *Michelle Bradley* for applicant Squamish Nation.
F. Matthew Kirchner and *Emma K. Hume* for applicant Coldwater Indian Band.
Chris Tollefson and *Anthony Ho* for applicant Federation of British Columbia Naturalists carrying on business as BC Nature.
Scott A. Smith, *Paul Seaman* and *Keith Brown* for applicant Tsleil-Waututh Nation.
Melinda J. Skeels and *Natalia Sudeyko* for applicant Stz'uminus First Nation.
Joelle Walker and *Erin Reimer* for applicants Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten and Yakweakwioose.

K. Michael Stephens, *Rebecca J. Robb* and *Matthew M.S. Palmer* for applicant City of Vancouver.
Joelle Walker and *Ryley Mennie* for applicant Shxw'ōwhámel First Nation.
Patrick Canning and *Erin Gray* for applicants Olivier Adkin-Kaya, Nina Tran, Lena Andres, and Rebecca Wolf Gage.
Crystal Reeves for applicant Upper Nicola Band.

Jan Brongers for respondent Attorney General of Canada.

DOCTRINE CITÉE

Gazette du Canada, Partie I, vol. 153, nº 25, 22 juin 2019.

DOUZE REQUÊTE REGROUPÉES en autorisation de déposer des demandes de contrôle judiciaire d'un décret (C.P. 2019-0820) daté du 18 juin 2019, par lequel le gouverneur en conseil a approuvé le projet d'agrandissement du réseau de Trans Mountain pour la seconde fois. Six requêtes accueillies.

OBSERVATIONS ÉCRITES

Dyna Tuytel et *Margot Venton*, pour les demanderesses, Raincoast Conservation Foundation et Living Oceans Society.
Sarah D. Hansen et *Megan Young*, pour les demandeurs, chef Ron Ignace et chef Rosanne Casimir, pour leur propre compte et au nom de tous les membres de Stk'emlupsemc Te Secwepemc de la Nation Secwepemc.
F. Matthew Kirchner et *Michelle Bradley*, pour la demanderesse, Nation Squamish.
F. Matthew Kirchner et *Emma K. Hume*, pour la demanderesse, Bande indienne Coldwater.
Chris Tollefson et *Anthony Ho*, pour la demanderesse, Federation of British Columbia Naturalists faisant affaire sous la raison sociale BC Nature.
Scott A. Smith, *Paul Seaman* et *Keith Brown*, pour la demanderesse, Tsleil-Waututh Nation.
Melinda J. Skeels et *Natalia Sudeyko*, pour la demanderesse, Stz'uminus First Nation.
Joelle Walker et *Erin Reimer*, pour les demandeurs, Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Première Nation Squiala, Tzeachten et Yakweakwioose.
K. Michael Stephens, *Rebecca J. Robb* et *Matthew M.S. Palmer*, pour la demanderesse, Ville de Vancouver.
Joelle Walker et *Ryley Mennie*, pour la demanderesse, Shxw'ōwhámel First Nation.
Patrick Canning et *Erin Gray*, pour les demandeurs, *Olivier Adkin-Kaya*, *Nina Tran, Lena Andres* et *Rebecca Wolf Gage*.
Crystal Reeves, pour la demanderesse, Bande Upper Nicola.
Jan Brongers, pour le défendeur, le procureur général du Canada.

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Maureen Killoran, QC, *Olivia C. Dixon* and *Sean Sutherland* for respondent Trans Mountain Pipeline ULC and Trans Mountain Corporation.
Doreen Mueller, *Stephanie Latimer*, *Jodie Hierlmeier* and *Jade Vo* for intervener Attorney General of Alberta.

SOLICITORS OF RECORD

Ecojustice, Calgary, for applicants Raincoast Conservation Foundation and Living Oceans Society.

Miller Thomson LLP, Vancouver, for applicants Chief Ron Ignace and Chief Rosanne Casimir, on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation.
Ratcliff & Company LLP, North Vancouver, for applicants Squamish Nation, Stz'uminus First Nation, Coldwater Indian Band, and Stz'uminus First Nation.

Pacific Centre for Environmental Law and Litigation Law Corporation, Victoria, for applicant Federation of British Columbia Naturalists carrying on business as BC Nature.

Gowling WLG (Canada) LLP, Vancouver, for applicant Tsleil-Waututh Nation.

Miller Titerle Law Corporation, Vancouver, for applicants Aitchelitz, Skowkale, Shxwhá:Y Village, Soowahlie, Squiala First Nation, Tzeachten and Yakweakwioose.
Hunter Litigation Chambers, Vancouver, for applicant City of Vancouver.
Miller Titerle Law Corporation, Vancouver, for applicant Shxw'ōwhámel First Nation.
British Columbia Arbutus Law Group LLP, Victoria, for applicants Olivier Adkin-Kaya, Nina Tran, Lena Andres, and Rebecca Wolf Gage.
Mandell Pinder LLP, Vancouver, for applicant Upper Nicola Band.
Deputy Attorney General of Canada for respondent.

Osler, Hoskin & Harcourt LLP, Calgary, for respondent Trans Mountain Pipeline ULC and Trans Mountain Corporation.
Alberta Justice and Solicitor General, Edmonton, for intervener Attorney General of Alberta.

Maureen Killoran, c.r., Olivia C. Dixon et *Sean Sutherland*, pour les défenderesses, Trans Mountain Pipeline ULC et Trans Mountain Corporation.
Doreen Mueller, *Stephanie Latimer*, *Jodie Hierlmeier* et *Jade Vo*, pour l'intervenant, le procureur général de l'Alberta.

AVOCATS INSCRITS AU DOSSIER

Ecojustice, Calgary, pour les demanderesses, Raincoast Conservation Foundation et Living Oceans Society.
Miller Thomson LLP, Vancouver, pour les demandeurs, chef Ron Ignace et chef Rosanne Casimir, pour leur proper compte et au nom de tous les autres membres de Stk'emlupsemc Te Secwepemc de la Nation Secwepemc.
Ratcliff & Company LLP, North Vancouver, pour les demanderesses, Nation Squamish, Stz'uminus First Nation, Bande indienne Coldwater et Stz'uminus First Nation.
Pacific Centre for Environmental Law and Litigation Law Corporation, Victoria, pour la demanderesse, Federation of British Columbia Naturalists faisant affaire sous la raison sociale BC Nature.
Gowling WLG (Canada) S.E.N.C.R.L., s.r.l., Vancouver, pour la demanderesse, Tsleil-Waututh Nation.
Miller Titerle Law Corporation, Vancouver, pour les demandeurs, Aitchelitz, Skowkale, Shxwhá:Y Village, Soowahlie, Première Nation Squiala, Tzeachten et Yakweakwioose.
Hunter Litigation Chambers, Vancouver, pour la demanderesse, Ville de Vancouver.
Miller Titerle Law Corporation, Vancouver, pour la demanderesse, Shxw'ōwhámel First Nation.
British Columbia Arbutus Law Group LLP, Victoria, pour les demandeurs, Olivier Adkin-Kaya, Nina Tran, Lena Andres et Rebecca Wolf Gage.
Mandell Pinder LLP, Vancouver, pour la demanderesse, Bande Upper Nicola.
La sous-procureure générale du Canada pour le défendeur.
Osler, Hoskin & Harcourt S.E.N.C.R.L/ s.r.l., Calgary, pour les défenderesses, Trans Mountain Pipeline ULC et Trans Mountain Corporation.
Alberta Justice and Solicitor General, Edmonton, pour l'intervenant, le procureur général de l'Alberta.

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The following are the reasons for order rendered in English by

[1] STRATAS J.A. : By Order in Council P.C. 2019-0820 dated June 18, 2019, the Governor in Council approved the Trans Mountain Pipeline expansion project for the second time: (2019) *C. Gaz.* I, Vol. 153, No. 25 [June 22, 2019]. Twelve sets of parties would like to challenge the approval by starting applications for judicial review. But before they can do that, they have to get leave from this Court: *National Energy Board Act*, R.S.C., 1985, c. N-7 [repealed S.C. 2019, c. 28, s. 44], section 55.

[2] As a result, 12 motions for leave to start applications for judicial review have been brought. A single judge of this Court decides whether leave should be granted: *National Energy Board Act*, paragraph 55(2)(c).

[3] By order of this Court, the motions have been consolidated. These reasons shall be placed in the lead file, file 19-A-35, and a copy shall be placed in each of the other files.

[4] For the following reasons, six of the motions for leave will be allowed and six will be dismissed. Assuming six applications for judicial review are started, they will be made ready for hearing in the shortest possible time.

A. The giving of reasons in this case

[5] The settled practice of this Court is not to give reasons when releasing its decisions on leave motions.

[6] The Chief Justice of this Court has recognized that in the unique circumstances of this case, this practice might have to be relaxed. He has issued a direction explaining this. The direction reads as follows:

> The Court's standing practice is not to issue reasons in disposing of leave applications. However this is an exceptional case as the respondents, who have a direct interest in the project, took no position for or against the leave applications in all cases but one, thereby leaving the matter to the discretion of the Court. Taking no position on a motion is a

Ce qui suit est la version française des motifs de l'ordonnance rendue par

[1] LE JUGE STRATAS, J.C.A. : Par voie de décret (C.P. 2019-0820 daté du 18 juin 2019), le gouverneur en conseil a approuvé le projet d'agrandissement du réseau de Trans Mountain pour la seconde fois ((2019), *Gaz. C.* I, vol. 153, nº 25 [22 juin 2019]). Douze groupes de parties souhaitent contester la décision portant approbation du projet au moyen d'un contrôle judiciaire. Or, ces parties doivent au préalable en demander l'autorisation à notre Cour (*Loi sur l'Office national de l'énergie*, L.R.C. (1985), ch. N-7 [abrogé par L.C. 2019, ch. 28, art. 44], article 55 (Loi)).

[2] Par conséquent, elles ont présenté 12 requêtes en autorisation de déposer des demandes de contrôle judiciaire. La décision d'accorder ou non une telle autorisation relève d'un juge de la Cour siégeant seul (Loi, alinéa 55(2)c)).

[3] Les requêtes ont été réunies par suite d'une ordonnance rendue par la Cour. L'original des présents motifs sera déposé au dossier principal, soit 19-A-35, et une copie sera versée aux autres dossiers.

[4] Pour les motifs qui suivent, j'accueille six des requêtes en autorisation et je rejette les six autres. Si six demandes de contrôle judiciaire sont effectivement déposées, l'instruction des instances en vue de la tenue de l'audience sera accélérée le plus possible.

A. La publication de motifs en l'espèce

[5] La pratique établie au sein de la Cour consiste à ne pas assortir de motifs ses décisions portant sur des requêtes en autorisation.

[6] Le juge en chef de la Cour a reconnu que, dans les circonstances particulières de la présente espèce, il se peut que cette pratique doive être assouplie. Il a émis une directive à ce sujet, dont je reproduis ici le texte :

> [TRADUCTION] La pratique normale de la Cour est de ne pas assortir de motifs ses décisions portant sur les demandes d'autorisation. Or, il s'agit en l'espèce d'une situation exceptionnelle, car les défendeurs, qui ont un intérêt direct en lien avec le projet, n'ont pas pris position, ni pour ni contre les demandes d'autorisation dans tous les dossiers,

common practice when dealing with procedural matters; it is not when issues of general importance are in play.

Being left without a contrary view, the Court on its own motion notified two interested parties pursuant to Rule 110 of the *Federal Courts Rules*, the Attorneys General of British Columbia and Alberta. Alberta responded by moving to intervene and, following submissions, was granted intervenor status. Alberta asks that the 12 applications be dismissed.

Should the judge seized with the motions for leave decide against the applicants, the issuance of reasons explaining why may be necessary, as an exception to the Court's practice. This is because the applicants, having been told by Canada, which holds the constitutional obligation to discharge the duty to consult, that it takes no position, would be entitled to know why the Court has decided against the applicants.

The matter is left to the discretion of the presiding judge.

[7] In response to this, I have exercised my discretion to issue reasons in support of the orders dismissing the leave motions.

B. The involvement of the Attorney General of Alberta in the leave motions

[8] The respondents took no position on 11 of the 12 leave motions because they considered the threshold for leave to be quite low. As described by the Chief Justice in his direction, the Court issued a notice under rule 110 [of the *Federal Courts Rules*, SOR/98-106]. In response, the Attorney General of Alberta brought a motion to intervene to oppose the leave motions. After considering the parties' submissions on the motion to intervene, the Court decided to add the Attorney General of Alberta as an intervener.

C. The criteria for granting leave

[9] The express text of the *National Energy Board Act* does not tell us when to grant leave. However, we can

à l'exception d'un seul. Ils laissent ainsi la Cour trancher à sa discrétion. C'est une pratique courante pour les parties de ne pas prendre position relativement à une requête en matière de procédure, mais ce ne l'est pas lorsque des questions d'importance générale sont soulevées.

Sans le bénéfice d'arguments contraires, la Cour, de son propre chef, a porté l'instance à l'attention de deux personnes susceptibles d'être intéressées, soit les procureurs généraux de la Colombie-Britannique et de l'Alberta, en vertu de l'article 110 des *Règles des Cours fédérales*. L'Alberta a déposé une requête en intervention, qui a été accueillie après examen des prétentions. L'Alberta demande le rejet des douze demandes.

Si le juge saisi des requêtes en autorisation déboute les demandeurs, il pourrait se révéler nécessaire de publier des motifs expliquant sa décision, contrairement à la pratique de la Cour. En effet, les demandeurs, informés par le Canada – qui est tenu par la Constitution de s'acquitter de son obligation de consulter – qu'il ne prend pas position, mériteraient de savoir pourquoi la Cour n'a pas tranché en leur faveur.

La question est laissée à la discrétion du juge des requêtes.

[7] Par suite de cette directive, j'ai décidé d'assortir de motifs les ordonnances portant rejet des requêtes en autorisation.

B. La participation du procureur général de l'Alberta dans l'instruction des requêtes en autorisation

[8] Les défendeurs n'ont pas pris position à l'égard de 11 des 12 requêtes en autorisation, car le critère applicable en la matière n'est à leur avis pas très exigeant. Comme l'indique le juge en chef dans la directive qu'il a émise, la Cour a signifié un avis en vertu de la règle 110 des Règles [*Règles des Cours fédérales*, DORS/98-106]. Par suite de cet avis, le procureur général de l'Alberta a présenté une requête en intervention dans le but de faire valoir son opposition aux requêtes en autorisation. Après examen des prétentions des parties relatives à la requête en intervention, la Cour a décidé d'accorder au procureur général de l'Alberta l'autorisation d'intervenir.

C. Les critères applicables en matière d'autorisation

[9] Le libellé de la Loi ne nous dit pas expressément quand il y a lieu d'accorder l'autorisation. Toutefois, il est

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deduce this from related sections of the Act and Parliament's purpose in requiring that leave be sought: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

possible de le déduire des dispositions connexes de cette loi et de l'intention du législateur, qui dispose que le contrôle judiciaire est subordonné au dépôt d'une demande d'autorisation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27 et *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559).

[10] The portion of the *National Energy Board Act* concerning project approvals is a complete code. It provides for the National Energy Board studying and assessing the project, the Board providing a report to the Governor in Council, and the Governor in Council considering the report and deciding one way or the other: *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, at paragraphs 119–127, leave to appeal to S.C.C. refused, 37201 (9 February 2017) [[2017] 1 S.C.R. xvi]; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3, [2018] 3 C.N.L.R. 205, at paragraphs 173–203, leave to appeal to S.C.C. refused, 38379 (2 May 2019) (the case in which this Court set aside the Governor in Council's first approval of the project). To prevent delay to a project that may benefit the public considerably, the Act imposes deadlines during the approval process.

[10] La partie de la Loi qui porte sur l'approbation des projets constitue un code complet. Ce code prévoit l'examen et l'évaluation par l'Office national de l'énergie (Office), la présentation d'un rapport par ce dernier au gouverneur en conseil ainsi que l'examen du rapport par le gouverneur en conseil, qui décide alors d'approuver ou non le projet (*Nation Gitxaala c. Canada*, 2016 CAF 187, [2016] 4 R.C.F. 418, aux paragraphes 119 à 127, autorisation de pourvoi à la C.S.C. refusée, 37201 (9 février 2017 [[2017] 1 R.C.S. xvi]); *Tsleil-Waututh Nation c. Canada (Procureur général)*, 2018 CAF 153, [2019] 2 R.C.F. 3, aux paragraphes 173 à 203, autorisation de pourvoi à la C.S.C. refusée, 38379 (2 mai 2019) (l'arrêt par lequel notre Cour a annulé la décision initiale du gouverneur en conseil d'approuver le projet). Pour éviter qu'un projet susceptible de présenter un important intérêt public traîne en longueur, la Loi prescrit les délais du processus d'approbation.

[11] As this process unfolds, recourse to the judicial system is forbidden; only at the end of the process, after the Governor in Council has decided the matter, is recourse potentially available: *National Energy Board Act*, subsections 52(11), 53(8) and 55(1); *Gitxaala Nation*, at paragraphs 119–127; *Tsleil-Waututh Nation*, at paragraphs 170–202. But this is neither automatic nor as of right; the Court must decide whether it is warranted: see *National Energy Board Act*, subsection 55(1), which requires a party first to seek leave from the Court. Leave must be sought quickly so that projects approved by the Governor in Council will not be unnecessarily held up: *National Energy Board Act*, paragraph 55(2)(a). Leave must be decided upon "without delay and in a summary way": *National Energy Board Act*, paragraph 55(2)(c). And a single judge with written materials decides—not the more time-consuming panel of three considering both written materials and oral submissions at a hearing: *National Energy Board Act*, paragraph 55(2)(c).

[11] Pendant le déroulement de ce processus, il est interdit d'ester en justice. À la fin du processus seulement, une fois que le gouverneur en conseil a pris sa décision, est-il éventuellement possible d'intenter un recours (Loi, paragraphes 52(11), 53(8) et 55(1); *Nation Gitxaala*, aux paragraphes 119 à 127; *Tsleil-Waututh Nation*, aux paragraphes 170 à 202). Or, ce recours n'est pas présenté d'office ni de plein droit; la Cour doit décider s'il est justifié (voir la Loi, au paragraphe 55(1), qui oblige la partie à demander pour ce faire l'autorisation de la Cour). Cette autorisation doit être demandée sans tarder, de sorte que les projets approuvés par le gouverneur en conseil ne soient pas inutilement retardés (Loi, alinéa 55(2)a)). Il est statué sur cette demande « à bref délai et selon la procédure sommaire » (Loi, alinéa 55(2)c)). Un juge siégeant seul tranche la demande sur dossier; la procédure plus longue exigeant une formation de trois juges, qui statuent à la lumière du dossier et de prétentions orales présentées à l'audience, n'est pas prévue (Loi, alinéa 55(2)c)).

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[12] Parliament's purpose is plain: a project is not to be hamstrung by multiple, unnecessary, long forays through the judicial system. Any recourse to the judicial system must be necessary and as short as possible.

[13] Thus, the leave requirement is not just a cursory checkpoint on the road to judicial review. It is more like a thorough customs inspection at the border.

[14] Leave requirements to this Court can be found under various legislative schemes. Under a couple of these, it has been suggested that a party seeking leave must show a "fairly arguable case" that warrants "a full review of the administrative decision, [with all] the [available] procedural rights, investigative techniques and, if applicable and necessary, [all the] evidence-gathering techniques [that are] available": see, e.g., *Lukács v. Swoop Inc.*, 2019 FCA 145, at paragraph 19 and cases cited.

[15] The standard of a "fairly arguable case" described in *Lukács* is a good place to begin. But given this legislative scheme and Parliament's purpose, more definitional guidance on the "fairly arguable" standard is needed.

[16] When applying the "fairly arguable" standard under section 55 of the *National Energy Board Act*, three ideas must be kept front of mind:

(a) *Fulfilment of the gatekeeping function*. The "fairly arguable" standard must be applied in a way that fulfils the important gatekeeping function of the leave requirement in this legislative regime. Thus, the arguments an applicant wishes to advance in a judicial review and the evidence it offers in support must be scrutinized meaningfully and rigorously to ensure they meet the "fairly arguable" standard. Leave must be denied to those without evidence who offer

[12] L'intention du législateur est on ne peut plus claire : un projet ne doit pas être freiné par de multiples recours judiciaires inutiles et interminables. Il faut que tout appel aux tribunaux soit nécessaire et le plus bref possible.

[13] Ainsi, dans la voie qui mène au contrôle judiciaire, l'obligation d'obtenir l'autorisation ne tient pas de la vérification sommaire effectuée en bordure de la route; elle ressortit davantage à une inspection en règle effectuée à la frontière.

[14] Les dispositions qui obligent une partie à obtenir l'autorisation de se pourvoir devant notre Cour sont prévues dans différents régimes légaux. Par exemple, on peut dire qu'une partie sollicitant l'autorisation de se pourvoir devrait invoquer des arguments « raisonnablement défendables » qui justifient « le contrôle intégral de la décision administrative, qui respecte tous les droits procéduraux [applicables] et fait appel aux techniques d'enquête et, le cas échéant, [à toutes les] techniques de collecte de la preuve pertinentes » (voir, p. ex. *Lukács c. Swoop Inc.*, 2019 CAF 145, au paragraphe 19 et la jurisprudence qui y est mentionnée).

[15] La norme de la « cause raisonnablement défendable » qui est décrite dans l'arrêt *Lukács* constitue un bon point de départ. Cependant, vu le régime légal applicable et l'intention du législateur, il est nécessaire de préciser ce qu'il faut entendre par une « cause raisonnablement défendable ».

[16] Lorsqu'il s'agit d'appliquer la norme de la « cause raisonnablement défendable » à une affaire intéressant l'article 55 de la Loi, il importe de garder à l'esprit les trois notions suivantes :

a) *La fonction de gardien judiciaire.* La norme de la cause « raisonnablement défendable » doit être appliquée de manière à ce que soit acquittée la fonction importante que représente au sein du régime légal l'obligation d'obtenir l'autorisation. Par conséquent, il faut passer au crible les prétentions qu'un demandeur souhaite faire valoir dans le cadre d'un contrôle judiciaire et la preuve qui les étaye pour décider si elles satisfont à cette norme. Il faut refuser

arguments that must have evidence and to those whose arguments face fatal legal bars.

(b) *The role of deference*. Sometimes, in law, the Court must give decision makers a margin of appreciation, leeway or deference when reviewing their decisions. These can drastically affect what is "fairly arguable": they can take an argument that is tenable in theory and make it hopeless in reality.

(c) *Practicality matters*. Granting leave to an argument that, if accepted with others, will not overturn the decision under review is a waste of time and resources and frustrates Parliament's purpose. This is common sense but it is also the law: reviewing courts will not overturn and send back a decision for redetermination if it is clear the same decision will be made: see, e.g., *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Maple Lodge Farms Ltd. v. Canada (Food Inspection Agency)*, 2017 FCA 45, 411 D.L.R. (4th) 175. Arguments pointing out minor flaws in the decision are less likely to pass this hurdle than arguments striking at the root of the decision.

l'autorisation aux parties qui font valoir des arguments sans les étayer et à celles dont les arguments sont irrecevables en droit.

b) *Le rôle de la déférence*. Parfois, la Cour est tenue en droit de donner une marge d'appréciation ou une certaine latitude aux décideurs ou de faire preuve à leur égard de déférence lorsqu'elle contrôle leurs décisions. Ces principes jouent considérablement sur ce qui constitue un argument « raisonnablement défendable » : ils peuvent rendre insoutenable en réalité un argument qui semblait soutenable en théorie.

c) *L'importance de l'aspect pratique*. Accorder à une partie l'autorisation de demander le contrôle judiciaire sur la foi d'un argument qui, s'il est admis avec d'autres, ne permettra pas d'infirmer la décision faisant l'objet du contrôle constitue une perte de temps et de ressources et méconnaît l'intention du législateur. Si cela tombe sous le sens, c'est également conforme au droit. Les cours saisies du contrôle judiciaire ne doivent pas infirmer une décision et la renvoyer au décideur pour qu'il tranche à nouveau s'il est évident que l'affaire se soldera par la même décision (voir, p. ex., *Stemijon Investments Ltd. c. Canada (Procureur général)*, 2011 CAF 299; *Robbins c. Canada (Procureur général)*, 2017 CAF 24; *Maple Lodge Farms Ltd. c. Canada (Agence d'inspection des aliments)*, 2017 CAF 45). Les arguments qui soulèvent des lacunes mineures dans une décision sont moins susceptibles de satisfaire à cet élément que ceux qui attaquent le fondement même d'une décision.

D. Analysis

(1) Introduction

[17] The most central issues in the leave motions before this Court are the alleged substantive unreasonableness of the Governor in Council's decision to approve the project and the Crown's failure to adequately consult with Indigenous peoples and First Nations. Given the meaning of the "fairly arguable case" standard, we must explore the extent to which margin of appreciation, deference or leeway

D. Analyse

1) Introduction

[17] Les principales questions que soulèvent les requêtes en autorisation dont la Cour est saisie sont celles de savoir, d'une part, si la décision du gouverneur en conseil d'approuver le projet était fondamentalement déraisonnable et, d'autre part, si la Couronne a manqué à son obligation de consulter adéquatement les peuples autochtones et les Premières Nations. Vu ce qu'il faut entendre par la norme

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factor into the analysis of these issues. We must also investigate whether any fatal legal bars and objections stand in the way of the applications.

(a) The deference to be afforded to the Governor in Council's decision to approve the project

[18] In reviewing the reasonableness of the Governor in Council's approval decision, the Court must give the Governor in Council the "widest margin of appreciation" over the matter: *Gitxaala Nation*, at paragraph 155; *Tsleil-Waututh Nation*, at paragraph 206. The level of deference is high.

[19] The Governor in Council's approval decision is a "discretionary [one] … based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest": *Gitxaala Nation*, at paragraphs 140–144 and 154; see also *Tsleil-Waututh Nation*, at paragraphs 206–223. Only the Governor in Council—not this Court—is equipped to evaluate such considerations with precision: *Gitxaala Nation*, at paragraphs 142–143, citing *League for Human Rights of B'Nai Brith Canada v. Canada*, 2010 FCA 307, [2012] 2 F.C.R. 312, at paragraphs 76–77. Thus, only arguments that can possibly get past a high level of deference can qualify as "fairly arguable".

(b) The leeway that must be given on the adequacy of consultation with First Nations and Indigenous peoples

[20] Adequate consultation consists of "reasonable efforts to inform and consult", not all possible efforts: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraph 62. There must be "meaningful two-way dialogue" and "serious consideration" about both "the specific and real concerns" of Indigenous peoples and possible measures to accommodate those concerns: *Haida Nation*, at paragraph 62; *R. v.*

de la « cause raisonnablement défendable », il importe de déterminer à quel point la marge d'appréciation, la latitude et la déférence jouent dans l'analyse de ces questions. Il faut également voir si les demandes sont irrecevables ou autrement empêchées.

a) La déférence que commande la décision du gouverneur en conseil d'approuver le projet

[18] Dans son analyse visant à déterminer si la décision du gouverneur en conseil était raisonnable, la Cour doit accorder à ce dernier « la marge d'appréciation la plus large possible » (*Nation Gitxaala*, au paragraphe 155; *Tsleil-Waututh Nation*, au paragraphe 206). La déférence est élevée.

[19] La décision du gouverneur en conseil est « discrétionnaire [et est] fondée sur des considérations de politique et d'intérêt public très larges apprécié[e]s en fonction de critères polycentriques, subjectifs ou vagues et [est] influencée par ses opinions sur les considérations d'ordre économique, culturel et environnemental et par l'intérêt public général » (*Nation Gitxaala*, aux paragraphes 140 à 144 et 154; voir également *Tsleil-Waututh Nation*, aux paragraphes 206 à 223). Seul le gouverneur en conseil est outillé pour évaluer de telles considérations avec précision. Notre Cour ne l'est pas (*Nation Gitxaala*, aux paragraphes 142 et 143, renvoyant à l'arrêt *Ligue des droits de la personne de B'Nai Brith Canada c. Canada*, 2010 CAF 307, [2012] 2 R.C.F. 312, aux paragraphes 76 et 77). Par conséquent, seuls les arguments qui sont susceptibles de survivre à une déférence élevée peuvent être qualifiés de « raisonnablement défendables ».

b) La latitude à accorder quand il s'agit de décider si les consultations des Premières Nations et des peuples autochtones étaient adéquates

[20] Les consultations sont adéquates si « les efforts raisonnables ont été déployés pour informer et consulter »; point n'est besoin de faire tous les efforts possibles (*Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, au paragraphe 62). Il faut un « véritable dialogue » et une « prise en compte sérieuse » des « préoccupations réelles et précises » des peuples autochtones et des mesures possibles pour y répondre (*Nation*

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Gladstone, [1996] 2 S.C.R. 723, (1996), 137 D.L.R. (4th) 648, at paragraph 170; *R. v. Nikal*, [1996] 1 S.C.R. 1013, (1996), 133 D.L.R. (4th) 658, at paragraph 110; *Tsleil-Waututh Nation*, at paragraphs 562–563.

[21] Compliance with the duty to consult is not measured by a standard of perfection: *Gitxaala Nation*, at paragraphs 182–184; *Tsleil-Waututh Nation*, at paragraphs 226, 508–509 and 762. Some leeway must be afforded because of the inevitability of "omissions, misunderstanding, accidents and mistakes" and "difficult judgment calls" in "numerous, complex and dynamic" issues involving many parties: *Gitxaala Nation*, at paragraph 182.

[22] The duty to consult does not require the consent or non-opposition of First Nations and Indigenous peoples before projects like this can proceed: *Gitxaala Nation*, at paragraphs 179–180; *Bigstone Cree Nation v. Nova Gas Transmission Ltd.*, 2018 FCA 89, 16 C.E.L.R. (4th) 1, at paragraph 49; *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216, 436 D.L.R. (4th) 596, at paragraph 37. Dissatisfaction, disappointment or disagreement with the outcome reached after consultation is not enough to trigger a breach of the duty: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at paragraph 83; *Bigstone*, at paragraph 70. Under the duty to consult, First Nations and Indigenous peoples do not have a right to veto a project.

[23] Thus, arguments that consultation was inadequate can only meet the "fairly arguable" standard if the alleged inadequacies go beyond the leeway given to the decision maker. The arguments must be focused on the process, quality and conduct of consultation.

(c) Fatal legal bars and objections

[24] An established body of law bars relitigation—namely the doctrines of *res judicata*, issue estoppel and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (issue estoppel); *Toronto*

haïda, au paragraphe 62; *R. c. Gladstone*, [1996] 2 R.C.S. 723, au paragraphe 170; *R. c. Nikal*, [1996] 1 R.C.S. 1013, au paragraphe 110; *Tsleil-Waututh Nation*, aux paragraphes 562 et 563).

[21] Lorsqu'il s'agit de s'acquitter de l'obligation de consulter, la perfection n'est pas requise (*Nation Gitxaala*, aux paragraphes 182 à 184; *Tsleil-Waututh Nation*, aux paragraphes 226, 508 à 509 et 762). Une certaine latitude doit être accordée au décideur, en raison « des omissions, des malentendus, des accidents et des erreurs » inévitables et des « questions de jugement difficiles » faisant intervenir des éléments « nombreux, complexes, dynamiques » intéressant de nombreuses parties (*Nation Gitxaala*, au paragraphe 182).

[22] L'obligation de consulter ne requiert pas le consentement — ou l'absence d'opposition — des Premières Nations et des peuples autochtones à des projets comme celui dont il est question en l'espèce comme condition à leur réalisation (*Nation Gitxaala*, aux paragraphes 179 et 180; *Bigstone Cree Nation c. Nova Gas Transmission Ltd.*, 2018 CAF 89, au paragraphe 49; *Première Nation Squamish c. Canada (Pêches et Océans)*, 2019 CAF 216, au paragraphe 37). L'insatisfaction ou la déception à l'égard de l'issue des consultations ou l'opposition à cette dernière ne permettent pas d'alléguer le manquement à l'obligation (*Ktunaxa Nation c. Colombie-Britannique (Forests, Lands and Natural Resource Operations)*, 2017 CSC 54, [2017] 2 R.C.S. 386, au paragraphe 83; *Bigstone*, au paragraphe 70). L'obligation de consulter ne donne pas aux Premières Nations et peuples autochtones un droit de veto à l'égard d'un projet.

[23] Par conséquent, les arguments quant aux consultations inadéquates ne sont « raisonnablement défendables » que si les prétendues lacunes excèdent la latitude à laquelle le décideur a droit. Ils doivent porter sur le processus, la qualité et la tenue des consultations.

c) Irrecevabilité et autres empêchements

[24] Des notions de droit établies font obstacle à la remise en cause, soit les doctrines de *res judicata*, de la préclusion découlant d'une question déjà tranchée et de l'abus de procédure (*Danyluk c. Ainsworth Technologies Inc.*, 2001

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(City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77 (abuse of process). With some wrinkles, these doctrines bar arguments from being advanced in a later, second proceeding when they were raised and decided in a first proceeding or could have been raised in that first proceeding.

[25] This bar is potentially live in these motions. In *Tsleil-Waututh Nation*, this Court struck down the Governor in Council's first approval of this project. In so doing, this Court did not require all the work and consultation leading up to the Governor in Council's approval to be redone. The Court decided that much of the earlier work satisfied the law. It only required targeted work and further meaningful consultation to be performed to address the specific flaws that led to the quashing of the first approval. The Governor in Council has now approved the project again and the applicants seek leave to start a new round of judicial reviews. Due to the doctrines barring relitigation, the applicants cannot now raise issues that were raised and decided (or that could have been raised) in *Tsleil-Waututh Nation*—and there were many, as the 254 pages and 776 paragraphs in it show.

[26] As a practical matter, this means that any judicial review of the Governor in Council's latest approval decision must be limited to: (1) measuring the targeted work and further consultation required by *Tsleil-Waututh Nation* against the applicable law and the specific flaws identified in *Tsleil-Waututh Nation*; and (2) assessing any legally relevant events that postdate *Tsleil-Waututh Nation* and affect the project's approval. Due to the doctrines barring relitigation, issues raised in a judicial review application that go beyond these things cannot meet the "fairly arguable" standard.

[27] The Court has discretion to relax the doctrines barring relitigation in appropriate circumstances: see *Danyluk*, at paragraph 33. But the applicants—especially in their responses to the submissions of the Attorney General of

CSC 44, [2001] 2 R.C.S. 460 (préclusion découlant d'une question déjà tranchée); *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77 (abus de procédure)). À quelques exceptions près, ces doctrines interdisent aux parties de faire valoir des arguments dans une instance ultérieure qui avaient déjà été présentés et débattus dans une instance précédente ou auraient pu l'être.

[25] Il se peut que pareil empêchement s'applique aux présentes requêtes. Dans l'arrêt *Tsleil-Waututh Nation*, la Cour a infirmé la décision initiale du gouverneur en conseil portant approbation du projet. La Cour n'a pas exigé que tous les travaux et les consultations ayant mené à la décision du gouverneur en conseil soient repris à neuf. Selon elle, une grande partie des travaux précédents étaient conformes à la loi. Elle exigeait seulement, pour pallier les lacunes précises qui avaient mené à l'annulation de la décision initiale, la reprise de certains travaux et la tenue de véritables consultations supplémentaires. Le gouverneur en conseil a depuis approuvé à nouveau le projet, et les demandeurs cherchent à obtenir l'autorisation d'intenter une nouvelle série de contrôles judiciaires. Vu les doctrines qui font obstacle à la remise en cause, les demandeurs ne peuvent aujourd'hui soulever des questions qui avaient été soulevées et tranchées (ou auraient pu l'être) dans l'arrêt *Tsleil-Waututh Nation*. Comme en témoignent les 254 pages et 776 paragraphes que comportent les motifs de cet arrêt, les questions étaient nombreuses.

[26] Ce qui veut dire, en pratique, que tout contrôle judiciaire de la seconde décision du gouverneur en conseil doit se limiter 1) à comparer les travaux indiqués et les consultations supplémentaires exigés par la Cour dans l'arrêt *Tsleil-Waututh Nation* au droit applicable et aux lacunes précisées dans cet arrêt et 2) à évaluer les faits pertinents sur le plan juridique qui se sont produits depuis le prononcé de cet arrêt et sont susceptibles d'influer sur l'approbation du projet. Vu les doctrines qui empêchent la remise en cause, les questions soulevées dans le cadre d'un contrôle judiciaire qui vont au-delà de ces deux démarches ne sont pas « raisonnablement défendables ».

[27] La Cour est habilitée, à sa discrétion, à assouplir l'application des doctrines empêchant la remise en cause, lorsque la situation s'y prête (*Danyluk*, au paragraphe 33). Or, les demandeurs, tout particulièrement dans leurs

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Alberta on relitigation—have not presented any case, let alone an arguable case, that this Court should do so.

[28] In this case, the doctrines barring relitigation are most important. Were the doctrines ignored, a never-ending series of court challenges could ensue. For example, in file 19-A-46, parties who did not participate in *Tsleil-Waututh Nation* have applied for leave to raise Charter [*Canadian Charter of Rights and Freedoms*] issues that could have been raised in *Tsleil-Waututh Nation* but were not. Without strict enforcement of the doctrines barring relitigation, this sort of thing could happen again and again, keeping the project tangled in litigation, subverting the purpose of this legislative scheme.

[29] Related to the bars against relitigation is the binding effect of prior decided cases. The law set out by this Court in *Tsleil-Waututh Nation* and *Gitxaala Nation*—both heavily based on governing authority from the Supreme Court of Canada—bind this Court and will determine large swathes of these leave applications. Thus, this is not the wider sort of case where the legal principles are unknown and have to be developed. Rather, this is the narrower sort of case where the Court must assess whether known legal principles have been followed. There is more scope for "fairly arguable" issues in the former sort of case than the latter.

(2) Evaluating the issues raised by the applicants in the leave motions

[30] To reiterate, the most central issues in the leave motions are the alleged substantive unreasonableness of the Governor in Council's decision to approve the project and the Crown's alleged failure to adequately consult with Indigenous peoples and First Nations. These issues can be subdivided for the purpose of evaluation and combined with other, narrower, issues raised by the applicants. It is useful to group them into four categories: alleged conflict of interest and bias, environmental issues and substantive reasonableness, issues relating to the consultation with

répliques aux observations du procureur général de l'Alberta sur la remise en cause — n'ont guère présenté d'arguments raisonnablement défendables qui justifieraient l'intervention de la Cour en ce sens.

[28] En l'espèce, les doctrines empêchant la remise en cause jouent un rôle primordial. En faire fi résulterait en une série d'interminables de recours judiciaires. Par exemple, dans le dossier 19-A-46, les parties — qui n'ont pas participé à l'affaire *Tsleil-Waututh Nation* — ont demandé l'autorisation d'ester pour plaider des questions relatives à la Charte [*Charte canadienne des droits et libertés*] qui auraient pu être soulevées dans l'instance précédente, mais ne l'ont pas été. À défaut d'une application stricte des doctrines, cette situation est susceptible de se produire à maintes reprises. Le projet risque alors d'être paralysé au sein du système judiciaire, ce qui n'est pas conforme à l'objet du régime légal.

[29] Les doctrines empêchant la remise en cause ont pour parallèle l'effet contraignant de la jurisprudence. Les règles de droit énoncées par notre Cour dans les arrêts *Tsleil-Waututh Nation* et *Nation Gitxaala* — tous deux fondés en grande partie sur la jurisprudence issue de la Cour suprême du Canada — lient notre Cour et permettent de trancher nombre des présentes demandes. Nous sommes saisis, non pas d'une affaire de vaste portée où les principes de droit applicables sont à établir, mais d'une affaire de portée plus restreinte qui appelle la Cour à décider si les principes de droit connus ont été respectés. Le premier type d'instance laisse davantage de champ aux questions « raisonnablement défendables » que le second.

2) Évaluation des questions soulevées dans les requêtes en autorisation

[30] Répétons que les principales questions que soulèvent les requêtes en autorisation sont celles de savoir, d'une part, si la décision du gouverneur en conseil d'approuver le projet était fondamentalement déraisonnable et, d'autre part, si la Couronne a manqué à son obligation de consulter adéquatement les peuples autochtones et les Premières Nations. Ces questions peuvent être divisées aux fins d'analyse et combinées à d'autres questions de portée plus limitée soulevées par les demandeurs. Il est utile de les regrouper sous quatre rubriques : conflits d'intérêts et

Indigenous peoples and First Nations, and remaining, miscellaneous issues.

(a) Alleged conflict of interest and bias

[31] Various applicants submit that the decision of the Governor in Council is vitiated by bias and a conflict of interest. They submit that the bias and conflict of interest arises from the fact that, soon after the first approval decision, the Government of Canada, through a corporate vehicle, acquired the respondent Trans Mountain and now, practically speaking, owns the project.

[32] This submission does not pass the "fairly arguable case" test.

[33] At the outset, it suffers from a fatal flaw. The Governor in Council is not the Government of Canada. The Governor in Council, the decision maker here, does not own the project.

[34] More fundamentally, section 54 of the *National Energy Board Act* requires the Governor in Council to decide whether to approve a project regardless of who owns it. The Act does not disqualify the Governor in Council from discharging this responsibility based on ownership of the project. The Act prevails over any common law notions of bias and conflict of interest: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781.

[35] This case would be different if the Governor in Council blindly approved the project because the Government of Canada now owns it instead of looking at legally relevant criteria. But to make that sort of point "fairly arguable", there must be at least a shred of evidence to support it. In the evidentiary record before the Court, there is none. Without evidence, suggestions of bias or conflict of interest are just idle speculations or bald allegations and cannot possibly satisfy the test of a "fairly arguable case": *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301, at paragraph 34 and cases cited therein; *JP Morgan Asset Management*

partialité; préoccupations environnementales et décision fondamentalement déraisonnable; consultation des peuples autochtones et des Premières Nations; autres questions diverses.

a) Conflits d'intérêts et partialité

[31] Divers demandeurs prétendent que la décision du gouverneur en conseil est viciée en raison de la partialité et de l'existence de conflits d'intérêts. Selon eux, ces vices résultent de l'achat, peu de temps après la décision initiale, de la défenderesse Trans Mountain, par le gouvernement du Canada par le truchement d'une société, de sorte que le projet lui appartient pratiquement.

[32] Cet argument n'est pas « raisonnablement défendable ».

[33] Au départ, cet argument est entaché d'un vice fatal. Le gouverneur en conseil n'est pas le gouvernement du Canada. Le gouverneur en conseil, l'organe décisionnel en l'espèce, n'est pas propriétaire du projet.

[34] Il existe une raison encore plus fondamentale : l'article 54 de la Loi oblige le gouverneur en conseil à décider d'approuver ou non un projet, sans égard à l'identité du propriétaire. La Loi ne déshabilite pas le gouverneur en conseil à s'acquitter de cette responsabilité selon l'identité du propriétaire du projet. La Loi l'emporte sur les principes de common law relatifs à la partialité et aux conflits d'intérêts (*Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781).

[35] L'affaire serait différente si le gouverneur en conseil avait aveuglément approuvé le projet parce que le gouvernement du Canada en est maintenant propriétaire au lieu d'examiner les critères juridiques pertinents. Toutefois, pour que ce genre d'argument soit « raisonnable défendable », il doit être un tant soit peu étayé. Dans le dossier dont la Cour est saisie, pareille preuve brille par son absence. Dans ce cas, les arguments portant sur la partialité et les conflits d'intérêts ne sont rien d'autre que des conjectures et de simples prétentions non étayées qui ne sauraient être « raisonnablement défendables » (voir l'arrêt *Merchant Law Group c. Canada Agence du revenu*,

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(Canada) Inc. v. Canada (National Revenue), 2013 FCA 250, [2014] 2 F.C.R. 557, at paragraph 45 and cases cited therein.

[36] Some applicants have noted public statements on the part of certain federal politicians in support of the project as proof of disqualifying bias. This issue is not "fairly arguable". In law, statements of this sort do not trigger disqualifying bias: see, e.g., *Gitxaala Nation*, at paragraphs 195–200; *Prophet River First Nation v. British Columbia (Environment)*, 2015 BCSC 1682, [2016] 1 C.N.L.R. 207, at paragraphs 189–200, affd 2017 BCCA 58, 94 B.C.L.R. (5th) 232; *West Moberly First Nations v. British Columbia (Energy and Mines)*, 2014 BCSC 924, 76 Admin. L.R. (5th) 223, at paragraphs 107–110.

(b) Environmental issues and substantive reasonableness

[37] The applicants' arguments on the environmental issues cannot meet the threshold of a "fairly arguable case".

[38] In *Tsleil-Waututh Nation*, many arguments about the environmental effects of the project either were made or could have been made but were not. Most of the environmental points the applicants now raise are not fairly arguable because they fall into one of these categories. They are barred by the doctrines against relitigation.

[39] A couple of examples will suffice to illustrate this. Some applicants submit that the Governor in Council had no jurisdiction to make a decision without ensuring the requirements of the *Species at Risk Act*, S.C. 2002, c. 29 were met. This point is not fairly arguable because this Court specifically rejected it in *Tsleil-Waututh Nation*, at paragraph 464.

[40] Some applicants allege flaws in the Board's examination of environmental matters under the *Species at Risk*

2010 CAF 184, au paragraphe 34 et la jurisprudence qui y est mentionnée ainsi que *JP Morgan Asset Management (Canada) Inc. c. Canada (Revenu national)*, 2013 CAF 250, [2014] 2 R.C.F. 557, au paragraphe 45 et la jurisprudence qui y est mentionnée).

[36] Certains demandeurs avancent comme preuve de partialité fatale des déclarations publiques en faveur du projet prononcées par des politiciens fédéraux. Cette question n'est pas « raisonnablement défendable ». En droit, de telles déclarations ne révèlent pas une partialité fatale (voir, p. ex., *Nation Gitxaala*, aux paragraphes 195 à 200; *Prophet River First Nation v. British Columbia (Minister of Environment)*, 2015 BCSC 1682, [2016] 1 C.N.L.R. 207, aux paragraphes 189 à 200, conf. par 2017 BCCA 58, 94 B.C.L.R. (5th) 232; *West Moberly First Nations v. British Columbia (Energy and Mines)*, 2014 BCSC 924, 76 Admin. L.R. (5th) 223, aux paragraphes 107 à 110).

b) Préoccupations environnementales et décision fondamentalement déraisonnable

[37] Les arguments des demandeurs sur les préoccupations environnementales ne sont pas « raisonnablement défendables ».

[38] Dans l'affaire *Tsleil-Waututh Nation*, nombre d'arguments sur l'incidence environnementale du projet ont été présentés ou auraient pu l'être. La plupart des préoccupations environnementales que soulèvent les demandeurs en l'espèce ne sont pas raisonnablement défendables, car elles appartiennent à l'une ou l'autre de ces catégories. Elles sont irrecevables par application des doctrines empêchant la remise en cause.

[39] Il suffit de deux exemples pour illustrer mon propos. Selon certains demandeurs, le gouverneur en conseil n'était pas habilité à prendre une décision sans vérifier que les critères précisés dans la *Loi sur les espèces en péril*, L.C. 2002, ch. 29, avaient été respectés. Cet argument n'est pas raisonnablement défendable parce que notre Cour l'a expressément rejeté dans l'arrêt *Tsleil-Waututh Nation*, au paragraphe 464.

[40] Des demandeurs affirment que l'examen par l'Office des questions environnementales qu'exige la *Loi*

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Act and the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, **s. 52**. Other applicants raise other matters, such as the project's greenhouse gas emissions, the need for the project, the economics of the project, and the risk of oil spills. These too are not fairly arguable because they were raised and decided or could have been raised in *Tsleil-Waututh Nation*.

[41] Recall what this Court decided in *Tsleil-Waututh Nation* (at paragraph 201): this Court found a "[material] deficien[cy]" in the National Energy Board's work such that its report to the Governor in Council was not an admissible "report" under section 54. This meant that the Governor in Council lacked a necessary legal prerequisite to decide under section 54. The "[material] deficien[cy]" in that case was major and glaring: the National Energy Board failed to examine the issue of project-related marine shipping as part of the project.

[42] Since this Court's decision in *Tsleil-Waututh Nation*, the National Energy Board addressed this material deficiency by providing a comprehensive, detail-laden, 678-page report to the Governor in Council that considered the issue of project-related marine shipping and related issues and suggested measures for mitigating effects. The Governor in Council considered the new report, as is evident from the Order in Council it issued.

[43] Many of the applicants submit that the new report is so flawed that the Governor in Council still lacks the necessary legal prerequisite of a "report" under section 54. This submission cannot possibly succeed based on the degree of examination and study of the issue of project-related marine shipping and related environmental issues in the new report.

[44] Under section 54, the Governor in Council had to consider whether the project should be approved and, if necessary, on what conditions. Based on the evidence the applicants have filed and the applicable law, it is impossible for the applicants to overcome the considerable deference the Court must afford to the Governor in Council as it considers the new report, in all its detail and technicality, and as it makes this sort of public interest decision: see

sur les espèces en péril et la *Loi canadienne sur l'évaluation environnementale (2012)*, L.C. 2012, ch. 19, **art. 52**, était lacunaire. D'autres soulèvent des questions différentes, comme les gaz à effet de serre qui seront émis par le projet, l'importance du projet, les retombées économiques du projet et le risque de déversement. Ces questions ne sont pas non plus raisonnablement défendables, car elles ont été soulevées et tranchées, ou auraient pu l'être, dans l'affaire *Tsleil-Waututh Nation*.

[41] Rappelons la décision de la Cour dans cette affaire, au paragraphe 201 : les travaux de l'Office comportaient des « lacunes importantes » de sorte que le rapport qu'il avait présenté au gouverneur en conseil ne constituait pas un « rapport » prévu à l'article 54. Ainsi, le gouverneur en conseil était privé d'un prérequis légal impératif pour prendre la décision que prévoyait l'article 54. Les « lacunes importantes » dans cette affaire étaient fondamentales et criantes : l'Office n'avait pas examiné l'effet du transport maritime lié au projet.

[42] Depuis l'arrêt *Tsleil-Waututh Nation*, l'Office a corrigé ces lacunes importantes en fournissant au gouverneur en conseil un rapport exhaustif et détaillé comportant 678 pages qui examine la question du transport maritime lié au projet et des questions connexes et propose des mesures pour atténuer les risques. Le gouverneur en conseil a pris connaissance du nouveau rapport, comme il ressort du décret qu'il a pris.

[43] Plusieurs demandeurs affirment que le nouveau rapport est si lacunaire que le gouverneur en conseil est toujours privé du prérequis légal que constitue le « rapport » prévu à l'article 54. Cet argument ne saurait être retenu, vu l'ampleur de l'étude du transport maritime lié au projet et des questions environnementales connexes dont le nouveau rapport fait état.

[44] Aux termes de l'article 54, le gouverneur en conseil était tenu de décider s'il y avait lieu d'approuver ou non le projet et de déterminer éventuellement des conditions. Vu la preuve produite par les demandeurs et le droit applicable, il est impossible pour l'argument de ces derniers de survivre à la déférence considérable dont la Cour doit faire preuve à l'égard du gouverneur en conseil, qui est appelé à examiner le nouveau rapport des plus détaillé et technique

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paragraphs 16(b) and 18–19, above. Its decision involved a weighing and balancing of the project's benefits against its detriments, drawing upon broad considerations of economics, science, the environment, the public interest, and other considerations of a policy nature, all of which lie outside of the ken of this Court: *Gitxaala Nation*, at paragraph 148, citing *Canada v. Kabul Farms Inc.*, 2016 FCA 143, 13 Admin. L.R. (6th) 11, at paragraph 25. The law forces this Court to afford significant deference—according to the cases, the "widest margin of appreciation" [*Gitxaala Nation*, at paragraph 155]—to the Governor in Council and the outcome it has reached based on this weighing and balancing. The applicants' case for substantive unreasonableness on environmental issues and the issues arising under environmental legislation is no stronger than that which this Court dismissed in *Gitxaala Nation* and *Tsleil-Waututh Nation*.

et à prendre ce genre de décision dans l'intérêt public (voir les paragraphes 16b) et 18 à 19 des présents motifs). Sa décision commandait une mise en balance des avantages et des inconvénients du projet effectuée à la lumière des considérations générales que sont les retombées économiques, les données scientifiques, l'environnement, l'intérêt public et de celles qui ressortissent aux politiques, dont aucune n'est du ressort de la Cour (*Nation Gitxaala*, au paragraphe 148, renvoyant à *Canada c. Kabul Farms Inc.*, 2016 CAF 143, au paragraphe 25). Le droit oblige la Cour à accorder une déférence considérable — suivant la jurisprudence, la « marge d'appréciation la plus large possible » [*Nation Gitxaala*, au paragraphe 155] — au gouverneur en conseil et à sa décision, qui résulte de cette mise en balance. L'argument des demandeurs, selon lequel la décision est fondamentalement déraisonnable sur le plan des préoccupations environnementales et des questions relatives à la législation en matière de protection de l'environnement, n'est pas plus convaincant que celui que la Cour a rejeté dans les arrêts *Nation Gitxaala* et *Tsleil-Waututh Nation*.

[45] As well, in attempting to meet the standard of "fairly arguable", the applicants have to show that their arguments could practically change the outcome: see paragraph 16(c), above. On this, they fail. The Governor in Council found that compelling public interest considerations clearly outweighed the adverse environmental effects. The decisive and emphatic nature of the Governor in Council's reasons set out in the Order in Council leads inexorably to the conclusion that if the matters raised by the applicants, Raincoast Conservation, Living Oceans Society, Federation of B.C. Naturalists and the City of Vancouver, were placed in a further new report given to the Governor in Council, the Governor in Council would still conclude the project is, on balance, in the public interest and would still approve it.

[45] En outre, pour que leurs arguments soient « raisonnablement défendables », les demandeurs doivent démontrer qu'ils mèneraient pratiquement à une issue différente (voir le paragraphe 16c) des présents motifs). Ils échouent à cet égard. Le gouverneur en conseil était d'avis que les importantes considérations d'intérêt public l'emportaient haut la main sur le risque de préjudice écologique. Les motifs dont est assorti le décret, décisifs et catégoriques, mènent inexorablement à la conclusion que, si les questions soulevées par Raincoast Conservation, Living Oceans Society, Federation of B.C. Naturalists et la Ville de Vancouver, demandeurs en l'espèce, figuraient dans un autre rapport qui serait présenté au gouverneur en conseil, ce dernier arriverait quand même à la conclusion que le projet est, tout compte fait, dans l'intérêt public et l'approuverait.

(c) Issues relating to the adequacy of the consultation with Indigenous peoples and First Nations

c) Consultations inadéquates des peuples autochtones et des Premières Nations

[46] At the outset, there are two sets of arguments relating to the adequacy of consultation that do not pass the "fairly arguable" standard.

[46] Précisons tout d'abord que deux arguments sur la qualité des consultations ne sont pas « raisonnablement défendables ».

[47] First, some of the applicants' arguments reflect their dissatisfaction and disagreement with the outcome of the

[47] Premièrement, certains demandeurs soulèvent leur insatisfaction à l'égard de l'issue des consultations et leur

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consultation process and effectively assert a right to consent or to exercise a veto over the project—the very things that numerous authorities tell us are not encompassed by the duty to consult.

[48] Second, in *Tsleil-Waututh Nation*, many points concerning the adequacy of consultation were raised and decided and many others could have been raised but were not. The doctrines against relitigation now apply to bar these points. This renders some of the points the applicants now raise inadmissible under the "fairly arguable" standard. A good example is shown by the Stz'uminus First Nation and the Shxw'ōwhámel First Nation. They raise consultation concerns that could have been raised and addressed in *Tsleil-Waututh Nation*. They did not appear in *Tsleil-Waututh Nation* to advance their concerns and are now barred from doing so. On this, the comments made in paragraph 28 above are apposite, as are the submissions of the Attorney General of Alberta at paragraphs 48–50 of his written submissions. These applicants will not be granted leave to start an application for judicial review.

[49] However, some issues advanced by the other Indigenous and First Nation applicants concerning the adequacy of consultation do meet the "fairly arguable" standard.

[50] The Court in *Tsleil-Waututh Nation* found (at paragraph 6) that Canada had not discharged its duty to consult in one part of the consultation process—Phase III. In particular, at paragraphs 557–563, this Court summarized a number of consultation flaws: a failure to engage in a meaningful two-way dialogue and, related to this, an unduly limited mandate given to Crown representatives who were engaged in consultation; an improper reluctance to depart from the findings of the National Energy Board and conditions on the project recommended by it; and an erroneous view on the part of the Governor in Council that it could not impose additional conditions on the project.

[51] As a result, this Court in *Tsleil-Waututh Nation* quashed the approval of the project and required more

opposition à cette issue et invoquent essentiellement le droit de consentir ou non au projet ou un droit de veto à cet égard, ce que l'obligation de consulter n'englobe pas selon une abondante jurisprudence.

[48] Deuxièmement, dans l'affaire *Tsleil-Waututh Nation*, nombre de questions portant sur la qualité des consultations avaient été soulevées et tranchées et beaucoup d'autres auraient pu l'être. Les doctrines empêchant la remise en cause viennent parer à ces arguments. Certains arguments soulevés par les demandeurs sont irrecevables, car ils ne sont pas « raisonnablement défendables ». L'argument de la Stz'uminus First Nation et de la Shxw'ōwhámel First Nation constitue un bon exemple. Ces demanderesses soulèvent des préoccupations relatives aux consultations qui auraient pu être examinées dans l'arrêt *Tsleil-Waututh Nation*. Elles n'ont pas comparu dans l'affaire *Tsleil-Waututh Nation* pour exprimer leurs préoccupations et sont donc irrecevables en leurs demandes. À ce sujet, les remarques qui figurent au paragraphe 28 des présents motifs sont pertinentes, ainsi que les paragraphes 48 à 50 des observations écrites du procureur général de l'Alberta. Par conséquent, ces demanderesses ne seront pas autorisées à demander le contrôle judiciaire.

[49] En revanche, certaines questions soulevées par d'autres demandeurs autochtones et des Premières Nations sur la qualité des consultations sont « raisonnablement défendables ».

[50] La Cour dans l'arrêt *Tsleil-Waututh Nation* est d'avis (voir le paragraphe 6) que le Canada ne s'est pas acquitté de son obligation de consulter à la phase III du processus de consultation. Tout particulièrement, aux paragraphes 557 à 563, la Cour résume les lacunes qui vicient les consultations : l'absence d'un véritable dialogue et, corollairement, le mandat trop restrictif donné aux représentants de la Couronne responsables de mener les consultations; la réticence indue à s'écarter des conclusions de l'Office et des conditions dont il avait recommandé que soit assorti le projet ainsi que la croyance erronée de la part du gouverneur en conseil qui estimait qu'il n'était pas habilité à assortir le projet de conditions supplémentaires.

[51] Par conséquent, la Cour dans l'arrêt *Tsleil-Waututh Nation* a infirmé la décision portant approbation du projet

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work to be done in Phase III of the consultation process. In the following months, further consultation took place to that end.

[52] Many of the Indigenous and First Nation applicants now allege that the poor quality and hurried nature of this further consultation rendered it inadequate. In order to appreciate this issue, some background needs to be set out.

[53] After *Tsleil-Waututh Nation* sent the matter back to the Governor in Council for redetermination, the Governor in Council issued an order under the *National Energy Board Act* requiring the Board, within 155 days, to reconsider its recommendation concerning the project and all terms and conditions set out in the Board's first report relevant to project-related marine shipping and related issues: Order in Council P.C. 2018-1177 (September 20, 2018). The Board delivered its reconsideration report on February 22, 2019.

[54] In *Tsleil-Waututh Nation* (at paragraph 771), this Court required that the further consultation process be completed before the Governor in Council decided on the approval of the project. But once the Governor in Council received the Board's reconsideration report, subsection 54(3) of the *National Energy Board Act* kicked in and required the Governor in Council to decide on the project within three months. Under subsection 54(3) the Governor in Council could extend this deadline. It did so, by one month, in order to allow more time for the further consultation process: Order in Council P.C. 2019-378 (April 17, 2019). At the time, some of the Indigenous and First Nation applicants complained that the extension was insufficient to complete the further consultation process. None of them brought an application for judicial review challenging the small size of the extension. And assuming the law permitted them to bring such an application at the time, it is now too late.

[55] Whether the further consultation process was adequate is unclear. Because a future panel of this Court will have to decide on its adequacy, only a few general comments will now follow.

et a exigé des travaux supplémentaires dans le cadre de la phase III du processus de consultation. Au cours des mois qui ont suivi, d'autres consultations ont eu lieu.

[52] Nombre des demandeurs autochtones et des Premières Nations prétendent dorénavant que la piètre qualité des consultations supplémentaires et la hâte avec laquelle elles ont été tenues rendent celles-ci inadéquates. Pour être en mesure d'évaluer cette question, il importe de la mettre en contexte.

[53] Après que la Cour, s'étant prononcée dans l'arrêt *Tsleil-Waututh Nation*, eut renvoyé l'affaire au gouverneur en conseil, ce dernier a pris un décret en vertu de la Loi obligeant l'Office à réexaminer sa recommandation à propos du projet ainsi que toutes les conditions proposées dans son premier rapport au sujet du transport maritime lié au projet et des questions connexes dans un délai de 155 jours (décret C.P. 2018-1177 (20 septembre 2018)). L'Office a présenté son second rapport le 22 février 2019.

[54] La Cour dans l'arrêt *Tsleil-Waututh Nation* (au paragraphe 771) demandait que les consultations supplémentaires soient terminées avant que le gouverneur en conseil prenne sa décision quant à l'approbation du projet. Or, dès lors que le gouverneur en conseil a reçu le second rapport de l'Office, le délai de trois mois que prévoit le paragraphe 54(3) de la Loi pour la décision a commencé à courir. Le gouverneur en conseil est habilité par cette disposition à proroger ce délai, ce qu'il a fait, accordant un mois de plus pour les consultations (décret C.P. 2019-378 (17 avril 2019)). À l'époque, certains demandeurs autochtones et des Premières Nations ont dit que la prorogation ne permettrait pas de terminer les consultations supplémentaires. Aucun n'a demandé le contrôle judiciaire du décret en raison de l'insuffisance du délai supplémentaire accordé. S'ils avaient même pu, en droit, présenter une telle demande, elle est maintenant prescrite.

[55] La question de savoir si les consultations supplémentaires étaient adéquates n'appelle pas une réponse claire. Comme une formation de juges de la Cour sera appelée à se prononcer sur cette question, je n'émets que quelques commentaires d'ordre général à ce sujet.

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[56] Given the fundamental nature of the interests of Indigenous peoples and First Nations, the applicants say the Governor in Council's decision that the further consultation was adequate should be strictly reviewed.

[56] Vu les intérêts fondamentaux des peuples autochtones et des Premières Nations en la matière, les demandeurs affirment que la décision du gouverneur en conseil suivant laquelle les consultations supplémentaires étaient adéquates appelle un contrôle strict.

[57] In their evidence, consisting of many thousands of detailed pages, the Indigenous and First Nations applicants point with considerable particularity and detail to issues they say were important to them. They say the Government of Canada ignored these issues in the original process of consultation and ignored them again in the further consultation process. They add that little or nothing was done in the process of further consultation from the time *Tsleil-Waututh Nation* was released until the National Energy Board delivered its report—a period slightly less than six months. In their view, the time left for the further consultation process, roughly four months, was insufficient to address the shortcomings identified by this Court in *Tsleil-Waututh Nation*. Even during these four months, some of the applicants allege inactivity by the Government of Canada.

[57] Les demandeurs autochtones et des Premières Nations soulignent expressément et de manière très détaillée dans leur dossier de preuve, qui fait plusieurs milliers de pages, les questions qui, selon leurs dires, leur importent. Ils affirment que le gouvernement du Canada a fait fi de ces questions dans la tenue des consultations initiales, et a fait de même lors du déroulement des consultations ultérieures. Ils ajoutent qu'aucune mesure ou presque n'a été prise pendant les consultations ultérieures de la date du prononcé de l'arrêt *Tsleil-Waututh Nation* jusqu'à celle du rapport de l'Office, soit en un peu moins de six mois. Selon eux, le délai prévu pour les consultations ultérieures, environ quatre mois, était trop court pour permettre de pallier les lacunes relevées par la Cour dans l'arrêt *Tsleil-Waututh Nation*. Certains demandeurs affirment que le gouvernement du Canada n'a rien fait, même durant ces quatre mois.

[58] The applicants do acknowledge that the Government of Canada introduced some new initiatives to assist consultation and added some conditions on the project approval that was ultimately given. But to them this is just window-dressing, box-ticking and nice-sounding words, not the hard work of taking on board their concerns, exploring possible solutions, and collaborating to get to a better place.

[58] Les demandeurs reconnaissent que le gouvernement du Canada a mis en œuvre de nouvelles initiatives pour faciliter les consultations et a assorti de nouvelles conditions le projet qui a ultimement été approuvé. Or, à leur avis, c'est de la poudre aux yeux, des gestes vides de sens et des palabres, et non pas la dure besogne qui consiste à écouter leurs préoccupations, à explorer les solutions possibles et à collaborer pour arriver à une meilleure issue.

[59] The respondents, including the Attorney General of Canada representing the Government of Canada, took no position for or against the leave motions brought by the Indigenous and First Nation applicants. The respondents did state that if leave were granted and applications for judicial review were brought they would support the Governor in Council's decision and oppose the applicants. But on the leave motions they offered no submissions or evidence to assist the Court.

[59] Les défendeurs, dont le procureur général du Canada qui représente le gouvernement du Canada, n'ont pas pris position à l'égard des requêtes en autorisation présentées par les demandeurs autochtones et des Premières Nations. Les défendeurs ont toutefois précisé que, si l'autorisation était accordée et que des demandes de contrôle judiciaire étaient déposées, ils défendraient la décision du gouverneur en conseil et feraient valoir leur opposition aux demandeurs. Toutefois, à propos des requêtes en autorisation comme telles, ils n'offrent aucune observation ni preuve susceptible d'aider la Cour.

[60] The Attorney General of Alberta did intervene to oppose the granting of leave. But while his legal submissions

[60] Le procureur général de l'Alberta est intervenu pour s'opposer aux requêtes. Ses observations juridiques

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were helpful, he was not involved in the further consultation process and so he could not provide evidence on it.

étaient certes utiles, mais comme il n'avait pas participé aux consultations ultérieures, il ne pouvait témoigner à cet égard.

[61] The recitals in the Governor in Council's Order in Council are all the Court has against the applicants' position in these leave motions. They assert that by the time of the decision, the Governor in Council believed that the further consultation with Indigenous peoples and First Nations was adequate. The recitals also set out many new consultative steps and initiatives pursued to remedy the flaws identified in *Tsleil-Waututh Nation* and plenty of general activity such as 46 ministerial meetings with 65 Indigenous groups.

[61] La Cour ne dispose que des attendus qui figurent dans le décret comme arguments qui militent en défaveur des thèses des demandeurs dans les requêtes en autorisation. Selon les attendus, au moment de la décision, le gouverneur en conseil estimait que les consultations supplémentaires des peuples autochtones et des Premières Nations étaient adéquates. Ils énumèrent les nombreuses nouvelles étapes et initiatives de consultation visant à pallier les lacunes relevées dans l'arrêt *Tsleil-Waututh Nation* et nombre d'activités générales, comme les 46 réunions ministérielles tenues avec 65 groupes autochtones.

[62] Down the road, the respondents might be able to present strong evidence supporting the adequacy of the further consultation and show that the Governor in Council reasonably, i.e., acceptably and defensibly, believed that the further consultation was adequate. The respondents might have submissions about the extent to which the Court should defer to the Governor in Council's assessment of the adequacy of consultation and the leeway the Court must give where issues of compliance with the duty to consult arise.

[62] À une date ultérieure, il se peut que les défendeurs présentent une preuve solide qui démontre que les consultations supplémentaires étaient adéquates et que le gouverneur en conseil estimait raisonnablement — c'est-à-dire de façon acceptable et défendable — qu'elles l'étaient. Les défendeurs pourraient alors présenter des observations sur la déférence dont la Cour doit faire preuve à l'égard du gouverneur en conseil qui a évalué la qualité des consultations et sur la latitude qu'il convient de lui accorder lorsqu'il s'agit de décider si l'obligation de consulter a été respectée.

[63] At this time, however, the respondents have withheld their evidence and legal submissions on these points. So the analysis cannot progress further.

[63] Or, à ce moment-ci, les défendeurs n'ont pas présenté de preuve et d'observations juridiques sur ces questions. L'analyse est donc freinée.

[64] Therefore, this Court must conclude that the issue of adequacy of the further consultation arising from the circumstances described in paragraphs 50–62, above, meets the "fairly arguable" standard for leave.

[64] Par conséquent, la Cour doit conclure que la question de savoir si les consultations supplémentaires étaient adéquates, que soulèvent les circonstances décrites aux paragraphes 50 à 62 des présents motifs, satisfait à la norme de la cause « raisonnablement défendable » à laquelle l'autorisation est subordonnée.

[65] I would state this issue in the form of a question: from August 30, 2018 (the date of the decision in *Tsleil-Waututh Nation*) to June 18, 2019 (the date of the Governor in Council's decision) was the consultation with Indigenous peoples and First Nations adequate in law to address the shortcomings in the earlier consultation process that were summarized at paragraphs 557–563 of *Tsleil-Waututh*

[65] J'énoncerais ainsi la question : du 30 août 2018 (la date du prononcé de l'arrêt *Tsleil-Waututh Nation*) au 18 juin 2019 (la date de la décision du gouverneur en conseil), les consultations des peuples autochtones et des Premières Nations étaient-elles adéquates en droit de telle sorte qu'elles permettent de pallier les lacunes des consultations initiales qui sont résumées aux paragraphes 557 à

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Nation? The answer to this question should include submissions on the standard of review, margin of appreciation or leeway that applies in law.

[66] The respondents should not be foreclosed from raising any bars or defences to any applications for judicial review. Therefore, a second question should be stated: do any defences or bars to the application for judicial review apply?

[67] Finally, depending on the answers to the foregoing questions, the issue of remedy may arise. As the administrative law principle set out in paragraph 16(c) above illustrates, sometimes the decision, despite its defects, should not be quashed and the matter should not be sent back for redetermination. As well, other considerations may affect the entitlement to a remedy, the type of remedy, or the terms of a remedy. Therefore, a third question should be stated: if the answers to the above questions are negative, should a remedy be granted and, if so, what remedy and on what terms?

[68] The parties are free to structure their submissions as they see fit, as long as they answer all of these questions in some way—and only these questions.

(d) Remaining miscellaneous issues

[69] To the extent that miscellaneous issues exist that do not neatly fit into the four categories above, none of them meet the "fairly arguable" standard. On these, the Court substantially adopts the submissions of the Attorney General of Alberta.

[70] In particular, in the case of file 19-A-46, there is no evidence supporting the applicants' Charter claims. The applicants' arguments are also barred by the doctrines against relitigation: see paragraph 28, above. On the issue of procedural fairness, this Court substantially adopts the submissions of the Attorney General of Alberta, and finds no arguable case. Here too, *Tsleil-Waututh Nation* provides a full answer. The legal principles of that case are not in

563 des motifs de l'arrêt *Tsleil-Waututh Nation*? La réponse à cette question devrait inclure des observations à propos de la norme de contrôle, marge d'appréciation ou latitude qui s'applique en droit.

[66] Les défendeurs doivent avoir tout loisir d'opposer quelque empêchement ou moyen de défense que ce soit aux demandes de contrôle judiciaire. Par conséquent, une seconde question s'impose : y a-t-il des moyens de défense ou des empêchements qui peuvent être opposés aux demandes de contrôle judiciaire?

[67] Enfin, selon les réponses qu'appelleront les questions précédentes, il se peut que les réparations soient soulevées. Comme l'illustre le principe de droit administratif expliqué au paragraphe 16c) des présents motifs, parfois il n'y a pas lieu d'infirmer la décision, malgré ses lacunes, et de renvoyer l'affaire au décideur. En outre, d'autres considérations sont susceptibles d'influer sur le droit à une réparation, le type de réparation ou les conditions dont elle est assortie. Par conséquent, une troisième question doit être énoncée : si les questions précédentes appellent des réponses négatives, y a-t-il lieu d'accorder une réparation (laquelle et à quelles conditions)?

[68] Les parties peuvent structurer leurs observations à leur guise, dès lors qu'elles répondent à toutes ces questions, mais uniquement à ces questions, d'une manière ou d'une autre.

d) Questions diverses

[69] S'il existe des questions diverses qui n'entrent pas dans le champ des quatre rubriques énumérées précédemment, aucune de ces questions n'est « raisonnablement défendable ». À cet égard, la Cour fait siennes en grande partie les observations du procureur général de l'Alberta.

[70] Tout particulièrement, dans le dossier 19-A-46, rien n'étaye les prétentions des demandeurs fondées sur la Charte. Les doctrines qui empêchent la remise en cause font également obstacle à leurs arguments (voir le paragraphe 28 des présents motifs). En ce qui concerne l'équité procédurale, la Cour fait siennes en grande partie les observations du procureur général de l'Alberta et estime que l'argument n'est pas défendable. Dans ce cas

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question and, when applied to the facts, foreclose the finding of a fairly arguable issue here.

E. Conclusion

[71] It follows that the Indigenous and First Nation applicants, other than the Stz'uminus First Nation and the Shxw'ōwhámel First Nation, will be given leave to start applications for judicial review addressing the two questions, above. These applicants are (in alphabetical order):

- Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten, Yakweakwioose;
- Chief Ron Ignace and Chief Rosanne Casimir, on their own behalf and on behalf of all other members of the Stk'emlupsemc Te Secwepemc of the Secwepemc Nation;
- Coldwater Indian Band;
- Squamish Nation;
- Tsleil-Waututh Nation; and
- Upper Nicola Band.

[72] All of the other leave motions will be dismissed.

F. The upcoming proceedings

[73] Given the issue on which leave will be permitted, the upcoming proceedings will be narrower and more focused than those in *Tsleil-Waututh Nation* concerning the first project approval.

[74] There is a substantial public interest in having the upcoming proceedings decided very quickly one way or the other.

également, les motifs de l'arrêt *Tsleil-Waututh Nation* fournissent un guide complet. Les principes juridiques de cet arrêt ne sont pas remis en question et, quand on les applique aux faits, il est impossible de conclure à l'existence d'une question raisonnablement défendable.

E. Conclusion

[71] Il s'ensuit que les demandeurs autochtones et des Premières Nations, outre la Stz'uminus First Nation et la Shxw'ōwhámel First Nation, seront autorisées à déposer des demandes de contrôle judiciaire portant sur les deux questions précédentes. Ces demandeurs sont les suivants, en ordre alphabétique :

- Aitchelitz, Skowkale, Shxwhá :y Village, Soowahlie, Première Nation Squiala, Tzeachten, Yakweakwioose;
- Chef Ron Ignace et chef Rosanne Casimir, pour leur propre compte et au nom de tous les membres de Stk'emlupsemc Te Secwepemc de la Nation Secwepemc;
- Bande indienne Coldwater;
- Nation Squamish;
- Tsleil-Waututh Nation;
- Bande Upper Nicola.

[72] Les autres requêtes en autorisation sont rejetées.

F. Déroulement des instances

[73] Vu le motif qui justifie d'accorder l'autorisation, les instances qui s'ensuivront auront une portée plus étroite que c'était le cas dans l'affaire *Tsleil-Waututh Nation*, qui portait sur l'approbation initiale du projet.

[74] Un important intérêt public commande que les instances soient tranchées très rapidement, dans un sens ou dans l'autre.

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[75] The parties are directed to file their notices of application for judicial review within seven days and, in the case of the Attorney General of Alberta, to file a notice of motion to intervene within seven days if he intends to try to participate in the applications.

[76] The parties are directed to contact the Judicial Administrator in the next three days to advise of their availability for a conference call with the Court in the next week to discuss a highly expedited schedule for the applications for judicial review. The Court queries whether the period for submitting evidence and cross-examinations could be extremely short: the evidentiary focus will be exclusively or almost exclusively on the further consultation process and the findings of fact and law in *Tsleil-Waututh Nation* will already be before the Court. Conceivably, the applicants' affidavits on these leave motions could be filed in chief in the applications, the respondents could be permitted a short time to file their responding affidavits, and the applicants could be permitted a short time after that to file reply affidavits. The applicants have also done much of the work necessary for their memoranda of fact and law and so the timelines for the filing of memoranda of fact and law might also be able to be shortened substantially.

G. Proposed disposition

[77] Orders will issue in accordance with these reasons. The terms of the orders for the successful applicants are the same. The terms of the orders for the unsuccessful applicants are the same except for the costs award in file 19-A-46.

[78] On the issue of costs, the respondents did not take a position in 11 of 12 motions and so no costs will be awarded for or against them in those motions. The exception is the motion in file 19-A-46. There, only the respondent, Trans Mountain Pipeline ULC, asked for its costs and it is entitled to them. The remaining respondents in that motion did not ask for costs and, thus, will not get them.

[75] Les parties doivent déposer leurs avis de demande de contrôle judiciaire dans les sept jours qui suivent, et le procureur général de l'Alberta, s'il entend solliciter la participation aux instances, doit déposer un avis de requête en intervention dans les sept jours qui suivent.

[76] Les parties doivent communiquer avec l'administrateur judiciaire dans les trois jours qui suivent pour donner leurs disponibilités en vue de la tenue d'une conférence téléphonique avec la Cour, qui se tiendra au cours de la semaine qui vient, pour discuter de l'instruction très accélérée des instances. La Cour cherche à savoir si les délais prévus pour la production de la preuve et les contre-interrogatoires pourraient être extrêmement courts. La preuve portera exclusivement ou presque sur les consultations supplémentaires, et la Cour dispose déjà des conclusions de fait et de droit issues de l'arrêt *Tsleil-Waututh Nation*. Il est possible que les affidavits des demandeurs déposés dans le cadre des requêtes en autorisation puissent être déposés en preuve principale dans le cadre des demandes; les défendeurs pourraient disposer d'un court délai pour déposer leurs affidavits en réplique, et les demandeurs auraient ensuite un court délai pour déposer leurs affidavits en réponse. Les demandeurs ont déjà fait le gros du travail en vue de la préparation de leur mémoire des faits et du droit, de sorte que le délai de dépôt de ces documents pourrait également être considérablement raccourci.

G. Dispositif proposé

[77] Des ordonnances seront rendues conformément aux présents motifs. Le libellé des ordonnances destinées aux demandeurs ayant eu gain de cause est identique. Le libellé des ordonnances destinées aux demandeurs déboutés est identique, à l'exception du passage qui concerne l'adjudication des dépens dans le dossier 19-A-46.

[78] À propos des dépens, les défendeurs n'ont pas pris position à l'égard de 11 des 12 requêtes. Ainsi, la Cour ne rend aucune ordonnance quant aux dépens dans le cadre de ces requêtes, sauf pour le dossier 19-A-46. Dans ce cas, seule Trans Mountain Pipeline ULC parmi les défendeurs a demandé qu'on lui adjuge les dépens, et elle y a droit. Les autres défendeurs nommés dans ce dossier n'ont pas demandé les dépens; la Cour ne leur accorde rien.

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[79] The order granting the Attorney General of Alberta leave to intervene did not protect him from an award of costs nor did it potentially entitle him to costs. In the result, his position was upheld in some motions and not upheld in others. However, his intervention was very helpful to the Court. So costs will not be ordered for or against the Attorney General of Alberta.

[79] L'ordonnance ayant autorisé le procureur général de l'Alberta à intervenir ne l'empêchait pas d'être condamné aux dépens et ne le privait pas du droit de les demander. Ses arguments ont été retenus dans certaines requêtes, mais il a succombé dans d'autres. Toutefois, son intervention s'est révélée très utile à la Cour. La Cour n'adjuge pas les dépens au procureur général de l'Alberta, et il n'y est pas condamné.

[80] Therefore, in the motion in file 19-A-46, costs will be awarded to the respondent, Trans Mountain Pipeline ULC. In all other motions, costs will not be awarded.

[80] Par conséquent, dans le dossier 19-A-46, les dépens sont adjugés à la défenderesse, Trans Mountain Pipeline ULC. Aucune ordonnance quant aux dépens n'est rendue dans les autres dossiers.

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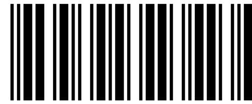

TAB11

COURT OF APPEAL FOR ONTARIO

CITATION: Klassen v. Beausoleil, 2019 ONCA 407
DATE: 20190517
DOCKET: C65963

2019 ONCA 407 (CanLII)

van Rensburg, Benotto and Harvison Young JJ.A.

BETWEEN

Henry Klassen

Plaintiff
(Appellant)

and

Robert Beausoleil and 1117726 Ontario Inc. o/a Robert's Boxed Meats

Defendants
(Respondents)

Rohit Kumar, for the appellant

J. Sebastian Winny, for the respondents

Heard: March 14, 2019

On appeal from the order of Justice David A. Broad of the Superior Court of Justice, dated September 6, 2018, with reasons reported at 2018 ONSC 5237.

Harvison Young J.A.:

[1] This is an appeal from an order denying the appellant leave to amend his Statement of Claim pursuant to r. 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The central issue is whether the appellant's proposed amendments to his Statement of Claim constitute a new cause of action that is statute-barred or whether the amendments seek alternate relief based on

material facts that already form part of the claim. For the reasons that follow, I conclude that the proposed amendments do not constitute a new cause of action, and that the appeal should be allowed.

The background facts

[2] The appellant Henry Klassen was a 33% shareholder (holding 100 shares) of the respondent corporation. In 1996, he agreed to sell his shares pursuant to a Share Purchase Agreement (the "1996 SPA") in exchange for: a) the repayment of certain back wages owing in the amount of approximately $25,000; and b) amounts owed pursuant to a promissory note in the amount of approximately $20,000.

[3] The 1996 SPA provided that the appellant's shares would be held in escrow pursuant to an Escrow Agreement (the "1996 Escrow Agreement") pending repayment of the back wages and the amounts owing under the promissory note. Upon satisfaction of these escrow release conditions, the purchasers would be entitled to seek the release of the shares and would gain legal title to the shares.

[4] The respondent Robert Beausoleil is the ultimate purchaser of the shares sold by Mr. Klassen in 1996, having purchased all of the outstanding shares of the company in 1997. The Share Purchase Agreement entered into at that time (the "1997 SPA") provided that Mr. Beausoleil, in purchasing the shares, also assumed responsibility for payment of the back wages and amounts owing on

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the promissory note. The appellant's 100 shares would continue to be held in escrow pending satisfaction of the escrow release conditions. To this end the appellant, Mr. Beausoleil and the two other shareholders executed an Amended Escrow Agreement (the "1997 Escrow Agreement"), which, in effect, continued the terms of the 1996 Escrow Agreement.

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[5] What happened over the next 18 years is very much in issue between the parties. The heart of the appellant's claim is that, shortly after Mr. Beausoleil purchased the shares in the corporation in 1997, they entered into an oral agreement under which he and Mr. Beausoleil would each become 50% co-equal shareholders in the corporation. The appellant also alleges that, for various reasons, Mr. Beausoleil and the corporation did not pay the back wages owing or the amounts owed under the promissory note.

[6] The dispute allegedly came to a head in late 2014, when Mr. Beausoleil denied that the appellant was a shareholder of the corporation. For his part, Mr. Beausoleil maintains that he has been the sole shareholder, director and officer of the corporation since purchasing all outstanding shares in 1997.

[7] In 2015, the appellant commenced this action against the corporation and Mr. Beausoleil, as the ultimate purchaser of his shares, for breach of contract, breach of trust, unjust enrichment and seeking relief under s. 248 of the *Business Corporations Act*, R.S.O., c. B.16 for the respondents' allegedly oppressive conduct.

[8] In August 2017, the respondents brought a motion for summary judgment, seeking the dismissal of the appellant's action in its entirety or, in the alternative, dismissing the appellant's claim to a 50% ownership interest, claim for amounts owing on the promissory note, and claim for back wages. One of the core arguments raised by the respondents was that the appellant's various claims were time-barred. The appellant responded, seeking the dismissal of the respondents' summary judgment motion or, in the alternative, judgment in his favor.

[9] The motion judge, Sloan J., granted summary judgment to the respondents on the promissory note, based on the respondents' payment of the amount owing.[1] He determined that the appellant did not have any further claim for interest owing on the promissory note. The motion judge also dismissed the appellant's claims in relation to certain other debts.

[10] However, the motion judge declined to grant summary judgment on the appellant's claims relating to the back wages and oral agreement for a 50% ownership interest in the corporation. It is clear from the motion judge's endorsement that he viewed the respondents' limitation defence to both claims as a live issue for trial. In particular, he found that since both claims and limitations defences turned on issues of credibility (and the alleged existence of

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[1] In January 2016, the corporation made what was described by the respondents as a "unilateral" payment of approximately $46,000 on the promissory note. The payment was also stated to be "without prejudice" to the appellant's other claims, and the respondents' defence of those other claims.

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numerous oral agreements), it was necessary to direct the claims to proceed to trial.

[11] In the course of the summary judgment motion, counsel for the appellant argued that the appellant remained a 33% shareholder by virtue of the respondents' failure to satisfy the escrow conditions. Counsel for the respondents objected on the basis that this theory was not pled in the appellant's Statement of Claim. The motion judge did not deal with this issue in his endorsement. Counsel for the appellant advised at the hearing of the appeal that this exchange between counsel at the summary judgment hearing was an important impetus for the subsequent r. 26.01 motion.

[12] Significantly, for the purpose of this appeal, the appellant's 100 shares remain in escrow. In October 2017, following the summary judgment motion, the appellant's counsel wrote to the escrow agent requesting the return of the appellant's shares, on the basis that the escrow release conditions under the 1996 Escrow Agreement and 1997 Escrow Agreement had not been satisfied. The respondents' counsel objected. The escrow agent refused to release the shares in light of the ongoing litigation between the parties.

[13] In January 2018, the appellant brought a motion (now the subject of this appeal) pursuant to r. 26.01 of the *Rules* for leave to amend his Statement of Claim. In particular, the appellant sought to amend his Statement of Claim to plead, in the alternative to his request for a declaration of a 50% ownership

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interest in the corporation, a request for a declaration that he had a 33% ownership interest in the corporation. This requested alternative relief is premised on the theory that the escrow release conditions in the 1996 Escrow Agreement and 1997 Escrow Agreement remain unsatisfied and the appellant's shares remain in escrow. If the appellant's shares remain in escrow, and he is entitled to seek their return, he remains a 33% shareholder in the corporation (assuming the corporation has not issued any additional shares). The appellant also sought to make certain other minor amendments to his Statement of Claim, which are not at issue in this appeal.

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The motion judge's decision

[14] The motion judge granted leave to the appellant to make most of the amendments sought, but refused to grant leave for the appellant to assert the alternative claim for a 33% ownership interest in the corporation. In this vein, he rejected the appellant's submission that the claim for a 33% legal ownership interest (based on the 1996 SPA, 1996 Escrow Agreement, 1997 SPA, and 1997 Escrow Agreement) was merely a claim for alternative relief, or the assertion of a different legal conclusion, based on no new facts and not going beyond the factual matrix of the original claims. The motion judge stated that the appellant had conceded that, if the alternative claim to a 33% ownership interest was the assertion of a new cause of action, it was statute-barred by the expiration of the

relevant limitation period. As a result, he refused to allow the amendments relating to that claim.

[15] In the motion judge's view, the appellant's claim to a 50% ownership interest in the corporation rested squarely on the alleged oral agreement between the appellant and the respondents. The factual basis for this was a series of alleged representations made by the respondents: see paras. 16-19. Thus, as currently constituted, the appellant's claim to an ownership interest in the corporation was not premised on the 1997 SPA or any other written document: at para. 19.

[16] The motion judge was also of the view that the sole cause of action relating to the assertion of an ownership interest in the corporation was the claim for breach of the oral agreement: at para. 20. By contrast, the claim to a 33% ownership interest in the corporation was based upon an entirely different set of written agreements, such that the amendment did not consist of an alternative claim for relief, or a statement of a different legal conclusion based on no new facts, and went far beyond the factual matrix from which the original claim to ownership arose: at para. 21. While the 1996 SPA, 1996 Escrow Agreement and 1997 SPA were referred to in the Statement of Claim in order to provide "background" facts preceding the oral agreement, those written agreements did not provide any "necessary support" for the claim to a 50% ownership interest: at para. 22.

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[17] As a result, the motion judge denied the appellant leave to amend his Statement of Claim to assert the alternative claim to a 33% ownership interest. However, the motion judge, with only limited analysis, allowed the appellant to make the balance of the amendments sought on the motion. This included an amendment to plead that the "conditions precedent for the transfer of the Klassen Escrow Shares have not been satisfied […and as] a result, Beausoleil has not acquired, and the Plaintiff is entitled to a return of, the Klassen Escrow Shares."

The arguments on appeal

[18] The appellant raises three core arguments on appeal. First, he argues that the trial judge erred in concluding that the alternative pleading of a 33% ownership interest was a new cause of action, rather than a claim for alternative relief or a different legal conclusion drawn from the same set of facts. He submits that the claim to a 33% ownership interest is a legal conclusion which flows from the respondents' failure to satisfy the applicable release escrow conditions. He argues that the Statement of Claim clearly pled that the escrow release conditions (payment of the back wages and amounts owed on the promissory note) had not been satisfied.

[19] Similarly, the appellant argues that the motion judge erred in requiring the alternative pleading of a 33% ownership interest to be grounded in the purported oral agreement, rather than in the broader factual matrix, in order to be a non-statute-barred amendment. Further, an amendment allowed by the motion judge

– namely, permitting the appellant to seek the return of his shares in escrow – is inconsistent with his order denying leave to assert a claim to a 33% ownership interest.

[20] Second, the appellant argues that the motion judge erred in attributing to the appellant an admission that the applicable limitation periods had expired, such that the amendment would only be permissible if it was a claim for alternative relief based on an existing cause of action. The appellant argues that the applicable limitation period did not begin to run until October 2017, when the appellant's request that his shares be released from escrow was refused.

[21] Third, the appellant asserts that the respondents would not suffer any presumed or actual non-compensable prejudice – apart from the alleged expiry of a limitation period – as a consequence of the amendment. As a result, the amendment must be allowed pursuant to r. 26.01 of the *Rules*.

[22] In response, the respondents argue that to allow the appellant leave to plead the alternative claim to a 33% ownership interest would fundamentally change the nature of the litigation, some 22 years after the relevant events in question. They argue, in substance, that the underlying claim to a 33% ownership interest and request for the return of the appellant's shares currently held in escrow is incurably time-barred. In this vein, they argue that the appellant discovered his claim for breach of the 1996 SPA, 1996 Escrow Agreement and 1997 SPA when the corporation defaulted on payment in 1997. Thus, any claim

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in relation to the breach of those agreements is statute-barred by the expiration of the six-year limitation period provided by s. 45(1)(g) of the *Limitations Act,* R.S.O. 1990, c. L. 15 or alternatively by the transitional provisions under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B.

[23] The respondents also argue that there has been extraordinary delay in seeking the amendments, such that a presumption of non-compensable prejudice arises. They point to the some 22 years that have elapsed since default in payment under the 1996 SPA, 1996 Escrow Agreement and 1997 SPA as evincing extraordinary delay. In any event, the respondents argue that they will suffer actual non-compensable prejudice as a consequence of the amendments because, among other things, they made a unilateral payment to the appellant on the promissory note in 2016 and because a material witness has died.

Analysis

(1) The test to be applied

[24] I begin with the text of r. 26.01 of the *Rules*. It provides:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. [Emphasis added.]

[25] The rule is framed in mandatory terms: the court must allow the amendment, unless the responding party would suffer non-compensable prejudice, the proposed pleading is scandalous, frivolous or vexatious, or the

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proposed pleading fails to disclose a reasonable cause of action: *158844 Ontario Ltd v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, 135 O.R. (3d) 681, at para. 25; *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2009 ONCA 517, 264 O.A.C. 220, at paras. 15-16.

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[26] The expiry of a limitation period is one form of non-compensable prejudice. A party cannot circumvent the operation of a limitation period by amending their pleadings to add additional claims after the expiry of the relevant limitation period: *Frohlick v. Pinkerton Canada Ltd*, 2008 ONCA 3, 88 O.R. (3d) 401, at para. 24; *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at paras. 21-23; *United Food and Commercial Workers Canada, Local 175 Region 6 v. Quality Meat Packers Holdings Limited,* 2018 ONCA 671, at paras. 64; *Davis v. East Side Mario's Barrie*, 2018 ONCA 410, at paras. 31-32. In this regard, the "addition of <u>new</u> statute-barred claims by way of an amendment is conceptually no different than issuing a new and separate Statement of Claim that advances a statute-barred claim" (emphasis added): *Quality Meat Packers,* at para. 64; citing *Frohlick*, at para. 24.

[27] An amendment will be statute-barred if it seeks to assert a "new cause of action" after the expiry of the applicable limitation period: *North Elgin*, at paras. 19-23, 33; *Quality Meat Packers*, at para. 65. In this regard, the case law discloses a "factually oriented" approach to the concept of a "cause of action" – namely, "a factual situation the existence of which entitles one person to obtain

from the court a remedy against another person": *North Elgin*, at para. 19; *Quality Meat Packers*, at para. 65.

[28] An amendment does not assert a new cause of action – and therefore is not impermissibly statute-barred – if the "original pleading … contains all the facts necessary to support the amendments … [such that] the amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded": *Dee Ferraro,* at paras. 4, 13-14; *North Elgin Centre Inc.*, at paras. 20-21; *East Side Mario's Barrie*, at paras. 31-32; *Quality Meat Packers*, at para. 65. Put somewhat differently, an amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded: *North Elgin*, at para. 23.

[29] The relevant principle is summarized in Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3rd ed. (Toronto: LexisNexis, 2017), at p. 186:

> A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide

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> particulars of an allegation already pled or additional facts upon [which] the original right of action is based.[2]

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[30] In the course of this exercise, it is important to bear in mind the general principle that, on this type of pleadings motion, it is necessary to read the original Statement of Claim generously and with some allowance for drafting deficiencies: *Farmers Oil and Gas Inc. v. Ontario (Ministry of Natural Resources)*, 2016 ONSC 6359, 134 O.R. (3d) 390 (Div. Ct.), at para. 23.

[31] Finally, the court may refuse an amendment where it would cause non-compensable prejudice. The prejudice must flow from the amendment and not some other source: *Iroquois Falls,* at para. 20. At some point the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party is presumed. In this event, the onus to rebut the presumed prejudice lies with the moving party: *State Farm*, at para. 25.

[32] Alternatively, the responding party may resist the amendment by proving actual prejudice – i.e. by leading evidence that the responding party has lost an opportunity in the litigation that cannot be compensated by an adjournment or an award of costs as a consequence of the amendment. It is incumbent on the responding party to provide specific details of the alleged prejudice: *State Farm*, at para. 25.

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[2] This statement of the law has been adopted by this court in *East Side Mario's*, at para. 32, and in *North Elgin*, at para. 20.

[33] Irrespective of the form of prejudice alleged, there must be a causal connection between the non-compensable prejudice and the amendment. The prejudice must flow from the amendment and not from some other source: *State Farm*, at para. 25.

[34] Bearing in mind these principles, the framework to determine the issues raised by this appeal is as follows:

- Are the proposed amendments to assert a claim to a 33% ownership interest the assertion of a “new cause of action”? If the proposed amendments are the assertion of a new cause of action, are the amendments statute-barred?
- Irrespective of the above, is this a case where non-compensable prejudice will arise as a consequence of the amendments?

(2) The proposed amendments do not assert a new cause of action

[35] The first issue is whether the proposed amendments to assert an alternative claim to a 33% ownership interest is the assertion of a “new cause of action” and statute-barred by the expiration of a limitation period. In my view, the proposed amendments do not assert a new cause of action.

[36] With respect, the motion judge erred in principle in his approach to the motion for leave to amend under r. 26.01 of the *Rules*. In suggesting that the 1996 SPA, 1996 Escrow Agreement and 1997 SPA were pled solely as

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"background" to the 50% ownership interest claim, the motion judge failed to appreciate that the appellant had explicitly asserted claims for breach of contract and breach of trust in relation to the those agreements. Reading the appellant's Statement of Claim generously, the proposed amendments do not amount to the assertion of a new cause of action; rather, the alternative claim to a 33% ownership interest is an alternative claim for relief, or an alternative legal conclusion, flowing from the material facts as original pled.

[37] I turn now to the content of the appellant's Statement of Claim and the material facts pled therein. Reading the Statement of Claim generously and as a whole, the essential factual matrix giving rise to the appellant's action is his decision to sell his shares in 1996, the respondents' failure to pay him for his shares, and the oral agreements allegedly made between the parties, including the oral agreement that he would become a 50% shareholder. As pled, these issues are all interwoven.

[38] While the allegation that the appellant is a 50% shareholder of the corporation has, for obvious reasons, been the predominant focus of the litigation to date, it is not the exclusive claim set out in the original Statement of Claim. The appellant has also expressly pled claims for breach of contract relating to the 1996 SPA, the 1996 Escrow Agreement and 1997 SPA, *in addition* to the purported breach of the oral agreement. Thus, the various written agreements referred to in the Statement of Claim not only provide the necessary material

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facts and background relating to the alleged breach of the oral agreement, but also the material facts necessary to ground a claim for breach of the written agreements themselves.

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[39] In this vein, the appellant's original Statement of Claim expressly "pleads and relies" on the 1996 SPA and 1996 Escrow Agreement, and sets out the material terms in respect of both agreements (see Statement of Claim, at paras. 9-11). The Statement of Claim similarly expressly pleads and relies on the terms of the 1997 SPA, under which Mr. Beausoleil is said to have assumed the rights and obligations relating to the 1996 SPA and 1996 Escrow Agreement (see Statement of Claim, at paras. 15-16).

[40] The appellant then expressly pleads that the respondents have breached their obligations under the 1996 SPA, 1996 Escrow Agreement, 1997 SPA, and oral agreement, in that, among other things:

- The respondents failed, neglected and/or refused to pay the back wages (Statement of Claim, at para. 29(b));
- The respondents have failed, neglected and/or refused to pay back the promissory note (Statement of Claim, at para. 29(c));
- The respondents have "sold, assigned, hypothecated, alienated, released from escrow or dealt with the Klassen Escrow Shares" (i.e. the appellant's

100 shares) in a manner contrary to the 1996 Escrow Agreement (Statement of Claim, at para. 29(d));

- The respondents have failed, neglected and/or refused to pay the appellant for the "Klassen Escrow Shares" when it was due and payable, or at all (Statement of Claim, at para. 29(g));
- The respondents have failed, neglected and/or refused to make good faith efforts to satisfy their obligations under the 1996 SPA, 1996 Escrow Agreement, 1997 SPA and/or the alleged oral agreement (Statement of Claim, at para. 29(j)); and
- In the alternative, the appellant pleads that the foregoing breaches amounted to the frustration of the 1996 SPA, 1996 Escrow Agreement, 1997 SPA or alleged oral agreement (Statement of Claim, at para. 30).

[41] The appellant further pleads that the respondents are liable for breach of trust because the respondents "appropriated or converted all or part of the Klassen Escrow Shares to their own use or to a use inconsistent" with the 1996 Escrow Agreement and 1997 SPA: Statement of Claim, at para. 31.

[42] The claim for relief in the original Statement of Claim expressly requests damages in respect of the non-payment of the promissory note and back wages, as well as $2 million in general damages for breach of contract and/or breach of

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trust. This relief can only be claimed in respect of the alleged breaches of the 1996 SPA, 1996 Escrow Agreement and 1997 SPA.

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[43] In light of these material facts expressly set out in the Statement of Claim, the appellant's requested amendments do not assert a new cause of action, but rather request alternative relief flowing from the respondents' alleged breach of the 1996 SPA, 1996 Escrow Agreement and 1997 SPA. In the appellant's original Statement of Claim, he expressly alleges that the respondents breached their contractual obligations by failing to satisfy the escrow release conditions – i.e. by paying the back wages and amounts owing under the promissory note – and sought damages in that regard. The proposed amendments do not seek to introduce any new material facts. Rather, the amendments seek to introduce, wherever a pleading of a 50% ownership interest is particularized, language to the effect of "or in the alternative a 33% ownership interest". In effect, the appellant seeks the return of his shares held in escrow and a declaration that he remains a 33% shareholder as a consequence of the respondents' breach of the 1996 SPA, 1996 Escrow Agreement and 1997 SPA, rather than an award of damages. This is a quintessential example of a request for "additional forms of relief, or [a clarification of] the relief sought, based on the same facts as originally pleaded": *Dee Ferraro,* at para. 4.

[44] I also agree with the appellant's submission that it is inconsistent for the motion judge to have granted leave to allow the appellant to plead an entitlement

to the return of the shares in escrow, while denying the amendment to plead that he remains a 33% shareholder. These pleadings are fundamentally interrelated.

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[45] During oral argument on the appeal, counsel for the respondent forcefully argued that the underlying claim to the return of the shares in escrow or claim to a 33% ownership interest, however framed, is incurably time-barred. In this vein, the respondents argue that the failure to make payment on the promissory note and back wages in 1997 triggered the start of the applicable limitation period, such that any claim for breach of the 1996 SPA, 1996 Escrow Agreement and 1997 SPA, and corresponding request for the return of the shares, is now statute-barred.

[46] Whatever the merits of the respondents' limitations arguments, it is only necessary to determine whether a limitation period has expired in respect of the proposed amendments if the amendments assert a new cause of action. I have concluded that the proposed amendments do not do so. For this reason, it is unnecessary to address the parties' various limitation arguments arising from the original pleadings at this stage. It is clear that whether any or all of the appellant's claims are time-barred will be a central issue at the eventual trial of this matter.

(3) The amendments would not cause prejudice to the respondents

[47] The next issue is whether the appellant's delay in seeking the amendment raises a presumption of non-compensable prejudice or whether the respondents have demonstrated actual, non-compensable prejudice. For the reasons that

follow, I conclude that the delay in seeking leave to amend, in these circumstances, does not raise a presumption of prejudice and that the respondents have not established they would otherwise suffer actual, non-compensable prejudice as a result of the amendments.

(4) Presumed prejudice

[48] The respondents argue that the appellant's delay in seeking the amendment raises a presumption of non-compensable prejudice. They focus on the fact that 22 years have elapsed between the events giving rise to the 33% ownership claim and the appellant seeking leave to amend his Statement of Claim.

[49] I disagree. The focus is properly on the period of delay between commencing the proceedings and seeking leave to amend, not the period between the underlying events in question and seeking leave to amend: *State Farm*, at para. 44. Here, the delay of approximately 2 years and 7 months between commencing the action (April 2015) and formally seeking leave to amend was short. Moreover, the appellant moved fairly promptly to amend his Statement of Claim following the summary judgment motion, when the respondents' counsel object to the appellant's position that the 33% ownership claim was sufficiently pled in the original Statement of Claim.

[50] Most significantly, as discussed earlier in these reasons, the amendment claims alternative relief based on the same material facts as were originally

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pleaded. It is integrally related to the existing claim. These circumstances cannot give rise to any presumed prejudice.

(5) Actual Prejudice

[51] The respondents also argue that they will suffer actual, non-compensable prejudice as a consequence of the amendments. They point to four sources of actual prejudice:

- In January 2016, the corporation made what was described by the respondents as a "unilateral" payment of approximately $46,000 on the promissory note. The payment was also stated to be "without prejudice" to the appellant's other claims, and the respondents' defence of those other claims. The respondents argue that if the amendments are allowed, the appellant may take the position that this payment is an acknowledgment and has restarted the limitation period to reclaim his escrowed shares. A material witness – Robert Detzler – has passed away. Mr. Detzler was briefly employed by the corporation. He was also involved in some negotiations over the course 1997-1998, along with Mr. Beausoleil and the appellant, with a view to combining the corporation with another meat supplier. The appellant argues that Mr. Detzler is a witness to anything that the appellant said about his ownership interest in the corporation during the period of 1997-1998. Mr. Detzler was examined by both parties in May 2017 before the summary judgment motion.

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- Relevant evidence from the corporation's business records and corporate files have been lost, as the corporation's practice is only to retain records for seven years.
- The respondents have already examined the appellant for discovery and, as a consequence, did not have the opportunity to examine the appellant on the alternative claim to a 33% ownership interest.

[52] I do not agree that the respondents have established that the amendments will cause them actual, non-compensable prejudice.

[53] First, the payment on the promissory note in January 2016 was tendered on an unconditional basis and without prejudice to the appellant's other claims. On the strength of that payment, the respondents were able to obtain summary judgment on the appellant's claim for payment on the promissory note. The respondents made a strategic choice to make a payment on the promissory note, and cannot now point to that payment as establishing actual prejudice.

[54] Second, I do not agree that allowing the amendments will cause the respondents to suffer prejudice as a consequence of Mr. Detzler's death. Mr. Detzler was not a party to the 1996 SPA, 1996 Escrow Agreement or 1997 SPA, nor privy to the negotiations leading up to the execution of those agreements. It is upon these agreements that the appellant's alternative claim to a 33% ownership interest is premised. While the respondents argue that Mr. Detzler might be able to give evidence about anything the appellant said regarding his

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ownership interest in the corporation during 1997-1998, presumably this would have been fully canvassed when the parties examined Mr. Detzler prior to respondents' summary judgment motion because the appellant's ownership in the corporation was squarely in issue at that time.

[55] Third, the alleged prejudice resulting from the destruction or loss of the business records does not arise as a consequence of the amendments. The evidence is that certain corporate records were destroyed by the corporation's solicitor in the ordinary course prior to the commencement of the action in 2015. Mr. Beausoleil similarly deposes that he suspended his practice of destroying business records after 7 years when the action was commenced. The respondents do not suggest that any further records have been lost or destroyed since the action was commenced. Thus, the alleged prejudice does not flow from the amendments; it flows from the historic nature of the allegations as originally particularized in the Statement of Claim.

[56] Fourth, any prejudice resulting from the fact that the appellant has already been examined for discovery can be cured by allowing for additional examinations.

[57] As a result, I conclude that the respondents have not discharged their onus of proving actual, non-compensable prejudice.

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Disposition

[58] For the forgoing reasons, the appeal is allowed. The appellant is granted leave to amend his Statement of Claim in accordance with the draft amended Statement of Claim filed on the motion below. The appellant is entitled to his costs of the appeal in the agreed upon amount of $10,000, inclusive of HST and disbursements, and the costs of the motion below in the agreed upon amount of $6,000, inclusive of HST and disbursements.

[59] In these circumstances, the respondents shall be entitled to deliver an amended statement of defence to address the amendments made by the appellant. The parties shall be entitled to conduct further examinations for discovery on matters arising out of the amendments. The costs of any such further examinations shall be determined by the ultimate trier, in the ordinary course.

Released: May 17, 2019
"MLB"

"A. Harvison Young J.A."
"I agree K. van Rensburg J.A."
"I agree M.L. Benotto J.A."

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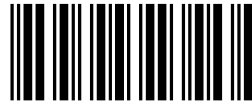

TAB12

CITATION: Reddy v. Freightliner Canada Inc. 2015, ONSC 1811
COURT FILE NO.: 59259
DATE: 2015/03/19

2015 ONSC 1811 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Darryl Reddy (Plaintiff)

- and -

Freightliner Canada Inc. and Co-Operators Life Insurance Company (Defendants)

BEFORE: Justice J. N. Morissette

COUNSEL: Andrew Camman & Susan Toth, for the plaintiff

Keith Geurts, for the defendant Freightliner Canada Inc.

No one appearing, for the defendant Co-Operators Life Insurance Company

HEARD: **March 18th, 2015**

ENDORSEMENT

[1] The defendant Freightliner Canada Inc. (Daimler) seeks an order for summary judgment granting the following:

a. Strike out paragraphs 3 and 4 of the Plaintiff's Reply on the basis that these paragraphs raise the "Dismissal Claim" as a new cause of action not pleaded in the statement of claim;

b. Declare that the plaintiff should not be granted leave to amend his statement of claim to plead the "Dismissal Claim", as such an amendment (i) would be barred by the *Limitations Act, 2002* and/or (ii) would result in prejudice to Daimler that could not be compensated for by costs or an adjournment; and

c. that the entire action as against Daimler be dismissed.

[2] At issue is whether the Reply raises a "new cause of action".

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Summary of procedure:

[3] The moving party terminated the employment of the plaintiff on January 8th, 2007. On January 19th, 2007, the plaintiff suffered a stroke rendering him permanently disabled. On January 31st, 2007, the plaintiff's then counsel wrote Daimler seeking long term disability benefits due to the wrongful dismissal of the plaintiff.

[4] On August 18th, 2008, a statement of claim was issued. On December 14th, 2012, a statement of defence was filed and on December 21st, 2012, through new counsel, a Reply was filed.

[5] On January 19th, 2012, a solicitor's negligence claim was issued against the original counsel for the plaintiff, who drafted the statement of claim. On June 11th, 2012, a statement of defence was filed and on September 27th, 2013, just days before the cross-examination of that counsel, an amended statement of defence was filed.

[6] Evidence before this Court demonstrates that the original intent by the original plaintiff's counsel was to claim for breach of employment contract and failure to maintain the plaintiff on his benefits during a notice period that would have been available to the plaintiff.

Summary of the parties' position:

[7] The moving party submits that the statement of claim does not plead in any way the plaintiff was "wrongfully dismissed" and as a result, cannot plead in Reply a "new cause of action" that is statute barred.

[8] The plaintiff submits that the statement of claim has sufficient factual matrix to include an alternative remedy as plead in the Reply. The plaintiff concedes that the statement of claim is not the best drafted pleading, but maintains that the following paragraphs are sufficient to allow leave to amend the statement of claim or not strike out the Reply:

> 5. In January 1998 the Plaintiff commenced employment with the Defendant Freightliner Canada Inc. at Sterling Truck Corporation in St. Thomas, Ontario as an Assembly Member.
>
> 6. In 2003 the Plaintiff applied for a supervisory position with Freightliner Canada Inc. In August 2003 he was successfully promoted to the position of Materials Supervisor.

7. As a term of his employment contract the Defendant Freightliner Canada Inc. provided to the Plaintiff a benefit package, including long term disability benefits. …

11. Prior to the summer of 2006 the Plaintiff had a consistent and satisfactory work performance record with the Defendant Freightliner Canada Inc.

12. In the summer of 2006 the Plaintiff began feeling unwell at work and this resulted in some inconsistency in his work performance. …

18. On January 8, 2007 the Plaintiff was terminated from his employment with the Defendant Freightliner Canada Inc. due to his continued failure to adequately perform his employment duties upon his return to work.

19. The Plaintiff's performance following his return to work in December 2006 was not in keeping with his record of employment up until the summer of 2006; however, it was consistent with his unsatisfactory performance immediately preceding his medical leave in November 2006.

20. In its termination letter dated January 8, 2007 the Defendant Freightliner Canada Inc. referenced the fact that the Plaintiff was placed on thirty (30) days notice of inconsistent performance on September 15, 2006 and that, following his return to work in December 2006, this inconsistent performance continued. This was the grounds upon which the Plaintiff was terminated on January 8, 2007. …

26. The Plaintiff's sickness and disability was ongoing and continuous throughout the brief period in which he returned to work in December 2006, prior to his termination on January 8, 2007 as evidenced by his continuing unsatisfactory performance following his return to his employment. …

28. The Plaintiff states that he was and is totally disabled in accordance with the terms of the insurance policy in that he has been physically unable to perform the essential duties of his normal occupation since in or about November 2006. The Plaintiff states that his total disability continues to the present time. …

39. The Plaintiff states that the Defendants have breached the terms of the insurance policy and/or the Plaintiff's contract of employment in wrongfully denying the Plaintiff's disability benefit payments under the

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> terms of the insurance policy and he claims damages equal to the amount payable to him pursuant to the insurance policy.

[9] The plaintiff further submits that the intent of the original counsel for the plaintiff to claim for benefits is irrelevant to the test before this Court. He further submits that if this Court finds that the pleading is a "new cause of action" then he concedes the limitation does apply.

The law and analysis:

[10] In wrongful dismissal pleadings, the plaintiff must allege that he/she was in an employment contract, which the plaintiff here does. He/she further must allege damages in two forms: (i) wages in lieu of notice; or (ii) if a plaintiff has a disability, then he must claim damages from the disability policy; which the plaintiff did.

[11] This is not a claim for wages in lieu of notice, but rather a claim for loss of disability payments due to the alleged breach of the employment contract.

[12] In the Reply, the plaintiff submits that it simply responded to the statement of defence that raised the issue of being terminated for "various misconduct". Rule 25.06(5) states an allegation that raises a new ground of claim shall not be made in a subsequent pleading, such as a Reply, but rather by way of an amendment to the statement of claim.

[13] Do the following paragraphs in the Reply raise a new cause of action?

> 3. With respect to paragraph 4, the plaintiff repeats and relies upon paragraph 39 of the statement of claim. More specifically, the plaintiff claims that the defendant Freightliner Canada Inc. (hereinafter "Daimler") breached the terms of his employment contract by wrongfully terminating him. The plaintiff dutifully, and to the best of his abilities, fulfilled the requirements of his position while in the employ of the defendants.
>
> 4. With respect to paragraphs 6 and 13, the plaintiff repeats and relies upon paragraph 39 of the statement of claim. More specifically, the plaintiff claims that liability for the loss of long term disability benefits will be that of the defendant Daimler should it be found that Daimler breached the employment contract by wrongfully terminating the plaintiff.

[14] This Court must approach this question by assessing the facts in a contextual orientation as to what will be considered a new ground of claim. In addition, Rule 25.08(2) states that a Reply is only subject to Rule 25.06(5), where, the matter might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading.

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[15] Is the failure to specifically title a claim "wrongful dismissal" fatal to a wrongful dismissal claim? Does the pleading in the Reply come as a shock or surprise to the defendant?

[16] The Divisional Court case of *Municipality of Greenstone v. Marshall Macklin Monaghan Limited* [1] found that the meaning of cause of action is:

> When the defendant's claim is that the amendment raises a new cause of action after the limitation period has expired, then the court's usual analytical approach is to consider the constituent elements of the alleged new cause of action to see if the facts as originally pleaded, or as better particularized in the proposed new pleading, could technically sustain that cause of action….
>
> If one accepts, as I do, that the broader, factually-oriented approach to the meaning of 'cause of action' in interpreting and applying rule 26.01 is the correct approach, and one also assumes that a similar definition must be used when applying rule 21.01(1)(b), then the defendant's basic entitlement is to have notice of the factual matrix out of which the claim for relief arises."[2]

[17] This approach is the broader, factually-oriented approach in *A1 Pressure Sensitive Products Inc. v. Bostik, Inc.*[3] In that case, the plaintiff brought an action for breach of contract and breach of warranty and fitness. It sought to amend its pleading to include claims for negligence and negligent misrepresentation. A Master had dismissed the plaintiff's motion to amend on the basis that the proposed amendments sought to assert a new cause of action after the limitation period expired. The Divisional Court allowed the plaintiff's appeal, holding that the amendments simply sought to claim alternative remedies based on the same facts.

[18] *In 1309489 Ontario Inc. v. BMO Bank of Montreal,*[4] Lauwers J. (as he then was) described the analysis as a functional and purposive approach. He allowed the amendments finding that, while the pleading could have been considerably clearer, the defendant "BMO knew without doubt that the 'litigation finger' was pointing at it". Before the expiry of the limitation period, the defendant had received notice of the factual matrix out of which the claims for relief arose.

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[1] [2013] ONSC 7058 (Div. Ct.)
[2] Ibid, at para. 27
[3] [2013] O.J. No. 3248 (Div. Ct.)
[4] 2011 ONSC 5505

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[19] The trend in the case law since the beginning of this decade seems to apply a broader, factually-oriented, functional and purposive approach in determining whether the amendment sought or the pleading in Reply, is a "new cause of action" or simply an alternative remedy based on the factual matrix of the original statement of claim.

[20] In *Kawartha Lakes (City) v. Gendron*,[5] MacDougall J. endorsed another quotation from Lauwers J.'s decision in *BMO* case when he held that the broad fact-based approach is consistent with the purposive approach to the interpretation of limitation periods:

> 'Cause of action' can mean the factual matrix out of which the claim arises, or the legal nature of the claim. The trend of the cases favours the broader, factually oriented approach to the meaning of "cause of action". This is a more functional approach that is also consistent with a purposive approach to the interpretation of limitations legislation.

[21] Daimler insists that because the intent of plaintiff's counsel when filing the statement of claim was not to claim a "wrongful dismissal", that the intent of counsel should prevail to demonstrate that the pleading in the Reply is now a "new cause of action". Daimler further submits that due to the time lapsed, it is prejudiced because many of the witnesses to the termination are either deceased or location unknown. Further, the plant closed in 2009.

[22] In my view, the intent of counsel when drafting the statement of claim is irrelevant to the analysis required by this Court. One must review the statement of claim and its factual matrix to ascertain whether or not failing to specifically label a claim "wrongful dismissal" will be fatal.

[23] In this case, the statement of defence of Daimler demonstrates that it knew full well such was being pleaded as it denied liability for the elements of wrongful dismissal. It plead at para. 4 the following:

> The plaintiff was employed by Daimler at its St. Thomas, Ontario plant from January 1998 to January 2007, when his employment was terminated for various misconduct. The St. Thomas plant was later closed in 2009.

[24] The Reply simply answers the allegation in the statement of defence that he was dismissed for cause.

[25] In my view, the lack of labelling "wrongful dismissal" in the statement of claim is not fatal because notice of the claim was made under the factual matrix that the defendant is allegedly in breach of the employment contract for "wrongfully" denying the plaintiff

[5] [2012] ONSC 2035 at pp. 6-7

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his disability payments. The only reason why the plaintiff's disability benefits were denied is because the plaintiff was terminated from his employment.

[26] For these reasons, the motion for summary judgment is dismissed.

[27] Should the parties be unable to reach an agreement on costs, I may review brief costs submissions within 30 days hereof by the plaintiff and within 30 days thereafter by the moving party and within 15 days thereafter a reply, if any.

"*Justice J. N. Morissette*"
Justice J. N. Morissette

Date: March 19, 2015

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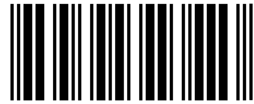

TAB13

COURT OF APPEAL FOR ONTARIO

CITATION: Reddy v. Freightliner Canada Inc., 2015 ONCA 797
DATE: 20151120
DOCKET: C60355

Hoy A.C.J.O., Gillese and Lauwers JJ.A.

BETWEEN

Darryl Reddy

Plaintiff (Respondent)

and

Freightliner Canada Inc. and Co-Operators Life Insurance Company

Defendants (Appellant)

Keith Geurts and Ellen Snow, for the appellant

Andrew Camman and Susan Toth, for the respondent

Heard: November 16, 2015

On appeal from the order of Justice Johanne N. Morissette of the Superior Court of Justice, dated March 19, 2015.

ENDORSEMENT

[1] Daryl Reddy worked for Freightliner Canada Inc. ("Daimler") from January 1998 to January 8, 2007, when Daimler terminated his employment. In the latter part of his employment, Mr. Reddy went on short-term disability because he had pericarditis. He returned to work but could not function well.

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[2] On January 19, 2007, Mr. Reddy suffered a stroke as a result of the same sickness. He was left unable to speak or move the left-hand side of his body.

[3] Mr. Reddy's attempt to obtain long-term disability benefits from Co-Operators Life Insurance Company ("Co-Operators") – the company that had given him short-term disability benefits – was rejected because he was no longer employed by Daimler.

[4] Mr. Reddy sued Daimler and Co-Operators for, among other things, long-term disability benefits ("LTD").

[5] Daimler defended the action and Mr. Reddy replied. In his reply (the "Reply"), Mr. Reddy claimed that Daimler had wrongfully terminated his employment.

[6] Daimler moved for summary judgment on the basis that Mr. Reddy raised wrongful dismissal as a new cause of action in his Reply and that cause of action was statute barred due to the passage of time.

[7] The motion judge dismissed the motion. She acknowledged that the statement of claim did not specifically plead that Mr. Reddy had been wrongfully dismissed but found that the failure to use those specific words was not fatal.

[8] After setting out the governing legal principles for determining whether the Reply raised a new cause of action, the motion judge concluded that it did not. At paras. 22-25 of her reasons, the motion judge stated:

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> [22] …One must review the statement of claim and its factual matrix to ascertain whether or not failing to specifically label a claim "wrongful dismissal" will be fatal.
>
> [23] In this case, the statement of defence of Daimler demonstrates that it knew full well such was being pleaded as it denied liability for the elements of wrongful dismissal. It plead at para. 4 the following:
>
>> The plaintiff was employed by Daimler at its St. Thomas, Ontario plant from January 1998 to January 2007, when his employment was terminated for various misconduct. The St. Thomas plant was later closed in 2009.
>
> [24] The Reply simply answers the allegation in the statement of defence that he was dismissed for cause.
>
> [25] In my view, the lack of labelling "wrongful dismissal" in the statement of claim is not fatal because notice of the claim was made under the factual matrix that the defendant is allegedly in breach of the employment contract for "Wrongfully" denying the plaintiff his disability payments. <u>The only reason why [Mr. Reddy's] disability benefits were denied is because the plaintiff was terminated from his employment</u>. [Emphasis added.]

[9] We agree with the motion judge, both as to the result and her reasons.

[10] The claim of wrongful dismissal came as no surprise to Daimler. Indeed, it defended the claim on the basis that Mr. Reddy's employment was terminated for cause. At the core of Mr. Reddy's claim is a set of facts establishing an employment relationship and contract, that the employment contract was breached at a result of termination without notice, and that damages flowed from the breach, including loss of LTD benefits.

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[11] Accordingly, the appeal is dismissed with costs to the respondent fixed at $10,000, all inclusive.

"Alexandra Hoy A.C.J.O."
"E.E. Gillese J.A."
"P. Lauwers J.A."

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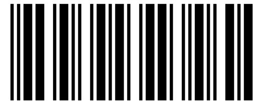

TAB14

CITATION: Kaiman v. Graham, 2009 ONCA 77
DATE: 20090128
DOCKET: C47530

COURT OF APPEAL FOR ONTARIO

2009 ONCA 77 (CanLII)

Weiler, Juriansz and MacFarland JJ.A.

BETWEEN

Cyril Kaiman, Personally and as Litigation
Guardian for Benyemina Kaiman, an infant,
and as Executor and Trustee of the Estate
of Diane Elizabeth (Diamond) Kaiman, deceased

Plaintiffs (Appellants)

and

Douglas Harvey Graham, Personally, and
Brenda Louise Graham and Ronald Johnston Swain,
Executor and Trustees of the Estate of Harvey
Leonard (Alexander) Graham

Defendants (Respondents)

Garry J. Wise, for the appellants

J. William Evans, for the respondent Douglas Harvey Graham

M. John Ewart and P. Kourtney O'Dwyer, for the respondents Brenda Louise Graham and Ronald Johnston Swain

Heard: December 9, 2008

On appeal from the judgment of Justice Robert D. Reilly of the Superior Court of Justice dated July 6, 2007 and reported at 58 R.P.R. (4th) 305.

Weiler J.A.:

2009 ONCA 77 (CanLII)

OVERVIEW

[1] The subject of this appeal is a cottage property. The central issue in this case is whether the Superior Court had jurisdiction to entertain the action brought by the appellants for damages and other relief or whether the Landlord and Tenant Board had exclusive jurisdiction under the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("*RTA*"). A subsidiary issue is whether, even if the Superior Court had jurisdiction, the appellants ought to be allowed to argue the applicability of the *RTA* on appeal.

FACTS

[2] The appellant Cyril Kaiman married Diamond in 1978. They had one child, the appellant Benyemina.

[3] Shortly after Cyril and Diamond married, they began to vacation at a cottage property owned by Diamond's father, Harvey Leonard Graham ("H.A."). In 1979, Cyril proposed an improvement to the cottage to H.A. The appellants say that H.A. agreed to the improvements and verbally agreed to give Cyril a 100 year lease.

[4] On September 1, 1982, H.A. and his wife Frances Edna Graham ("Frances") entered into a lease with Diamond (and Diamond only) in respect of the cottage. The lease was for a term of 40 years. It contained a termination clause stating that notwithstanding the 40 year term, the lease shall expire upon the death of H.A. and the happening of one of three events: (i) France's death; (ii) France's remarriage; or (iii) written notice by Frances that she no longer wishes to use the cottage property.

[5] The appellants say that both Cyril and Diamond continued to negotiate with H.A. for a 100 year lease and to include provision for any children of the marriage in the lease. Revised leases were prepared but never executed.

[6] On August 18, 1999, H.A. transferred the entire property to his son, the respondent Douglas. Shortly thereafter, Diamond passed away. H.A. passed away two years later. Since Diamond's death, the appellants say that they have been denied use and enjoyment of the cottage property. Frances provided written notice trigging termination of the lease in January 2005.

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[7] At trial, the appellants sought the following relief: a declaration that they had an equitable interest in the cottage property; rectification of the written lease agreement to extend the term to 100 years; and a declaration that an unsigned written lease was valid and subsisting. They also sought damages in the amount of $250,000 on account of the improvements to the cottage on the basis of *quantum meruit* and unjust enrichment.

[8] On appeal, the appellants do not attack the basis of the trial judge's decision. They submit that the trial judge lacked jurisdiction to hear the claim they brought because the *RTA* applies to the cottage and the Landlord and Tenant Board had exclusive jurisdiction to deal with the matters in issue. The appellants submit that, as a result, the judgment of the Superior Court judge is a nullity and ought to be quashed. They also argue that they are tenants as "heirs" of Diamond pursuant to s. 2 of the *RTA* and that the lease termination clause is void since it is an agreement to terminate a lease entered into at the time of the tenancy, contrary to s. 37(5)(a).

ANALYSIS

1. *Did the Superior Court have jurisdiction to hear the case presented before it?*

[9] As stated above, the appellants neither pleaded nor raised the *RTA* at trial. The question is thus whether the appellants should be allowed to rely on it for the first time on appeal. Since the appellants' argument goes to the jurisdiction of the Superior Court, it may be raised for the first time on appeal: see *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108, at para. 17.

[10] Although the matter is by no means free from contention, for the purposes of determining the jurisdictional issue, I am prepared to assume that the *RTA* applied to the cottage property in issue. It is clear, however, that the Superior Court had jurisdiction to hear the case presented before it and that the matters in issue at trial did not fall within the exclusive jurisdiction of the Landlord and Tenant Board.

[11] Contrary to the appellants' submission, the central issue at trial was *not* the interpretation and applicability of a lease governed by the *RTA*. Rather, as discussed above, the issues at trial concerned the extension of the lease based on an alleged oral promise and compensation for improvements based on unjust enrichment or *quantum meruit*. The Superior Court undoubtedly had jurisdiction over this subject matter and the subject matter contained in the statement of claim.

[12] The appellants have framed the issue on appeal as being whether a declaration terminating their tenancy should be granted. They submit that the Landlord and Tenant Board has exclusive jurisdiction to decide this issue: see generally, Part V of the *RTA* and s. 168(2). However, their statement of claim does not contain a request for a declaration

terminating a tenancy. It requests a declaration that a tenancy exists. The *RTA* does not confer jurisdiction on the Tribunal to determine whether there is a valid tenancy agreement. The existence of a tenancy agreement is presumed: *O'Brien v. 718458 Ontario Inc.* (1999), 25 R.P.R. (3d) 57 (Ont. Gen. Div.).

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[13] Furthermore, in their statement of claim, the appellants sought numerous grounds of relief, including equitable relief and a certificate of pending litigation, which the Landlord and Tenant Board would have had no jurisdiction to order.

[14] In any event, even if the Board had jurisdiction to determine whether the tenancy was validly terminated, having regard to the appellants' claim for damages in the amount of $250,000, the appellants were entitled to commence their proceeding in the Superior Court. Having done so, that court had all the jurisdiction that the Board would have had.

[15] Section 207(1) of the *RTA* states that the Board, where it otherwise has jurisdiction, may order the payment of the greater of $10,000 and the jurisdiction of Small Claims Court. Section 207(2) states:

> A person entitled to apply under this Act but whose claim exceeds the Board's monetary jurisdiction may commence a proceeding in any court of competent jurisdiction for an order requiring the payment of that sum and, if such a proceeding is commenced, the court may exercise any powers that the Board could have exercised if the proceeding had been before the Board and within its monetary jurisdiction.

Simply put, the Superior Court had jurisdiction to grant any and all of the relief claimed by the appellants. The Board did not. Any jurisdiction it did have was, by virtue of s. 207(2), non-exclusive.

[16] Accordingly, I would dismiss the appellants' submission that the Superior Court lacked jurisdiction to try the case.

2. *Although the Superior Court had jurisdiction, should the appellants' argument respecting the RTA be entertained on appeal?*

[17] The appellants rely on s. 3 of the *RTA* which states that the Act applies "with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary". They argue that the exception in s. 5(a) of the Act does not apply. That section provides:

> 5. This Act does not apply with respect to,

> (a) living accommodation intended to be provided to the travelling or vacationing public or occupied for a seasonal or temporary period in a hotel, motel or motor hotel, resort, lodge, tourist camp, cottage or cabin establishment, inn, campground, trailer park, tourist home, bed and breakfast vacation establishment or vacation home.

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The appellants place particular reliance on the Divisional Court decision in *Putnam v. Grand River Conservation Authority* (2006), 210 O.A.C. 191 which held that year-round cottage properties did not fall within the predecessor to s. 5(a) of the *RTA* since the properties were not "part of a cottage or cabin establishment" that was analogous to a hotel, motel or the other types of accommodation set out in the definition. Accordingly, the appellants wish us to make a determination on appeal as to the applicability of the *RTA* or to refer the matter for hearing before the Landlord and Tenant Board.

[18] The general rule is that appellate courts will not entertain entirely new issues on appeal. The rationale for the rule is that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal: *Ontario Energy Savings L.P. v. 767269 Ontario Ltd.*, 2008 ONCA 350, at para. 3. The burden is on the appellant to persuade the appellate court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial": *Ross. v. Ross* (1999), 181 N.S.R. (2d) 22 (C.A.), at para. 34, per Cromwell J.A.; *Ontario Energy Savings* at para. 3. This burden may be more easily discharged where the issue sought to be raised involves a question of pure law: see e.g. *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (C.A.); *R. v. Brown*, [1993] 2 S.C.R. 918, per L'Heureux-Dubé J., dissenting. In the end, however, the decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties: *R. v. Warsing*, [1998] 3 S.C.R. 579, per L'Heureux-Dubé J., dissenting; *R. v. Sweeney* (2000), 50 O.R. (3d) 321 (C.A.); *Vidulich* at pp. 398-99.

[19] In my opinion, it would be contrary to the interests of justice to entertain the appellants' argument respecting the *RTA* with a view to having the issue of the applicability of the Act determined by this court or at a new hearing. Five reasons support this conclusion.

[20] First, appeals cannot be conducted without any regard for the pleadings and positions advanced at trial. The majority of the relief requested – a declaration that the appellants had an equitable interest in the cottage property, rectification and specific

performance of a lease, a declaration that an unsigned lease was valid, and damages – had nothing to do with the *RTA*. Having regard to the fact that the appellants' arguments at trial did not succeed and that they did not challenge them on appeal, it is clear that there was "no error at trial in this case" and that the appellants are seeking "an opportunity to present a whole new case" based on a statute that was neither pleaded nor argued before the Superior Court. To allow them to raise the *RTA* in these circumstances would run "contrary to the basic purpose of an appeal which is to correct trial error": *Canadiana Towers Ltd. v. Fawcett* (1978), 21 O.R. (2d) 545 (C.A.), at p. 548.

[21] Second, the issue of whether the *RTA* applies to the cottage property appears to involve an application of facts to a legal definition and is thus a question of mixed fact and law.[1] Since the *RTA* was neither raised nor contemplated at trial, the factual record regarding the nature and use of the property is sparse. All that is known is that it was a cottage and that the Kaiman family used it during the summers over the duration of the lease period and sometimes over Christmas for a couple of weeks. Had the respondents known that the *RTA* would have been in issue, they could have developed a more fulsome record on these matters so as to support their contention that the *RTA* does not apply.

[22] Third, no explanation has been put forward as to why this argument was not raised at trial. Counsel on this appeal, who did not represent the appellants at trial, does not allege negligence or incompetence on the part of trial counsel. Nor is there any affidavit from trial counsel to the effect that the *RTA* was not pleaded or raised due to inadvertence. We are simply asked to speculate that this is in fact what happened. The appellants should not be allowed to have a second chance based on speculation.

[23] Fourth, in seeking to be allowed to raise this issue, the appellants did not undertake to save harmless the respondents from their costs at trial on a full indemnity basis or offer to pay the costs of the appeal on this basis. The fact that the appellants did not ensure that the respondents would be adequately compensated in costs for their failure to raise the *RTA* at trial is a factor that has been held to weigh against allowing new arguments on appeal: see e.g. *V.S. v. Nova Scotia (Minister of Health)* (2006), 249 N.S.R. (2d) 185 (C.A.), at para. 28.

[24] Fifth, even if this court were to refer the question of whether the cottage property was subject to the *RTA* to the Landlord and Tenant Board, the likelihood of success of the appellants' argument is by no means clear and is outweighed by the interests of finality. The approach in *Putnam* appears to depart from previous approaches taken by the Divisional Court to the interpretation of s. 5(a) of the *RTA* and its predecessor, s. 3(a) of

[1] While the Divisional Court held in *Putnam* that the interpretation of the exemption to the *RTA* for seasonal and temporary accommodation raised a question of law in the circumstances of that case, the court noted that the factual record was accepted by all parties and was not controversial. The same cannot be said in this case.

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the *Tenant Protection Act, 1997*, S.O. 1997, c. 24. In *McCormick v. Paul Bunyan Trailer Camp Ltd*. (1999), 22 R.P.R. (4th) 305 (Div. Ct.), Aitken J. held that all that was necessary for the exemption to apply was that: (1) the living accommodation falls within one of the categories set out in the definition; and (2) it is intended to be occupied for a seasonal or temporary period. It is arguable that this could be said of the cottage at issue in this case. It would be unfair to the respondents to allow the appellants to rely on the *RTA* on appeal in light of the state of the authorities and this sparse factual record. It would also be unfair to the respondents to have them undergo the expense of yet another hearing at first instance simply because a fresh lawyer on the case thought of a new argument that may or may not succeed.

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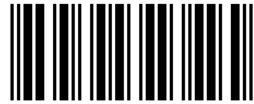
CONCLUSION

[25] Having regard to the positions advanced in the pleadings and at trial, the issue being one of mixed fact and law, the lack of any explanation as to why the argument was not raised at trial, the lack of any undertaking by the appellants' with respect to costs on a full indemnity basis, the likelihood of success of the new argument and the interests of finality, it would be contrary to the interests of justice to allow the appellants to raise the new argument concerning the *RTA* at this late stage.

[26] For these reasons, I would dismiss the appeal. Costs of the appeal are to the respondents and, as agreed, are fixed at $2,500, all inclusive, to each respondent.

RELEASED: RGJ
January 28, 2009

"Karen M. Weiler J.A."
"I agree R.G. Juriansz J.A."
"I agree J. MacFarland J.A."



TAB15

COURT OF APPEAL FOR ONTARIO

CITATION: 2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225
DATE: 20160322
DOCKET: M46061 (C61637)

Brown J.A. (In Chambers)

BETWEEN

2403177 Ontario Inc.

Applicant (Respondent/ Responding Party)

and

Bending Lake Iron Group Limited

Respondent (Appellant/ Responding Party)

Kenneth Kraft, for the moving party, A. Farber & Partners Inc.

Robert MacRae, for the responding party, Bending Lake Iron Group Limited

Heard: March 8, 2016

ENDORSEMENT

I. OVERVIEW

[1] This motion considers the somewhat awkward and anachronistic appeal provisions contained in s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A. Farber & Partners Inc. was appointed receiver of the

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property of Bending Lake Iron Group Limited (the “Debtor”) pursuant to s. 243(1) of the *BIA*. The Receiver moves for directions whether the Debtor requires leave to appeal under s. 193(e) of the *BIA* from the approval and vesting order made by the motion judge on January 8, 2016, 2016 ONSC 199, transferring all the Debtor’s property to an unrelated purchaser, Legacy Hill Resources Ltd. (“Legacy Hill”). At the conclusion of the hearing, I held that the Debtor did require leave to appeal and set a timetable for its leave motion. These are my reasons for so ordering.

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II. HISTORY OF THE RECEIVERSHIP

[2] The Debtor went into receivership on September 11, 2014 on the application of its secured creditor, 2403177 Ontario Inc. (the “Receivership Order”). The Debtor’s major asset is an undeveloped iron ore mine site located northwest of Thunder Bay, Ontario.

[3] By order dated November 27, 2014, the court approved a Sales and Investor Solicitation Process for the Debtor’s property (the “SISP Order”). Significantly, the Debtor consented to the SISP Order.

[4] In November 2015, the Receiver moved for court approval of an asset purchase agreement it had entered into with Legacy Hill for substantially all of the Debtor’s property (the “Sale Agreement”). The Debtor opposed the motion and,

in turn, brought its own motion seeking a variety of relief, including the postponement of the sale of its property.

[5] The motion judge approved the Sale Agreement and ordered the vesting of the Debtor's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order"). As well, the motion judge dismissed the Debtor's motion to postpone the sale and for other relief.

[6] The Debtor filed a notice of appeal dated January 13, 2016 seeking to set aside the Approval and Vesting Order. Section 195 of the *BIA* provides that all proceedings under an order appealed from are stayed until the appeal is disposed of. However, the Debtor did not perfect its appeal within the time required by the *Rules of Civil Procedure*, and this court has issued a notice of intention to dismiss the appeal for delay unless it is perfected by March 22, 2016.

[7] Legacy Hill is not prepared to close the Sale Agreement until the Debtor has exhausted its appeal rights in this court.

[8] The Receiver moves for a declaration that the Debtor requires leave to appeal. Granting such relief would quash the Debtor's existing notice of appeal.

III. ISSUE ON THE MOTION

[9] The central issue on this motion is whether the Approval and Vesting Order falls into any of the categories of cases identified in s. 193 of the *BIA* in

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which an appeal lies as of right to this court, or whether the Debtor must obtain leave to appeal under s. 193(e). Section 193 of the *BIA* provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[10] The Debtor submits that the Approval and Vesting Order falls within ss. 193(a), (b), and (c), and therefore an appeal lies as of right. I shall consider the Debtor's submissions on each sub-section in turn.

IV. SECTION 193(A): DOES THE APPROVAL AND VESTING ORDER INVOLVE FUTURE RIGHTS?

A. Positions of the parties

[11] The Debtor submits the point in issue in its appeal involves future rights. The Debtor makes the following submissions in its factum:

> [T]here remains outstanding a Notice of Motion seeking a finding that the Receiver has violated the Crown's fiduciary duty to Aboriginal Peoples, as well as the

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> Honour of the Crown, such duties being owed by the Receiver as an Officer of the Court. This motion has not been heard as of yet.
>
> …
>
> The future rights of the "affected Aboriginal communities" will very much be affected by the confirmation of the Vesting Order as granted by [the motion judge].

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[12] In order to assess this submission, some review is required of the evidence the Debtor placed before the motion judge on the sale approval motion about "affected Aboriginal communities" and of the relief the Debtor plans to seek in a further motion before the motion judge.

B. Debtor's evidence concerning "affected Aboriginal communities"

[13] Mr. Henry Wetelainen, the President and CEO of the Debtor, swore an affidavit which was filed in opposition to the Receiver's motion to approve the Sale Agreement. In it, he deposed that, in early 2015, after the Receivership Order had been made, he held discussions with Legacy Hill about a possible "partnership/co-operative development in rescuing [the Debtor] from receivership." He described his discussions with Legacy Hill as attempts to attract a financial partner to assist in the refinancing of the Debtor in order to terminate the Receivership.

[14] At various points in his affidavit, Mr. Wetelainen stated he had pursued those discussions as part of his "continued efforts on behalf of [the Debtor] and

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its creditors, shareholders, stakeholders and affected Aboriginal communities." He deposed that the termination of the receivership would have a "concurrent benefit to [the Debtor], its creditors, shareholders, stakeholders and affected Aboriginal communities."

[15] Despite having pursued discussions with Legacy Hill in early 2015, Mr. Wetelainen opposed the Sale Agreement. He took the position that Legacy Hill had breached a fiduciary duty owed to the Debtor by dealing with the Receiver. Frankly, it is difficult to understand that position given that under the Receivership Order and the SISP Order, Mr. Wetelainen, as an officer of the Debtor, was not permitted to pursue the discussions he did with Legacy Hill without the knowledge and concurrence of the Receiver.

[16] In any event, Mr. Wetelainen's evidence disclosed that the main reason he opposed the Sale Agreement was that he wanted more time for the Debtor to find financing to take out its secured creditors and terminate the receivership. In his affidavit, he explained why the Debtor was seeking orders to postpone approval of the Sale Agreement:

> The Orders being sought from the Court will ensure that all of the creditors, shareholders, stakeholders and affected Aboriginal communities be given an appropriate period of time pursuant to Court Order to permit [the Debtor] to complete the Corporate requirement for the purpose of providing the creditors, shareholders, stakeholders and affected Aboriginal communities to invest in Special Shares in [the Debtor]

> in order to retire the debt that [the applicant] has agreed to reduce to the amount as reflected in the Assets Purchase Agreement.
>
> …
>
> The net result of the successful refinancing of [the Debtor] will be that all the shareholders will have their share value protected and [the Debtor] will be required to deal with unsecured creditors in a fair fashion. At all times during the financing proceedings with [Legacy Hill], I anticipated that there would be a compromise with respect to the amount of debt owed to the Applicant.

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[17] In Mr. Wetelainen's view, the Sale Agreement is a "disasterous agreement that will wipe out millions of dollars of shareholder value, creditor obligations to stakeholders and various Aboriginal communities."

[18] A further reason given by Mr. Wetelainen for his opposition to the Receiver's sale was that an asset purchase by Legacy Hill ran "a very substantial risk of [Legacy Hill] alienating all of the affected Aboriginal communities as well as the members of the communities where a workforce would have been drawn from and whose cooperation would have been received. The Aboriginal Employment Preferences Policy identifies these clearly articulated goals."

C. The Debtor's pending motion

[19] The Debtor intends to bring a motion before the motion judge at the end of May seeking an order that it be granted leave to commence an action against the Receiver "for damages as a result of the failure of the Receiver to uphold the

honour of the Crown and the Crown's fiduciary duties to Aboriginal peoples including the Aboriginal communities affected by the actions of the Receiver." In its notice of motion, the Debtor asserts it had provided "continual notice" to the Receiver that Aboriginal communities were directly affected by the receivership, yet the Receiver failed to maintain the honour of the Crown by not notifying affected Aboriginal communities of its intention to seek a sale of the Debtor's assets.

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D. Analysis

[20] The concept of "future rights" as a category of cases appealable to this court as of right traces its origins to the late nineteenth century federal *Winding-Up Act*.[1] The passage of time has not improved the clarity of the concept. In *Elias v. Hutchinson*,[2] McGillivray C.J.A. commented, at para. 20, that "the authorities leave me in a state of uncertainty as to what a future right is at all, let alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights."

[21] Although the category of "future rights" increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts

---

[1] Now, the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 103. See *In re Union Fire Insurance Co.* (1886), 13 O.A.R. 268, (C.A.) at pp. 294-295.
[2] (1981), 14 Alta. L.R. (2d) 268; 121 D.L.R. (3d) 95, [1981] A.J. No. 896 (C.A.).

have attempted to cloak the term “future rights” with some practical meaning. In *Re Ravelston Corp.,*[3] Doherty J.A. stated, at para. 18:

> The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal … Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights… [Citations omitted.]

[22] Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* “must refer to rights which could not at the present time be asserted but which will come into existence at a future time.”

[23] More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*,[4] stated, at para. 15:

> “Future rights” are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

[24] The Debtor’s argument that the Approval and Vesting Order involves the future rights of “affected Aboriginal communities” is vague and difficult to follow. Nevertheless, I do not accept it for several reasons.

[3] (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)
[4] 2013 ONCA 282, 115 OR (3d) 617.

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[25] First, for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor company – i.e. its creditors or shareholders.[5] On the sale approval motion, the Debtor did not adduce evidence that any "affected Aboriginal community" had such an economic interest in the Debtor, nor did any "affected Aboriginal community" adduce such evidence on the motion. The Receiver, in its December 21, 2015 Supplemental Report to its Third Report, informed the court that based on its review of the Debtor's creditors listing, "no Aboriginal groups are creditors of [the Debtor]."

[26] Second, at this stage of the process it does not lie in the Debtor's mouth to contend that the Receiver failed to give proper notice to "affected Aboriginal communities". The time to raise such an issue was when the Receiver sought approval of the SISP Order, yet the Debtor consented to that order.

[27] Third, to the extent that the Approval and Vesting Order affects the rights of those with an economic interest in the Debtor, it affects the present, existing rights of the Debtor's creditors and shareholders, not their future rights.

[28] Finally, it is clear from Mr. Wetelainen's affidavit that the Debtor's real complaint about the effect of the Approval and Vesting Order is one concerning the "commercial advantages or disadvantages that may accrue from the order challenged on appeal." Mr. Wetelainen objected to the Sale Agreement because

[5] See *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at p. 242 quoting with approval *In Re Kern Agencies Ltd.* (1931), 12 C.B.R. 279 (Sask. C.A.), at p. 281.

its approval would wipe out shareholder equity and preclude efforts by the shareholders to raise financing to pay out the Debtor's secured creditors. That has nothing to do with "future rights" within the meaning of s. 193(a).

[29] I conclude that the point in issue in the Debtor's challenge of the Approval and Vesting Order does not involve future rights within the meaning of s. 193(a) of the *BIA*.

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V. SECTION 193(B): WILL THE APPROVAL AND VESTING ORDER AFFECT OTHER CASES OF A SIMILAR NATURE IN THIS PROCEEDING?

A. Positions of the parties

[30] The Debtor submits that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceeding. In its factum, the Debtor argues that in granting the Approval and Vesting Order the motion judge failed "to deal with the rights of the affected Aboriginal communities," an issue the Debtor wishes to raise on its appeal. The Debtor argues that the same issue will lie at the heart of its motion before the motion judge later in May seeking leave to sue the Receiver. The Debtor contends that because the Approval and Vesting Order likely will affect its motion for leave to sue the Receiver, s. 193(b) of the *BIA* applies.

[31] The Receiver disputes that the issues on appeal would impact other issues in the receivership.

B. Analysis

[32] The jurisprudence under s. 193(b) of the *BIA* has consistently interpreted the section as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings."[6] The cases have expressed different views on whether the decisions covered by s. 193(b) can only concern rights asserted against the bankrupt by parties other than the bankrupt, or whether the issue may concern rights asserted by multiple persons against the bankrupt, rather than one person's rights arising in multiple contexts.[7] Regardless, s. 193(b) must concern "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings.[8]

[33] Section 193(b) possesses several anachronistic features. First, while permitting an appeal of right on an issue that likely will arise again in an insolvency proceeding might appear to foster the efficient conduct of insolvency proceedings, in reality any automatic appeal right will slow down insolvency proceedings which usually operate on a "real-time" basis. As well, the language of s. 193(b) does not measure the overall significance of the issue to the proceeding – minor issues which might arise again are treated in the same fashion as major ones. Finally, most contemporary insolvency litigation sees one

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[6] *Wong v. Luu*, 2013 BCCA 547, at para. 21.
[7] See *Wong v. Luu*, at para. 21, and the Quebec jurisprudence summarized in *Re Norbourg Gestion d'actifs inc.,* 2006 QCCA 752, 33 C.B.R. (5th) 144 at paras. 9-11.
[8] *Global Royalties Ltd. v. Brook*, 2016 ONCA 50, at para. 19.

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judge assigned to manage the proceeding from its inception to its end. Under a "one judge" model of case management, common or repeat issues tend to get grouped together for adjudication at one time, not at different stages of the proceeding.

[34] I do not accept the Debtor's submission that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceedings.

[35] The Receiver filed evidence on this motion which shows the Debtor did not raise any issue about a receiver's constitutional duty to consult "affected Aboriginal communities" either in its materials or during its submissions on the sale approval motion. The Debtor does not dispute this evidence. Accordingly, the Debtor will be seeking to raise the duty to consult issue for the first time on appeal.

[36] In the normal course, appeals are not the proper forum in which to raise brand new issues that significantly expand or alter the landscape of the litigation.[9] The burden rests on an appellant to persuade the court that all the facts necessary to address the point are before the court as fully as if the issue had been raised in the court below.[10] It is far from clear that the Debtor would

[9] *Perez v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229, 171 D.L.R. (4th) 520 (C.A.), at para. 11.
[10] *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

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succeed in persuading this court that the interests of justice require an exception to this normal course of litigation. The Debtor faces several high hurdles.

[37] First, the Debtor consented to the SISP Order which authorized the Receiver to proceed with the sales process. The Debtor did not raise the issue of a duty to consult "affected Aboriginal communities" about a sale at that time; it is difficult to conceive how it can do so now.

[38] Second, it is very doubtful that the Debtor has standing to advance on appeal an argument based on the duty to consult. As the Supreme Court of Canada explained in *Behn v. Moulton Contracting Ltd.*,[11] at para. 30:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature… But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights. [Citations omitted.]

[39] No evidence was led on this motion to suggest that any Aboriginal group had authorized the Debtor to represent it for the purpose of asserting rights under s. 35 of the *Constitution Act*, *1982*.

[40] Third, s. 193(b) of the *BIA* requires that the order sought to be appealed is likely to affect "other cases of a similar nature in the bankruptcy proceedings." Here, the Approval and Vesting Order disposed of all the property of the Debtor.

[11] 2013 SCC 26, [2013] 2 S.C.R. 227.

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Consequently, there will not be any other case dealing with the disposition of the Debtor's property in this receivership.

[41] The final hurdle is that only after the Debtor received the January 8, 2016 reasons of the motion judge granting the Approval and Vesting Order did it launch its motion for leave to sue the Receiver for its alleged breach of the duty to consult. That sequence of events strongly suggests that, having unsuccessfully opposed the Receiver's sale, the Debtor looked for some procedural device to fit itself into s. 193(b). Its motion for leave to sue the Receiver was the result. In my view, a party cannot create a "case" after the impugned order was made in order to invoke s. 193(b). Consequently, the Debtor's pending motion for leave to sue does not qualify as a case of a similar nature in the receivership.

[42] For those reasons, the Approval and Vesting Order does not fall within s. 193(b) of the *BIA*.

VI. SECTION 193(C): DOES THE PROPERTY INVOLVED IN THE APPEAL EXCEED IN VALUE $10,000?

A. Positions of the parties

[43] The Debtor submits that the Approval and Vesting Order will transfer property in excess of $10,000 and, therefore, falls within s. 193(c) of the *BIA* because "the property involved in the appeal exceeds in value ten thousand dollars."

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[44] While the actual sale price is subject to a confidentiality order pending the closing of the transaction, there is no dispute that the sale price significantly exceeds $10,000. Nor is there any dispute that if the transaction closes, the Debtor's secured lenders will suffer a significant shortfall.[12]

[45] On its part, the Receiver submits that an approval and vesting order forms part of the methods a receiver employs to dispose of a debtor's assets and, as such, is a matter of procedure that does not fall within s. 193(c).

B. Analysis

[46] The history of the interpretation of s. 193(c) is an unusual one. Under the modern approach to statutory interpretation, the words in a statute must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act.[13] By contrast, as the Manitoba Court of Appeal observed at para. 9 in *Re Dominion Foundry Co.,*[14] the interpretation of the phrase "the property involved in the appeal" found in s. 193(c) historically has proceeded in a different fashion, drawing heavily upon cases interpreting a similar provision in the federal *Winding-Up Act*,[15] as well as on the jurisprudence

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[12] In its Third Report dated November 30, 2015, the Receiver informed the court that the Debtor's liabilities totaled approximately $12.4 million consisting of (i) secured loans from the applicant in excess of $3.5 million, (ii) payroll deduction and HST claims by the Canada Revenue Agency of approximately $405,000, and (iii) unsecured liabilities of close to $8.5 million.

[13] *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex* 2002 SCC 42, 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

[14] (1965), 51 W.W.R. 679.

[15] Such as *Faillis and Deacon v. United Fuel Investments Ltd*, [1962] S.C.R. 771, at p. 774.

considering former provisions in the *Supreme Court of Canada Act* which linked the right to appeal to "the amount or value of the matter in controversy."[16]

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[47] Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation.[17] However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) – with the bar set low to fall within s. 193(c)[18] – or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings.[19]

[48] In my view, two contextual factors should inform any application of the sub-section.

[49] First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek

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[16] *Trimor Mortgage Investment Corporation v. Fox*, 2015 ABCA 44, at para. 8; *Galaxy Sports Inc. v. Abakhan & Associates Inc.*, 2003 BCCA 322, 44 C.B.R. (4th) 218 at para. 12; *Newfoundland and Labrador Refining Corporation v. IJK Consortium*, 20098 NLCA 23, 52 C.B.R. (5th) 8 at para. 18.

[17] *Wong v. Luu,* at para. 23; *Re Norbourg Gestion d'actifs inc*, at para. 9.

[18] *Wong v. Luu*, at para. 23.

[19] *Re Stelco Inc*. (2005), 8 C.B.R. (5th) 150 (Ont. C.A.), at para. 4.

leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.*, the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.

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[50] Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

[51] For example, if one were to accept the Debtor's argument that whenever the value of the property transferred by a sales approval and vesting order exceeded $10,000 an appeal as of right to this court exists, then, as the Manitoba Court of Appeal noted, at para. 7, in *Re Dominion Foundry Co.*, an appeal as of right would exist in almost every case because very few insolvency cases would involve property that did not exceed the statutory threshold. Blair J.A. repeated that concern in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, at para. 17. By contrast, a challenge to a sales approval and

vesting order obtained by a debtor company under the *CCAA* would require obtaining leave to appeal under s. 13 of that Act.

[52] In my view, no principled basis exists to distinguish the treatment of a sale by a receiver or trustee, from that by a *CCAA* debtor company. In each case, approval of the sale would require consideration of the types of principles articulated in *Royal Bank of Canada v. Soundair*.[20] A need for the legislative harmonization of appeal rights in insolvencies is apparent.

[53] In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.

Is the order procedural in nature?

[54] The caselaw holds that s. 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, including orders concerning the methods by which receivers or trustees realize an estate's assets.

[20] (1991), 4 O.R. (3d) 1 (C.A.).

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[55] In *Re Dominion Foundry Co.*, the motion judge had dismissed a request to set aside a sale of assets by a trustee in bankruptcy on the grounds that the sale was improvident and the trustee had acted improperly. The Manitoba Court of Appeal held, at para. 20, that although the sale involved assets whose value exceeded the statutory threshold, an order concerning the method by which the trustee disposed of assets did not fall within s. 193(c). Consequently, where a person seeks to challenge an order on appeal by calling into question the methods employed by a trustee to dispose of the assets of the bankrupt, the order involves a matter of procedure which does not fall within s. 193(c).

[56] The Alberta Court of Appeal reached a similar result in *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd. (Trustee of)*.[21] There, the trustee had invited tenders for the purchase of the bankrupt's equipment. When tenders closed, the trustee determined that Alternative's tender was the highest. Once another tenderer, Impco Technologies Inc., found out that it was not the highest bidder, it submitted a second tender offering substantially more than Alternative. The trustee sought directions from the court. The bankruptcy judge directed the trustee to accept Impco's second, higher tender. Alternative filed a notice of appeal and moved before the Alberta Court of Appeal for a determination that it could appeal as of right under s. 193(c) because the value of the property involved exceeded the statutory threshold.

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[21] 1997 ABCA 273, 48 C.B.R. (3d) 171.

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[57] O'Leary J.A., following *Re Dominion Foundry Co.*, held that Alternative had no right of appeal under s. 193(c). He reasoned, at para. 12, that the bankruptcy judge's order was essentially a procedural direction to the trustee in the face of Alternative's challenge to the method by which the equipment was sold, by-passing the tender process.

[58] In the present case, the overwhelming majority of the Debtor's grounds of appeal are process-related, involving issues concerning the Debtor's dealings with Legacy Hill following the Receivership Order, the Receiver's disclosure of information about the Sale Agreement, the negotiation process it followed with Legacy Hill, its treatment of persons affected by the Sale Agreement, and the adequacy of notice it gave to "affected Aboriginal communities." Those grounds of appeal are procedural in nature and do not fall within s. 193(c).

Does the order put into play the value of the Debtor's property?

[59] The second principle emerging from the caselaw is that s. 193(c) is not engaged where the decision or order does not call into play the value of the debtor's property. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.,* Blair J.A. considered whether an order appointing a receiver over assets of debtor corporations that exceeded $10,000 in value fell within s. 193(c). He concluded that it did not stating, at para. 17, that "an order appointing a receiver does not bring into play the value of the property; it simply appoints an

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officer of the court to preserve and monetize those assets, subject to court approval."

[60] In the present case, the Approval and Vesting Order marked the final step in the Receiver's monetization of the Debtor's assets. The property of the Debtor is to be converted through the Sale Agreement into a pool of cash and, as stated in the Approval and Vesting Order, "the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets." The ground of appeal advanced by the Debtor to the effect that the sale process should be postponed to let shareholders re-finance the company does not bring into play the value of the Debtor's property, so s. 193(c) does not apply.

Does the order result in a gain or loss?

[61] Finally, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. In *Trimor Mortgage Investment Corporation v. Fox*,[22] Paperny J.A. described this aspect of s. 193(c) at para. 8:

> The test to be applied under this section was originally articulated in *Orpen v Roberts*, [1925] SCR 364 at 367, [1925] 1 DLR 1101, and confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, [1962] SCR 771, 4 CBR (NS) 209, which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.

[22] 2015 ABCA 44.

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[62] The Approval and Vesting Order did not determine the entitlement of any party with an economic interest in the Debtor to the sale proceeds. In that sense, no interested party gained or lost as a result of the order.

[63] However, one ground of appeal set out in the Debtor's notice of appeal is that the motion judge erred in law in finding that the Receiver had not acted improvidently. In its factum, the Debtor contends that the Receiver's sale of its property is improvident because it would result in a loss of $125 million to its shareholders. In support of that ground of appeal, on this motion the Debtor relied on a memo prepared by Broad Oak Associates dated February 3, 2014, half a year before the Receivership Order was made. Using an iron ore pellet price of US$100 per tonne, Board Oak placed the value of a fully-developed Bending Lake iron ore project in the range of US$100 million to $300 million. This, the Debtor argues, shows that the Approval and Vesting Order selling its undeveloped mine site assets resulted in a loss to shareholders of an amount exceeding $10,000 in value, giving it a right to appeal under s. 193(c).

[64] I do not accept the Debtor's submission. The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. In order to bring itself within s. 193(c), the Debtor must do more than make a bald allegation of improvident sale. This is real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process. The Debtor must demonstrate some basis in the

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evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value $10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than $10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal.[23]

[65] In the present case, the evidentiary record discloses that there were no competing bids for the Debtor's property for the motion judge to consider; only Legacy Hill expressed a serious enough interest to lead to a Sale Agreement with the Receiver.

[66] Neither the Debtor nor its shareholders put before the motion judge a valuation of the Debtor made near in time to the execution of the Sale Agreement. Mr. Wetelainen did not attach the pre-receivership Broad Oak memo to the affidavit he placed before the motion judge. By contrast, the Receiver reported to the motion judge that the market price of iron ore had declined to the mid-US$50 per tonne range, making a court sanctioned sales process "very challenging in the current market conditions." The market price for iron ore

[23] See, for example, *Faillis and Deacon v. United Fuel Investments Ltd.* where, at pp. 773-774 the Supreme Court of Canada described the specific evidence of loss contained in the record.

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reported by the Receiver was far below the pre-receivership assumptions used by Broad Oak.

[67] Nor did Mr. Wetelainen depose on the sale approval motion that the Debtor's property was worth over $100 million. Instead, in his affidavit he stressed the need to postpone the sale to allow the Debtor's shareholders time to negotiate a compromise of the secured debt and then pay off the compromised debt.

[68] Finally, the Debtor's secured lenders supported the Sale Agreement, notwithstanding that they would suffer a significant shortfall on the sale.

[69] Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than $10,000 because the Receiver could have obtained a higher price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

[70] I conclude that the Approval and Vesting Order does not fall within s. 193(c) of the *BIA*.

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VII. DISPOSITION

[71] For these reasons, I granted the Receiver's motion and ordered that the Debtor requires leave to appeal from the Approval and Vesting Order. The Debtor's notice of appeal dated January 13, 2016 is quashed.

[72] The parties agreed to the following timetable for the filing of materials on the Debtor's leave to appeal motion:

(i) The Debtor would file its leave materials by March 28, 2016;

(ii) The Receiver would file any responding materials by April 4, 2016;

(iii) The Debtor would file reply materials, if any, by April 11, 2016.

[73] I directed that the leave materials be placed before a panel for consideration on April 12, 2016. I did so, in part, to obviate the need for Debtor's counsel to travel down to Toronto for an oral Chambers leave motion.

[74] The parties may serve their leave materials electronically. Although the parties will need to file the appropriate number of hard copies of their materials in accordance with the *Rules of Civil Procedure*, they may file with the court an electronic copy either by email or by USB key. The date of electronic filing will be deemed the date of the filing of the materials with the court.

[75] The parties agreed that the costs of this motion would be reserved to the panel hearing the leave to appeal motion.

"David Brown J.A."

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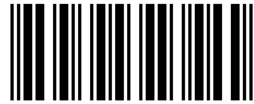

TAB16

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tasci (Re),*
2020 BCCA 317

Date: 20201119
Docket: CA47030

2020 BCCA 317 (CanLII)

IN THE MATTER OF THE BANKRUPTCY OF
Kris Sinan Tasci

Between:

Lynette Dianne Hebert, Just Fish-Inn Inc., Stonewater Ventures (No. 179) Ltd., Stonewater Ventures (No. 181) Ltd.

Appellants
(Applicants)

And

Roy Sommerey

Respondent
(Respondent)

Before: The Honourable Mr. Justice Abrioux
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 29, 2020 (*Tasci (Re)*, 2020 BCSC 1438, Vernon Docket 180676).

Counsel for the Appellants (via teleconference): J.D. Shields

Counsel for the Respondent (via teleconference): K. Ihas

Place and Date of Hearing: Vancouver, British Columbia
October 23, 2020

Place and Date of Judgment: Vancouver, British Columbia
November 19, 2020

Summary:

The applicants seek to appeal an order dismissing their application to set aside an order under s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] which permitted the respondent to commence proceedings in place of a trustee. They submit that they may appeal as of right pursuant to ss. 193(b) and (c) of the BIA as the impugned order is so broad as to permit the respondent to bring additional proceedings similar to the one at issue, and concerns a sum of property exceeding $10,000. Alternatively, they submit that leave should be granted pursuant to s. 193(e) on the basis that the standing of civil defendants and the sufficiency of affidavit evidence in s. 38 proceedings are questions of general significance, and that the impugned order was impermissibly broad. Held: Leave to appeal is required and leave is denied. The application does not engage ss. 193(b) or (c) and the proposed grounds of appeal do not warrant granting leave.

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Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] The applicant appellants seek to appeal an order of Justice Davies (the "Order") pronounced September 29, 2020 and not yet entered, which dismissed their application to set aside *(i)* an order made by a Master granting the respondent permission to commence proceedings in place of the trustee pursuant to s. 38 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 [*BIA*]; and *(ii)* 16 Certificates of Pending Litigation ("CPLs") filed by the respondent against various of their properties. They seek an order that they may appeal the order as of right, or alternatively, an order granting leave to appeal.

[2] The respondent opposes the application. He submits that there is no leave as of right and that the application for leave should be dismissed.

[3] For the reasons that follow, I agree with the respondent that leave to appeal is required, and I would decline to grant leave.

Background

[4] Mr. Kris Tasci, a businessman, made an assignment in bankruptcy on December 14, 2017. Roy Sommerey, his former lawyer, filed a proof of claim with the Trustee on February 21, 2018, pursuant to which he is a secured creditor of the

bankrupt in the amount of $1,201,018.91 and an unsecured creditor in the amount of $548,829.45.

[5] On August 9, 2019, Mr. Sommerey emailed the Trustee requesting an update on the status of Mr. Tasci's bankruptcy. He also asked the Trustee to commence legal proceedings against Mr. Tasci, Mr. Tasci's spouse Ms. Herbert, and their respective companies in respect of alleged fraudulent preferences and fraudulent transactions. Mr. Sommerey noted that he had become aware of possible claims following review of a bailiff's report received August 30, 2017, and that the two-year limitation period pursuant to s. 6 of the *Limitation Act,* S.B.C. 2012, c. 13 was therefore fast approaching.

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[6] The Trustee replied that she was unable to respond to information requests until she returned to work on August 20, 2019 and that there were no funds in the estate with which to proceed with the proposed action. She advised Mr. Sommerey that he would either have to fund the litigation or apply under s. 38(1) of the *BIA* to bring proceedings at his own expense.

[7] Section 38 of the *BIA* provides:

> Proceeding by creditor when trustee refuses to act
>
> 38(1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> Transfer to creditor
>
> (2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.
>
> Benefits belong to creditor
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

> Trustee may institute proceeding
>
> (4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

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[8] On August 19, 2019, Mr. Sommerey appeared before a Master of the Supreme Court of British Columbia and obtained short leave to proceed with the s. 38 application. The following day Master Schwartz granted the order, which authorized Mr. Sommerey to

> 1. … prosecute legal proceedings against the Bankrupt and other persons and companies … to be named as defendants … for conducting or participating in money, property or financial transactions comprising fraudulent transfers, fraudulent preferences, and/or placing property or money derived from or through the initiative and work of the … Bankrupt into the names of others …

[9] The Trustee's right title and interest in the proceedings was then transferred to Mr. Sommerey. On August 23, 2019, he filed a Notice of Civil Claim with the Kelowna registry against Mr. Tasci and the applicants in this application, seeking remedies under the *Fraudulent Preference Act,* R.S.B.C. 1996, c. 164 and *Fraudulent Conveyance Act,* R.S.B.C. 1996, c. 163, among others.

[10] The applicants filed a Notice of Application on July 20, 2020 to set aside Master Schwartz's order. Their arguments centered on three grounds: *(i)* that Mr. Sommerey, a practicing lawyer, inappropriately relied on his own affidavit; *(ii)* that the affidavit failed to disclose a cause of action except through reliance upon inadmissible hearsay; and *(iii)* that the short leave application of August 19, 2020, was "in every way an *ex parte* application" and that Mr. Sommerey had failed to comply with the duty to make full and frank disclosure.

[11] Justice Davies dismissed the application on September 29, 2020. In his reasons for judgment, indexed at 2020 BCSC 1438 (the "Reasons"), he explained that in light of Mr. Sommerey's correspondence with the Trustee and his steps in obtaining short leave, the application was not equivalent to an *ex parte* application.

He found that Mr. Sommerey was not precluded from relying on his own affidavit since he was acting on his own behalf rather than on behalf of a client. Lastly, he decided that there was sufficient admissible evidence in Mr. Sommerey's affidavit to uphold Master Schwartz's order.

[12] In light of these conclusions, the judge declined to address what the applicants submit was a threshold issue, being whether they have the standing to challenge the granting of an s. 38 order.

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The Legislation

[13] Recourse to this Court in this matter is governed by s. 193 of the *BIA:*

> Court of Appeal
>
> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> > (a) if the point at issue involves future rights;
> >
> > (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
> >
> > (c) if the property involved in the appeal exceeds in value ten thousand dollars;
> >
> > (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
> >
> > (e) in any other case by leave of a judge of the Court of Appeal.

Positions of the Parties

[14] This application raises two issues: whether leave to appeal is required; and if so, whether it should be granted.

[15] The applicants' primary position is that they are entitled to appeal as of right on the basis of ss. 193(b) and 193(c) of the *BIA*. They submit that s. 193(b) applies because the scope of Master Schwartz's order is so broad as to leave "no limits to what cases of a similar nature [Mr.] Sommerey might bring against the current Defendants or others." They also argue that s. 193(c) applies in that the property at issue in Mr. Sommerey's Notice of Civil Claim is well in excess of $10,000.

[16] Alternatively, they submit that leave should be granted under s. 193(e). They say that the proposed appeal is of general importance since it raises issues concerning the sufficiency of evidence in support of s. 38 applications, the permissible scope of s. 38 orders and the standing of similarly situated applicants to challenge these orders once made. In particular, they refer to certain case law which, they submit, reflects inconsistent approaches to the issue of standing. They add that the appeal is clearly of great importance to the applicants, since it could be dispositive of Mr. Sommerey's civil claim. The appeal, they submit, would have arguable merit.

[17] In relation to the sufficiency of the affidavit evidence required on an s. 38 application, the applicants say that it is clear from Mr. Sommerey's affidavit that he seeks to commence the action against them for the purposes of conducting a speculative fishing expedition. Paragraph 31 of his affidavit states:

> 31. The exact nature of what Mr. Tasci did do and is doing in business, the money these activities made and what he did or directed to be done with it are all unknown to me. It is necessary to commence legal proceedings to obtain this information.

[18] Mr. Sommerey submits that neither ss. 193(b) nor 193(c) applies in the circumstances. He argues that s. 193(b) is inapplicable because there are no other proceedings of a similar nature in these bankruptcy proceedings. Furthermore, s. 193(c) does not apply because the proposed appeal concerns procedural matters lacking any direct monetary impact on the applicants.

[19] Mr. Sommerey further argues that leave should not be granted under s. 193(e). He characterizes the points on the proposed appeal as of limited significance generally or to the action itself. He submits that an appeal would lack merit, as the applicants are seeking to "re-argue the issue[s] *de novo*" by raising the same arguments made before the chambers judge. Lastly, he submits that granting leave to appeal would unduly hinder the progress of his action.

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Analysis

Is Leave Required?

[20] The applicants base their primary submission on this issue by referring to ss. 193(b) and 193(c) of the *BIA*. They submit that these subsections involve rights which this Court has described as "broad, generous and wide-reaching": *Wong v. Luu,* 2013 BCCA 547 at para. 23 (Harris J.A. in Chambers) [*Wong*]. Following this approach, they have an appeal from the judge's order as of right.

[21] In *Forjay Management Ltd. v. Peeverconn Properties Inc.,* 2018 BCCA 188 at paras. 33–35 (in Chambers) [*Forjay*], Justice Willcock referred to differing view points on this issue:

> Construction of Section 193
>
> [33] The respondents say s. 193(a) to (d) of the *BIA* should be read narrowly, relying, in part on the decision of the Ontario Court of Appeal in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 (Chambers) [*Bending Lake*]. In that case, Brown J.A. says:
>
>> [47] Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation.[17] However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) – with the bar set low to fall within s. 193(c)[18] – or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings.[19]
>>
>> [Emphasis added.]
>
> [34] Justice Brown adopted the latter approach. The former approach is that taken by my brother Harris J.A. *in Wong v. Luu*, 2013 BCCA 547, described at para. 23:
>
>> [23] I am not persuaded that the objects and purposes of the legislation compel such a narrow construction of the subsection so that it does not apply to the circumstances of this case. I agree that the requirement for leave to appeal in circumstances falling outside those captured by a right of appeal indicates the need to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy. This is clearly one of the principal objectives of bankruptcy legislation. Nonetheless, that

> objective cannot be taken too far in eliminating the right to appeal. The right of appeal under the *Bankruptcy and Insolvency Act* is broad, generous and wide-reaching. A right of appeal exists, for example, in respect of any matter if the property in question has a value greater than $10,000. This can hardly be thought of as a limited right of appeal; to the contrary, the bar is set low indeed. Interpreting s. 193(b) to confer a right of appeal in the circumstances of this case does not frustrate, nor is it inconsistent with, the purpose and objects of the bankruptcy legislation.
>
> [35] Bearing in mind that there are what appear to be differing approaches to the interpretation of the legislation, I turn to the specific provisions. For reasons that will, I hope, become obvious, it is not necessary in this case to reject the narrow approach of Brown J.A. or to expressly adopt the broader approach favoured by this Court in *Wong*.

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[22] I consider myself to be in a similar position here since whether the broad or narrow approach is followed, the result would be the same. The applicants do not have a right to an appeal; leave is required.

[23] I will first consider s. 193(b), which provides that an appeal lies to the Court of Appeal from any order or decision, if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings.

[24] Section 193(b) only applies if the other cases potentially affected by an impugned order are “in the bankruptcy proceedings,” which is to say “in the same matter”: *Forjay* at para. 42, citing *Wong* at para. 22. Those other cases must involve a “real dispute”: *Wong* at para. 19, citing *Lemay c. Lamarre* (1934), 16 C.B.R. 189 (Q.C.C.A.).

[25] In *Forjay,* the appellants sought to appeal an order of Justice Fitzpatrick directing the court-appointed receiver of a property development to disclaim 40 pre-sale contracts for units in the development. The appellants, who were parties to those contracts, argued that they had a right to appeal the order pursuant to ss. 193(a), (b) or (c). Justice Willcock held, *inter alia,* that s. 193(b) was engaged because the appeal was likely to affect the resolution of disputes between purchasers and secured creditors over other pre-sale contracts in the development, many of which were “of a similar nature” to those at issue: *Forjay* at paras. 40 and 43.

[26] Here, the applicants have not identified any other cases in the bankruptcy proceedings that could be affected by the judge's order. Rather, they argue that the underlying order of Master Schwartz is so broad that it could conceivably lead Mr. Sommerey to bring further cases of a similar nature. In my view, this fails to satisfy the threshold of a "real dispute" that would bring the proposed appeal within s. 193(b) such that leave to appeal would not be required.

[27] I will now turn to s. 193(c) which provides an appeal lies to the Court of Appeal from any order or decision "if the property involved in the appeal exceeds in value ten thousand dollars."

[28] *Forjay* is authority for the proposition that s. 193(c) does not apply to orders that:

(a) are procedural in nature;

(b) do not bring into play the value of the debtor's property; or

(c) do not result in a loss.

Forjay at para. 47, citing *Bending Lake* at para. 53.

[29] To "result in a loss," the order in question must contain some element of a final determination of economic interests: *Forjay* at para. 53, citing *Bending Lake* at para. 61.

[30] All three factors from *Forjay* are present here.

[31] No property, strictly speaking, is at issue in this appeal. The issue underlying this application and the proceedings below is whether Mr. Sommerey was entitled to bring a claim against the applicants in place of the Trustee. Even if the appeal was successful, the claims in the action would not be resolved, but would rather revert to the Trustee of the Bankrupt's estate. As such, s. 193(c) is not engaged.

[32] I would therefore find that neither provision applies, and leave to appeal is required.

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Should Leave Be Granted?

[33] The test for leave pursuant to s. 193(e) of the *BIA* was recently described by Justice Garson in *McKibbon v. BDO Canada Limited,* 2020 BCCA 7 (in Chambers):

> [20] In *Farm Credit Canada v. Gidda*, 2015 BCCA 236 at para. 11 (Chambers), Justice Goepel citing *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 articulated the test for granting leave under s. 193(e) of the *BIA*. The test inquires whether the proposed appeal:
>
> > a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
> >
> > b) is *prima facie* meritorious, and
> >
> > c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.
>
> [21] Justice Goepel noted that these criteria are functionally identical to the general test for leave to appeal set out in P*ower Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), which direct an inquiry into:
>
> > [1] whether the point on appeal is of significance to the practice;
> >
> > [2] whether the point raised is of significance to the action itself;
> >
> > [3] whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
> >
> > [4] whether the appeal will unduly hinder the progress of the action.
>
> [22] In the general test for leave to appeal, the overarching concern is the interests of justice: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 (Chambers) at para. 2. As per Justice Goepel in *Farm Credit Canada*, the two tests above are functionally identical, and this includes the requirement that I consider the interests of justice in an application for leave to appeal under s. 193(e) of the *BIA*.

[34] In my view, Justice Davies accurately summarized the framework which applies to an s. 38 application at paras. 23–26 of the Reasons:

> [23] Although s. 38 states that notice of the contemplated proceeding is to be given to other creditors no such notice is required before an application can be made. The only party to whom notice of an application under s. 38 must be given is the trustee of the bankrupt's estate. See: *Bank of British Columbia v. McCracken et al* (1986), 4 B.C.L.R. (2d) 35 (C.A.) [*McCracken*] and *Jaston and Co. v. McCarthy* (1998), 59 B.C.L.R. (3d) 168 (C.A.) [*Jaston*].

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> [24] More specifically, there is no requirement that notice be given to the bankrupt or any other proposed defendant. See: *Salloum (Re)* (1990), 51 B.C.L.R. (2d) 336 [*Salloum*] at para. 27.
>
> [25] It is also settled law in British Columbia that failure to comply with or incomplete procedural compliance with s. 38 of the *Act* is to be treated in appropriate circumstances only as an irregularity. See: *Jaston* and *Culp v. KPMG et al.,* 2006 BCSC 1599 [*Culp*] at para. 13, leave to appeal refused, 2006 BCCA 462 at para. 20.
>
> [26] *Jaston* further establishes that where there is no proof of prejudice caused to a person affected by non-compliance or incomplete procedural compliance with the procedural requirements of s. 38 of the *Act* such an irregularity can and should be cured by the making of or amending an order made under s. 38 *nunc pro tunc*.

[35] The power to grant an s. 38 application is discretionary: *KPMG LLP v. Culp,* 2006 BCCA 462 at para. 22 (Smith J.A. in Chambers).

[36] The applicants submit that the issues raised on appeal, which include who has standing to oppose an s. 38 application and the adequacy of the affidavit evidence in support of the application for an s. 38 order, are of general importance to the practice in bankruptcy/insolvency matters, and to the administration of justice as a whole. Accordingly, they require that a division of the Court address them.

[37] Regarding standing, they submit that courts appear to have differed on when a bankrupt or civil defendant has standing in s. 38 proceedings.

[38] In particular, they cite jurisprudence in British Columbia that appears to be divided regarding whether fraud is the sole ground upon which standing can be founded, or whether other concerns such as harm to the administration of justice or material nondisclosure may also suffice: see *Formula Atlantic Financial Corp. v. Canada (Attorney General)* (1994), 10 B.C.L.R. (3d) 52 at paras. 11–13 (C.A.) (Taylor J.A. in Chambers) and *Culp v. KPMG et al.,* 2006 BCSC 1599 at paras. 28 and 36, leave to appeal ref'd 2006 BCCA 462 at para. 21.

[39] They contrast this with jurisprudence in other provinces that appears to have endorsed the broader view of standing: see *Shaw (Trustee of) v. Nicol Island*

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Development Incorporated, 2009 ONCA 276 at paras. 44–48; *Smith v. Pricewaterhousecoopers Inc.,* 2013 ABCA 288 at para. 34.

[40] In this case, the applicants submit that their standing derives from procedural irregularities in the proceedings below, including Mr. Sommerey's reliance on what they assert was inadmissible evidence, and para. 31 of Mr. Sommerey's affidavit which is set out at para. 17 above.

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[41] In my view the applicants have not established that this issue militates in favour of leave being granted.

[42] The judge, having considered many of the authorities to which I have referred on the question of standing, stated at para. 39 of the Reasons:

> [39] I have concluded that the issues raised should be determined on the merits of this application rather than upon the disputed issue of whether the applicants have standing to apply to set aside the Order.

[43] While there may be inconsistencies in the jurisprudence, and I make no comment on whether there are in fact any, since the issue played no part in the outcome of the proceedings below and there was no analysis by the judge on the issue, in my view the interests of justice would be better served by considering the question with the benefit of full reasons in the Court below: *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at paras. 45–46 [*Gorenshtein*]; *Price v. Robson*, 2017 BCCA 419 at para. 75 (Fitch J.A. in Chambers).

[44] I will now turn to the applicants' other submissions.

[45] An appeal is not significant to the practice where there is an abundance of law on the point and where it would not settle the law on a substantive or procedural issue: *Carpenter Fishing et al v. HMTQ,* 2002 BCCA 104 (Prowse J.A. in Chambers) at para. 6.

[46] In considering the merits of the application, the judge concluded that Mr. Sommerey's affidavit was sufficient to support the making of the Master's Order.

He did so having carefully considered the applicants' objections to Mr. Sommerey having filed and spoken to his own affidavit together with other arguments relating to inadmissible hearsay.

[47] With respect to the latter issue, the judge, having quoted from this Court's decision in *Albert v. Politano*, 2013 BCCA 194 at paras. 19–22 concluded:

> [71] In considering the applicant's hearsay submissions it must also be noted that if evidence is not adduced to prove the truth of an out of court statement or document but is rather adduced for a non-hearsay purpose, it will not be inadmissible.
>
> [72] In this case the causes of action against the applicants and Mr. Tasci that are asserted by Mr. Sommerey (as identified by him to the Trustee in the correspondence from which I have quoted at para. 19 of these Reasons) are fraudulent preferences and fraudulent transactions contrary to the provisions of either the *Act* or of Provincial legislation, or both.
>
> [73] Those causes of action are not complex.
>
> [74] The delict in each case is the transfer of an interest in property by an insolvent debtor to avoid recovery from the sale of that property by creditors or in an attempt by an insolvent debtor to advantage one creditor (usually a related party) to the disadvantage of others.
>
> [75] Mr. Sommerey's affidavit and the information upon which he relied in seeking authorization under s. 38 of the *Act* must be considered in that context.
>
> [76] More specifically in relation to admissible evidence related to the causes of action asserted by him, Mr. Sommerey:
>
> 1) Identified from his own knowledge the assets and apparent wherewithal of the bankrupt when he and his wife loaned significant amounts of money to Mr. Tasci when compared to the bankrupt's similar lifestyle after his assignment in bankruptcy.
> 2) Identified from his own knowledge the existence of the applicants' corporations involved with or related to the bankrupt and his wife and the fact that Mr. Tasci granted a security interest to one of those corporations in 2014 when Mr. Sommerey and his wife were unsecured judgement creditors due to a shortfall in mortgage foreclosure proceedings against Mr. Tasci.
> 3) Identified with specificity the bailiff retained by Ms. Whidden to pursue collection proceedings under her GSA who reported upon assets that were seized by him and also identified assets held by either a corporation related to the bankrupt and his wife or by the bankrupt's wife. Although that evidence is not admissible to prove the truth of what the bailiff determined to be the ownership of individual items seized, it is, admissible to the extent that it records

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> Mr. Sommerey's knowledge of the progress or lack of progress of the collection proceedings.
>
> 4) Identified from his own knowledge that the security interest granted by the bankrupt to the related company in 2014 was amended by the bankrupt in 2017 (immediately before the bankrupt's assignment bankruptcy) to provide security over two of the assets that had earlier been seized by the bailiff.
>
> [77] The fact that Mr. Sommerey's wife was later successful in obtaining an order for the disposition of assets seized by the bailiff (a copy of which was appended to Mr. Sommerey's affidavit) notwithstanding the assertions by the related corporation that it held a security interest in some of those assets is not hearsay evidence and also affirms the truth of at least some of the contents of the information related to Mr. Sommerey by the bailiff.
>
> [78] In all of those circumstances I am satisfied that notwithstanding some of the information contained in Mr. Sommerey's affidavit constitutes inadmissible hearsay because he did not specifically assert his belief in each piece of information to which he referred, sufficient reliable non-hearsay evidence remains after the excising of inadmissible hearsay evidence to preclude the setting aside of the Order.

[48] I agree with the respondent that the sufficiency of Mr. Sommerey's affidavit evidence before Master Schwartz was a highly fact-specific exercise. Furthermore:

- the legal framework referred to by the judge does not involve any point of principle nor does it raise an issue of importance to the practice or the action itself; and
- the applicants have not identified any extricable errors of law in the judge's decision, such that granting leave is warranted.

[49] The applicants also submit that the Master's order was impermissibly broad and vague. This issue does not appear to have been specifically addressed before the judge and would thus constitute a new issue on appeal. As Justice Saunders explained in *Gorenshtein* at para. 44, this Court "generally does not consider submissions that were not advanced in the proceeding giving rise to the order appealed." The power to do so is ultimately discretionary, and is "guided by the balancing of the interests of justice as they affect all parties": *R. v. Winfield,* 2009 YKCA 9 at para. 18.

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[50] The applicants cite *Jaston & Co. v. McCarthy* (1998), 59 B.C.L.R. (3d) 168 (C.A.). In that case, the plaintiffs had obtained an order under s. 38 of the *BIA* permitting them to “take this proceeding in their own names …,” without any further specification. On appeal, this Court observed that the order “according to its terms … purport[ed] to permit the appellants to take over the bankruptcy proceeding” and therefore failed to comply with s. 38: at paras. 27–28.

[51] In my view, *Jaston* is distinguishable. Master Schwartz’s order in this case specifies that the order applies to proceedings for fraudulent transactions, fraudulent preferences and other instances in which property derived from the Bankrupt’s own efforts, and held in trust for the Bankrupt, has been transferred to others. While broadly worded, I am not persuaded that this amounts to permitting Mr. Sommerey to “take over the bankruptcy proceeding.”

[52] Considering the stringency of the test for permitting new issues on appeal, I am not persuaded that it would be appropriate to entertain this issue on appeal.

[53] For all these reasons I would also conclude that the applicants have not established that the appeal is *prima facie* meritorious.

[54] The final factor to be considered is whether granting leave will unduly hinder the progress of the action.

[55] This factor includes an examination of potential concerns as to timing and the sufficiency of the factual matrix. As explained by Justice Hall in *Smith v. Global Plastics,* 2001 BCCA 152 (in Chambers):

> [11] Concerns as to timing and possible interference with a number of matters that are important such as,
>
> > [1] the trial date which we ought not to imperil,
> >
> > [2] the possibility of bringing a rule 18A application;
> >
> > [3] the possibility of settlement negotiations; or
> >
> > [4] matters that relate to the temporal aspect of the litigation.
>
> must fall for consideration in making any decision relative to any order for leave, or a stay that might be granted.

[56] It appears from the record that the appellants have failed to comply with document obligations and to move the underlying action forward since the application which resulted in the order under appeal was brought before the judge.

[57] Accordingly, this criterion also weighs against granting leave to appeal.

[58] In conclusion, when I consider all the relevant factors, it is not in my view, in the interests of justice, to grant leave.

Disposition

[59] Pursuant to s. 193(3) of the *BIA* leave to appeal is required.

[60] For the reasons I have identified, leave to appeal is denied.

"The Honourable Mr. Justice Abrioux"

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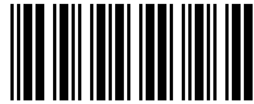

TAB17

COURT OF APPEAL FOR ONTARIO

CITATION: Polla v. Croatian (Toronto) Credit Union Limited, 2020 ONCA 818
DATE: 20201218
DOCKET: C66800

2020 ONCA 818 (CanLII)

van Rensburg, Pardu and Thorburn JJ.A.

BETWEEN

Ferdinando Polla

Plaintiff (Appellant)

and

Croatian (Toronto) Credit Union Limited, Zvonimir Josipovic, Stephen P. Kovacevic, Stanko Bingula, Anton Jurincic, Mato Menalo, Ante Mimica, Ignac Radencic, Joe Sertic, Josip Vinski, Deposit Insurance Corporation of Ontario, Retford & Bates LLP and Financial Services Commission of Ontario

Defendants (Respondents)

Benjamin Salsberg, for the appellant

Frank E.P. Bowman, Douglas B.B. Stewart and Deepshikha Dutt, for the respondents Zvonimir Josipovic, Stephen P. Kovacevic, Stanko Bingula, Anton Jurincic, Mato Menalo, Ante Mimica, Ignac Radencic and Joe Sertic

Sandra E. Dawe and Jonathan Miller, for the respondent Retford Lane Bates LLP

Heard: July 15, 2020 by videoconference

On appeal from the judgment of Justice Jane Ferguson of the Superior Court of Justice, dated March 13, 2019, with reasons reported at 2018 ONSC 1641.

van Rensburg J.A.:

2020 ONCA 818 (CanLII)

A. INTRODUCTION

[1] This is an appeal from a judgment dismissing the appellant's action. The appellant sued various parties to recover his lost investment of $5 million in the Croatian (Toronto) Credit Union Limited (the "CCU"). He had discontinued or dismissed his claims against the two regulators of the CCU, the Deposit Insurance Corporation of Ontario ("DICO") and the Financial Services Commission of Ontario ("FSCO"), and he had obtained default judgment against Josip Vinski, the CCU's former chief executive officer, who was bankrupt. The action proceeded to trial against the respondents, who were the members of the CCU's board of directors (the "Board") and CCU's external auditors, Retford Lane Bates LLP ("RLB"), in respect of claims for misrepresentation in an offering statement, under the *Credit Unions and Caisses Populaires Act*, *1994*, S.O. 1994, c. 11 (the "Act"), and common law negligence.

[2] After three weeks of trial, the appellant proposed to amend his Amended Statement of Claim to allege a misrepresentation in the offering statement that was not previously pleaded: essentially, that the offering statement's description of the CCU's lending services as based on a property's "appraised value" was a materially untrue statement because the CCU often based residential mortgage loan approvals on the value provided in the property's purchase and sale agreement, instead of obtaining an independent appraisal opinion. The appellant

argued that it was not until midway through the trial that he discovered that some mortgage loans were being made by the CCU based on the price in purchase and sale agreements, and without appraisals. The parties agreed to continue with the trial and to argue the motion at its conclusion as part of their closing submissions. By the end of the trial, it was evident that the appellant's original allegations of common law and statutory misrepresentation and negligence against the Board and RLB were not going to succeed, and the appellant's closing submissions made it clear that he was only pursuing the statutory misrepresentation claim set out in his proposed amended pleading.[1]

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[3] The trial judge refused leave to the appellant to amend his pleading, on the basis that the amendment asserted a new claim for statutory misrepresentation that was statute-barred, and that, in any event, the respondents would be irreparably prejudiced if the amendment were permitted. She went on to decide the issues that would have required determination had leave to amend been granted, finding against the appellant on all issues in respect of both liability and damages. The trial judge concluded that the impugned passage in the offering statement was neither a misrepresentation, nor was it material. Even if there had been a material misrepresentation, the respondents were entitled to the statutory

[1] The reasons for judgment deal almost entirely with the statutory misrepresentation claim raised by the proposed amendment. The trial judge did however address and dismiss the appellant's common law negligence claim against the Board notwithstanding that the appellant's closing submissions focused only on the statutory misrepresentation claim raised by the proposed amendment: see paras. 176-186.

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defence under s. 82(5) of the Act (they did not believe and had no reasonable grounds to believe that there had been a misrepresentation). Finding that the appellant would have known about the alleged misrepresentation at the time of his investment, the trial judge concluded that his deemed reliance was rebutted under s. 82(2) of the Act. She also determined that the loss of the appellant's investment, which was the basis for his claim for damages, was not caused by the alleged misrepresentation, and that there was contributory negligence.

[4] The appellant raises a number of arguments on appeal, addressing the trial judge's refusal to grant leave to amend, as well as her treatment of the various issues respecting liability and damages based on the misrepresentation claim set out in the proposed amendment.

[5] For the reasons that follow, I would dismiss the appeal. I see no error in the trial judge's refusal to permit the appellant to amend the Amended Statement of Claim because the limitation period for his new statutory misrepresentation claim had expired. As the amendment was properly refused, it is unnecessary to address the appellant's other grounds of appeal.

B. FACTS

[6] The trial judge's reasons for judgment set out a comprehensive account of the litigation, the appellant's claims, the respondents' defences, and the evidence at the trial. The facts relevant to this appeal can be briefly stated.

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[7] The CCU was a financially troubled credit union. As a result of a cheque-kiting scheme (referred to by the parties and in the court below as the "Perfex fraud"), and the subsequent withdrawal of a significant number of member deposits, the CCU fell below its liquidity and capital requirements as prescribed under the Act, and increased its overdraft with Credit Union Central of Ontario ("CUCO") to over $18 million. In order to continue operations, the CCU needed to address the overdraft and to borrow additional funds from CUCO. Working with the regulators and CUCO, CCU prepared a recovery plan. As part of the recovery plan, the CCU issued an offering statement dated May 23, 2008 with the primary purpose of raising at least $3.5 million so that it could overcome the deficiencies created by the Perfex fraud and re-establish lending activity.

[8] The appellant, a retired lawyer, was looking to get back into the mortgage business. The trial judge described the investment as a "dream come true" for the appellant, who wanted to arrange mortgage financing for his clients and earn referral fees. In June 2008, the appellant, through a family company, purchased 50,000 preferred shares of the CCU for $5 million.

[9] By July 23, 2008, and after receiving monies from various subscribers, the CCU had met its required liquidity and capital ratios and was approved to resume lending. In August 2008, the appellant obtained a mortgage loan for $2.7 million from the CCU. This was in addition to a $100,000 loan he had received, arranged

by Mr. Vinski, before the CCU was approved to resume lending. Arnold Milan, who was a long-time member of the CCU and business partner of the appellant, and Mr. Milan's wife also borrowed $2.6 million in August 2008.

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[10] These loans, which were discovered by the Board in November 2008, caused the CCU to again fall below its liquidity requirements. The regulators responded with an investigation, resulting in the CCU being placed into administration and DICO taking over its operations in July 2009.

[11] Months after the CCU was placed into administration, and after Mr. Vinski had been suspended from his employment with the CCU, a fraudulent scheme referred to as the "Oklahoma Mortgage Fraud" (the "OMF"), was discovered. This was a complex fraud involving Mr. Vinski and various external parties, in which vacant properties were "flipped" from one fraudster to another at significantly inflated values. Mr. Vinski was convicted of fraud and sentenced to prison, but no one else at the CCU was suspected or charged for participation in the OMF.

[12] The assets of the CCU were eventually liquidated, and the appellant lost his investment.

The Action

[13] The appellant commenced an action in 2010, pleading common law negligence against the respondents. In March 2012, the statement of claim was amended (the "Amended Statement of Claim") to plead that the appellant's action

against the respondents was also brought under s. 82 and related sections of the Act.

[14] The Act requires, among other things, that an offering statement provide "full, true and plain disclosure of all material facts relating to the securities that the credit union proposes to issue": s. 77(3). Section 82 provides for a statutory cause of action for misrepresentation in an offering statement as follows:

> 82 (1) If an offering statement … contains a misrepresentation, a purchaser of a security shall be deemed to have relied upon the misrepresentation if it was a misrepresentation when the purchase was made.
>
> (2) Subsection (1) does not apply if the purchaser knew about the misrepresentation when purchasing the security.
>
> (3) The purchaser has a right of action for damages against,
>
> > (a) the credit union;
> >
> > (b) every person, other than an employee of a credit union, who sells the security on behalf of the credit union;
> >
> > (c) every director of the credit union at the time the offering statement … was filed with the Superintendent[2];
> >
> > (d) every person whose consent has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and
> >
> > (e) every person who signed the offering statement … other than the persons included in clauses (a) to (d).

---

[2] The Act has since been amended to reflect the fact that the Financial Services Regulatory Authority of Ontario ("FSRA") replaced FSCO and DICO, including replacement in this passage of the reference to the Superintendent (of FSCO) by the Chief Executive Officer (of FSRA): S.O. 2018, c. 8, Sched. 7, s. 5.

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…

(5) A person who signed the disclosure certificate … or a director is not liable under this section if [the person] proves one of the following:

…

3. The person had no reasonable grounds to believe, and did not believe, that there had been a misrepresentation.

(6) In this section,

"misrepresentation" means,

(a) an untrue statement of material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made.

[15] The Amended Statement of Claim, at para. 12, asserts the following claims against the Board members:

12. The Plaintiff pleads that the Defendants, Zvonimir Josipovic, Stephen P. Kovacevic, Stanko Bingula, Anton Jurincic, Mato Menalo, Ante Mimica, Ignac Radencic and Joe Sertic negligently induced the Plaintiff to purchase shares in [CCU] in the following manner:

(a) They permitted an Offering Statement to go out to the public when they knew or ought to have known that it was misleading; in particular, they knew that the true financial difficulty of the Credit Union was not simply a consequence of a "member's account deficiency", but rather the result of a fraud or frauds perpetrated upon the Credit Union by its own officers in conspiracy with third parties;

(b) They permitted Josip Vinski to remain in a position of authority, speaking for [CCU] until April 30, 2009 when they were or ought to have been aware that he was unfit for the position and had already acted fraudulently in the

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> "Oklahoma" mortgages described below and the Perfex matters. They knew or ought to have known that he was likely to mislead members of the public in the future, including those in the position of the Plaintiff herein;
>
> (c) They permitted the mass redemption of term deposits in excess of $100,000.00 by the Credit Union in favour of their friends and acquaintances.

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[16] Paragraph 15 of the Amended Statement of Claim asserts the following claims against RLB:

> 15. The Plaintiff pleads that the Defendant, [RLB] negligently induced the Plaintiff to invest in shares in [CCU] in the following manner:
>
> (a) [RLB] failed to abide by the terms of its own engagement letter with [CCU] in failing to recognize the fraud perpetrated upon the Credit Union by the "Oklahoma" mortgage fraudsters as described in Superior Court action #CV-09-8471-00CL;
>
> (b) [RLB] failed to recognize and indicate that loans in excess of [CCU's] permissible limit of $300,000.00 had frequently been made;
>
> (c) [RLB] negligently failed to recognize the absence of appraisals in the "Oklahoma" loan files of the Credit Union as described in Superior Court action #CV-09 8471-00CL;
>
> (d) [RLB] prepared and delivered financial statements which they knew or ought to have known did not fairly represent, in all material respects, the financial position of the Credit Union.

[17] Although the Amended Statement of Claim pleads that the claim for damages is "at common law and pursuant to the provisions of the [Act]", the only claim against the respondents in respect of a misrepresentation in an offering

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statement is as stated in para. 12(a) – that the offering statement was misleading "in particular, [the Board] knew that the true financial difficulty of the Credit Union was not simply a consequence of a 'member's account deficiency', but rather the result of a fraud or frauds perpetrated upon the Credit Union by its own officers in conspiracy with third parties" (emphasis added).

[18] At the appellant's examination for discovery in December 2011, an undertaking was given to set out the "misleading and/or misleading by omission statements in the [offering statement]". The undertaking answers provided in March 2012 did not mention, expressly or by implication, any misstatement or omission relating to appraisals.[3]

The Motion to Amend

[19] Approximately three weeks into the trial, the appellant sought to further amend the Amended Statement of Claim. He proposed to add the following paragraph:

> 11 A. The aforementioned Offering Statement provided, *inter alia*, at page 17, as follows:

---

[3] This is from the trial judge's reasons at para. 155(vi). The answers to undertakings were not part of the appeal record. According to the written submissions at trial by RLB, which were filed on the appeal, the appellant's answers to undertakings pointed to the following instances of alleged misstatement or omission: (1) the 'Perfex fraud' is misdescribed in the Offering Statement; (2) the assets of the Credit Union are overstated by $8.2 million; (3) the Offering Statement does not disclose that there were mass redemptions of deposits in June and July, 2007; (4) the Offering Statement does not disclose that most of the commercial loan portfolio was a loan on one property in which Mr. Vinski had an interest; and (5) the Offering Statement does not disclose that Mr. Vinski operated without supervision by the Board of the Credit Union.

> "Lending Services
>
> CCU [Croatian (Toronto) Credit Union Limited] is licensed by the FSCO as a Class 2 Credit Union under the Act. As part of its license, CCU is subject to certain limits on its lending. The Board has approved, and management follows, lending policies in all areas to minimize the risk of loan losses. These lending policies are in compliance with the Act and are applied by the Corporation's Credit Committee. For Residential Mortgages, the Corporation will lend up to 95% of the appraised value of the property where an insurance company insures the mortgage. Otherwise, the loan will be limited to a maximum of 75% of the appraised value. The Corporation also has a recommended debt service level of 40% of the borrower's available income."

[20] The appellant also proposed to amend para. 12(a) of the Amended Statement of Claim to add to the pleading against the Board that they "knew that the Credit Union had made, and was continuing to make, mortgage loans without appraisals", and to add a pleading against RLB, as para. 15(e):

> (e) [RLB] consented to the attachment of the Audited Financial Statement of the [CCU] for the years 2015, 2016 and 2017 when they knew that the contents of the Offering Statement at page 17 thereof respecting "appraised values" were untrue and that the said financial statements were prepared on the basis that appraisals were not always required and taken by the credit union in respect of mortgage loans made and advanced by it. The Plaintiff pleads that such conduct is contrary to the provisions of s. 82 of the [Act] and the standard of care applicable to professional accountants in like circumstances.

[21] Essentially the representation that the appellant proposed to assert in his proposed amendment was that the CCU was making loans on the security of

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residential properties only in accordance with the terms of its credit policies, that is, where there had been an appraisal, and that this was a misrepresentation because the CCU's practice was to proceed without appraisals in some circumstances. The appellant's theory was that if the CCU had required appraisals to lend on residential properties, as represented in the offering statement, rather than using agreements of purchase and sale, the OMF would have been detected and the CCU would not have failed.

[22] The motion to amend was supported by the affidavit of one of the appellant's lawyers (not his counsel on appeal). The lawyer deposed that it was determined only during the trial that the CCU was routinely and extensively lending on the security of residential mortgages without first obtaining appraisals of the subject properties, and that this was contrary to the representation concerning lending services as expressed at p. 17 of the offering statement. The lawyer deposed that the motion to amend was brought out of an abundance of caution, and that the proposed amendment consisted of facts that were known to the Board, that were never previously disclosed to the appellant and that already formed part of the existing factual matrix as pleaded in the Amended Statement of Claim. The lawyer confirmed under cross-examination out of court that in 2012, during the course of the proceedings, he and the appellant had received a copy of the CCU's Board-approved 2002 credit policy, which disclosed that when making loans, purchase and sale agreements could substitute for an appraisal.

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[23] On the suggestion and with the agreement of all counsel, the trial judge directed that the motion to amend would not be determined at the time it was brought, but that it would be argued by counsel as part of their closing submissions. Counsel for all parties confirm that this procedure was adopted in order to minimize further disruption to the trial schedule, and that the trial continued under the assumption that the amendment had been allowed for evidentiary purposes and the understanding that the motion was opposed.

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[24] The trial judge noted that, by the end of the trial, the appellant was advancing only claims for statutory misrepresentation in relation to the misrepresentation that he sought to add in his motion to amend, and that he had abandoned his other claims in the action.[4]

The Trial Judge's Reasons for Refusing the Amendment

[25] The trial judge noted that the appellant proposed to amend the Amended Statement of Claim to allege a new misrepresentation – essentially, that the offering statement represented that the CCU always based its mortgages on the opinion of a professional appraiser, even though the Board knew that the CCU frequently approved mortgages based on an agreement of purchase and sale.

---

[4] Reasons for Judgment, at paras. 8 and 139. Notwithstanding that she regarded the other claims as having been abandoned, the trial judge's reasons briefly addressed and dismissed the appellant's common law negligence claim against the Board. See note 1 above.

[26] The respondents opposed the amendment on the basis that this was a new and separate misrepresentation claim that was discoverable since 2012 when the appellant received a copy of the CCU's 2002 credit policy, and that the two-year limitation period for asserting a claim in respect of this misrepresentation had accordingly expired. The respondents also opposed the amendment on the basis that it would cause them prejudice which could not be compensated for by costs.

[27] The trial judge agreed with the respondents that the proposed amendment sought to advance a new and separate misrepresentation claim. Referring to para. 12(a) of the Amended Statement of Claim, she observed that the appellant was pleading that the defendants were at fault for their failure to disclose a "fraud or frauds" from which the CCU was suffering. Although the factual matrix as pleaded set out the broad context in which this misrepresentation occurred, the act complained of was fundamentally different. While the existing pleading pleaded a misrepresentation in the offering statement, the proposed amendment was based on a "different act of the defendants, a separate alleged failure to disclose": at para. 158. The trial judge observed that "the proposed amendment [alleged] an entirely separate misrepresentation or failure to disclose on the part of the defendants", and that it "[was] not 'part and parcel of the dealings' already described in the existing amended statement of claim": at para. 159.

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[28] The trial judge concluded that the misrepresentation referred to in the proposed amendment was discoverable since 2012 when the appellant received the 2002 credit policy, which clearly noted that agreements of purchase and sale could be used to determine property values, and that this was not, as the appellant had argued, a "bombshell" that was dropped during the trial.[5] A reasonable person would have assumed that the 2002 credit policy was in place at the time that the CCU distributed the offering statement, and "[i]f this had struck [the appellant] as giving rise to material misrepresentation in the [offering statement], he could have amended his statement of claim to add that allegation at that time": at para. 160. The two-year limitation period under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B had expired.

[29] The trial judge concluded that, in any event, the respondents, who had defended the action for eight years and into the trial based on the original pleaded misrepresentations, would suffer irreparable prejudice if she allowed an amendment that was raised only after the appellant and several other material witnesses had testified: at para. 162. She characterized the appellant's attempt to amend his pleadings as a "wild goose chase", and she stated that "[h]e [could not]

---

[5] As the trial judge noted, the Board-approved credit policy that was in place when the offering statement was distributed was the 2005 credit policy, however, its relevant terms were essentially the same as the 2002 credit policy.

evolve his claim mid-way during trial to address different acts by the defendants based on an entirely new theory of the case”: at para. 163.

C. ANALYSIS

[30] The appellant asserts that the trial judge erred (1) in concluding that the proposed amendment was the pleading of a new claim which was statute-barred; and (2) in refusing the amendment in any event on the basis of prejudice to the respondents.

[31] The trial judge’s conclusion that the proposed amendment made a new claim is a legal determination, which is subject to the “correctness” standard of review on appeal: see *Blueberry River First Nation v. Laird*, 2020 BCCA 76, 32 B.C.L.R. (6th) 287, at paras. 20-21; *Strathan Corporation v. Khan*, 2019 ONCA 418, at paras. 7-8. Her conclusion that the limitation period had expired is a determination of mixed fact and law, that was based in this case on a finding of fact as to when the appellant ought to have known about the new misrepresentation, and reviewable on a standard of “palpable and overriding error”: see *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 38. The same deferential standard of review applies to the refusal of an amendment based on an assessment of prejudice: *Tuffnail v. Meekes*, 2020 ONCA 340, 449 D.L.R. (4th) 478, at para. 120, leave to appeal refused, [2020] S.C.C.A. No. 269.

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[32] The general rule respecting the amendment of pleadings is that an amendment <u>shall</u> be granted at any stage of a proceeding on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 26.01. The expiry of a limitation period in respect of a proposed new claim is a form of non-compensable prejudice, where leave to amend to assert the new claim will be refused: *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180, at para. 26.

[33] There is no real dispute between the parties about the applicable test. In *1100997 Ontario Limited v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, this court observed that an amendment to a statement of claim will be refused if it seeks to assert a "new cause of action" after the expiry of the applicable limitation period. As this court explained, at para. 19, in this context, a "cause of action" is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (as opposed to the other sense in which the term "cause of action" is used – as the form of action or legal label attached to a claim: see the discussion in *Ivany v. Financiere Telco Inc.*, 2011 ONSC 2785, at paras. 28-33).

[34] The relevant principles are summarized in Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 4th ed. (Toronto: LexisNexis Canada, 2020), at pp. 220-21, as follows:

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> A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon [which] the original right of action is based.

This passage has been cited with approval by this court. See *1100997 Ontario Limited*, at para. 20, *Davis v. East Side Mario's Barrie*, 2018 ONCA 410, at para. 32, and *Klassen*, at para. 29.

[35] The appellant asserts that the trial judge erred when she characterized the proposed amendment as pleading a new cause of action. He argues that the facts that were pleaded in the Amended Statement of Claim – before the motion to amend was brought during the trial – were broad enough to encompass the statutory misrepresentation claim that was advanced during the trial. He submits that he was not asserting a new cause of action but simply a specific particular of his case that arose out of the factual matrix already pleaded: that there was an offering statement that contained misrepresentations. Specifically, he asserts that there was a "single instance of tortious conduct contravening the Act, namely the distribution of the [offering statement] to [the appellant]."

[36] I disagree.

[37] The necessary starting point is to consider the substance of the appellant's claim before he sought the pleadings amendment. What acts or omissions that

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would give rise to the respondents' liability were already at issue in the action? The court must determine whether the existing pleading already contains the factual matrix to support any claim to which the proposed amendment relates, or whether the amendment seeks to put forward additional facts that are necessary and material to a new and different claim.

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[38] In conducting this assessment, the court must read the pleadings generously in favour of the proposed amendment: *Klassen*, at para. 30; *Rabb Construction Ltd. v. MacEwen Petroleum Inc.*, 2018 ONCA 170, 29 C.P.C. (8th) 146, at para. 8. The existing pleadings, together with the proposed amendment, must be considered in a functional way – that is, keeping in mind that the role of pleadings is to give notice of the *lis* between the parties. As such, the question in this case is whether the respondents would reasonably have understood, from the Amended Statement of Claim and the particulars provided on discovery, that the appellant was pursuing a claim in respect of the matter addressed by the proposed amendment.

[39] The trial judge accepted that there was a connection between the facts pleaded in the Amended Statement of Claim and the proposed amendment, since the appellant was always pleading that there was a misrepresentation in the offering statement. As such the factual circumstances or "matrix" that were already pleaded provided the broad context in which the statutory misrepresentation

referred to in the proposed amendment arose. The original pleading however alleged that the misrepresentation (by omission) was a failure to disclose frauds, while the proposed amendment was based on a different act of the respondents and a separate failure to disclose.

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[40] There is no error here. The trial judge's understanding of the appellant's claims was based not only on her comparison of the proposed amendment to the Amended Statement of Claim. She knew that the appellant had further particularized his claims for misrepresentation (in 2012), at which time the misrepresentation referred to in the proposed amendment had not been raised. She also had the benefit of presiding over the trial, including the period leading up to the proposed amendment, when the claims that the appellant was pursuing had been set out and addressed in the evidence of the witnesses. All of this informed her conclusion that the appellant was seeking to "evolve his claim mid-way during trial to address different acts by the defendants based on an entirely new theory of the case": at para. 163.

[41] The appellant's existing claim was not, as he asserts before this court, a statutory claim in respect of a misleading offering statement. The distribution of the offering statement was not the "act or omission" that he was pursuing in his claim. Rather, he was pursuing a claim for statutory misrepresentation under the Act. The wording of s. 82 of the Act makes it clear that the claim is in respect of a

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misrepresentation (as defined by the Act) in an offering statement, and not in respect of the distribution of the offering statement itself. Section 82(1) provides for deemed reliance "upon the misrepresentation" (emphasis added) where the offering statement contains a misrepresentation if it was a misrepresentation when the purchase of securities was made. The statutory defences also relate to specific misrepresentations. Under s. 82(2), deemed reliance does not apply "if the purchaser knew about the misrepresentation when purchasing the security" (emphasis added). Section 82(5) provides that a person who signed the disclosure certificate or a director is not liable if the person proves "[t]he person had no reasonable grounds to believe, and did not believe, that there had been a misrepresentation" (emphasis added).

[42] Having pursued an action in respect of a statutory misrepresentation in an offering statement, it was not open to the appellant to change course in the middle of the trial – to advance a claim in respect of a new and different misrepresentation regarding the failure to obtain appraisals – that had not been pursued up to that point in the action. The existing pleading did not contain the factual matrix that would support the claim asserted in the proposed amendment. The proposed amendment, although related to the same offering statement, alleged an entirely different misrepresentation from what had been pleaded in the Amended Statement of Claim and particularized during the discovery process. As such, the trial judge was correct in concluding that the misrepresentation relating to the basis

on which the CCU made loans was based on a different act of the respondents, a separate alleged failure to disclose, and as such was not “part and parcel of” the claims the appellant was advancing in his Amended Statement of Claim.

[43] Finally, the appellant challenges the trial judge’s conclusion that the misrepresentation claim that he proposed to advance in the amendment to his Amended Statement of Claim was discoverable in 2012. The appellant asserts that he only discovered this misrepresentation during the trial, after hearing the evidence of two Board witnesses and seeing the 2005 credit policy, and that, as such, his pleading is not statute-barred.

[44] This argument cannot succeed. While the appellant may only have adverted to the claim giving rise to the amendment in the course of the trial, the trial judge concluded that the alleged misrepresentation was discoverable in 2012 when the appellant received the Board-approved 2002 credit policy, which clearly noted that agreements of purchase and sale were being used to determine property values, and that after that point, a reasonable person would have assumed that the 2002 credit policy was in place when the offering statement was distributed. There is no reason to interfere with the trial judge’s conclusion that the new misrepresentation claim was discoverable in 2012. Her conclusion was fully supported by the evidence. As such the amendment of the Amended Statement of Claim to assert

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a new statutory misrepresentation claim was properly refused because that claim was statute-barred.

[45] The conclusion that the new misrepresentation claim, which was ultimately the only claim relied on by the appellant at trial, was properly dismissed because it was statute-barred is sufficient to dispose of this appeal.

D. DISPOSITION

[46] For these reasons I would dismiss the appeal. I would award costs to the respondents in the amounts agreed between the parties: $45,000 to the Board respondents and $30,000 to RLB, both amounts inclusive of disbursements and applicable taxes.

Released: December 18, 2020 (“K.M.v.R.”)

“K. van Rensburg J.A.”
“I agree. G. Pardu J.A.”
“I agree. Thorburn J.A.”

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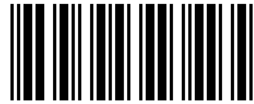

TAB18

1986 CarswellOnt 500
Ontario Supreme Court, High Court of Justice

McComb v. American Can Canada Inc.

1986 CarswellOnt 500, [1986] O.J. No. 2616, 15 C.P.C. (2d) 242

McCOMB v. AMERICAN CAN CANADA INC.

Trainor J.

Heard: December 23, 1986
Judgment: December 24, 1986
Docket: No. 11647/82

Counsel: *Timothy S.B. Danson* , for appellant (plaintiff).
James P. Dube , for respondents (defendants).

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.8 Amendment
X.8.d Grounds for refusal
X.8.d.iii Miscellaneous
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.i General principles
Headnote
Practice --- Pleadings — Amendment — Grounds for refusal — General
Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel
No prejudice to defendant.
Appeal allowed from dismissal of motion to amend statement of claim to plead allegations previously struck out from reply.
In 1983 the Court struck out certain allegations from the plaintiff's reply. In 1986, the plaintiff moved for leave to amend the statement of claim to plead substantially the same allegations in a fresh statement of claim. The Master dismissed the motion on the grounds of issue estoppel. The plaintiff appealed.
Held:
The appeal was allowed.
Although pleading a new cause of action in reply was contrary to the Rules, seeking an amendment to plead a new or additional cause of action in a statement of claim was within the purview of the Rules. The amendment was to be allowed unless prejudice would result that could not be compensated for by costs or an adjournment. The defendant had failed to demonstrate that granting the relief sought would result in prejudice to the defendants.
Table of Authorities
Rules considered:

Ontario Rules of Civil Procedure —

r. 26.01

Words and Phrases considered:

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unless prejudice would result that could not be compensated for by costs or an adjournment

APPEAL by plaintiff from order of Master dismissing motion for leave to amend statement of claim.

***Trainor J.*:**

1 The Master erred in refusing to allow the amendments sought on the basis that an issue estoppel had been created.

2 The issue before Steele J. where he struck paragraphs of a reply that added new causes of action was an entirely different issue than that before the Master. In simple terms, pleading a new cause of action in reply is contrary to the Rules but seeking an amendment to plead new or additional causes of action in a statement of claim is within the purview of the Rules and is to be allowed "unless prejudice would result that could not be compensated for by costs or an adjournment" [Ontario Rules of Civil Procedure, r. 26.01].

3 There has been substantial delay throughout the conduct of this litigation, however both sides are at fault and more importantly the defendant had failed to demonstrate prejudice.

4 Order to go setting aside the order of the Master relating to the amendments and allowing the amended statement of claim to be filed and served forthwith.

5 The defendant is to have 10 days in which to amend its defence.

6 Discovery necessitated by the amendments is to be allowed.

7 Costs in the cause both here and in the Court below.

Appeal allowed.

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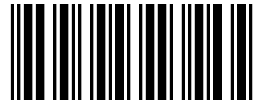

TAB19

Cabot Insurance Company Limited and Rex Gilbert Moore, deceased, by his Administratrix, Muriel Smith *Appellants*

v.

Peter Ryan *Respondent*

Indexed as: Ryan *v.* Moore

Neutral citation: 2005 SCC 38.

File No.: 29849.

2004: December 7; 2005: June 16.

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

ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Limitation of actions — Survival of action against deceased — Limitation periods — Estoppel by convention — Estoppel by representation — Discoverability rule — Confirmation of cause of action — Limitation period under Survival of Actions Act expiring one year after death of party to action or six months after date when letters of administration granted — Statement of claim for damages in relation to motor vehicle accident issued against defendant within two-year limitation period prescribed by Limitations Act — Defendant's death unknown to plaintiff until after shorter limitation period in Survival of Actions Act had expired — Whether doctrine of estoppel by convention or by representation applicable to prevent defendant from raising limitation defence — Whether confirmation of cause of action or discoverability rule applicable to extend limitation period of Survival of Actions Act — Survival of Actions Act, R.S.N.L. 1990, c. S-32, s. 5 — Limitations Act, S.N.L. 1995, c. L-16.1, ss. 5, 16.

Estoppel — Estoppel by convention — Requirements — Whether requirements of doctrine of estoppel by convention met.

Estoppel — Estoppel by representation — Limitation of actions — Whether defendant's silence regard-

Cabot Insurance Company Limited et feu Rex Gilbert Moore, représenté par son administratrice Muriel Smith *Appelants*

c.

Peter Ryan *Intimé*

Répertorié : Ryan *c.* Moore

Référence neutre : 2005 CSC 38.

N^{o} du greffe : 29849.

2004 : 7 décembre; 2005 : 16 juin.

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

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE-ET-LABRADOR

Prescription — Survie d'une action intentée contre une personne décédée — Délais de prescription — Préclusion par convention — Préclusion par assertion de fait — Règle de la possibilité de découvrir le dommage — Confirmation de la cause d'action — Délai de prescription prévu par la Survival of Actions Act expirant un an après le décès d'une partie à une action ou six mois après la date de délivrance de lettres d'administration — Déclaration relative à un préjudice résultant d'un accident d'automobile déposée contre le défendeur avant l'expiration du délai de prescription de deux ans fixé par la Limitations Act — Demandeur apprenant le décès du défendeur seulement après l'expiration du délai de prescription plus court établi par la Survival of Actions Act — La règle de la préclusion par convention ou par assertion de fait empêche-t-elle le défendeur d'invoquer la prescription comme moyen de défense? — La confirmation de la cause d'action ou la règle de la possibilité de découvrir le dommage a-t-elle pour effet de prolonger le délai de prescription prévu par la Survival of Actions Act? — Survival of Actions Act, R.S.N.L. 1990, ch. S-32, art. 5 — Limitations Act, S.N.L. 1995, ch. L-16.1, art. 5, 16.

Préclusion — Préclusion par convention — Conditions — Les conditions de la règle de la préclusion sont-elles remplies?

Préclusion — Préclusion par assertion de fait — Prescription — Le silence du défendeur concernant le

ing shorter limitation period constitutes representation grounding estoppel.

On November 27, 1997, three vehicles operated by the respondent R, the appellant M, and a third party were involved in an accident. R decided to pursue a personal injury claim against M. He was unaware that, on December 26, 1998, M had died of causes unrelated to the accident. On February 16, 1999, Letters of Administration were granted to M's administratrix. On October 28, 1999, R issued his statement of claim naming M as the defendant; it was within the two-year limitation period prescribed by the *Limitations Act*, but outside the limitation period under the *Survival of Actions Act*, namely one year after the death of a party to an action or six months after letters of administration are granted. The appellant insurer sought an order striking out the statement of claim for being out of time. R also filed an application to amend the name of the defendant in the statement of claim. The Supreme Court of Newfoundland and Labrador denied the insurer's application to have the action dismissed and granted R's application. The Court of Appeal allowed, in part, both the appeal and cross-appeal, concluding that the *Survival of Actions Act* applied to the action, but that the appellants were nevertheless estopped from relying upon the shorter limitation period.

Held: The appeal should be allowed on the issue of estoppel and the statement of claim struck out. The decision of the Court of Appeal should otherwise be affirmed. There are no reasons based on any legal doctrine to preclude M's estate or the insurer from relying on the *Survival of Actions Act* limitation period.

The discoverability rule does not apply to the *Survival of Actions Act*. This rule cannot be relied on where, as here, the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action. By using a specific event as the starting point of the "limitation clock" under the *Survival of Actions Act*, the legislature displaced the discoverability rule in all situations to which the *Survival of Actions Act* applies. [24-25] [27]

Section 16 of the *Limitations Act* does not apply to the *Survival of Actions Act* either. Any confirmation of the cause of action would have no effect on the *Survival of Actions Act* limitation period because the *Survival of Actions Act* does not create a cause of action but simply confers a right to pursue a claim notwithstanding the fact

délai de prescription plus court constitue-t-il une assertion justifiant la préclusion?

Un accident impliquant trois véhicules conduits par l'intimé R, l'appelant M et une tierce personne est survenu le 27 novembre 1997. R a décidé d'intenter une action pour préjudice corporel contre M. Il ignorait que, le 26 décembre 1998, M était décédé de causes non liées à l'accident. Le 16 février 1999, des lettres d'administration ont été délivrées à l'administratrice de M. Le 28 octobre 1999, R a déposé sa déclaration désignant M comme défendeur; ce dépôt a été fait avant l'expiration du délai de prescription de deux ans fixé par la *Limitations Act*, mais après celle du délai de prescription prévu par la *Survival of Actions Act*, qui est d'un an suivant la date du décès d'une partie à une action ou de six mois suivant la délivrance de lettres d'administration. L'assureur appelant a sollicité une ordonnance de radiation de la déclaration pour cause de tardiveté. R a également présenté une demande de modification du nom de la partie défenderesse inscrit dans la déclaration. La Cour suprême de Terre-Neuve-et-Labrador a rejeté la demande de l'assureur visant à obtenir le rejet de l'action et a accueilli la demande de R. La Cour d'appel a accueilli en partie l'appel principal et l'appel incident, concluant que la *Survival of Actions Act* s'appliquait à l'action, mais que les appelants étaient néanmoins préclus d'invoquer le délai de prescription plus court.

Arrêt : Le pourvoi est accueilli en ce qui concerne la question de la préclusion et la déclaration est radiée. La décision de la Cour d'appel est par ailleurs confirmée. Il n'y avait aucune raison fondée sur quelque règle juridique d'empêcher la succession de M ou l'assureur d'invoquer le délai de prescription fixé par la *Survival of Actions Act*.

La règle de la possibilité de découvrir le dommage ne s'applique pas à la *Survival of Actions Act*. Cette règle ne peut pas être invoquée dans les cas où, comme en l'espèce, la loi applicable lie expressément le délai de prescription à un événement déterminé qui n'a rien à voir avec le moment où la partie lésée en prend connaissance ou avec le fondement de la cause d'action. En désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur a écarté la règle de la possibilité de découvrir le dommage dans tous les cas où la *Survival of Actions Act* s'applique. [24-25] [27]

L'article 16 de la *Limitations Act* ne s'applique pas non plus à la *Survival of Actions Act*. Une confirmation de la cause d'action n'aurait aucun effet sur le délai de prescription fixé par la *Survival of Actions Act* parce que cette loi ne crée pas une cause d'action, mais ne fait que conférer un droit d'intenter une action malgré le décès

that one of the parties has died. In any event, there was no confirmation of the cause of action in this case, as there was no admission of liability through the letters sent between the parties' representatives or through the payments made by the insurer to R's counsel for property damage or for medical reports. The letters and payments were intended only to promote the investigation and early resolution of certain aspects of the claim. [37] [42] [45-48]

The requirements to establish estoppel by convention — a communicated shared assumption between the parties, reliance on the shared assumption and detriment — are not met. None of the letters exchanged by R's counsel and the adjuster with respect to R's personal injury claim prove the existence of a common assumption that M was alive or that the limitation defence would not be relied on. The letters lack clarity and certainty. Even if one could conclude that there was a mutual assumption between the parties, it cannot realistically be asserted that R communicated to the appellants that he shared the mistaken assumption. Moreover, R not only did not rely on the alleged assumption, but his conduct does not show an intention to affect the legal relations between the parties. The record does not disclose that R changed his position in any way on the basis of this alleged mutual assumption. Rather, the evidence suggests that he never put his mind to the shorter *Survival of Actions Act* limitation period. Given that there was no shared assumption or reliance, the detriment requirement does not need to be addressed. It should be noted, however, that a detriment is not established by a reduced limitation period. [63-66] [70-72] [75]

Finally, R cannot rely on estoppel by representation. Estoppel by representation cannot arise from silence unless a party is under a duty to speak. In the present case, there was no duty on the appellants to advise R of a limitation period, to assist him in the prosecution of the claim, or to advise him of the consequences of the death of one of the parties. [76-77]

Cases Cited

Referred to: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Page v. Austin* (1884), 10 S.C.R. 132; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182; *Payne v. Brady* (1996), 140 D.L.R. (4th) 88,

de l'une des parties. De toute façon, la cause d'action n'a pas été confirmée en l'espèce étant donné que ni les lettres (échangées entre les représentants des parties) ni les paiements effectués (par l'assureur à l'avocat de R pour le préjudice matériel ou des rapports médicaux) ne traduisent une reconnaissance de responsabilité. Les lettres et les paiements étaient seulement destinés à faire avancer l'enquête et à favoriser le règlement rapide de certains aspects de la demande d'indemnité. [37] [42] [45-48]

Les conditions pour qu'il y ait préclusion par convention — présupposition commune communiquée entre les parties, avoir agi sur la foi de cette présupposition commune (acte de confiance) et préjudice — ne sont pas remplies. Aucune des lettres que l'avocat de R et l'expert en sinistres ont échangées relativement à l'action pour préjudice corporel de R n'établit l'existence d'une présupposition commune que M était vivant ou que la prescription ne serait pas invoquée comme moyen de défense. Ces lettres manquent de clarté et de certitude. Même si on pouvait conclure à l'existence d'une présupposition commune des parties, on ne saurait réalistement affirmer que R a informé les appelants qu'il partageait leur présupposition erronée. De plus, non seulement R ne s'est-il pas fié à la présupposition dont on allègue l'existence, mais encore sa conduite ne démontre aucune intention de modifier les rapports juridiques entre les parties. Le dossier ne montre pas que R a modifié de quelque façon que ce soit sa situation en raison de la présupposition commune dont on allègue l'existence. La preuve indique plutôt qu'il n'a jamais songé au délai de prescription plus court prévu par la *Survival of Actions Act*. Étant donné l'absence de présupposition commune ou d'acte de confiance, il n'est pas nécessaire d'examiner le critère du préjudice. Toutefois, il y a lieu de souligner qu'un délai de prescription plus court n'est pas une preuve de préjudice. [63-66] [70-72] [75]

Enfin, R ne peut pas invoquer la préclusion par assertion de fait. La préclusion par assertion de fait ne peut pas découler d'un silence, à moins qu'une partie ne soit tenue de parler. En l'espèce, les appelants n'étaient pas tenus d'informer R de l'existence d'un délai de prescription, de l'aider à intenter son action ou de l'aviser des conséquences du décès de l'une des parties. [76-77]

Jurisprudence

Arrêts mentionnés : *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Page c. Austin* (1884), 10 R.C.S. 132; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6; *Peixeiro c. Haberman*, [1997] 3 R.C.S. 549; *Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200; *Snow c. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182; *Payne c. Brady* (1996), 140 D.L.R. (4th) 88,

leave to appeal refused, [1997] 2 S.C.R. xiii; *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193; *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370; *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL); *Edwards v. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321; *MacKenzie Estate v. MacKenzie* (1992), 84 Man. R. (2d) 149; *Justice v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501; *Good v. Parry*, [1963] 2 All E.R. 59; *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481; *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716; *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304; *MacKay v. Lemley* (1997), 44 B.C.L.R. (3d) 382; *Harper v. Cameron* (1892), 2 B.C.R. 365; *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce Intenational Bank Ltd.*, [1982] 1 Q.B. 84; *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548; *The "Indian Grace"*, [1998] 1 Lloyd's L.R. 1; *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28; *The "Vistafjord"*, [1988] 2 Lloyd's L.R. 343; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL); *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL); *Troop v. Gibson*, [1986] 1 E.G.L.R. 1; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL); *Baird Textile Holdings Ltd. v. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274; *John v. George*, [1995] E.W.J. No. 4375 (QL); *Seechurn v. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ 67; *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459; *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934; *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227; *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87.

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Survival of Actions Act, R.S.N.L. 1990, c. S-32, ss. 2, 5, 8(1).

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Limitations Act, S.N.L. 1995, ch. L-16.1, art. 5, 16.
Survival of Actions Act, R.S.N.L. 1990, ch. S-32, art. 2, 5, 8(1).

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Wells C.J.N. and Cameron, Roberts and Welsh JJ.A., and Russell J. (*ex officio*)) (2003), 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181, 50 E.T.R. (2d) 8, [2003] N.J. No. 113 (QL), 2003 NLCA 19, reversing, in part, a decision of Orsborn J. (2001), 205 Nfld. & P.E.I.R. 211, 615 A.P.R. 211, 18 C.P.C. (5th) 95, 41 E.T.R. (2d) 287, 19 M.V.R. (4th) 120, [2001] N.J. No. 284 (QL). Appeal allowed.

Sandra R. Chaytor and *Jorge P. Segovia*, for the appellants.

Ian F. Kelly, *Q.C.*, and *Gregory A. French*, for the respondent.

The judgment of the Court was delivered by

BASTARACHE J. — We are asked to decide whether or not a shortened limitation period under s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32 (see Appendix), applicable upon the death of one of the parties to an action, can be enforced against a party who had no knowledge of the death until after the limitation period had expired. The respondent, Peter Ryan ("Ryan"), argues that the answer should be no; he invoked in front of our Court and in the courts below a number of legal principles which I shall address: discoverability, confirmation, estoppel by convention and estoppel by representation. The issue of estoppel was raised for the first time by the Court of Appeal itself.

The discoverability rule dictates that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by

Fridman, G. H. L. *The Law of Contract in Canada*, 4th ed. Scarborough, Ont. : Carswell, 1999.
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POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve-et-Labrador (le juge en chef Wells et les juges Cameron, Roberts et Welsh et le juge Russell (*ex officio*)) (2003), 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181, 50 E.T.R. (2d) 8, [2003] N.J. No. 113 (QL), 2003 NLCA 19, qui a infirmé, en partie, une décision du juge Orsborn (2001), 205 Nfld. & P.E.I.R. 211, 615 A.P.R. 211, 18 C.P.C. (5th) 95, 41 E.T.R. (2d) 287, 19 M.V.R. (4th) 120, [2001] N.J. No. 284 (QL). Pourvoi accueilli.

Sandra R. Chaytor et *Jorge P. Segovia*, pour les appelants.

Ian F. Kelly, *c.r.*, et *Gregory A. French*, pour l'intimé.

Version française du jugement de la Cour rendu par

1 LE JUGE BASTARACHE — La Cour est appelée à décider si le délai de prescription plus court que l'art. 5 de la *Survival of Actions Act*, R.S.N.L. 1990, ch. S-32 (voir l'annexe), prévoit en cas de décès de l'une des parties à une action peut s'appliquer à une partie qui n'a pris connaissance du décès qu'après l'expiration du délai de prescription. L'intimé Peter Ryan prétend qu'il faut répondre par la négative; il a invoqué, devant notre Cour et devant les tribunaux d'instance inférieure, un certain nombre de règles juridiques que je vais examiner : la possibilité de découvrir le dommage, la confirmation, la préclusion par convention et la préclusion par assertion de fait. C'est la Cour d'appel elle-même qui a soulevé pour la première fois la question de la préclusion.

2 Selon la règle de la possibilité de découvrir le dommage, une cause d'action prend naissance, pour les besoins de la prescription, au moment où les faits substantiels sur lesquels repose cette cause d'action

the plaintiff by the exercise of reasonable diligence (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224).

ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable (*Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, p. 224).

3 Section 16(1) of the *Limitations Act*, S.N.L. 1995, c. L-16.1 (see Appendix), prescribes that confirmation of a cause of action occurs when a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action. Thus, at that moment, the limitation clock is restarted, and the time before the date of the confirmation will not be counted.

Le paragraphe 16(1) de la *Limitations Act*, S.N.L. 1995, ch. L-16.1 (voir l'annexe), prévoit qu'une cause d'action est confirmée si une personne reconnaît la cause d'action appartenant à autrui ou si elle effectue un paiement à l'égard de cette cause d'action. Ainsi, le compte à rebours recommence dès lors, et le temps écoulé avant la date de confirmation ne compte pas.

4 Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (G. S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

Il peut y avoir préclusion par convention lorsque les parties ont convenu de présupposer que certains faits sont véridiques et constituent le fondement de l'opération qu'elles s'apprêtent à conclure (G. H. L. Fridman, *The Law of Contract in Canada* (4e éd. 1999), p. 140, note 302). Si les parties ont agi sur la foi de cette présupposition conventionnelle, alors, en ce qui concerne l'opération, chaque partie est précluse, par rapport à l'autre, de mettre en doute la véracité ainsi présupposée de l'exposé des faits, dans le cas où il serait injuste de permettre à l'une d'elles de revenir sur cette présupposition (G. S. Bower, *The Law Relating to Estoppel by Representation* (4e éd. 2004), p. 7-8).

5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 10 S.C.R. 132, at p. 164).

Pour que la préclusion par assertion de fait s'applique, une assertion positive doit avoir été faite par la partie que l'on souhaite voir liée par celle-ci afin que la partie avec qui elle traitait agisse sur la foi de cette assertion, et cette dernière doit avoir agi sur la foi de l'assertion de sorte qu'il serait inéquitable de permettre à l'auteur de l'assertion d'en mettre en doute la véracité ou d'agir de quelque manière incompatible avec elle (*Page c. Austin* (1884), 10 R.C.S. 132, p. 164).

6 None of these doctrines can find application in the present case. I will address each of these doctrines and in most cases adopt the reasons of the Court of Appeal with mere comment. One legal concept requires more attention from this Court, given that it is being asked to develop a legal test with regard to its application: estoppel by convention.

Aucune de ces règles n'est applicable en l'espèce. Je vais examiner chacune de celles-ci et, dans la plupart des cas, approuver les motifs de la Cour d'appel en ajoutant un simple commentaire. Une notion juridique mérite que notre Cour s'y attarde davantage étant donné qu'elle est appelée à établir un critère juridique d'application : la préclusion par convention.

I. Background

A. *Facts*

7 On November 27, 1997, three vehicles were involved in an accident. They were operated by the respondent, Ryan, the appellant, Rex Gilbert Moore, and a third party (not involved in this matter), David Crummey. Ryan decided to pursue a personal injury claim against Moore. He was unaware that, on December 26, 1998, Moore had died of causes unrelated to the accident. On February 16, 1999, Letters of Administration were granted to Moore's administratrix, Muriel Smith. On October 28, 1999, Ryan issued his statement of claim; it was within the two-year limitation period prescribed by the *Limitations Act*, but outside the applicable six-month limitation period from the granting of the letters of administration under the *Survival of Actions Act*. Ryan argues that the appellant is estopped from relying upon the shorter limitation period. Alternatively, he argues that the discoverability principle or the confirmation rule apply to extend this shorter limitation period.

8 As this case is centred on issues related to limitation periods, it is important to recollect the important events leading up to this litigation:

November 27, 1997	*The accident*
November 28, 1997	Cabot Insurance Co. ("Cabot Insurance") appoints adjuster Brian Lacey to look after the claim against its insured Moore. Ryan retains counsel who contacts the adjuster advising of his retainer and that Ryan, while his injuries are being assessed, will pursue his property damage claim directly with the adjuster.

I. Contexte

A. *Les faits*

Un accident impliquant trois véhicules est survenu le 27 novembre 1997. Ces véhicules étaient conduits par l'intimé M. Ryan, l'appelant Rex Gilbert Moore, ainsi qu'une tierce personne (non partie à l'instance), David Crummey. M. Ryan a décidé d'intenter une action pour préjudice corporel contre M. Moore. Il ignorait que, le 26 décembre 1998, M. Moore était décédé de causes non liées à l'accident. Le 16 février 1999, des lettres d'administration ont été délivrées à Muriel Smith, l'administratrice de M. Moore. M. Ryan a déposé sa déclaration le 28 octobre 1999, soit avant l'expiration du délai de prescription de deux ans fixé par la *Limitations Act*, mais après celle du délai de prescription de six mois qui, aux termes de la *Survival of Actions Act*, commence à courir à partir de la délivrance de lettres d'homologation ou d'administration. M. Ryan prétend que l'appelant est préclus d'invoquer le délai de prescription plus court. Subsidiairement, il fait valoir que ce délai plus court peut être prolongé en vertu de la règle de la possibilité de découvrir le dommage ou de la règle de la confirmation.

Étant donné que la présente affaire porte sur des questions liées aux délais de prescription, il importe de rappeler les principaux faits à l'origine du litige :

27 novembre 1997	*L'accident*
28 novembre 1997	Cabot Insurance Co. (« Cabot Insurance ») nomme l'expert en sinistres Brian Lacey qui s'occupera de la demande d'indemnité dont fait l'objet son assuré M. Moore. M. Ryan retient les services d'un avocat, qui communique avec l'expert en sinistres pour l'informer de son mandat et l'aviser qu'en attendant que ses blessures soient évaluées M. Ryan lui présentera directement sa demande d'indemnité pour préjudice matériel.

December 1997 – December 1998	Cabot Insurance pays Ryan's property damage claim directly to him. Correspondence is exchanged between Ryan's counsel and the adjuster concerning Ryan's medical condition, the adjuster seeking documentation and updates on Ryan's condition, and the counsel providing the information requested. The counsel forwards Ryan's hospital chart to the adjuster, for which Cabot Insurance reimburses counsel the $40 fee.
December 26, 1998	*Moore dies at age 75 from causes unrelated to the accident.*
January 25, 1999	The adjuster writes to Ryan's counsel seeking medical information and reiterating that the insurer would pay a reasonable fee for a medical report. He refers to Moore as "Our Insured".
February 16, 1999	*Letters of Administration of the Estate of Rex Moore are granted to Muriel Smith.*
April 5, 1999	Ryan's counsel forwards to the adjuster an invoice for a medical report of Ryan's examination by an orthopaedic surgeon.
July 29, 1999	The adjuster forwards to Ryan's counsel a cheque for payment of the medical report. The cheque is payable to

décembre 1997 – décembre 1998	Cabot Insurance verse directement à M. Ryan une indemnité pour préjudice matériel. L'avocat de M. Ryan et l'expert en sinistres échangent une correspondance concernant l'état de santé de M. Ryan, l'expert en sinistres sollicitant des documents et des mises à jour sur l'état de santé de M. Ryan, et l'avocat fournissant les renseignements demandés. L'avocat fait parvenir à l'expert en sinistres le dossier hospitalier de M. Ryan, pour lequel Cabot Insurance rembourse à l'avocat des frais de 40 $.
26 décembre 1998	*M. Moore décède à l'âge de 75 ans de causes non liées à l'accident.*
25 janvier 1999	L'expert en sinistres écrit à l'avocat de M. Ryan pour obtenir des renseignements médicaux et réitérer que l'assureur est disposé à payer des frais raisonnables pour un rapport médical. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
16 février 1999	*Des lettres d'administration de la succession de Rex Moore sont délivrées à Muriel Smith.*
5 avril 1999	L'avocat de M. Ryan fait parvenir à l'expert en sinistres une facture pour un rapport d'examen médical de M. Ryan par un chirurgien orthopédique.
29 juillet 1999	L'expert en sinistres envoie à l'avocat de M. Ryan un chèque pour payer le rapport médical. Le chèque est à l'ordre du

	Dr. Landells. He refers to Moore as “Our Insured”.
August 16, 1999	*Six months have passed since the grant of letters of administration of Moore’s estate.*
October 28, 1999	The statement of claim is issued naming Rex Moore as defendant.
February 10, 2000	Ryan’s counsel writes to the adjuster seeking payment for the cost of obtaining the chart from Ryan’s family physician. He refers to Moore as “Your Insured”.
March 2, 2000	Ryan’s counsel writes to the adjuster requesting payment for the chart of another physician. He refers to Moore as “Your Insured”.
May 18, 2000	*The adjuster learns of Moore’s death.*
September 22, 2000	*Ryan’s counsel learns of Moore’s death after attempting to serve the statement of claim.*
October 24, 2000	Ryan’s counsel suggests to Cabot Insurance’s claims examiner, Valerie Moore, in a meeting (to discuss claims unrelated to this case) that there might be a problem with the limitation period.

	Dr Landells. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
16 août 1999	*Six mois se sont écoulés depuis la délivrance des lettres d’administration de la succession de M. Moore.*
28 octobre 1999	Dépôt de la déclaration désignant Rex Moore comme défendeur.
10 février 2000	L’avocat de M. Ryan écrit à l’expert en sinistres pour lui demander de payer les frais exigés pour le dossier tenu par le médecin de famille de M. Ryan. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
2 mars 2000	L’avocat de M. Ryan écrit à l’expert en sinistres pour lui demander de payer les frais exigés pour le dossier tenu par un autre médecin. Il désigne M. Moore comme étant [TRADUCTION] « Notre assuré ».
18 mai 2000	*L’expert en sinistres apprend le décès de M. Moore.*
22 septembre 2000	*L’avocat de M. Ryan apprend le décès de M. Moore après avoir tenté de signifier la déclaration.*
24 octobre 2000	Lors d’une réunion (tenue pour discuter de demandes non liées à la présente affaire), l’avocat de M. Ryan laisse entendre à Valerie Moore, une rédactrice sinistres de Cabot Insurance, que le délai de prescription pourrait poser un problème.

November 9, 2000	Cabot Insurance refuses to settle Ryan's claim because the action is outside the limitation period.

9 novembre 2000	Cabot Insurance refuse de régler la demande de M. Ryan parce que l'action a été intentée après l'expiration du délai de prescription.

9 Cabot Insurance applied to intervene in the proceedings and sought an order striking out the statement of claim for being out of time. It further claimed that the statement of claim naming a dead person as defendant was a nullity and was not capable of being amended. Ryan also filed an application to amend the statement of claim to describe the defendant as "Rex Moore, Deceased, by his administratrix, Muriel Smith".

Cabot Insurance a présenté une demande d'intervention dans l'instance et a sollicité une ordonnance de radiation de la déclaration pour cause de tardiveté. Elle a, en outre, fait valoir que la déclaration désignant une personne décédée comme défenderesse était nulle et ne pouvait pas être modifiée. M. Ryan a également présenté une demande de modification de la déclaration en vue de désigner le défendeur comme étant [TRADUCTION] « Feu Rex Moore, représenté par son administratrice Muriel Smith ».

B. *Supreme Court of Newfoundland and Labrador* (2001), 205 Nfld. & P.E.I.R. 211

10 At the Supreme Court of Newfoundland and Labrador, Orsborn J. denied Cabot Insurance's application to have the action dismissed. First, he held that the discoverability rule did not apply to postpone the running of the *Survival of Actions Act* limitation period, since the fact of death was not an element of the cause of action and was not required to complete the cause of action (paras. 50-51). Second, Orsborn J. held that the confirmation provisions of s. 16 of the *Limitations Act* are not expressly confined to the limitation periods fixed by the *Limitations Act*. He saw no reason in principle why a cause of action continued under the *Survival of Actions Act* could not be confirmed and the limitation period fixed by that Act thus continued. He concluded that Cabot Insurance's payment for the medical report on July 29, 1999 constituted a confirmation of Ryan's cause of action. Since the action was commenced within six months of this payment, the proceeding was still within the short *Survival of Actions Act* limitation period and was not statute barred (paras. 52-63). Third, Orsborn J. concluded that in any event, on the facts of this case, the cause of action against Moore was not a cause of action to which the *Survival of Actions Act* applies. The *Survival of Actions Act* permits a cause of action to survive "for the benefit of or against" an estate

B. *Cour suprême de Terre-Neuve-et-Labrador* (2001), 205 Nfld. & P.E.I.R. 211

Le juge Orsborn de la Cour suprême de Terre-Neuve-et-Labrador a rejeté la demande de Cabot Insurance visant à obtenir le rejet de l'action. Premièrement, il a conclu que la règle de la possibilité de découvrir le dommage ne s'appliquait pas pour reporter le point de départ du délai de prescription prévu par la *Survival of Actions Act*, étant donné que le décès en tant que tel ne constituait pas un élément de la cause d'action et n'était pas nécessaire pour compléter la cause d'action (par. 50-51). Deuxièmement, le juge Orsborn a estimé que l'application des dispositions de l'art. 16 de la *Limitations Act*, relatives à la confirmation, n'était pas expressément limitée aux délais de prescription fixés par la *Limitations Act*. Il ne voyait pas pourquoi, en principe, une cause d'action ayant subsisté en vertu de la *Survival of Actions Act* ne pouvait pas être confirmée de manière à maintenir le délai de prescription fixé par cette loi. Il a conclu que le paiement du 29 juillet 1999, que Cabot Insurance avait effectué pour le rapport médical, confirmait la cause d'action de M. Ryan. Étant donné que les procédures avaient été engagées dans les six mois suivant ce paiement, l'action respectait encore le court délai de prescription fixé par la *Survival of Actions Act* et n'était pas prescrite (par. 52-63). Troisièmement, le juge Orsborn

(s. 2(b)). The *Survival of Actions Act* deals with the potential acquisition or dissipation of estate assets. However, in this case, Ryan's claim poses no risk to the assets of the estate. Instead, the risk lies on the insurer. Moore was a defendant in name only, and the real party to the action was the insurer. Thus, Ryan's cause of action was not extinguished on Moore's death (paras. 66-76). Fourth, Orsborn J. held that if Ryan's cause of action had not been confirmed and if the *Survival of Actions Act* was indeed applicable (which he held it was not), then the action would have been a nullity for being commenced outside the limitation period. However, as this was not the case, the plaintiff was not statute barred.

a décidé que, de toute façon, compte tenu des faits de la présente affaire, la cause d'action contre M. Moore n'était pas visée par la *Survival of Actions Act*. Cette loi permet qu'une cause d'action survive [TRADUCTION] « au profit » d'une succession ou « contre » celle-ci (al. 2b)). Elle traite de l'acquisition ou de la dissipation potentielles d'éléments d'actif de la succession. En l'espèce, cependant, la demande de M. Ryan ne présente aucun risque pour les biens de la succession. C'est plutôt l'assureur qui est exposé à un risque. M. Moore n'avait de défendeur que le nom, la véritable partie à l'action étant l'assureur. La cause d'action de M. Ryan ne s'était donc pas éteinte au décès de M. Moore (par. 66-76). Quatrièmement, le juge Orsborn a conclu que, si la cause d'action de M. Ryan n'avait pas été confirmée et que la *Survival of Actions Act* était effectivement applicable (ce qui n'était pas le cas, selon lui), alors l'action aurait été nulle pour cause de tardiveté. Toutefois, comme ce n'était pas le cas, l'action du demandeur n'était pas prescrite.

C. *Court of Appeal of Newfoundland and Labrador* (2003), 224 Nfld. & P.E.I.R. 181, 2003 NLCA 19

(1) Wells C.J. (for the majority)

C. *Cour d'appel de Terre-Neuve-et-Labrador* (2003), 224 Nfld. & P.E.I.R. 181, 2003 NLCA 19

(1) Le juge en chef Wells (au nom des juges majoritaires)

11

The majority of the Court of Appeal allowed, in part, both the appeal and cross-appeal. The applications judge's order to permit the intervention of Cabot Insurance and the amendment of the statement of claim was affirmed. Wells C.J. held that the applications judge made no error in considering the existence of insurance in determining whether or not the action posed a financial risk to the estate. He nevertheless held that the applications judge erred in holding that the cause of action against Moore is a cause of action to which the *Survival of Actions Act* did not apply. The court explained that unless the *Survival of Actions Act* applies, the action will be a nullity. The right to institute a tort action after death, or continue an action after death, derives from the statute. Without such a statute, this right does not otherwise exist.

La Cour d'appel, à la majorité, a accueilli en partie l'appel principal et l'appel incident. Elle a confirmé l'ordonnance du juge des requêtes autorisant l'intervention de Cabot Insurance et la modification de la déclaration. Le juge en chef Wells a conclu que le juge des requêtes n'avait commis aucune erreur en tenant compte de l'existence d'une assurance pour décider si l'action présentait un risque financier pour la succession. Il a néanmoins décidé que le juge des requêtes avait commis une erreur en concluant que la cause d'action contre M. Moore n'était pas visée par la *Survival of Actions Act*. La cour a expliqué que, à moins que la *Survival of Actions Act* ne s'applique, l'action était nulle. Le droit d'intenter une action délictuelle après le décès, ou de poursuivre une action après le décès, découle de la Loi. En l'absence d'une telle loi, ce droit n'existe pas.

12 The majority agreed with the applications judge that the discoverability rule does *not* apply to postpone the running of the limitation period under the *Survival of Actions Act*. Concluding that the limitation period in the statute runs from an event that occurs without regard to the injured party's knowledge, the majority deemed that allowing the application of the discoverability rule would disrupt the exception to the common law rule, the courts thereby intruding into the legislature's jurisdiction.

Les juges majoritaires ont partagé l'opinion du juge des requêtes selon laquelle la règle de la possibilité de découvrir le dommage *ne* s'applique *pas* pour reporter le point de départ du délai de prescription prévu par la *Survival of Actions Act*. Concluant que le délai de prescription prévu par la Loi court à compter de la date d'un événement qui survient, peu importe que la partie lésée en ait connaissance ou non, les juges majoritaires ont considéré que l'application de la règle de la possibilité de découvrir le dommage aurait pour effet d'écarter l'exception à cette règle de common law, les tribunaux se trouvant alors à empiéter sur la compétence du législateur.

13 The majority disagreed with Orsborn J.'s holding that the confirmation provisions of the *Limitations Act* also apply to the limitation period under the *Survival of Actions Act*. Wells C.J. held that s. 16 of the *Limitations Act* provides confirmation of a cause of action and not of the right to commence it. The majority pointed out that the nature of the cause of action, or whether it is confirmed, is not relevant to the date of death or of grant of probate which triggers the limitation period created by the *Survival of Actions Act*. Confirmation did not arise in relation to the limitation period stemming from the *Limitations Act* because the statement of claim was issued within two years of the collision, i.e. within the prescribed delay.

Les juges majoritaires ont exprimé leur désaccord avec la conclusion du juge Orsborn selon laquelle les dispositions de la *Limitations Act* relatives à la confirmation s'appliquent également au délai de prescription fixé par la *Survival of Actions Act*. Le juge en chef Wells a statué que l'art. 16 de la *Limitations Act* prévoit la confirmation d'une cause d'action et non du droit d'intenter une action. Les juges majoritaires ont souligné que la nature de la cause d'action ou la question de savoir si la cause d'action est confirmée n'est pas pertinente en ce qui concerne la date de décès ou la délivrance de lettres d'homologation qui marque le point de départ du délai de prescription établi par la *Survival of Actions Act*. La question de la confirmation ne se posait pas en ce qui concernait le délai de prescription résultant de la *Limitations Act* étant donné que la déclaration avait été déposée dans les deux ans suivant la collision, c'est-à-dire dans le délai prévu.

14 Turning to the last issue, the majority held that Moore's estate and Cabot Insurance were barred by the principle of estoppel from relying on the fact of Moore's death and the granting of letters of administration. The particular form of estoppel invoked was estoppel by convention. Wells C.J., having reviewed Canadian and foreign authorities and decisions, concluded that estoppel by convention was established (para. 79). The majority held that detrimental reliance was not required. Consequently, Cabot Insurance and Moore were estopped from pleading that Moore died or that letters of

Quant au dernier point, les juges majoritaires ont conclu que la règle de la préclusion empêchait la succession de M. Moore et Cabot Insurance d'invoquer le décès en tant que tel de M. Moore et la délivrance de lettres d'administration. La forme de préclusion invoquée était la préclusion par convention. Après avoir passé en revue la doctrine et la jurisprudence canadiennes et étrangères, le juge en chef Wells a décidé que la préclusion par convention était établie (par. 79). Les juges majoritaires considéraient qu'aucun acte de confiance préjudiciable n'était nécessaire. Cabot Insurance et M. Moore

administration were granted prior to May 2000 in order to invoke the shorter *Survival of Actions Act* limitation period. As a result, nullity could not be established and the statement of claim was amended to name the administratrix of Moore as defendant in the action.

étaient donc préclus d'invoquer le délai de prescription plus court fixé par la *Survival of Actions Act* en faisant valoir que M. Moore était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000. Par conséquent, la nullité ne pouvait pas être établie et la déclaration a été modifiée de manière à désigner l'administratrice de M. Moore comme partie défenderesse dans l'action.

(2) Cameron J.A. (dissenting)

(2) La juge Cameron (dissidente)

15

In dissenting reasons, concurred in by Welsh J.A., Cameron J.A. disagreed with the estoppel analysis and held that it did not apply to the case at bar. After analysing case law and doctrine, she concluded that mutual misunderstanding (both parties assuming that Moore was alive) did not amount to a common assumption. The dissenting judges did not find that the letters sent by Cabot Insurance to Ryan's counsel referring to "Our Insured: Rex Moore" formed the basis on which the parties governed their conduct. The failure to commence the action within the *Survival of Actions Act*'s limitation period was *not* due to any arrangement between the parties, and consequently, there was no reliance on any convention. Therefore, this principle did not apply. Ryan's action was therefore time barred. The dissenting judges would have allowed the appeal.

Dans ses motifs dissidents, auxquels le juge Welsh a souscrit, la juge Cameron s'est dite en désaccord avec l'analyse de la préclusion et a décidé que cette règle ne s'appliquait pas en l'espèce. Après avoir analysé la jurisprudence et la doctrine, elle a conclu qu'une méprise de part et d'autre (les deux parties ayant cru que M. Moore était vivant) ne constituait pas une présupposition commune. Les juges dissidents n'ont pas considéré que les lettres portant la mention [TRADUCTION] « Notre assuré : Rex Moore » que Cabot Insurance avait envoyées à l'avocat de M. Ryan avaient déterminé la conduite des parties. L'omission d'intenter l'action avant l'expiration du délai de prescription fixé par la *Survival of Actions Act* n'était *pas* le fruit d'un arrangement entre les parties, si bien que l'on ne s'était fondé sur aucune convention. Par conséquent, cette règle ne s'appliquait pas. L'action de M. Ryan était donc prescrite. Les juges dissidents auraient accueilli l'appel.

II. Analysis

II. Analyse

A. *Discoverability*

A. *La possibilité de découvrir le dommage*

(1) Statutory Limitation Periods

(1) Les délais de prescription légaux

16

The situation here is governed by two limitation periods: s. 5 of the *Limitations Act* (see Appendix) and s. 5 of the *Survival of Actions Act*. The limitation period in s. 5 of the *Limitations Act* applies initially. Section 5 of the *Survival of Actions Act* superimposes itself on s. 5 at a later point in time, but does not eliminate it. This follows from the fact that the *Survival of Actions Act* does not create a new cause of action, as will be explained later.

Deux délais de prescription s'appliquent en l'espèce : celui prévu par l'art. 5 de la *Limitations Act* (voir l'annexe) et celui prévu par l'art. 5 de la *Survival of Actions Act*. Le délai de prescription établi par l'art. 5 de la *Limitations Act* s'applique au départ. Il se superpose, par la suite, au délai fixé par l'art. 5 de la *Limitations Act*, sans toutefois l'éliminer. Cela découle du fait que la *Survival of Actions Act* ne crée pas une nouvelle cause d'action, comme je l'expliquerai plus loin.

17 Pursuant to s. 5 of the *Limitations Act*, a person can bring an action for damages in respect of injury based on contract or tort within two years of the date on which the right to do so arose. Ryan, by issuing a statement of claim on October 28, 1999, naming Rex Moore as the defendant, therefore, met the prescribed limitation period in the *Limitations Act*. Nevertheless, unknown to the parties, Rex Moore had died on December 26, 1998, altering the fact scenario.

Aux termes de l'art. 5 de la *Limitations Act*, une action en dommages-intérêts pour préjudice, fondée sur une inexécution de contrat ou sur un délit, peut être intentée dans les deux ans suivant la date à laquelle a pris naissance le droit de l'intenter. En déposant, le 28 octobre 1999, une déclaration désignant Rex Moore comme défendeur, M. Ryan a donc respecté le délai de prescription fixé par la *Limitations Act*. Cependant, Rex Moore était décédé le 26 décembre 1998, à l'insu des parties, ce qui modifiait le scénario.

18 As stated by the Court of Appeal, it is well known that at common law a personal action in tort is extinguished on the death of the victim or the wrongdoer: *actio personalis moritur cum persona* (see G. Mew, *The Law of Limitations* (2nd ed. 2004), at p. 253). Being unable to sue the estate of a deceased tortfeasor was particularly severe as it left injured survivors of motor vehicle accidents without any means of recovery. This led legislatures to enact statutes to diminish the hardship of the common law rule. The *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6, and the *Survival of Actions Act* were such statutes. Under the *Fatal Accidents Act*, the estate of a person who died as a result of the accident, or the survivors of that person, are accorded the right to maintain an action for death by wrongful act. Also, pursuant to s. 2 of the *Survival of Actions Act* (see Appendix), an action vested in or existing against a person who has died can be maintained by or against the deceased person's estate. However, s. 5 of the *Survival of Actions Act* prohibits an action brought six months after letters of probate or administration of the estate of the deceased have been granted, and after the expiration of one year from the date of death. Hence, the provision is meant to keep the action "alive" for a specific period of time. The *Survival of Actions Act* imposes an additional limitation period. As eloquently affirmed by Orsborn J., the *Survival of Actions Act* does not create a cause of action. It grafts its provision onto an existing cause of action, one which is complete in all of its elements before the operation of the *Survival of Actions Act* (para. 45).

Comme l'a affirmé la Cour d'appel, il est bien connu qu'en common law une action délictuelle personnelle s'éteint au décès de la victime ou de l'auteur de la faute : *actio personalis moritur cum persona* (voir G. Mew, *The Law of Limitations* (2e éd. 2004), p. 253). L'incapacité de poursuivre la succession de l'auteur d'un délit civil décédé était particulièrement lourde de conséquences du fait qu'elle privait de toute possibilité d'indemnisation les survivants blessés d'un accident d'automobile. Cela a amené des législatures à adopter des lois destinées à adoucir la règle de common law. La *Fatal Accidents Act*, R.S.N.L. 1990, ch. F-6, et la *Survival of Actions Act* comptent parmi ces lois. Aux termes de la *Fatal Accidents Act*, la succession d'une personne décédée à la suite d'un accident ou les personnes qui lui survivent ont le droit d'intenter une action pour décès causé par une faute. De plus, aux termes de l'art. 2 de la *Survival of Actions Act* (voir l'annexe), une action appartenant à une personne décédée ou existant contre elle peut être intentée par ou contre sa succession. Toutefois, l'art. 5 de la *Survival of Actions Act* prévoit qu'aucune action ne peut être intentée après les six mois qui suivent la délivrance de lettres d'homologation ou d'administration de la succession de la personne décédée et après l'expiration d'un délai d'un an suivant la date du décès. Cette disposition vise donc à assurer la « survie » de l'action pendant une période déterminée. La *Survival of Actions Act* fixe un autre délai de prescription. Comme le juge Orsborn l'a si bien dit, la *Survival of Actions Act* ne crée pas une cause d'action. Elle greffe sa disposition sur une cause d'action existante dont tous les éléments sont présents avant que la *Survival of Actions Act* soit appliquée (par. 45).

19 In the case at bar, the *Survival of Actions Act* has the effect of shortening the time period within which the action could be taken because "an action founded in tort may only be taken by or against the estate of a deceased person if it is commenced within that period of time that is common to both limitations periods": *per* Wells C.J., at para. 37.

En l'espèce, la *Survival of Actions Act* a pour effet de raccourcir le délai dans lequel l'action pourrait être intentée parce qu'[TRADUCTION] « une action délictuelle ne peut être intentée par ou contre la succession d'une personne décédée que pendant la période de chevauchement des deux délais de prescription » : le juge en chef Wells, par. 37.

20 Ryan argues that the *Survival of Actions Act* contemplates that a cause of action can arise under the *Survival of Actions Act*. I fail to see how the expression "[c]auses of action under this Act" or "an action . . . under this Act" found in ss. 8(1) and 5 respectively can be seen to indicate the *creation* of a new cause of action. The *Survival of Actions Act* expressly contemplates the *survival* of causes of action *existing* against a person who has died (s. 2). I take that to mean that the cause of action existed prior to the application of the *Survival of Actions Act*. The survival of a cause of action for a time and its creation are two different things.

Selon M. Ryan, la *Survival of Actions Act* prévoit qu'une cause d'action peut prendre naissance en vertu de ses dispositions. Je ne vois pas comment les expressions [TRADUCTION] « causes d'action en vertu de la présente loi » ou « action [. . .] intentée en vertu de la présente loi », contenues respectivement au par. 8(1) et à l'art. 5, peuvent être considérées comme indiquant la *création* d'une nouvelle cause d'action. La *Survival of Actions Act* prévoit expressément la *survie* des causes d'action *existant* contre une personne décédée (art. 2). À mon avis, cela signifie que la cause d'action existait avant que la *Survival of Actions Act* soit appliquée. La création d'une cause d'action et sa survie pendant un certain temps sont deux choses différentes.

(2) Discoverability: The Judge-Made Rule

(2) La possibilité de découvrir le dommage : la règle prétorienne

21 The debate concerning the use of the discoverability principle in tort actions has been settled by this Court in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, *Central Trust* and *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6.

Dans les arrêts *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2, *Central Trust* et *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, notre Cour a tranché le débat concernant l'application de la règle de la possibilité de découvrir le dommage dans les actions délictuelles.

22 The discoverability principle provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust*, at p. 224. In some provinces, the discoverability rule has been codified by statute; in others, it has been deemed redundant because of other remedial provisions.

Selon la règle de la possibilité de découvrir le dommage, « une cause d'action prend naissance, aux fins de la prescription, lorsque les faits importants sur lesquels repose cette cause d'action ont été découverts par le demandeur ou auraient dû l'être s'il avait fait preuve de diligence raisonnable » : *Central Trust*, p. 224. Dans certaines provinces, la règle de la possibilité de découvrir le dommage a été codifiée; dans d'autres provinces, elle a été jugée redondante à cause de l'existence d'autres dispositions réparatrices.

23 While discoverability has been qualified in the past as a "general rule" (*Central Trust*, at p. 224; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at

Bien qu'elle ait été qualifiée, par le passé, de « règle générale » (*Central Trust*, p. 224; *Peixeiro c. Haberman*, [1997] 3 R.C.S. 549, par. 36), la règle

para. 36), it must not be applied systematically without a thorough balancing of competing interests (*Peixeiro*, at para. 34). The rule is an interpretative tool for construing limitation statutes. I agree with the Manitoba Court of Appeal when it writes:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200, at p. 206)

See also *Peixeiro*, at para. 37; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (Nfld. C.A.).

24 Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see Mew, at p. 55).

(3) Discoverability Principle Does Not Apply to the *Survival of Actions Act*

25 Ryan submits that the discoverability rule applies to the limitation period contained in s. 5 of the *Survival of Actions Act*. He argues that the

de la possibilité de découvrir le dommage ne doit pas être appliquée systématiquement sans une évaluation complète des intérêts opposés (*Peixeiro*, par. 34). Cette règle est un outil d'interprétation des lois qui établissent des délais de prescription. Je partage l'opinion de la Cour d'appel du Manitoba lorsqu'elle écrit :

> [TRADUCTION] À mon avis, la règle prétorienne de la possibilité de découvrir le dommage n'est rien de plus qu'une règle d'interprétation. Dans tous les cas où une loi indique que l'action en justice doit être intentée dans un certain délai après un événement donné, il faut interpréter les termes de cette loi. Lorsque ce délai court à partir du « moment où naît la cause d'action » ou de tout autre événement qui peut être interprété comme ne survenant qu'au moment où la victime prend connaissance du dommage, c'est la règle prétorienne de la possibilité de découvrir le dommage qui s'applique. Toutefois, si le délai court à compter de la date d'un événement qui survient clairement, et sans égard à la connaissance qu'en a la victime, cette règle ne peut prolonger le délai fixé par le législateur. [Je souligne.]

(*Fehr c. Jacob* (1993), 14 C.C.L.T. (2d) 200, p. 206)

Voir également les arrêts *Peixeiro*, par. 37, et *Snow c. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (C.A.T.-N.).

Par conséquent, la Cour d'appel de Terre-Neuve-et-Labrador a raison de dire que la règle s'applique [TRADUCTION] « généralement » lorsque la loi lie le point de départ du délai de prescription à la naissance de la cause d'action. Il n'est pas permis, en droit, de recourir à la règle prétorienne de la possibilité de découvrir le dommage dans les cas où la loi applicable lie expressément le délai de prescription à un événement déterminé qui n'a rien à voir avec le moment où la partie lésée en prend connaissance ou avec le fondement de la cause d'action (voir Mew, p. 55).

(3) La règle de la possibilité de découvrir le dommage ne s'applique pas à la *Survival of Actions Act*

M. Ryan fait valoir que la règle de la possibilité de découvrir le dommage s'applique au délai de prescription prévu à l'art. 5 de la *Survival of Actions*

limitation period should not begin to run until he knew, or ought reasonably to have known, the material facts which determine (i) his cause of action under the *Survival of Actions Act* and (ii) the limitation period. In sum, Ryan claims that the death of Moore is integral to the cause of action and that the limitation period should not start to run until he knew that he had a cause of action against the estate of Rex Moore. The appellants submit that the discoverability rule does not apply to the *Survival of Actions Act* as it would transcend the logic of statutory interpretation and the scheme enacted by the legislature. In addition, they say that the rule does not apply where time runs from a fixed event.

Act. Il prétend que ce délai de prescription ne devrait commencer à courir qu'à partir du moment où il a pris connaissance, ou aurait raisonnablement dû prendre connaissance, des faits substantiels déterminants en ce qui concerne (i) sa cause d'action en vertu de la *Survival of Actions Act* et (ii) le délai de prescription. Somme toute, M. Ryan affirme que le décès de M. Moore fait partie intégrante de la cause d'action et que le délai de prescription ne devait commencer à courir qu'à partir du moment où il a découvert qu'il avait une cause d'action contre la succession de Rex Moore. Les appelants soutiennent que la règle de la possibilité de découvrir le dommage ne s'applique pas à la *Survival of Actions Act* étant donné qu'elle transcenderait la logique de l'interprétation des lois et du régime établi par le législateur. Ils ajoutent que la règle ne s'applique pas lorsque le délai a pour point de départ un fait déterminé.

26

Like the Court of Appeal, I am of the view that the appellants' position is correct. For ease of reference, I reproduce s. 5 of the *Survival of Actions Act*:

> **5.** An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

À l'instar de la Cour d'appel, je suis d'avis que la position des appelants est correcte. Pour en faciliter la consultation, je reproduis l'art. 5 de la *Survival of Actions Act* :

[TRADUCTION]

> **5.** Aucune action ne peut être intentée en vertu de la présente loi à moins que les procédures ne soient engagées dans les six mois suivant la délivrance de lettres d'homologation ou d'administration de la succession de la personne décédée, et, pour les besoins d'une action fondée sur la présente loi, les procédures ne doivent pas être engagées après l'expiration d'un an suivant la date du décès de la personne en question.

27

Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. The Act does not establish a relationship between these events and the injured party's knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I

Aux termes de la *Survival of Actions Act*, le délai de prescription court à compter du décès du défendeur ou de la délivrance, par un tribunal, de lettres d'administration ou d'homologation. L'article est clair et explicite : le délai commence à courir au moment où survient l'un de ces deux faits particuliers. La Loi n'établit aucun lien entre ces faits et le moment où la partie lésée en prend connaissance. Je conviens avec les appelants que la connaissance n'est pas un facteur à considérer : le décès ou la délivrance des lettres survient indépendamment de l'état d'esprit du demandeur. En l'espèce, nous nous trouvons devant une situation où, comme notre Cour l'a reconnu dans l'arrêt *Peixeiro*, la règle prétorienne de

agree with the Court of Appeal that by using a specific event as the starting point of the "limitation clock", the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies.

la possibilité de découvrir le dommage ne s'applique pas pour prolonger le délai fixé par le législateur. Je suis donc d'accord avec la Cour d'appel pour dire qu'en désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur se trouvait à écarter la règle de la possibilité de découvrir le dommage dans tous les cas où la *Survival of Actions Act* s'applique.

28

A number of the appellate courts have dealt with the question of discoverability in the context of actions by or against estates of deceased persons. The appellants rely extensively on *Payne v. Brady* (1996), 140 D.L.R. (4th) 88 (Nfld. C.A.), leave to appeal refused, [1997] 2 S.C.R. xiii. While the facts of that case are very similar to the present, it is not clear whether the Court of Appeal of Newfoundland decided that the rule of discoverability did not apply because death is always a possibility or because the appellant Payne had ample time after she became aware of the death of Brady to commence her action. What is clear is the point advanced by O'Neill J.A.: the death of a prospective defendant and the possibility of a shortened period to commence an action is a reality that claimants and their counsel have to guard against: *Payne*, at p. 94.

Un certain nombre de cours d'appel ont examiné la question de la possibilité de découvrir le dommage dans le contexte d'actions intentées par ou contre les successions de personnes décédées. Les appelants invoquent abondamment l'arrêt *Payne c. Brady* (1996), 140 D.L.R. (4th) 88 (C.A.T.-N.), autorisation de pourvoi refusée, [1997] 2 R.C.S. xiii. Bien que les faits de cet arrêt ressemblent énormément à ceux de la présente affaire, on ne sait pas clairement si la Cour d'appel de Terre-Neuve y a décidé que la règle de la possibilité de découvrir le dommage ne s'appliquait pas parce que le décès est toujours une possibilité ou parce que l'appelante Payne avait eu amplement le temps d'intenter son action après avoir appris le décès de M. Brady. Ce qui est clair, c'est la remarque du juge O'Neill : le décès d'un éventuel défendeur et la possibilité d'un délai de prescription plus court sont des réalités contre lesquelles les demandeurs et leurs avocats doivent se prémunir (*Payne*, p. 94).

29

The Nova Scotia Court of Appeal decision in *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193, is invoked by the respondent. However, the reasoning of that case cannot be applied in the case at bar. In *Burt*, the Court of Appeal held that the discoverability rule applied to s. 10 of the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163. The Nova Scotia Court of Appeal stated its position in the following manner (at p. 208):

> If the discoverability rule applies to a limitation period running from "when the damages were sustained" (*Peixeiro*) and from "the final determination of the action against the insured" (*Grenier*), I think it is not unreasonable to apply it to the period one year after the death so as to start time running only when the claimant knows or ought to know that the death might be a wrongful one. This, having in mind the statutory scheme of the *Fatal*

L'intimé invoque l'arrêt de la Cour d'appel de la Nouvelle-Écosse *Burt c. LeLacheur* (2000), 189 D.L.R. (4th) 193. Toutefois, le raisonnement adopté dans cette affaire ne peut pas s'appliquer en l'espèce. Dans l'arrêt *Burt*, la Cour d'appel a conclu que la règle de la possibilité de découvrir le dommage s'appliquait à l'art. 10 de la *Fatal Injuries Act*, R.S.N.S. 1989, ch. 163. La Cour d'appel de la Nouvelle-Écosse a exposé son point de vue en ces termes (p. 208) :

> [TRADUCTION] Si la règle de la possibilité de découvrir le dommage s'applique à un délai de prescription qui court à compter de la date « où les dommages ont été subis » (*Peixeiro*) et du « règlement final de l'action intentée contre l'assuré » (*Grenier*), je ne pense pas qu'il soit déraisonnable de l'appliquer à ce délai un an après le décès de sorte qu'il ne commence à courir qu'au moment où le demandeur prend connaissance ou aurait

Injuries Act, is no greater a stretch of the language than was made by the courts in *Peixeiro*, *Grenier* and other cases, all for the purpose of preventing a potential injustice.

We must avoid the accusation of usurping the role of the Legislature, but in my opinion to apply the discoverability rule here is consistent with what has already been done before. On the true consideration of s. 10 of the *Fatal Injuries Act*, time does not run simply from a fixed event, but from constituent elements of the cause of action created by the statute. [Emphasis added.]

30 In *Burt*, the death of a person for which an action can be brought under the *Fatal Injuries Act* does not merely refer to the time of death as provided in the *Survival of Actions Act*, but to a "wrongful" death. It is not an event totally unrelated to the accrual of the cause of action. Hence, the death of the person there is in fact a "constituent elemen[t] of the cause of action", contrary to the present case.

31 In my view, the case that best assists this Court in the present matter is the one giving rise to the Ontario Court of Appeal's decision in *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370. The court had to determine the possible application of the discoverability rule to s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23, the statutory provision in Ontario permitting an action in tort by or against the estate of a deceased person and limiting the period during which such actions may be commenced. Abella J.A., as she then was, concluded, at para. 16, that the discoverability rule did not apply to the section since the state of actual or attributed knowledge of an injured person in a tort claim is not germane when a death has occurred. She explained at paras. 8-9:

In s. 38(3) of the *Trustee Act*, the limitation period runs from a death. Unlike cases where the wording of the limitation period permits the time to run, for example,

dû prendre connaissance du fait qu'il se pourrait que le décès ait été causé par la faute d'autrui. Compte tenu de l'économie de la *Fatal Injuries Act*, ce n'est pas aller plus loin que les tribunaux l'ont fait dans les arrêts *Peixeiro*, *Grenier* et autres, toujours dans le but d'écarter un risque d'injustice.

Bien qu'il nous faille éviter d'être accusés d'usurper le rôle du législateur, j'estime qu'appliquer la règle de la possibilité de découvrir le dommage en l'espèce est compatible avec ce qui a déjà été fait. Un examen attentif de l'art. 10 de la *Fatal Injuries Act* révèle que le délai commence à courir non pas simplement à compter du moment où survient un fait déterminé, mais dès que sont établis les éléments constitutifs de la cause d'action créée par la loi. [Je souligne.]

Dans l'arrêt *Burt*, la mention du décès d'une personne qui peut faire l'objet d'une action fondée sur la *Fatal Injuries Act* renvoie non pas simplement au moment du décès, comme c'est le cas dans la *Survival of Actions Act*, mais à un décès « causé par la faute d'autrui ». Il ne s'agit pas d'un fait dépourvu de tout lien avec la naissance de la cause d'action. Par conséquent, le décès de la personne dans cette affaire est, en fait, un « élémen[t] constituti[f] de la cause d'action », contrairement à ce qui se passe en l'espèce.

À mon avis, l'affaire la plus utile à notre Cour en l'espèce est celle qui est à l'origine de l'arrêt de la Cour d'appel de l'Ontario *Waschkowski c. Hopkinson Estate* (2000), 47 O.R. (3d) 370. La cour devait décider si la règle de la possibilité de découvrir le dommage pouvait être appliquée au par. 38(3) de la *Loi sur les fiduciaires*, L.R.O. 1990, ch. T.23, la disposition législative ontarienne qui prévoit qu'une action délictuelle peut être intentée par ou contre la succession d'une personne décédée et qui limite le délai dans lequel ces actions peuvent être intentées. La juge Abella (maintenant juge de notre Cour) a conclu, au par. 16, que la règle de la possibilité de découvrir le dommage ne s'appliquait pas à cette disposition puisque, dans une action délictuelle, l'état des connaissances d'une personne lésée ou celui qu'on lui attribue n'a aucune pertinence en cas de décès. Elle a expliqué ceci, aux par. 8-9 :

[TRADUCTION] Aux termes du par. 38(3) de la *Loi sur les fiduciaires*, le délai de prescription court à compter d'un décès. Contrairement aux affaires dans lesquelles

from "when the damage was sustained" (*Peixeiro*) or when the cause of action arose (*Kamloops*), there is no temporal elasticity possible when the pivotal event is the date of a death. Regardless of when the injuries occurred or matured into an actionable wrong, s. 38(3) of the *Trustee Act* prevents their transformation into a legal claim unless that claim is brought within two years of the death of the wrongdoer or the person wronged.

The underlying policy considerations of this clear time limit are not difficult to understand. The draconian legal impact of the common law was that death terminated any possible redress for negligent conduct. On the other hand, there was a benefit to disposing of estate matters with finality. The legislative compromise in s. 38 of the *Trustee Act* was to open a two-year window, making access to a remedy available for a limited time without creating indefinite fiscal vulnerability for an estate. [Emphasis added.]

See also *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL) (C.A.), and *Edwards v. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321 (C.A.).

32 Ryan's cause of action arose prior to Moore's death and Ryan was well aware of his cause of action both before Moore's death and before the expiration of the *Survival of Actions Act* limitation period. In fact, the day following the accident, Ryan retained a solicitor to pursue a claim for damages against Moore for injuries alleged to have resulted from the accident. At that point, Ryan could have sued Moore as all the elements of his cause of action were known. He did not need to have knowledge of the death in question to prove his claim or issue and serve the statement of claim. Moore's subsequent death had no impact whatsoever on the accrual of Ryan's cause of action. Consequently, I agree with the conclusion of the applications judge, at para. 50:

The fact of death is of no relevance to the cause of action in question. It is not an element of the cause of action and is not required to complete the cause of action. Whatever the nature of the cause of action, it is existing

le délai de prescription peut, en raison de sa formulation, avoir pour point de départ, par exemple, la date « où les dommages ont été subis » (*Peixeiro*) ou le moment où la cause d'action a pris naissance (*Kamloops*), aucune élasticité temporelle n'est possible lorsque la date de décès est l'élément décisif. Peu importe le moment où le préjudice a été causé ou est devenu une faute ouvrant droit à une action, le par. 38(3) de la *Loi sur les fiduciaires* empêche qu'il donne lieu à une action en justice, à moins que cette action ne soit intentée dans les deux ans suivant le décès de l'auteur de la faute ou de la personne lésée.

Les considérations de politique générale qui sous-tendent ce délai précis ne sont pas difficiles à comprendre. L'effet juridique draconien de la common law était que le décès écartait toute possibilité de réparation pour une conduite négligente. Par contre, il était avantageux de régler les questions de succession de manière définitive. Le compromis législatif à l'art. 38 de la *Loi sur les fiduciaires* consistait à ouvrir une brèche de deux ans afin de donner accès à une réparation pendant un temps limité, sans placer indéfiniment une succession dans une situation de vulnérabilité financière. [Je souligne.]

Voir aussi *Canadian Red Cross Society (Re)*, [2003] O.J. No. 5669 (QL) (C.A.), et *Edwards c. Law Society of Upper Canada (No. 1)* (2000), 48 O.R. (3d) 321 (C.A.).

La cause d'action de M. Ryan a pris naissance avant le décès de M. Moore, et M. Ryan était bien au fait de sa cause d'action tant avant le décès de M. Moore qu'avant l'expiration du délai de prescription fixé par la *Survival of Actions Act*. En réalité, M. Ryan a, le lendemain de l'accident, retenu les services d'un avocat en vue d'intenter une action en dommages-intérêts contre M. Moore pour des blessures qui auraient été causées par l'accident. M. Ryan aurait alors pu poursuivre M. Moore étant donné que tous les éléments de sa cause d'action étaient connus. Il n'avait pas besoin d'être au courant du décès en question pour établir le bien-fondé de sa demande ou pour déposer et signifier sa déclaration. Le décès subséquent de M. Moore n'avait absolument aucune incidence sur la naissance de la cause d'action de M. Ryan. En conséquence, je suis d'accord avec la conclusion du juge des requêtes, au par. 50 :

[TRADUCTION] Le décès en tant que tel n'a aucune pertinence en ce qui concerne la cause d'action en question. Il ne constitue pas un élément de la cause d'action et n'est pas nécessaire pour compléter la cause d'action.

and complete before the *Survival of Actions Act* operates, in the case of a death, to maintain it and provide a limited time window within which it must be pursued. The fact of the death is irrelevant to the cause of action and serves only to provide a time from which the time within which to bring the action is to be calculated.

A further reason for the non-application of the discoverability rule is the evident impact such a rule would have on the distribution of assets to the beneficiaries. Without a time limit, an executor or an administrator would not feel free to distribute the assets of an estate until all reasonable possibilities of claim had been addressed. This would be cumbersome and unrealistic. "An estate should not be held to ransom interminably by the advancement of claims which are not proceeded with in a timely manner": *MacKenzie Estate v. MacKenzie* (1992), 84 Man. R. (2d) 149 (Q.B.), at para. 18, cited in *Justice v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (Man. C.A.), at p. 510.

The *Survival of Actions Act* is itself a legislative exception to a common law rule. Thus, it would displace the intention of the legislature to "stretch" the limitation period. Borrowing the words of Marshall J.A. in *Snow*, at para. 43, to apply the rule of construction of reasonable discoverability to such a provision would be tantamount to mounting a fiction transcending the limits of logical statutory interpretation. Hence, it would constitute an impermissible incursion into the legislative process.

(4) Special Circumstances

Ryan submits, as an alternative, that if the discoverability rule does not apply, the limitation period should be extended because of the "special circumstances" principle. He claims that, pursuant to this principle, fairness and justice require that an innocent plaintiff should not be deprived of compensation through no fault of his own. This argument was not invoked in front of the applications judge or the Court of Appeal, and is not supported by any evidence; under these circumstances, it is, in my view, without merit.

Quelle que soit la nature de la cause d'action, elle existe et est complète avant que la *Survival of Actions Act* s'applique, en cas de décès, pour la maintenir et fixer un délai limité dans lequel l'action devra être intentée. Le décès en tant que tel n'est pas pertinent en ce qui concerne la cause d'action et sert seulement de point de départ pour calculer le délai dans lequel l'action devra être intentée.

33 Une autre raison de ne pas appliquer la règle de la possibilité de découvrir le dommage est l'incidence évidente que cette règle aurait sur la distribution de l'actif aux bénéficiaires. En l'absence d'un délai, un exécuteur ou un administrateur hésiterait à distribuer l'actif d'une succession avant d'avoir examiné toutes les possibilités raisonnables de réclamation, ce qui serait peu pratique et irréaliste. [TRADUCTION] « Une succession ne devrait pas être gardée indéfiniment en otage par des réclamations non traitées promptement » : *MacKenzie Estate c. MacKenzie* (1992), 84 Man. R. (2d) 149 (B.R.), par. 18, cité dans l'arrêt *Justice c. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (C.A. Man.), p. 510.

34 La *Survival of Actions Act* constitue en soi une exception législative à la règle de common law. « Prolonger » le délai de prescription aurait pour effet d'écarter l'intention du législateur. Comme l'a dit le juge Marshall dans l'arrêt *Snow*, au par. 43, appliquer à une telle disposition la règle d'interprétation de la possibilité raisonnable de découvrir le dommage reviendrait à créer une fiction qui transcenderait les limites de l'interprétation logique des lois. Du même coup, il s'agirait d'une incursion inacceptable dans le processus législatif.

(4) Circonstances spéciales

35 Subsidiairement, M. Ryan fait valoir que, si la règle de la possibilité de découvrir le dommage ne s'applique pas, le délai de prescription doit être prolongé en raison du principe des « circonstances spéciales ». Il soutient que selon ce principe, l'équité et la justice commandent qu'un demandeur innocent ne soit pas privé d'indemnisation s'il n'a lui-même commis aucune faute. Cet argument n'a été avancé ni devant le juge des requêtes ni devant la Cour d'appel, et ne repose sur aucun élément de preuve; dans ces circonstances, je le considère non fondé.

B. *Confirmation*

36 Ryan claims that the confirmation of the cause of action pursued under s. 16 of the *Limitations Act* applies to extend the limitation period contained in s. 5 of the *Survival of Actions Act*. He argues that the correspondence exchanged between Cabot Insurance's adjuster and his previous counsel, the payment made by Cabot Insurance for his property damage claim, as well as a payment of $500 to his previous counsel for a medical report, prove acknowledgment (as contemplated by the *Limitations Act*) and therefore confirmation.

37 The appellants submit that s. 16 of the *Limitations Act* does not apply to the *Survival of Actions Act*. They claim that any confirmation of the cause of action would have no effect on the *Survival of Actions Act* limitation period because the *Survival of Actions Act* does not create a cause of action but simply confers a right to pursue a claim notwithstanding the fact that one of the parties has died. Finally, they argue that there was no confirmation of the cause of action in this case as there was no admission of liability through the letters nor the payments made.

38 I agree with the appellants' position as accepted by the Court of Appeal.

39 The relevant portions of s. 16 of the *Limitations Act* provide:

16. (1) A confirmation of a cause of action occurs where a person

(a) acknowledges that cause of action, right or title of another person; or

(b) makes a payment in respect of that cause of action, right or title of another.

(2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.

B. *Confirmation*

M. Ryan prétend que la confirmation de la cause d'action prévue à l'art. 16 de la *Limitations Act* s'applique pour prolonger le délai de prescription fixé à l'art. 5 de la *Survival of Actions Act*. Il fait valoir que l'échange de correspondance entre l'expert en sinistres de Cabot Insurance et son ancien avocat, le paiement effectué par Cabot Insurance relativement à sa demande d'indemnité pour préjudice matériel et le versement de 500 $ à son ancien avocat pour un rapport médical prouvent qu'il y a eu reconnaissance (comme le prévoit la *Limitations Act*) et donc confirmation.

Les appelants soutiennent que l'art. 16 de la *Limitations Act* ne s'applique pas à la *Survival of Actions Act*. Selon eux, une confirmation de la cause d'action n'aurait aucun effet sur le délai de prescription fixé par la *Survival of Actions Act* parce que cette loi ne crée pas une cause d'action, mais ne fait que conférer un droit d'intenter une action malgré le décès de l'une des parties. Enfin, ils affirment que la cause d'action n'a pas été confirmée en l'espèce étant donné que ni les lettres ni les paiements effectués ne traduisent une reconnaissance de responsabilité.

Je partage le point de vue des appelants, qui a été retenu par la Cour d'appel.

Voici les parties pertinentes de l'art. 16 de la *Limitations Act* :

[TRADUCTION]

16. (1) Une cause d'action est confirmée si, selon le cas, une personne :

a) reconnaît cette cause d'action, ce droit ou ce titre appartenant à autrui;

b) effectue un paiement à l'égard de cette cause d'action, de ce droit ou de ce titre appartenant à autrui.

(2) En cas de confirmation, la période antérieure à la date de la confirmation est exclue du calcul de la prescription de l'action de la personne qui bénéficie de cette confirmation par rapport à celle qui est liée par celle-ci.

(3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.

. . .

(5) In order to be effective a confirmation must be in writing and signed by

(a) the person against whom that cause of action lies; or

(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

40 When a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action, a confirmation of that cause of action occurs. Consequently, the time accrued before the date of that confirmation shall not be considered when determining the limitation period (s. 16(2)). Confirmation must, of course, be made prior to the expiration of the limitation period (s. 16(3)).

41 Section 16 can only apply to a limitation period which limits the time during which an action may be taken. Since the limitation period which arises under the *Survival of Actions Act* supersedes the first limitation period of the *Limitations Act*, and does not create or revive an action, but merely permits it to continue, s. 16 cannot apply to it as found by the Court of Appeal (para. 67).

42 Even if this were not the case, the facts here do not support a finding of confirmation on the part of the appellants. I will address this issue briefly as a matter of principle.

43 In order to establish confirmation, one of two events must be proven: (1) that the party acknowledged the cause of action; or (2) that there was a payment made in respect of the cause of action (see Mew, at p. 115).

44 The term "acknowledges" as used in s. 16(1)(a) of the *Limitations Act* has been described by Lord Denning in *Good v. Parry*, [1963] 2 All E.R. 59 (C.A.), at p. 61, as requiring an "admission". While

(3) Le paragraphe (2) ne vise un droit d'action que si la confirmation a lieu avant l'expiration du délai de prescription applicable à ce droit d'action.

. . .

(5) La confirmation est valide si elle est consignée dans un écrit, signée par l'une des personnes suivantes et remise à la personne qui bénéficie de cette cause d'action ou à son mandataire :

a) soit la personne visée par la cause d'action,

b) soit son mandataire.

Il y a confirmation lorsqu'une personne reconnaît la cause d'action d'autrui ou effectue un paiement à l'égard de cette cause d'action. Par conséquent, la période antérieure à la date de cette confirmation est exclue du calcul du délai de prescription (par. 16(2)). La confirmation doit évidemment avoir lieu avant l'expiration du délai de prescription (par. 16(3)).

L'article 16 ne peut s'appliquer qu'au délai dans lequel une action peut être intentée. Comme l'a conclu la Cour d'appel, l'art. 16 ne peut pas s'appliquer au délai de prescription fixé par la *Survival of Actions Act* étant donné qu'il supplante le premier délai de prescription fixé par la *Limitations Act* et ne crée pas et ne relance pas une action, mais lui permet simplement de suivre son cours (par. 67).

Même si ce n'était pas le cas, les faits de la présente affaire ne permettent pas de conclure à une confirmation de la part des appelants. Je vais, par principe, examiner brièvement cette question.

Pour prouver qu'il y a eu confirmation, il est nécessaire d'établir l'existence de l'un des deux faits suivants : (1) la partie a reconnu la cause d'action, ou (2) un paiement a été effectué à l'égard de la cause d'action (voir Mew, p. 115).

Le terme « *acknowledges* » (« reconnaît ») utilisé à l'al. 16(1)a) de la *Limitations Act* a été décrit par lord Denning, dans l'arrêt *Good c. Parry*, [1963] 2 All E.R. 59 (C.A.), p. 61, comme nécessitant une

care must be shown when applying English case law, as the English *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, does not provide for the acknowledgment of the "cause of action" but the acknowledgment of the "claim", it is still persuasive authority for the present interpretation.

« *admission* » (« admission »). Bien que la jurisprudence anglaise doive être appliquée avec prudence, étant donné qu'en Angleterre la *Limitation Act*, 1939, 2 & 3 Geo. 6, ch. 21, prévoit non pas la reconnaissance de la « cause d'action » mais la reconnaissance de la « demande d'indemnité », cette jurisprudence reste convaincante pour les besoins de l'interprétation en l'espèce.

45 Thus, a party can only be held to have acknowledged the claim if that party has in effect admitted his or her liability to pay that which the claimant seeks to recover (see *Surrendra Overseas Ltd. v. Government of Sri Lanka*, [1977] 2 All E.R. 481 (Q.B.)). As the British Columbia Court of Appeal concluded in *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716, at p. 721, a person can acknowledge as a bare fact that someone has asserted (by making a claim) a cause of action against him, without acknowledging any liability. Simple acknowledgment of the "existence" of a cause of action is insufficient to meet the requirements of s. 16(1)(a). Acknowledgment must involve acknowledgment of some liability.

Ainsi, il est possible de conclure qu'une partie a reconnu la demande d'indemnité seulement si elle a effectivement admis qu'elle était tenue de payer ce que le demandeur tente de recouvrer (voir *Surrendra Overseas Ltd. c. Government of Sri Lanka*, [1977] 2 All E.R. 481 (B.R.)). Comme l'a conclu la Cour d'appel de la Colombie-Britannique, dans l'arrêt *Podovinikoff c. Montgomery* (1984), 14 D.L.R. (4th) 716, p. 721, une personne peut simplement reconnaître que quelqu'un a fait valoir (en présentant une demande d'indemnité) une cause d'action contre elle sans reconnaître quelque responsabilité que ce soit. La simple reconnaissance de l'« existence » d'une cause d'action est insuffisante pour satisfaire aux exigences de l'al. 16(1)a). La reconnaissance doit comporter une admission de responsabilité quelconque.

46 Consequently, the letters from the adjuster to Ryan's counsel (i.e. letters of November 18, 1998 and January 25, 1999) do not restart the clock as they do not constitute an admission of liability on the part of Cabot Insurance. These were obviously only requests for information and part of the normal investigation process. As submitted by the appellants, if mere investigation of claims were to constitute confirmation, then potential defendants, in order to protect limitation defence, would have no choice but to refuse to investigate until a statement of claim is issued. This would destroy the possibility of early settlements and lead to increased litigation and costs.

Par conséquent, les lettres (du 18 novembre 1998 et du 25 janvier 1999) que l'expert en sinistres a envoyées à l'avocat de M. Ryan ne font pas recommencer le compte à rebours étant donné qu'elles ne constituent pas une reconnaissance de responsabilité de la part de Cabot Insurance. Il est évident que ces lettres n'étaient que des demandes de renseignements et faisaient partie du processus normal d'enquête. Comme l'ont prétendu les appelants, si le simple fait d'enquêter sur une demande devait constituer une confirmation, alors pour conserver le droit d'invoquer la prescription comme moyen de défense, les défendeurs éventuels n'auraient d'autre choix que de refuser d'enquêter jusqu'à ce qu'une déclaration soit déposée. Cela écarterait la possibilité d'un règlement rapide et entraînerait une augmentation de l'incidence et du coût des procès.

47 The same conclusion applies to the second way that confirmation can occur, through payment. Of importance is the fact that both payments mentioned by Ryan, payments for Ryan's medical chart

La même conclusion s'applique à la deuxième façon de confirmer, c'est-à-dire au moyen d'un paiement. Il importe de souligner que les deux paiements mentionnés par M. Ryan, à savoir ceux effectués pour

and Dr. Landells' medical report, were not evidence of liability by Cabot Insurance; nor did they indemnify Ryan, at least in part, for damages caused by the accident. Thus, they cannot be payments in respect of the "cause of action". Ryan relies on the Newfoundland Court of Appeal decision in *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304, for the proposition that a payment made to a physician, but sent to the plaintiff's solicitor will constitute confirmation. With respect, I am of the view that the Court of Appeal erred in this determination. I prefer the contrary position of the British Columbia Court of Appeal in *MacKay v. Lemley* (1997), 44 B.C.L.R. (3d) 382, at para. 21. Payment for a medical report with a cheque payable to a physician, but sent to the plaintiff's solicitor, does not constitute confirmation of the plaintiff's cause of action:

> The mere fact that the payment, although made payable to the doctor, was directed through the lawyer's office for forwarding does not, in my view, bring the payment into the express wording of the section. The payment here, as in *Germyn*, was intended to pay to the doctor. The doctor was not a person through whom the appellant could claim. This was not a reimbursement to anyone for having paid for the medical report but a direct payment to the doctor by [the Insurance Corporation of British Columbia].

48 The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.

C. *Estoppel*

49 Moore's estate and Cabot Insurance submit that the majority of the Court of Appeal erred when it concluded that they were estopped from relying on the fact of Moore's death and the granting of letters of administration, thus preventing them from arguing that Ryan's action was outside the *Survival of Actions Act* limitation period. They claim that neither estoppel by convention nor estoppel by

le dossier médical de M. Ryan et le rapport médical du Dr Landells, ne constituaient pas une preuve de responsabilité de la part de Cabot Insurance, et n'indemnisaient pas non plus M. Ryan, en partie du moins, pour le préjudice causé par l'accident. Ainsi, ils ne sauraient être des paiements à l'égard de la « cause d'action ». M. Ryan se fonde sur la décision rendue par la Cour d'appel de Terre-Neuve dans l'affaire *Wheaton c. Palmer* (2001), 205 Nfld. & P.E.I.R. 304, pour affirmer qu'un paiement fait à un médecin, mais envoyé à l'avocat du demandeur, constitue une confirmation. En toute déférence, j'estime que cette décision de la Cour d'appel est erronée. Je préfère le point de vue contraire que la Cour d'appel de la Colombie-Britannique a exprimé dans l'arrêt *MacKay c. Lemley* (1997), 44 B.C.L.R. (3d) 382, par. 21. Le paiement pour un rapport médical, effectué par chèque à l'ordre d'un médecin mais envoyé à l'avocat du demandeur, ne constitue pas une confirmation de la cause d'action du demandeur :

> [TRADUCTION] J'estime que le simple fait d'avoir transmis par le bureau de l'avocat le paiement destiné au médecin n'en fait pas un paiement au sens du libellé exprès de la disposition. Le paiement effectué en l'espèce était, comme dans l'affaire *Germyn*, destiné au médecin. Le médecin n'était pas une personne dont l'appelant pouvait se servir comme intermédiaire pour présenter une demande d'indemnité. Il s'agissait non pas d'un remboursement destiné à une personne ayant payé le rapport médical, mais d'un paiement direct fait au médecin par [l'Insurance Corporation of British Columbia].

Le but de ces types de paiement et de correspondance est crucial. En l'espèce, ils étaient censés non pas constituer une reconnaissance de responsabilité, mais seulement faire avancer l'enquête et favoriser le règlement rapide de certains aspects de la demande d'indemnité.

C. *La préclusion*

La succession de M. Moore et Cabot Insurance soutiennent que les juges majoritaires de la Cour d'appel ont eu tort de conclure qu'ils étaient préclus d'invoquer le décès en tant que tel de M. Moore et la délivrance des lettres d'administration, ce qui les empêchait de faire valoir que l'action de M. Ryan avait été intentée après l'expiration du délai de prescription fixé par la *Survival of Actions Act*. Elles

representation applies to the facts of the present case. Ryan argues that the appellants are precluded or estopped from relying on the limitation period in the *Survival of Actions Act* because of the application of either of these two types of estoppel.

prétendent que ni la préclusion par convention ni la préclusion par assertion de fait ne s'applique aux faits de la présente affaire. Selon M. Ryan, les appelants sont préclus d'invoquer le délai de prescription fixé par la *Survival of Actions Act* en raison de l'application de l'un ou l'autre de ces deux types de préclusion.

50 While the principle of estoppel is often referred to in connection with cases of waiver, election, abandonment, acquiescence and laches, in the context of commercial and contractual relationships, the case law in Canada on this subject is not as abundant as that in the United Kingdom. It is therefore useful for this Court to address the issue in some detail, especially where it has long been accepted that estoppels are to be received with caution and applied with care (see *Harper v. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.), at p. 383).

Bien que la règle de la préclusion soit souvent mentionnée à l'égard d'affaires de renonciation, d'exercice d'un choix, d'abandon, d'acquiescement et de manque de diligence dans le contexte de rapports commerciaux et contractuels, la jurisprudence canadienne sur ce sujet n'est pas aussi abondante que celle du Royaume-Uni. Il est donc utile que notre Cour procède à un examen assez approfondi de la question, d'autant plus qu'il est reconnu depuis longtemps que les préclusions doivent être admises avec prudence et appliquées avec soin (voir *Harper c. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.), p. 383).

51 The state of the law of estoppel was articulated by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122, as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

Dans l'arrêt *Amalgamated Investment & Property Co. (In Liquidation) c. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), p. 122, lord Denning a décrit ainsi l'état du droit en matière de préclusion :

> [TRADUCTION] La règle de la préclusion est l'une des plus souples et des plus utiles de l'arsenal du droit. Cependant, elle a été appliquée dans une multitude d'affaires. C'est pourquoi je ne les ai pas toutes examinées dans le présent jugement. Cette règle a connu, au cours des 150 dernières années, une évolution en plusieurs étapes : la préclusion propriétale, la préclusion par assertion de fait, la préclusion par acquiescement et la préclusion promissoire. On a par ailleurs cherché à en limiter la portée au moyen d'une série de maximes : la préclusion n'est qu'une règle de preuve, la préclusion ne peut pas donner naissance à une cause d'action, la préclusion n'élimine pas la nécessité de s'interroger, et ainsi de suite. On peut maintenant considérer que toutes ces maximes forment une seule règle générale dénuée de restriction. Lorsque les parties à une opération se fondent sur une présupposition sous-jacente — de fait ou de droit — peu importe qu'elle découle d'une affirmation inexacte ou d'une erreur — qui a guidé leurs rapports —, aucune d'elles ne peut revenir sur cette présupposition lorsqu'il serait inéquitable ou injuste de lui permettre de le faire. Si l'une des parties souhaite revenir sur la présupposition, les tribunaux accorderont à l'autre partie la réparation qui s'impose en equity.

The jurisprudence discloses six types of estoppel: estoppel by representation of fact, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed and estoppel by negligence (see Bower, at pp. 3-9). I will examine here the ones at the centre of this dispute, estoppel by convention and estoppel by representation.

52 Six types de préclusion se dégagent de la jurisprudence : la préclusion par assertion de fait, la préclusion propriétale, la préclusion promissoire, la préclusion par convention, la préclusion du fait d'un acte formaliste et la préclusion fondée sur la négligence (voir Bower, p. 3-9). J'examinerai ici celles qui sont au cœur du présent litige, soit la préclusion par convention et la préclusion par assertion de fait.

(1) Estoppel by Convention

(a) *Definition and Principles*

(1) Préclusion par convention

a) *Définition et principes*

The origin of the doctrine of estoppel by convention can be traced to estoppel by deed for which sealing and delivery were essential, and for which the foundation of duty lay not in the agreement itself, or any reliance thereon, but in the formal solemnity of the deed, reflecting the concern of ancient jurisprudence with form as opposed to substance. The modern rule has evolved enormously (see Bower, at pp. 179-80; T. B. Dawson, "Estoppel and obligation: the modern role of estoppel by convention" (1989), 9 *L.S.* 16).

53 Les origines de la règle de la préclusion par convention remontent à la préclusion du fait d'un acte formaliste, pour laquelle le cachetage et la remise étaient essentiels et où le fondement de l'obligation résidait non pas dans la convention elle-même, ou dans le fait de s'y fier, mais dans le caractère solennel et officiel de l'acte, ce qui traduisait l'intérêt de la jurisprudence ancienne pour la forme plutôt que pour le fond. La règle moderne a changé énormément (voir Bower, p. 179-180; T. B. Dawson, « Estoppel and obligation : the modern role of estoppel by convention » (1989), 9 *L.S.* 16).

Bower defines the modern concept of estoppel by convention as follows (at p. 180):

> An estoppel by convention, it is submitted, is an estoppel by representation of fact, a promissory estoppel or a proprietary estoppel, in which the relevant proposition is established, not by representation or promise by one party to another, but by mutual, express or implicit, assent. This form of estoppel is founded, not on a representation made by a representor and believed by a representee, but on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. When the parties have so acted in their relationship upon the agreed assumption that the given state of facts or law is to be accepted between them as true, that it would be unfair on one for the other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is as to a matter of fact, or promissory, and/or proprietary.

54 Bower définit ainsi la notion moderne de préclusion par convention (p. 180) :

> [TRADUCTION] La préclusion par convention, soutient-on, est une préclusion par assertion de fait, une préclusion promissoire ou une préclusion propriétale où la proposition pertinente est établie non par voie d'assertion ou de promesse faite par une partie à une autre, mais par voie d'assentiment réciproque, exprès ou implicite. Cette forme de préclusion repose non pas sur une assertion faite par une personne et crue par celle à qui elle est destinée, mais sur un exposé conjoint des faits ou du droit dont la véracité est supposée constituer, par convention entre les parties, un fondement de leurs rapports. Lorsque, dans leurs rapports, les parties ont agi en fonction de la présupposition conventionnelle qu'elles devraient tenir pour véridique l'état de fait ou de droit en question, de sorte qu'il serait inéquitable pour l'une d'elles que l'autre revienne sur cette présupposition conventionnelle, alors cette partie aura un recours contre l'autre selon qu'il s'agit d'une préclusion relative à une question de fait, ou encore d'une préclusion promissoire ou propriétale, ou les deux à la fois.

55 S. Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel* (2nd ed. 2002), at p. 223, affirms that estoppel by convention will occur where:

(i) the parties have established, by their construction of their agreement or a common apprehension as to its legal effect, a convention basis; (ii) on that basis the parties have regulated their subsequent dealings; (iii) one party would suffer detriment if the other were to be permitted to resile from that convention.

See also *Chitty on Contracts* (29th ed. 2004), vol. 1, at p. 283.

Dans *Wilken and Villiers : The Law of Waiver, Variation and Estoppel* (2e éd. 2002), p. 223, S. Wilken affirme qu'il y a préclusion par convention lorsque :

[TRADUCTION] (i) les parties ont, par leur interprétation de leur convention ou par leur compréhension commune de ses effets juridiques, établi un fondement conventionnel; (ii) les parties ont réglé leurs rapports subséquents sur ce fondement; (iii) une des parties subirait un préjudice s'il était permis à l'autre partie de revenir sur cette convention.

Voir également *Chitty on Contracts* (29e éd. 2004), vol. 1, p. 283.

56 The Court of Appeal of Newfoundland and Labrador, after a review of the case law in the United Kingdom and in Canada, formulated the following four elements which need to be proven (at para. 79):

(i) The evidence establishes an assumption in common between the parties as to a state of facts;

(ii) The parties have adopted the common assumption as the conventional basis for a transaction into which they have entered;

(iii) The dispute in respect of which the estoppel by convention is asserted arises out of that transaction; and,

(iv) A detriment would flow to the party asserting the estoppel if the other party is permitted to resile from the assumed stated facts.

These requirements were accepted by the respondent.

Après avoir examiné la jurisprudence du Royaume-Uni et du Canada, la Cour d'appel de Terre-Neuve-et-Labrador a énoncé les quatre éléments suivants qui doivent être prouvés (par. 79) :

[TRADUCTION]

(i) la preuve établit l'existence d'une présupposition commune aux parties quant à un état de fait;

(ii) les parties ont adopté la présupposition commune comme fondement conventionnel de l'opération qu'elles ont conclue;

(iii) le litige à l'égard duquel la préclusion par convention est invoquée découle de cette opération;

(iv) la partie qui invoque la préclusion subirait un préjudice s'il était permis à l'autre partie de revenir sur l'état de fait présupposé.

L'intimé a reconnu ces conditions.

57 The appellants submit that there are six requirements for the estoppel by convention. They cite as support the New Zealand Court of Appeal decision in *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548, at p. 550. In fact, they simply advocate a more detailed description of the requirements also found in other foreign cases.

Les appelants affirment que six conditions doivent être remplies pour qu'il y ait préclusion par convention. À l'appui de cette affirmation, ils citent l'arrêt de la Cour d'appel de la Nouvelle-Zélande *National Westminster Finance NZ Ltd. c. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548, p. 550. En fait, ils préconisent simplement une description plus détaillée des conditions qui sont également énoncées dans d'autres décisions étrangères.

58 The jurisprudence in the United Kingdom is indeed abundant in contrast to that in Canada (see,

La jurisprudence du Royaume-Uni est effectivement abondante comparativement à celle qui existe

e.g., *The "Indian Grace"*, [1998] 1 Lloyd's L.R. 1 (H.L.), at p. 10; *The "August Leonhardt"*, [1985] 2 Lloyd's L.R. 28 (C.A.), at pp. 34-35; *The "Vistafjord"*, [1988] 2 Lloyd's L.R. 343 (C.A.), at pp. 349-53).

This Court is not bound by any of the above analytical frameworks. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

(1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).

(2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.

(3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

See Wilken, at pp. 227-28; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL) (S.C.), at para. 35; *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL) (Gen. Div.), at para. 31.

(b) *Application of the Law*

The majority of the Court of Appeal held that estoppel by convention applied in the circumstances of this case. It concluded that there was an assumption between the parties as to a state of facts, namely: that Moore was alive; that the parties adopted this assumption as the basis upon which

au Canada (voir, par exemple, *The « Indian Grace »*, [1998] 1 Lloyd's L.R. 1 (H.L.), p. 10; *The « August Leonhardt »*, [1985] 2 Lloyd's L.R. 28 (C.A.), p. 34-35; *The « Vistafjord »*, [1988] 2 Lloyd's L.R. 343 (C.A.), p. 349-353).

59 Notre Cour n'est liée par aucun des cadres analytiques susmentionnés. Après avoir examiné la jurisprudence du Royaume-Uni et du Canada ainsi que les commentaires de certains auteurs sur le sujet, j'estime que les critères suivants constituent le fondement de la règle de la préclusion par convention :

(1) Les rapports des parties doivent avoir reposé sur une présupposition de fait ou de droit commune : la préclusion exige qu'une assertion manifeste émanant d'une déclaration ou d'une conduite ait créé une présupposition commune. La préclusion peut néanmoins résulter (implicitement) d'un *silence*.

(2) Une partie doit avoir agi sur la foi de cette présupposition commune, et ses actes doivent avoir entraîné une modification de sa situation juridique.

(3) Il doit également être injuste ou inéquitable de permettre à l'une des parties de revenir sur la présupposition commune ou de s'en écarter. La partie qui cherche à établir la préclusion doit donc démontrer que, s'il est permis à l'autre partie de revenir sur la présupposition, elle subira un préjudice en raison du changement de la situation présupposée.

Voir Wilken, p. 227-228; *Canacemal Investment Inc. c. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (QL) (C.S.), par. 35; *Capro Investments Ltd. c. Tartan Development Corp.*, [1998] O.J. No. 1763 (QL) (Div. gén.), par. 31.

b) *Application du droit*

60 La Cour d'appel, à la majorité, a décidé que la préclusion par convention s'appliquait en l'espèce. Elle a conclu que les parties avaient présupposé l'existence d'un état de fait, à savoir que M. Moore était vivant, que les parties avaient convenu d'agir sur la foi de cette présupposition dans leurs

their transactions relating to Ryan's claim were to be conducted; that the dispute in respect of which the estoppel was asserted arose out of the transactions between the parties in dealing with Ryan's claim; and that detriment would flow to Ryan if Moore's estate or the insurer were permitted to resile from the common assumption. As will be evidenced from the analysis below, I cannot agree with this conclusion.

(i) Assumption Shared and Communicated

61 The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind" (*Troop v. Gibson*, [1986] 1 E.G.L.R. 1 (C.A.), at p. 5; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL) (C.A.), at para. 49). The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity: *Troop*, at p. 6; see also *Baird Textile Holdings Ltd. v. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274, at para. 84.

62 While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other (*John v. George*, [1995] E.W.J. No. 4375 (QL) (C.A.), at para. 37). Mutual assent is what distinguishes the estoppel by convention from other types of estoppel (Bower, at p. 184). The courts have described communications complying with this requirement as "crossing the line". In *The "August Leonhardt"*, at pp. 34-35, Kerr L.J. held that

> [a]ll estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by

opérations relatives à la demande de M. Ryan, que le litige à l'égard duquel la préclusion était invoquée découlait des opérations que les parties avaient conclues en traitant la demande de M. Ryan, et que M. Ryan subirait un préjudice s'il était permis à la succession de M. Moore ou à l'assureur de revenir sur la présupposition commune. Comme le montrera l'analyse ci-dessous, je ne puis souscrire à cette conclusion.

(i) Présupposition commune et communiquée

La condition essentielle de la préclusion par convention, qui la distingue des autres types de préclusion, est que les deux parties soient, au moment pertinent, [TRADUCTION] « sur la même longueur d'onde » (*Troop c. Gibson*, [1986] 1 E.G.L.R. 1 (C.A.), p. 5; *Hillingdon London Borough c. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL) (C.A.), par. 49). La cour doit déterminer quel état de fait a été accepté par les parties, et décider si les conditions de la convention sont assez claires et dénuées d'ambiguïté pour donner naissance à un droit exécutoire en equity : *Troop*, p. 6; voir également *Baird Textile Holdings Ltd. c. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274, par. 84.

Même s'il se peut qu'il ne soit pas nécessaire que la présupposition de la partie qui invoque la préclusion ait été créée ou encouragée par la partie précluse, elle doit être commune en ce sens que chacune des parties est au courant de la présupposition de l'autre (*John c. George*, [1995] E.W.J. No. 4375 (QL) (C.A.), par. 37). C'est l'assentiment réciproque qui distingue la préclusion par convention des autres types de préclusion (Bower, p. 184). Les tribunaux ont affirmé que les communications qui satisfont à cette exigence sont celles [TRADUCTION] « qui passent » de leur auteur à leur destinataire. Dans l'arrêt *The « August Leonhardt »*, p. 34-35, le lord juge Kerr a conclu que

> [TRADUCTION] [t]oute préclusion doit comporter une déclaration ou une conduite de la partie qui serait précluse, à laquelle le prétendu destinataire de l'assertion était en droit de se fier et s'est effectivement fié. En ce sens, toute préclusion peut être considérée comme nécessitant une assertion manifeste émanant soit d'une

statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. . . .

There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that — across the line between the parties — his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism. [Emphasis added.]

See also *The "Vistafjord"*, at p. 350. Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other (*The "Indian Grace"*, at p. 10). Further, the estopped party must have, at the very least, communicated to the other that he or she is indeed sharing the other party's (*ex hypothesi*) mistaken assumption (*John*, at para. 81; Bower, at p. 184).

63 In the present case, the record discloses 14 letters exchanged by Ryan's counsel and the adjuster with respect to the respondent's personal injury claim (A.R., vol. II, at pp. 150-70). However, none of these prove the existence of a common assumption. The letters lack clarity and certainty. The mere fact that communications occurred between the parties does not establish that they both assumed that Moore was alive. It is unlikely the question of whether Moore was alive or dead crossed the minds of either the appellants or the respondent. The fact that Ryan's counsel had originally diarized the claim as having a two-year limitation period under the *Limitations Act* shows that he had not turned his mind to the possibility of a shorter limitation period under the *Survival of*

déclaration soit d'une conduite, qui passe de son auteur à son destinataire. Cette assertion peut prendre la forme d'une déclaration expresse ou découler implicitement d'une conduite, comme l'omission du prétendu auteur de l'assertion de réagir à quelque chose qui a été dit ou fait par son prétendu destinataire, qui semble manifester un assentiment donnant lieu à une préclusion par silence ou acquiescement. De même, dans les soi-disant cas de préclusion par convention, les parties doivent adopter une conduite manifeste de part et d'autre qui est fondée sur une présupposition commune, mais erronée. . .

Il ne saurait y avoir de préclusion à moins que le prétendu auteur de l'assertion n'ait dit ou fait quelque chose, ou omis de faire quelque chose, de sorte que — de manière générale entre les parties — son action ou son inaction a fait naître une certaine croyance ou attente dans l'esprit du prétendu destinataire de l'assertion, qui fait que, selon les circonstances, il ne serait plus acceptable de permettre au prétendu auteur de l'assertion de revenir sur celle-ci en contestant la croyance ou l'attente qu'elle a engendrée. Par conséquent, le prétendu auteur de l'assertion doit, tout au moins dans cette mesure, prêter le flanc à la critique. [Je souligne.]

Voir également *The « Vistafjord »*, p. 350. Il ne suffit donc pas que chacune des deux parties agisse sur la foi d'une présupposition non communiquée à l'autre (*The « Indian Grace »*, p. 10). En outre, la partie précluse doit, à tout le moins, avoir informé l'autre partie qu'elle partageait effectivement sa présupposition erronée (*ex hypothesi*) (*John*, par. 81; Bower, p. 184).

En l'espèce, le dossier révèle que l'avocat de M. Ryan et l'expert en sinistres ont échangé 14 lettres relativement à l'action pour préjudice corporel de l'intimé (d.a., vol. II, p. 150-170). Cependant, aucune de ces lettres n'établit l'existence d'une présupposition commune. Les lettres manquent de clarté et de certitude. Le seul fait que des communications aient eu lieu entre les parties n'établit pas qu'elles ont toutes les deux présupposé que M. Moore était vivant. Il est peu probable que la question de savoir si M. Moore était vivant ou mort ait traversé l'esprit des appelants ou de l'intimé. Le fait que l'avocat de M. Ryan ait, au départ, inscrit dans son calendrier que l'action était assujettie à un délai de prescription de deux ans en vertu de la *Limitations Act* démontre qu'il n'avait pas songé à la possibilité qu'un délai

Actions Act. Effectively, this Court is in the presence of mutual ignorance, not mutual assumption.

de prescription plus court s'applique en vertu de la *Survival of Actions Act*. En réalité notre Cour se trouve en présence d'une ignorance de part et d'autre et non d'une présupposition commune.

64 Ryan submits, and it was agreed by the Court of Appeal, that the subject line in the letters exchanged between his counsel and the adjuster which read "Your Insured: Rex Moore" or "Our Insured: Rex Moore" is self-explanatory and indicates an assumption by both parties, that Moore was alive. I strongly disagree. This is an unrealistic interpretation of the subject line in the letters. Such an expression can mean one thing only: the named insured under the automobile insurance policy was Rex Moore. The words are a mere identification of the file the undersigned is dealing with. The Court of Appeal erred by giving weight to the subject line of these letters, which, properly interpreted, provide no evidence of a mutual assumption that Moore was alive.

M. Ryan prétend, ce dont la Cour d'appel a convenu, que l'objet des lettres échangées par son avocat et l'expert en sinistres, qui se lit [TRADUCTION] « Votre assuré : Rex Moore » ou « Notre assuré : Rex Moore », est éloquent et indique que les deux parties présupposaient que M. Moore était vivant. Je ne suis pas du tout d'accord. Il s'agit là d'une interprétation irréaliste de l'objet de ces lettres. Une telle mention ne peut signifier qu'une chose : la personne assurée en vertu de la police d'assurance automobile était Rex Moore. Ces mots ne servent qu'à identifier le dossier dont traite le signataire de la lettre. La Cour d'appel a commis une erreur en accordant de l'importance à la mention de l'objet de ces lettres qui, interprétée correctement, n'établit pas l'existence d'une présupposition commune que M. Moore était vivant.

65 Nor did the fact that the parties were conferring without regard to the limitation period establish a shared assumption that the limitation defence would not be relied on. The letters contain limited and simple requests for details of the claim, and do not establish a convention between the parties (see *Hillingdon London Borough*, at paras. 57 and 60; *Seechurn v. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ 67, at p. 396). In fact, the matter did not proceed beyond the preliminary stage of investigating the merits of the personal injury claim. There were no negotiations or settlement discussions, no admission of liability, and no agreement to forego a possible limitation defence.

Le fait que les parties se soient entretenues sans tenir compte du délai de prescription n'établissait pas non plus l'existence d'une présupposition commune que la prescription ne serait pas invoquée comme moyen de défense. Ces lettres renferment de simples demandes de détails concernant l'action et n'établissent pas l'existence d'une convention entre les parties (voir *Hillingdon London Borough*, par. 57 et 60; *Seechurn c. ACE Insurance S.A.-N.V.*, [2002] 2 Lloyd's L.R. 390, [2002] EWCA Civ 67, p. 396). En fait, l'affaire n'a pas dépassé le stade préliminaire de l'enquête relative au bien-fondé de l'action pour préjudice corporel. Il n'y a eu aucune négociation ou discussion de conciliation, aucune reconnaissance de responsabilité ou entente de renonciation à la possibilité d'invoquer la prescription comme moyen de défense.

66 Even if one could conclude that there was a mutual assumption between the parties, I am of the view that it cannot realistically be asserted that the respondent communicated to the appellants that he indeed shared the mistaken assumption. In this regard, I agree with the dissenting members of the Court of Appeal when they affirm (at para. 108):

Même si on pouvait conclure à l'existence d'une présupposition commune des parties, j'estime qu'on ne saurait réalistement affirmer que l'intimé a informé les appelants qu'il partageait effectivement leur présupposition erronée. À cet égard, je suis du même avis que les juges dissidents de la Cour d'appel lorsqu'ils affirment (par. 108) :

It is true that both parties assumed Mr. Moore was alive. That, as noted above, is not sufficient to establish estoppel by convention. Prior to Mr. Moore's death, any reference to him implying he was alive was a reflection of the truth at that time. That cannot be said to be a communication which becomes the basis of a convention that they will proceed on the assumption that Mr. Moore is alive, even beyond his death. There is no direct or circumstantial evidence which would lead to such a conclusion. The question becomes: could any agreement have arisen after Mr. Moore's death? The two letters written by the adjuster after Mr. Moore's death were in error when they said "Our insured – Rex Moore" but there is no communication to the other party and acceptance that they are to govern their future conduct on that basis.

[TRADUCTION] Il est vrai que les deux parties ont présupposé que M. Moore était vivant. Comme nous l'avons déjà souligné, cela n'est pas suffisant pour établir la préclusion par convention. Avant le décès de M. Moore, toute mention de son nom laissant entendre qu'il était vivant reflétait alors la réalité. On ne saurait dire que cela constitue une communication sur la foi de laquelle les parties ont convenu d'agir en présupposant que M. Moore serait vivant, même après son décès. Aucune preuve directe ou indirecte ne permet d'arriver à une telle conclusion. Il faut alors se demander si une convention aurait pu survenir après le décès de M. Moore. Les deux lettres écrites par l'expert en sinistres après le décès de M. Moore étaient erronées lorsqu'elles mentionnaient « Notre assuré – Rex Moore », mais aucune partie n'a informé l'autre partie ou accepté que cela déterminerait leur conduite future.

(ii) Detrimental Reliance

(ii) L'acte de confiance préjudiciable

67

The appellants submit that detrimental reliance is a requirement that must be proven in order to find convention estoppel. I agree. The Court of Appeal erred in finding this condition fulfilled by simple proof that a detriment would flow to the party asserting the estoppel if the other party were permitted to resile from the assumed stated facts, without a finding of reliance.

Selon les appelants, l'acte de confiance préjudiciable est une condition dont l'existence doit être prouvée pour que l'on puisse conclure à la préclusion par convention. Je suis d'accord. La Cour d'appel a eu tort de conclure que, pour que cette condition soit remplie, il suffisait de prouver que la partie invoquant la préclusion subirait un préjudice s'il était permis à l'autre partie de revenir sur l'état de fait présupposé, sans qu'il soit nécessaire de conclure à l'existence d'un acte de confiance.

68

The jurisprudence and academic comments support the requirement of detrimental reliance as lying at the heart of true estoppel (see Bower, at pp. 6 and 184; *John*, at para. 86; *Hillingdon London Borough*; *The "August Leonhardt"*, at p. 35; *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459 (B.C.C.A.), at pp. 469-70; *Canacemal*, at paras. 33-35; *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934, at para. 74; *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (B.C.S.C.), at pp. 235-36).

La jurisprudence et la doctrine confirment que la condition de l'acte de confiance préjudiciable est au cœur de la véritable préclusion (voir Bower, p. 6 et 184; *John*, par. 86; *Hillingdon London Borough*; *The « August Leonhardt »*, p. 35; *Litwin Construction (1973) Ltd. c. Pan* (1988), 52 D.L.R. (4th) 459 (C.A.C.-B.), p. 469-470; *Canacemal*, par. 33-35; *Vancouver City Savings Credit Union c. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417 (QL), 2002 BCSC 934, par. 74; *32262 B.C. Ltd. c. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (C.S.C.-B.), p. 235-236).

69

Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and detriment. The former requires a finding that the party seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his

L'acte de confiance préjudiciable englobe deux notions distinctes, mais connexes : l'acte de confiance et le préjudice. La première notion exige de conclure que la partie qui cherche à établir la préclusion a modifié sa conduite en agissant ou en s'abstenant d'agir sur la foi de la présupposition, ce

or her legal position. If the first step is met, the second requires a finding that, should the other party be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change from his or her assumed position (see Wilken, at p. 228; *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Austl. H.C.), at p. 674).

qui a eu pour effet de modifier sa situation juridique. Lorsque la première étape est franchie, la deuxième exige de conclure que, s'il est permis à l'autre partie de revenir sur la présupposition, la partie invoquant la préclusion subira un préjudice en raison du changement de sa situation présupposée (voir Wilken, p. 228; *Grundt c. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 (H.C. Austr.), p. 674).

70 Returning to the case at bar, even if one were to assume the existence of a communicated common assumption between the parties, there is no evidence that the respondent relied on this assumption. The evidence suggests that the respondent never put his mind to the shorter *Survival of Actions Act* limitation period. First, Ryan's counsel diarized the matter as a two-year limitation period. Second, the issue of estoppel by convention was raised for the first time by the Court of Appeal itself and was never discussed before the applications judge. Moreover, in the affidavit of Ryan's counsel, nowhere does he state that he believed that the adjuster intended him to act or refrain from acting in reliance on any agreement (A.R., vol. II, at pp. 137-46). From the date of the accident, November 27, 1997, to the expiry of the *Survival of Actions Act* limitation period, August 16, 1999, there was never any discussion by the respondent of the limitation period. On October 24, 2000, when Ryan's counsel indicated for the first time to Cabot Insurance's claim examiner that there might be a problem with the limitation period, he did not refer to a mutual understanding that Moore was to be treated as being alive for the purposes of Ryan's claim, nor did he raise the existence of an agreement.

Pour revenir aux faits de la présente affaire, même si on présumait l'existence d'une présupposition commune communiquée entre les parties, rien ne prouve que l'intimé s'est fié à cette présupposition. La preuve indique que l'intimé n'a jamais songé au délai de prescription plus court prévu par la *Survival of Actions Act*. Premièrement, l'avocat de M. Ryan a inscrit dans son calendrier que l'affaire était assujettie à un délai de prescription de deux ans. Deuxièmement, la question de la préclusion par convention a été soulevée pour la première fois par la Cour d'appel elle-même et n'a jamais été débattue devant le juge des requêtes. En outre, dans son affidavit, l'avocat de M. Ryan ne mentionne nulle part qu'il croyait que l'expert en sinistres souhaitait qu'il agisse ou s'abstienne d'agir sur la foi d'une convention quelconque (d.a., vol. II, p. 137-146). Entre la date de l'accident, soit le 27 novembre 1997, et la date d'expiration du délai de prescription prévu par la *Survival of Actions Act*, soit le 16 août 1999, l'intimé n'a jamais discuté du délai de prescription. Lorsque, le 24 octobre 2000, l'avocat de M. Ryan a indiqué pour la première fois à la rédactrice sinistres de Cabot Insurance que le délai de prescription pourrait poser un problème, il n'a pas mentionné que les parties s'étaient entendues pour traiter M. Moore comme s'il était vivant pour les besoins de la demande de M. Ryan et n'a pas soulevé non plus l'existence d'une convention.

71 It was not open to Ryan's counsel to refrain from bringing an action against Rex Gilbert Moore based solely on the limited communications between counsel. The letters relied upon were limited to the collection of medical information and documentation about Ryan's alleged injuries — nothing more. I have already spoken about the subject line; one

Il n'était pas loisible à l'avocat de M. Ryan de s'abstenir de poursuivre Rex Gilbert Moore en raison seulement des communications limitées qui ont eu lieu entre les avocats. Les lettres invoquées ne concernaient que le rassemblement de renseignements et de documents médicaux concernant les blessures qu'aurait subi M. Ryan, rien de plus. J'ai

cannot disregard the fact that all negotiations/communications were also done on a "without prejudice" basis.

déjà parlé de la mention de l'objet; on ne peut faire abstraction du fait que toutes les négociations et communications ont également été effectuées sous réserve de tous droits.

Consequently, I agree with the dissenting members of the Court of Appeal that the respondent not only did not rely on this alleged assumption, but his conduct does not show an intention to affect the legal relations between the parties. The record does not disclose that the respondent changed in any way his position on the basis of this alleged mutual assumption.

72 Par conséquent, je suis d'accord avec les juges dissidents de la Cour d'appel pour dire que non seulement l'intimé ne s'est pas fié à la présupposition dont on allègue l'existence, mais encore sa conduite ne démontre aucune intention de modifier les rapports juridiques entre les parties. Le dossier ne montre pas que l'intimé a modifié de quelque façon que ce soit sa situation en raison de la présupposition commune dont on allègue l'existence.

(iii) Detriment

(iii) Préjudice

Once the party seeking to establish estoppel shows that he acted on a shared assumption, he must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption (Wilken, at p. 228). It is often said that the fact that there will have been a change from the presumed legal position will facilitate the establishment of detriment: "This is because there is an element of injustice inherent within the concept of the shared assumption — one party has acted unjustly in allowing the belief or expectation to 'cross the line' and arise in the other's mind": Wilken, at p. 228.

73 Dès que la partie qui cherche à établir la préclusion démontre qu'elle a agi sur la foi d'une présupposition commune, elle doit prouver l'existence d'un préjudice. Pour que ce moyen soit retenu, il doit être injuste ou inéquitable de permettre à une partie de revenir sur la présupposition commune (Wilken, p. 228). On dit souvent que le fait qu'il y ait eu modification de la situation juridique présupposée facilite l'établissement de l'existence d'un préjudice : [TRADUCTION] « Cela est dû au fait que la notion de présupposition commune comporte forcément un élément d'injustice — une partie a agi de manière injuste en permettant que la croyance ou l'attente "passe" dans l'esprit de l'autre » : Wilken, p. 228.

This final requirement of estoppel has been described as proving that it would be "unjust", "unconscionable" or "unfair" to permit a party to resile from the mutual assumption (see, e.g., Bower, at p. 181; *John*; *The "Indian Grace"*; *The "Vistafjord"*). However, it may be preferable to refrain from using "unconscionable", in order to avoid confusion with this last concept which has developed a special meaning in relation to inequality of bargaining power in the law of contracts (where we speak of unconscionable transactions, for instance) (see *Litwin Construction*, at p. 468).

74 On a dit que cette dernière condition de la préclusion prouve qu'il serait « injuste », « inique » ou « inéquitable » de permettre à une partie de revenir sur la présupposition commune (voir, par exemple, Bower, p. 181; *John*; *The « Indian Grace »*; *The « Vistafjord »*). Cependant, il peut être préférable de s'abstenir d'utiliser le mot « inique » afin d'éviter toute confusion avec cette dernière notion, qui a pris un sens particulier en ce qui concerne l'inégalité du pouvoir de négociation en droit des contrats (où l'on parle d'opérations iniques, par exemple) (voir *Litwin Construction*, p. 468).

In the case at bar, given that there was no shared assumption or reliance, the detriment criterion does not need to be addressed. I would note, however,

75 En l'espèce, étant donné l'absence de présupposition commune ou d'acte de confiance, il n'est pas nécessaire d'examiner le critère du préjudice.

that a detriment is not established by a reduced limitation period, as suggested by the respondent. Limitation periods and prescriptions, in the diverse areas of the law, have the similar effect and impact. The *Survival of Actions Act* has provided a benefit not available at common law; this benefit cannot legitimately be characterized as unfair and unjust.

Je tiens toutefois à souligner qu'un délai de prescription plus court n'est pas une preuve de préjudice, comme l'a laissé entendre l'intimé. Le délai de prescription et la prescription ont, dans les divers domaines du droit, un effet et une incidence similaires. La *Survival of Actions Act* procure un avantage que n'offre pas la common law; on ne saurait légitimement qualifier cet avantage d'inéquitable et injuste.

(2) Estoppel by Representation

(2) Préclusion par assertion de fait

76 Where there is no shared assumption, as in the present case, there can be no estoppel by convention, no matter how unjust the other party's conduct may appear to be. However, in some circumstances, the party seeking to establish estoppel may be able to rely on estoppel by representation, an alternative here advocated by the respondent. The added difficulty in such a case is that an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel: see Wilken, at p. 227; Bower, at pp. 46-47.

En l'absence de présupposition commune, comme c'est le cas en l'espèce, il ne peut y avoir de préclusion par convention, aussi injuste que puisse paraître la conduite de l'autre partie. Toutefois, dans certaines circonstances, la partie qui cherche à établir la préclusion peut être en mesure d'invoquer la préclusion par assertion de fait, une solution que l'intimé préconise en l'espèce. La difficulté additionnelle qui se pose dans un tel cas tient au fait que la préclusion par assertion de fait ne peut pas découler d'un silence, à moins qu'une partie ne soit tenue de parler. Le silence ou l'inaction seront considérés comme une assertion si l'auteur de l'assertion avait envers le destinataire de celle-ci une obligation légale de divulguer ou de prendre des mesures, et que l'omission de le faire est invoquée comme donnant lieu à la préclusion : voir Wilken, p. 227; Bower, p. 46-47.

77 Ryan submits that in the present case silence constituted a representation grounding estoppel because there was a duty to disclose relevant information as it would be unfair for the appellants to benefit from non-disclosure. I disagree. In the present case, there was no duty on the appellants, who were at the time only potential defendants, to advise Ryan of a limitation period, to assist him in the prosecution of the claim, or to advise him of the consequences of the death of one of the parties. There is no fiduciary or contractual relationship here (contrast with *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87). The appellants had no duty to exercise reasonable care, nor to divulge any information.

M. Ryan prétend que, dans la présente affaire, le silence constituait une assertion justifiant la préclusion parce qu'il y avait une obligation de divulguer les renseignements pertinents due au fait qu'il serait inéquitable que les appelants profitent de l'absence de divulgation. Je ne suis pas d'accord. En l'espèce, les appelants, qui n'étaient à l'époque que des défendeurs éventuels, n'étaient pas tenus d'informer M. Ryan de l'existence d'un délai de prescription, de l'aider à intenter son action ou de l'aviser des conséquences du décès de l'une des parties. Il n'existe aucun rapport fiduciaire ou contractuel en l'espèce (contrairement à l'affaire *Queen c. Cognos Inc.*, [1993] 1 R.C.S. 87). Les appelants n'étaient tenus ni de faire preuve de diligence raisonnable ni de divulguer quelque renseignement que ce soit.

78

Hence, there was no representation, no duty to speak, no intention to affect legal relations and no reliance in this case.

Il n'y avait donc, en l'espèce, aucune assertion, aucune obligation de parler, aucune intention de modifier les rapports juridiques ni aucun acte de confiance.

III. Conclusion

III. Conclusion

79

The legislature created an exception to the common law rule by enacting the *Survival of Actions Act*. It extended the rights of the parties to permit them to continue an action against a deceased. The relevant provision modifies the common law. It is not this Court's role to interfere with the scheme established by the legislature.

Le législateur a créé une exception à la règle de common law en édictant la *Survival of Actions Act*. Il a élargi la portée des droits des parties afin de leur permettre de poursuivre une action contre une personne décédée. La disposition pertinente modifie la common law. Il n'appartient pas à notre Cour de modifier le régime établi par le législateur.

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There are no reasons based on estoppel, or any other legal doctrine, to preclude Moore's estate or Cabot Insurance from relying on the *Survival of Actions Act* limitation period. Accordingly, I would allow the appeal on the issue of estoppel, affirm the decision of the Court of Appeal on the other issues, and strike the statement of claim, with costs throughout, at all levels of court.

Il n'y a aucune raison fondée sur la préclusion ou quelque autre règle juridique d'empêcher la succession de M. Moore ou Cabot Insurance d'invoquer le délai de prescription fixé par la *Survival of Actions Act*. Par conséquent, je suis d'avis d'accueillir le pourvoi en ce qui concerne la question de la préclusion, de confirmer la décision de la Cour d'appel relativement aux autres questions et de radier la déclaration, avec dépens dans toutes les cours.

APPENDIX

Limitations Act, S.N.L. 1995, c. L-16.1

5. [Limitation period 2 years] Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action

(a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;

. . .

16. [Confirmation] (1) A confirmation of a cause of action occurs where a person

(a) acknowledges that cause of action, right or title of another person; or

(b) makes a payment in respect of that cause of action, right or title of another.

ANNEXE

Limitations Act, S.N.L. 1995, ch. L-16.1

[TRADUCTION]

5. [Délai de prescription de 2 ans] Les actions suivantes se prescrivent par deux ans suivant la date à laquelle a pris naissance le droit de les intenter :

a) l'action en dommages-intérêts pour préjudice corporel ou matériel, y compris la perte économique découlant du préjudice, que ce soit pour un délit, une inexécution de contrat ou un manquement à une obligation légale;

. . .

16. [Confirmation] (1) Une cause d'action est confirmée si, selon le cas, une personne :

a) reconnaît cette cause d'action, ce droit ou ce titre appartenant à autrui;

b) effectue un paiement à l'égard de cette cause d'action, de ce droit ou de ce titre appartenant à autrui.

(2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.

(3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.

. . .

(5) In order to be effective a confirmation must be in writing and signed by

(a) the person against whom that cause of action lies; or

(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

Survival of Actions Act, R.S.N.L. 1990, c. S-32

2. [Causes of action to survive] Actions and causes of action

(a) vested in a person who has died; or

(b) existing against a person who has died,

shall survive for the benefit of or against his or her estate.

5. [Limitation of action] An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

Appeal allowed with costs.

Solicitors for the appellants: Cox Hanson O'Reilly Matheson, St. John's.

Solicitors for the respondent: Curtis, Dawe, St. John's.

(2) En cas de confirmation, la période antérieure à la date de la confirmation est exclue du calcul de la prescription de l'action de la personne qui bénéficie de cette confirmation par rapport à celle qui est liée par celle-ci.

(3) Le paragraphe (2) ne vise un droit d'action que si la confirmation a lieu avant l'expiration du délai de prescription applicable à ce droit d'action.

. . .

(5) La confirmation est valide si elle est consignée dans un écrit, signée par l'une des personnes suivantes et remise à la personne qui bénéficie de cette cause d'action ou à son mandataire :

a) soit la personne visée par la cause d'action,

b) soit son mandataire.

Survival of Actions Act, R.S.N.L. 1990, ch. S-32

[TRADUCTION]

2. [Survie des causes d'action] Les actions et causes d'action :

a) appartenant à une personne décédée survivent au profit de sa succession;

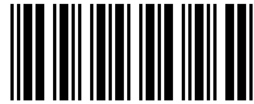
b) existant contre une personne décédée survivent contre sa succession.

5. [Prescription des actions] Aucune action ne peut être intentée en vertu de la présente loi à moins que les procédures ne soient engagées dans les six mois suivant la délivrance de lettres d'homologation ou d'administration de la succession de la personne décédée, et, pour les besoins d'une action fondée sur la présente loi, les procédures ne doivent pas être engagées après l'expiration d'un an suivant la date du décès de la personne en question.

Pourvoi accueilli avec dépens.

Procureurs des appelants : Cox Hanson O'Reilly Matheson, St. John's.

Procureurs de l'intimé : Curtis, Dawe, St. John's.



TAB20

COURT OF APPEAL FOR ONTARIO

CITATION: Fram Elgin Mills 90 Inc. v. Romandale Farms Limited, 2021 ONCA 201
DATE: 20210401
DOCKET: C67533 and C67557

Gillese, Lauwers and Benotto JJ.A.

DOCKET: C67533

BETWEEN

Fram Elgin Mills 90 Inc.
(formerly Frambordeaux Developments Inc.)

Plaintiff

and

Romandale Farms Limited, Jeffrey Kerbel,
2001251 Ontario Inc. and First Elgin Developments Inc.

Defendants
(Respondent/Appellants)

AND BETWEEN

Fram 405 Construction Ltd. and Bordeaux Homes Inc.

Plaintiffs

and

Romandale Farms Limited, 2001251 Ontario Inc., First Elgin Developments Inc. and Jeffrey Kerbel

Defendants
(Respondent/Appellants)

2021 ONCA 201 (CanLII)

AND BETWEEN

Romandale Farms Limited

Plaintiff (Respondent)

and

2001251 Ontario Inc.

Defendant (Appellant)

AND BETWEEN

2001251 Ontario Inc.

Plaintiff (Appellant)

and

Romandale Farms Limited

Defendant (Respondent)

DOCKET: C67557

BETWEEN

Fram Elgin Mills 90 Inc.
(formerly Frambordeaux Developments Inc.)

Plaintiff (Appellant)

and

Romandale Farms Limited, Jeffrey Kerbel,
2001251 Ontario Inc. and First Elgin Developments Inc.

Defendants (Respondent)

2021 ONCA 201 (CanLII)

AND BETWEEN

Fram 405 Construction Ltd. and
Bordeaux Homes Inc.

Plaintiffs (Appellant)

and

Romandale Farms Limited, 2001251 Ontario Inc.,
First Elgin Developments Inc. and Jeffrey Kerbel

Defendants (Respondent)

AND BETWEEN

Romandale Farms Limited

Plaintiff

and

2001251 Ontario Inc.

Defendant

AND BETWEEN

2001251 Ontario Inc.

Plaintiff

and

Romandale Farms Limited

Defendant

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Chris G. Paliare and Tina H. Lie, for the appellants Jeffrey Kerbel, 2001251 Ontario Inc., and First Elgin Developments Inc. (C67533)

Sheila R. Block, Jeremy Opolsky, Sara J. Erskine, and Benjamin Lerer for the appellants Fram Elgin Mills 90 Inc. (formerly Frambordeaux Developments Inc.) and Fram 405 Construction Inc. (C67557)

Sarit E. Batner, Kosta Kalogiros, and Avi Bourassa, for the respondent Romandale Farms Limited (C67533 and C67557)

Heard: September 8 and 9, 2020, by video conference

On appeal from the judgment of Justice Nancy J. Spies, of the Superior Court of Justice, dated September 13, 2019, with reasons reported at 2019 ONSC 5322, and from the costs order, dated April 2, 2020.

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Gillese J.A.:

[1] These appeals involve competing claims to undeveloped lands in Markham, Ontario. They illustrate the perils associated with a landowner selling interests in the land to more than one party in more than one transaction.

[2] The appeals raise many legal issues, one of which is the little-known equitable doctrine of estoppel by convention. In Canada, this doctrine finds its roots in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. As you will see, estoppel by convention plays a critical role in the resolution of these appeals.

I. OVERVIEW

[3] Romandale Farms Limited ("**Romandale**") owned two neighbouring farms in Markham[1] known as the McGrisken Farm and the Snider Farm (the "Lands"). The Lands comprise approximately 275 acres of undeveloped land in the Elgin Mills Road and Warden Avenue area of Markham.

[4] Initially, Romandale was the sole owner of the Lands. However, in 2003 and 2005, Romandale entered into agreements relating to the Lands, as a result of which much litigation has ensued.

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[1] When the parties entered into the various agreements, Markham was still a town in Ontario. It did not become a city until 2012. For ease of reference, I will refer to the municipality simply as "Markham".

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[5] In 2003, Romandale sold an undivided 5% interest in the Lands to Fram.[2] Romandale and Fram planned to obtain the necessary planning approval for the Lands so that they could be developed for residential use. It was their intention that Fram would build homes on the Lands, sell them, and share the profits with Romandale. Romandale and Fram entered into a number of agreements relating to the Lands, including co-owners agreements (the "**COAs**"). Under the COAs, subject to limited exceptions, neither party could dispose of its interest in the Lands. The COAs also contained a buy-sell mechanism that was generally available only after secondary planning approval ("**SPA**")[3] had been obtained for the Lands. SPA is required before the Lands can be developed.

[6] In August 2005, Romandale entered into an agreement with Kerbel[4] (the "**2005 August Agreement**") consisting of several transactions respecting properties in Markham. One of the transactions was the sale of Romandale's 95% interest in the Lands to Kerbel. This was to be achieved in two steps. In the first step, Romandale sold Kerbel 5% of its interest in the Lands.[5] In the second step,

---

[2] This term is explained in para. 19 below.
[3] SPA is defined in s. 5.07 of the COAs as "an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)".
[4] This term is explained in para. 20 below.
[5] Romandale's sale of 5% of its 95% interest in the Lands resulted in Kerbel acquiring a 4.75% undivided interest in the Lands.

Romandale agreed to sell its remaining interest in the Lands to Kerbel, conditional on either Fram's consent to the sale or Romandale's exercise of the buy-sell provisions in the COAs. All of the transactions under the 2005 August Agreement have been completed with the exception of the sale of Romandale's remaining interest in the Lands to Kerbel.[6]

[7] Whether Romandale is bound by the 2005 August Agreement – and its obligations respecting the sale of its remaining interest in the Lands – is the driving force behind these appeals.

[8] In 2007, Fram sued Romandale and Kerbel, claiming that the 2005 August Agreement was an impermissible disposition of Romandale's interest in the Lands under the COAs (the "**2007 Action**").

[9] In 2008, Fram and the development manager for the Lands sued Romandale and Kerbel. They alleged that the 2005 August Agreement amounted to a breach of the construction management agreements between Fram and Romandale respecting the Lands (the "**2008 Action**").

[10] In 2009, government decisions significantly changed the timelines and development prospects for the Lands. Development of the Snider Farm was

[6] Romandale received over $16 million in immediate value from Kerbel under the 2005 August Agreement.

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delayed until 2021-2031 and of the McGrisken Farm until 2031-2051. In addition, the Snider Farm was newly earmarked for employment use, which would prevent residential development.

[11] The 2007 and 2008 Actions were scheduled for trial in the fall of 2010. In an attempt to settle them before trial, Fram, Kerbel and Romandale attended a judicial mediation in September 2010. At the mediation, the three parties reached an agreement in principle. That agreement included a statement of the parties' intention that the purchase and sale of Romandale's remaining interest in the Lands to Kerbel would take place after the Lands obtained SPA (the "**Statement**"). Romandale later withdrew from the settlement agreement. However, in December 2010, Fram and Kerbel settled the matters between them and entered into a settlement agreement (the "**Settlement Agreement**"). It is important to note that para. 5 of the Settlement Agreement contains the Statement.

[12] In 2014, Romandale sued Kerbel claiming Kerbel breached the 2005 August Agreement by taking steps to reduce the amount of developable acreage on the Lands (the "**2014 Action**").

[13] In 2015, Romandale changed legal counsel. For the first time, it took the position that, because of the Statement in the Settlement Agreement, Kerbel had repudiated the 2005 August Agreement. Romandale also announced that it considered itself no longer bound by the 2005 August Agreement. Accordingly, in

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2016, Kerbel sued Romandale to compel it to perform its remaining obligation under the 2005 August Agreement (the “**2016 Action**”).

[14] The four actions involving the Lands were tried together in the fall of 2018.

[15] By judgment dated September 13, 2019 (the “**Judgment**”), all four actions were resolved in favour of Romandale. The trial judge’s key determination was that Kerbel repudiated the 2005 August Agreement when it entered into the Settlement Agreement because para. 5 of the Settlement Agreement stated the parties’ intention that the purchase and sale of the Remaining Interest would take place after SPA. The trial judge found that Romandale had accepted the repudiation and concluded that the 2005 August Agreement was at an end. Accordingly, Romandale was excused from performing its remaining obligations under the 2005 August Agreement.

[16] Both Fram and Kerbel (collectively, the “**Appellants**”) appeal to this court. Their appeals were consolidated. The Appellants ask this court to, among other things, declare that the 2005 August Agreement is valid and enforceable, and make an order for specific performance requiring Romandale to perform its obligations under the 2005 August Agreement.

[17] For the reasons that follow, I would allow the appeals and make the requested order for specific performance.

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II. THE PARTIES

[18] There are two sets of appellants in this appeal.

[19] The Fram appellants consist of Fram Elgin Mills 90 Inc. and Fram 405 Construction Ltd. Fram Elgin Mills 90 Inc. is part of a group of companies known as the Fram Building Group. It was incorporated for the purpose of developing the Lands. Before 2010, it was named Frambordeaux Developments Inc. Frank Giannone is the president of Fram Elgin Mills 90 Inc. In deciding the issues in these appeals, it generally does not matter whether the Fram appellants were involved collectively or individually. For ease of reference, I use “Fram” when I refer to one or more of the Fram appellants. However, when the distinction matters, I use the individual party’s name.

[20] The Kerbel appellants consist of 2001251 Ontario Inc., First Elgin Developments Inc., and Jeffrey Kerbel. They are land developers and builders. Mr. Kerbel is the principal of the Kerbel group of companies. Again, for ease of reference, I use “Kerbel” when I refer to one or more of the Kerbel appellants but, when the distinction matters, I use the individual party’s name.

[21] Romandale is a corporation that has long owned properties in the Markham area, including the Lands. Helen Roman-Barber has been the principal of Romandale since 1988. The Roman family owns and operates Romandale. It also owned the Triple R Lands, an adjoining property to the Lands.

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III. KEY DATES AND AGREEMENTS

[22] Below you will find a summary of the key dates and most significant agreements. A more detailed chronology of events is contained in Schedule “A” to these reasons. In the analysis of the various issues, I rely on the detailed recitation of facts set out in that chronology. This section and the chronology in Schedule “A” are based on the factual findings in the trial judge’s reasons (the “**Reasons**”).

[23] In Schedule “B” to these reasons, you will find the text of: the key contractual provisions in the COAs between Romandale and Fram; the 2005 August Agreement; and, the Settlement Agreement.

2003

[24] Romandale sells Fram an undivided 5% interest in the Lands and the parties enter into two identical sets of agreements, one set for each farm property. Each set consisted of three documents: the **COA**, which sets out the terms and conditions on which Romandale and Fram, as co-owners, hold title to the Lands; the Construction Management Agreement (“**CMA**”), under which Fram was to construct and sell residential units on the Lands, once the Lands achieved SPA; and the Development Management Agreement (“**DMA**”), which governed the development process for the Lands. Bordeaux Developments (Ontario) Inc. (“**Bordeaux**”) was also a party to the DMAs and, under its terms, Bordeaux was

appointed the development manager responsible for the development requirements of the Lands.

[25] Of these agreements, the COAs are the most significant for these appeals. The buy-sell provision in s. 5.07 of the COAs permits a co-owner, under certain conditions, to tender on the other an offer to sell its entire interest in the Lands and, at the same time, an offer to buy the other's entire interest in the Lands on the same terms as the offer to sell. The non-tendering party must choose whether to buy out the tendering party or sell its interest. The buy-sell is available once SPA is obtained for the Lands or the DMAs are terminated.

[26] Section 6.02 of the COAs provides that if an event of default occurs and is continuing, the non-defaulting party has the right to, among other things, bring proceedings for specific performance and/or buy the defaulting party's interest in the Lands at 95% of fair market value.

[27] Development of the Lands depended on obtaining planning approval, including appropriate amendments to the official plan. These changes are made to the secondary plan, which provides more detailed policies for the development of a specific area. The process of obtaining development approval for specific lands is known as SPA. This is reflected in s. 5.07(a) of the COAs which defines SPA as "an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)".

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[28] When Romandale and Fram entered into these agreements in 2003, Romandale had not yet started the SPA process.

2004

[29] With Fram's consent, Romandale borrows $6 million from the Bank of Nova Scotia ("**BNS**"), secured by a mortgage on the Lands.

2005

[30] With Fram's consent, Romandale terminates the DMAs with Bordeaux.[7] The ongoing work to move the Lands through SPA continues through a new agreement between Fram and Romandale to co-manage development of the Lands.

[31] BNS calls its $6 million mortgage. Romandale needs financing to repay the BNS loan by August 30, 2005. It also needs cash to make distributions to the Roman family. The solution is the 2005 August Agreement, which Romandale and Kerbel enter into on August 29, 2005.

[32] In the 2005 August Agreement, Kerbel agrees to pay off the BNS mortgage and extend the same amount as a new loan to Romandale under the same security and Romandale agrees to: (1) sell Kerbel its 95% interest in the Lands for a fixed

[7] In response, Bordeaux sues Romandale and Fram, alleging the termination was invalid and of no force or effect. Romandale settled the Bordeaux litigation in 2014.

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price of $160,000 per acre; (2) on behalf of the Roman family, sell Kerbel the adjoining Triple R Lands for $175,000 per acre, subject to a purchase price adjustment for non-developable acreage; and (3) grant Kerbel a right of second refusal over other lands, called the Elgin South Property. The sale of Romandale's interest in the Lands is to occur in two steps:

a. Step 1: an initial sale of 5% of Romandale's interest in the Lands; and

b. Step 2: the sale of Romandale's remaining interest in the Lands ("**Remaining Interest**"), conditional on:

i. Romandale buying out Fram's interest in the Lands pursuant to the buy-sell provisions in the COAs; or

ii. Fram consenting to the transaction.

[33] I refer to the second step of the sale of Romandale's interest in the Lands to Kerbel as the "**Conditional Provision**".

[34] All the transactions in the 2005 August Agreement have been completed, except the sale of Romandale's Remaining Interest to Kerbel under the Conditional Provision. Romandale received over $16 million in immediate value from Kerbel under the 2005 August Agreement: $6 million in new mortgage financing;

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$2,128,000 in cash for its 5% interest in the Lands; and, $8,575,000 for the Triple R Lands.

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[35] Paragraph 5 of the 2005 August Agreement empowers Kerbel to cause Romandale to trigger the buy-sell provision in the COAs following SPA being obtained for the Lands. Paragraph 5 also gives Kerbel exclusive control over the development of the Lands.

[36] Ms. Roman-Barber tells Fram she reached an agreement with Kerbel under which she sold the Triple R Lands, assigned the BNS mortgage, and sold a 5% interest in the Lands. She does not disclose that Romandale also committed to sell its entire interest in the Lands through the Conditional Provision.

2007

[37] Despite repeated requests that Romandale provide it with a copy of the 2005 August Agreement, it is only in April 2007 that Fram's counsel is permitted to read a copy.

[38] Fram starts the 2007 Action against Romandale and Kerbel, alleging that the 2005 August Agreement was a prohibited disposition under the COAs. It also seeks an injunction restraining Romandale from any further sale of its interest in the Lands. Further, it gives notice it will seek to exercise its remedy under the COAs to purchase Romandale's interest in the Lands at 95% of fair market value.

[39] The injunction is ordered.

2008

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[40] Fram and Bordeaux start the 2008 Action against Romandale and Kerbel based on alleged breaches of the CMAs. Under the CMAs, Fram has the right to construct residences on the Lands once SPA is obtained.

[41] Kerbel, as owner of the Triple R Lands, together with neighbouring landowners, form the North Markham Landowners Group ("**NMLG**") with the goal of engaging collectively with the relevant authorities about the development of their respective properties.

[42] From 2008 onward, the NMLG retains consultants and commissions studies required for the development process and engages in that process with Markham. NMLG's development costs have been in the hundred of thousands of dollars. Until 2011, Kerbel reimbursed Romandale for all costs associated with the Lands, including Romandale's share of the NMLG "cash calls" that were made to fund the NMLG ongoing development activities.

2009

[43] Government decisions change the anticipated development timeline for the Lands. As a result, development of the Snider Farm is delayed until 2021-2031

and of the McGrisken Farm until 2031-2051. In addition, the Snider Farm is proposed for employment use, which would prevent residential development.

[44] At Kerbel's insistence, Romandale joins the NMLG.

2010

[45] In the hope of resolving the 2007 and 2008 Actions before trial, Romandale, Fram, and Kerbel engage in settlement discussions at a judicial mediation in September 2010. The three parties reach an agreement in principle on the main settlement terms. One of the agreed settlement terms is that the sale of Romandale's Remaining Interest to Kerbel will occur after the Lands achieve SPA. The following day, counsel for Romandale writes to counsel for Fram and Kerbel and outlines the agreed points of settlement, including that sale of its Remaining Interest will occur when SPA has been obtained for the Lands.

[46] Romandale withdraws from the settlement in October but Fram and Kerbel move forward and enter into the Settlement Agreement in December 2010.

[47] The Settlement Agreement provides that if Romandale does not concur in it and the 2007 and 2008 Actions proceed to trial:

(1) Fram would discontinue its claims against Kerbel, not seek a declaration that the 2005 August Agreement is void, and restrict its claims against Romandale to damages;

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(2) Kerbel would provide Fram with an option to purchase a 50% interest in Romandale’s Remaining Interest, on the same terms and conditions as Kerbel might purchase Romandale’s Remaining Interest;

(3) If Fram exercises the option, it and Kerbel would enter into a joint venture agreement to develop the Lands with (effectively) an equal sharing of costs;

(4) Fram does not consent to Romandale’s sale of its Remaining Interest in the Lands to Kerbel; and

(5) Para. 5 of the Settlement Agreement includes the statement of Fram and Kerbel’s intention that “the purchase and sale of Romandale’s Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after [SPA] for the Lands has been obtained”.

2011

[48] By letter dated January 28, 2011, counsel for Romandale advises Fram and Kerbel that Romandale objects to Kerbel’s land planner telling the NMLG that there was a change in the ownership of the Lands. The letter reiterates that Romandale conditionally sold the Lands to Kerbel under the 2005 August Agreement and “[t]he condition could only be satisfied by either a) secondary plan approval (which has not been achieved); b) or the consent of [Fram] to the transaction”.

[49] Romandale represents the Lands at the NMLG and instructs its planning consultant (and others working for it) to not share information with Kerbel’s planner.

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[50] Kerbel's counsel sends a letter, dated February 17, 2011, to Romandale's counsel complaining that Ms. Roman-Barber's conduct is a breach of para. 5 of the 2005 August Agreement in which Romandale ceded control of the development process for the Lands to Kerbel. It demands that Romandale confirm to the NMLG that Kerbel's planning consultant has the sole authority to represent the Lands and threatens to commence proceedings if Ms. Roman-Barber does not comply with para. 5 of the 2005 August Agreement.

[51] Romandale's counsel responds by letter, dated February 25, 2011, asserting that its client had "at all times acted in accordance" with the 2005 August Agreement and that it is considering whether the Settlement Agreement was a breach of the 2005 August Agreement.

2013

[52] Meanwhile, Romandale and Kerbel are involved in litigation over the purchase price of the Triple R Lands (the "**Triple R Lands Litigation**"), one of the transactions in the 2005 August Agreement. In February 2013, Romandale and Kerbel enter into a partial settlement in which they agree that if Kerbel is found to be entitled to a price adjustment, the determination of the non-developable lands

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is to be done "pursuant to the terms of the [2005 August Agreement] and the Amendment".[8]

[53] Romandale leaves the NMLG.

2014

[54] Romandale starts the 2014 Action against Kerbel, alleging that Kerbel fundamentally breached the 2005 August Agreement by taking steps to reduce the amount of developable acreage on the Lands. It seeks a declaration that the 2005 August Agreement is terminated or, alternatively, damages.

[55] This court releases its decision in the Triple R Lands Litigation, finding in favour of Kerbel. It declares that Kerbel is entitled to a purchase price reduction in accordance with the 2005 August Agreement.

2015

[56] Romandale retains new counsel and takes a new position: the buy-sell provisions in the COAs could be performed before SPA because the DMAs with Bordeaux had been terminated in February 2005.

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[8] The 2005 August Agreement was amended by an agreement dated March 14, 2006, to provide that any amount owing to Kerbel from a purchase price adjustment for non-developable acreage of the Triple R Lands, which was to be made at the end of the fifth year of the vendor takeback mortgage, would be set off against the eventual purchase price for the Remaining Interest in the Lands.

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[57] Romandale obtains leave to amend its pleadings in the 2007 Action to allege, for the first time, that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement because it contained para. 5 which provides that the purchase and sale of Romandale's Remaining Interest in the Lands would occur after SPA. Also for the first time, in its amended pleading, Romandale asserts that it will not perform the 2005 August Agreement in any event.

2016

[58] Kerbel starts the 2016 Action against Romandale, seeking specific performance of the 2005 August Agreement.

2017

[59] Kerbel files a crossclaim in the 2007 Action seeking specific performance of the 2005 August Agreement and an order directing Romandale to comply with its terms.

[60] Romandale files a defence to Kerbel's crossclaim in the 2007 Action and newly alleges that the 2005 August Agreement offends the rule against perpetuities.

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2018

[61] Shortly before the trial of the four actions begins in October 2018, Fram and Kerbel amend the Settlement Agreement to allow the sale of Romandale's Remaining Interest to close immediately, rather than after SPA, and Fram delivers its consent to that sale.

[62] When the trial begins, SPA has not been obtained for the Lands.

IV. THE TRIAL REASONS

[63] As the trial reasons are over 100 single-spaced pages in length, I will not attempt to summarize them here. Instead, I set out below a summary of the disposition of each of the four actions. Thereafter, I summarize the Reasons on the issues raised in these appeals.

Disposition of the Four Actions

[64] The trial judge concluded that Romandale did not breach the COAs when it entered into the 2005 August Agreement and dismissed the 2007 Action accordingly. In reaching this conclusion, the trial judge held that: (1) the Conditional Provision was not a "Disposition" in breach of s. 5.03 of the COAs; (2) Romandale was not obliged to give Fram notice and a copy of the 2005 August Agreement so, if it did fail to disclose the same (which Romandale disputed), the failure was not a breach of the COAs; and, (3) Romandale did not breach the COAs by ceding

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control over the development of the Lands to Kerbel under the 2005 August Agreement (Reasons, at paras. 187-91, 204-05).

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[65] The trial judge concluded that Romandale's entry into the 2005 August Agreement did not amount to a breach of the CMAs because Romandale continued to own its Remaining Interest in the Lands and "for all practical purposes" continued to control the development of the Lands in the same way as before (Reasons, at para. 226). Accordingly, she dismissed the 2008 Action.

[66] With respect to the 2014 Action, the trial judge declared that the 2005 August Agreement was "at an end and terminated" and she dismissed Kerbel's crossclaim seeking damages against Romandale. These orders flowed from the trial judge's determination that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement (Reasons, at paras. 346, 442).

[67] Having found that Kerbel had repudiated the 2005 August Agreement and that Romandale accepted the repudiation, the trial judge dismissed Kerbel's 2016 Action for specific performance of the 2005 August Agreement (Reasons, at paras. 346, 442).

Estoppel (Reasons, at paras. 359-72)

[68] At trial, both estoppel by representation and estoppel by convention were argued. The trial judge addressed estoppel by representation in the Reasons. However, she did not address estoppel by convention.

[69] Quoting from para. 29 of *Scotsburn Co-operative Services Ltd. v. W.T. Goodwin Ltd.*, [1985] 1 S.C.R. 54, the trial judge set out the following legal principles for estoppel by representation, at para. 359:

> …The essence of estoppel is representation by words or conduct which induces detrimental reliance. A more exhaustive definition is offered in Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed., 1977), at p. 4:
>
> > …where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto. [Emphasis in the Reasons.]

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[70] The trial judge described Fram and Kerbel's position on estoppel as follows. They argued that, prior to the Settlement Agreement and for a number of years following it, Romandale consistently took the position that: (1) the 2005 August Agreement was valid and enforceable; and (2) if Fram did not consent to Romandale's sale of its Remaining Interest to Kerbel, the buy-sell in the 2005 August Agreement would be performed after SPA. They asserted that Fram relied on Romandale's position in entering into the Settlement Agreement, thereby compromising its claim to the Lands by 50%, and that Kerbel also compromised its position in reliance on Romandale's position.

[71] Romandale contended that Fram and Kerbel overstated its positions and stripped them of the context in which they were taken. The trial judge agreed, for the following reasons. In the 2007 Action, Romandale's primary position was that the 2005 August Agreement did not breach the COAs and, as a result, the 2005 August Agreement was valid. The trial judge acknowledged that Romandale did take the position that the buy-sell in the 2005 August Agreement would be triggered after SPA because the buy-sell in the COAs could only be triggered after SPA. However, she noted that Romandale's position on the buy-sell in the COAs was mistaken and the parties shared this mistaken understanding until 2015 when Romandale rectified its mistake and amended its pleadings. At that point, Romandale asserted that the 2005 August Agreement was unenforceable

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because Kerbel repudiated it by entering into the Settlement Agreement. However, the trial judge stated that this assertion did not change Romandale's primary position: Romandale continued to defend the 2007 Action on the basis that the 2005 August Agreement did not breach the COAs. She said that Romandale did not backtrack from its primary position: it was responding to new factual events that carried legal consequences.

[72] On the issue of reliance, the trial judge said that Fram's only evidence was a "bald assertion" by Mr. Giannone that he relied on Romandale's position that the 2005 August Agreement was enforceable. She said this evidence was totally unreliable and could not be accepted.

[73] In any event, the trial judge concluded, any reliance would have been "totally unreasonable" as Romandale objected to the Settlement Agreement before it was entered into. Therefore, Fram and Kerbel proceeded at their own risk.

Repudiation of the 2005 August Agreement (Reasons, at paras. 305–46)

[74] The trial judge stated the legal principles governing repudiation as follows, at para. 305:

> The applicable law is not in dispute. A contract may be said to be repudiated when one party acts in a way, by words or conduct, that evinces an intent to no longer be bound by the contract. Only a very substantial breach will amount to a repudiation. As the court stated in *Jedfro Investments* at para. 21, "having 'little regard' for an

> agreement does not establish that a party is repudiating the agreement". Repudiation arises where the innocent party is deprived of substantially the whole benefit of its agreement. When faced with repudiation, the innocent party may elect to treat the contract as at an end, relieving the parties from further performance. [Citations omitted.]

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[75] She concluded that the Settlement Agreement materially and substantially changed the deal in the 2005 August Agreement for the following reasons. Because Kerbel was no longer at liberty to cause Romandale to trigger the buy-sell before SPA and Fram was no longer at liberty to consent before SPA, the result of the Settlement Agreement was to tie up the Lands until after SPA, then decades away or more, at a fixed price, without paying Romandale for the Lands and while leaving Romandale with all the risks and liabilities. She said this entirely devalued the Conditional Provision, given the time value of money, and that Kerbel shifted all of the risk of the Lands to Romandale by tying up the Lands indefinitely without any compensation to Romandale.

[76] The trial judge also concluded that, by entering into the Settlement Agreement, Kerbel demonstrated an intent not to be bound by the ongoing performance of the 2005 August Agreement. It wanted instead to abide only by its new Settlement Agreement with Fram.

[77] The trial judge determined that Kerbel's repudiation of the 2005 August Agreement deprived Romandale of substantially the whole benefit of that

agreement. In making this determination, the trial judge considered each transaction in the 2005 August Agreement "on its own" and stated that there was no dispute that by the time of the Settlement Agreement, Romandale had not received any of the benefit of the Conditional Provision. She said that all of the transactions in the 2005 August Agreement were either of no benefit to Romandale or of relatively modest benefit when compared to the Conditional Provision. She concluded that performance of the other parts of the 2005 August Agreement could not "represent Romandale receiving substantially the whole of the benefit of that agreement" (at para. 336).

[78] The trial judge found that Romandale had accepted Kerbel's repudiation. In making this finding, she said: (1) by February 2011, Kerbel knew that Romandale was no longer acting in accordance with the 2005 August Agreement; and (2) in a letter dated February 9, 2011, from counsel for Romandale to counsel for Kerbel, Romandale took the position that Kerbel "had breached" the 2005 August Agreement and it was "considering its rights" (at para. 338).

[79] Having found that Romandale accepted Kerbel's repudiation, the trial judge concluded that the parties were relieved of their obligations under the Conditional Provision and it was at an end. Consequently, the Conditional Provision was not enforceable against Romandale.

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[80] The trial judge also concluded that Kerbel breached its duty of good faith and its fiduciary duty in acting as Romandale's agent, by fettering its discretion in the Settlement Agreement as to when to cause Romandale to trigger the buy-sell. Further, she was of the view that by entering into the Settlement Agreement, Kerbel breached the "time is of the essence" clause in the 2005 August Agreement and the clause stipulating that the conditions precedent were for the mutual benefit of the parties.

Frustration (Reasons, at paras. 347-49)

[81] In light of the trial judge's determination on repudiation, it was not necessary that she consider Romandale's alternative argument that the 2005 August Agreement was rendered unenforceable on account of frustration. However, the trial judge stated, had it been necessary to consider it, she was persuaded that the 2005 August Agreement was frustrated.

[82] Relying on *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 53, the trial judge said that frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract" (at para. 348).

[83] The trial judge said it was clear that when the 2005 August Agreement was entered into, both Ms. Roman-Barber and Mr. Kerbel expected that SPA was only

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years away, not decades away. Unforeseen planning changes resulted in SPA being delayed for decades and the farms being put on different development tracks. In addition, the Snider Farm could be developed only as employment lands, not for residential use. These changes were beyond the control of the parties and rendered the performance of the Conditional Provision radically different from that to which the parties agreed.

Mistake (Reasons, at paras. 350-53)

[84] Romandale argued that if obtaining SPA was a prerequisite to triggering the buy-sell, the Conditional Provision was unenforceable because Kerbel and Romandale were mistaken, when entering into the 2005 August Agreement, as to the time horizon within which SPA could be achieved.

[85] The trial judge accepted this argument and found the Conditional Provision void for mistake. She said the following, at para. 351:

> Both Romandale and Kerbel, in making a “time is of the essence” clause, fixing a purchase price of $160,000 per acre, and providing for the conditions precedent for their mutual benefit, without any sunset clause or otherwise set[ting] the closing date, were operating on the mistaken understanding that SPA would occur within a relatively short time period, and certainly not decades after the [2005 August Agreement] was entered into.

[86] Citing *Miller Paving Ltd. v. B. Gottardo Construction Ltd.*, 2007 ONCA 422, 86 O.R. (3d) 161, at para. 23, the trial judge set aside the 2005 August Agreement

contract for common mistake as, in all the circumstances, it would be "unconscientious" for a contracting party to avail itself of the legal advantage it had obtained. She agreed with Romandale that it would be unconscionable and commercially absurd to enforce the Conditional Provision or even consider it valid and enforceable since the parties would "never have agreed to its terms, especially the fixed price per acre of the Lands, had they known that the timeline for SPA would change so drastically and … be pushed out decades in the future".

Kerbel's Claims were Time-Barred (Reasons, at paras. 400-07)

[87] The trial judge found that even if Kerbel had a claim for specific performance of the 2005 August Agreement, its claim was barred by the expiration of the two-year limitation period under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, (the "*Limitations Act*") and the equitable doctrine of laches.

[88] The trial judge found that Kerbel was aware, as of 2011, that Romandale: viewed the Conditional Provision as being at an end; was no longer co-operating with Kerbel to advance the Lands through development as required by the 2005 August Agreement; and, was shutting Kerbel out for its own purposes. She said this conduct clearly revealed that Romandale intended to remain the owner of the Lands and, from its point of view, the Conditional Provision was dead.

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[89] Despite being aware of this, Kerbel took no material steps to enforce its rights and acquiesced to the state of affairs for years before asserting a claim for specific performance for the first time in the 2016 Action.

[90] She rejected Kerbel's claim that it did not know until 2015 that Romandale intended to not perform the Conditional Provision, saying that this was undermined by the clear implications of Romandale's conduct since 2011.

[91] Kerbel did not seek specific performance of the 2005 August Agreement until it commenced the 2016 Action. That was more than five years after it wrote to Romandale in 2011 asserting that Romandale was breaching the 2005 August Agreement, and threatening to commence litigation to affirm the breach. By 2016, Kerbel was outside the two-year statutory limitation period, had acquiesced to Romandale's conduct, and had permitted a state of affairs to exist where Romandale spent years investing significant time, effort, and money into the Lands.

Specific Performance (Reasons, at paras. 399, 408-23)

[92] The trial judge held that Kerbel was not entitled to specific performance of the 2005 August Agreement because the Lands were not unique.

[93] The trial judge found the Lands were not unique because Kerbel's only evidence of uniqueness was "a bald assertion from Mr. Kerbel" and because the

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expert evidence, including from Kerbel's expert, contradicted Kerbel's assertion. The experts called by all three parties used a "direct comparison" approach to provide their opinions on land values. The direct comparison approach determines value based on an analysis of sales of similar properties within a close time period and location. The trial judge concluded that because Fram and Kerbel's experts were able to use the "direct comparison" approach to value the Lands, "the Lands are not unique".

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[94] Further, the trial judge said, the Lands are not unique because they were "just an investment for Kerbel", there were suitable substitute properties that Kerbel could purchase, and it was possible to quantify the monetary equivalent of Kerbel's alleged future losses.

V. THE ISSUES ON THE APPEALS

A. Issues Raised by Fram

[95] Fram says that the trial judge made numerous errors in her lengthy trial decision. To narrow its appeal, Fram focused on two issues. It submits that the trial judge erred in:

1. failing to find that Romandale was estopped, based on either estoppel by representation or estoppel by convention, from claiming that the Settlement Agreement breached the 2005 August Agreement; and

2. concluding that, by entering into the Settlement Agreement, Kerbel breached the 2005 August Agreement.

B. Issues Raised by Kerbel

[96] In its appeal, Kerbel raises five issues. It submits that the trial judge erred in concluding that:

3. it repudiated the 2005 August Agreement by entering into the Settlement Agreement;
4. the 2005 August Agreement was frustrated;
5. the 2005 August Agreement was void for mistake;
6. its claim was limitation barred; and,
7. it was not entitled to specific performance of the 2005 August Agreement.

VI. ROMANDALE ALLEGES THRESHOLD FLAWS

[97] Before turning to the issues raised on appeal, I will address Romandale's contention that the appeals suffer from two threshold flaws warranting their dismissal.

[98] First, Romandale submits that Fram's appeal is improper because it is not an appeal from the dismissal of its 2007 and 2008 Actions but, rather, an attempt to appeal from the 2014 and 2016 Actions, to which Fram was not a party. It says

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that only a party to a proceeding below can appeal and the fact that multiple actions are ordered to be heard together does not alter the distinct identities of the parties.

[99] Second, Romandale submits that the appeals are improper because they are founded on a new, never pleaded or asserted interpretation of the 2005 August Agreement: that it gave Kerbel an unfettered discretion to cause Romandale to trigger the buy-sell before or after SPA. Romandale contends that this interpretation contradicts the one that Kerbel argued at trial: that the 2005 August Agreement required that it cause Romandale to trigger the buy-sell only after SPA. Romandale concludes on this alleged flaw by noting that, had the Appellants raised this new theory in their pleadings or at trial, the evidence "would have no doubt been different". Allowing Fram and/or Kerbel to now advance this theory, Romandale says, would be manifestly unfair.

[100] For the following reasons, I do not accept that either alleged threshold flaw justifies dismissing the appeals.

A. The First Alleged Threshold Flaw

[101] In my view, the direction that the four actions be tried together coupled with the way in which the trial was conducted are a full answer to the first alleged flaw.

[102] In his capacity as the case management judge in these proceedings and pursuant to r. 6 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, Dunphy J.

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exercised his discretion and directed that the four actions be tried together in a single trial. He also gave directions about matters relating to the conduct of the trial. There can be no doubt about the wisdom of these directions.

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[103] Rule 6 provides that where two or more proceedings are pending in the court, an order may be made that they be tried together if it appears to the court that the proceedings have a common question of law or fact, the relief claimed in them arises out of the same transaction or series of transactions, or "for any other reason". An order under r. 6 is discretionary.

[104] The purpose behind r. 6 is to avoid a multiplicity of proceedings and thereby prevent inconsistent dispositions, protect scarce judicial resources, and save expense to the parties. It also safeguards against a tactical decision to subject a party or parties to more than one action and, therefore, promotes fairness: see *Wood v. Farr Ford Ltd.*, 2008 CanLII 53848 (Ont. S.C.), at para. 23; *Mohamed Imran Hanif v. Ontario College of Pharmacists, Her Majesty the Queen in Right of Ontario and AGO*, 2013 ONSC 6991, 315 O.A.C. 368 (Div. Ct.), at para. 18.

[105] It is readily apparent that the preconditions to the application of r. 6 were met. The four actions had common questions of law and fact. And, the relief claimed in the actions arose out of one or more of the transactions relating to the Lands. As the trial judge noted, at para. 23 of the Reasons, the direction that the four actions be tried together was made because the actions "involve all of the

current disputes between these three protagonists with respect to their interests in the Lands”.

[106] Further, the direction that the actions be tried together fulfilled the purpose which underlies r. 6. A single trial avoided a multiplicity of proceedings among the parties, prevented inconsistent dispositions relating to the Lands, protected scarce judicial resources, and saved the parties expense. In my view, it also does away with Romandale’s contention that Fram was a party only to its actions and not to the proceeding below. The four actions were tried together and a single judgment was rendered in respect of those actions. The fact that the Judgment sets out the relief granted in respect of each action separately does not alter the fact that Fram was a party to the proceeding below and, thus, has the right to appeal from the Judgment.

[107] Furthermore, Romandale’s position on the first alleged threshold flaw flies in the face of the way in which these actions proceeded at trial. Although the actions were not formally consolidated, the trial of the actions was effectively consolidated, with the evidence being used on all issues and argument permitted on all issues by all parties.

[108] At trial, Fram was permitted to lead evidence and make argument on the same issues it now raises on appeal. The Reasons show that both Fram and Kerbel argued the issues raised in the appeals; the trial judge repeatedly refers to

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Fram’s position on the issues and she often refers to Fram’s and Kerbel’s positions interchangeably. Had Romandale wished to take issue with Fram making argument and adducing evidence on the issues at trial, it was incumbent on Romandale to object at trial, which would have given Fram the opportunity to request to be added as a party. Having stayed silent at trial, Romandale cannot now take the position that Fram does not have standing on this appeal to raise and argue the issues it is pursuing.

[109] Finally, I note that Romandale did not question the propriety of Fram’s appeal before the case management judge of this court who issued the order consolidating the appeals. It does not now lie in Romandale’s mouth to suggest that Fram is not entitled to pursue its appeal.

[110] For these reasons, Fram’s appeal is not improper.

B. The Second Alleged Threshold Flaw

[111] Romandale’s second alleged threshold flaw is based on the new interpretation of the 2005 August Agreement it says that Fram and/or Kerbel advance on appeal. In my analysis of Issue #1, below, I explain that because of estoppel by convention, Romandale is barred from asserting that the buy-sell provisions in the COAs and the 2005 August Agreement could be utilized pre-SPA. The trial judge interpreted the 2005 August Agreement on the basis that the buy-sell provision could be utilized pre-SPA (Reasons, para. 291). That is, she

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interpreted it in a way that is impermissible because of the operation of estoppel by convention. Consequently, her interpretation of the 2005 August Agreement cannot stand and it is unnecessary to decide Issue #2. The allegedly new interpretation was made in the context of Issue #2. As it is unnecessary to decide Issue #2, it is also unnecessary to decide whether the Appellants committed the second threshold flaw as Romandale alleges.

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[112] Thus, the second alleged threshold flaw does not warrant the dismissal of these appeals.

VII. ANALYSIS OF FRAM'S ISSUES

Issue #1: Did the trial judge err in failing to find that Romandale was estopped, based on estoppel by representation or by convention, from claiming that the Settlement Agreement breached the 2005 August Agreement?

A. The Parties' Positions

Fram

[113] Fram contends that, before 2015, Romandale repeatedly made two representations: (1) under the COAs, the buy-sell could not be exercised until after SPA; and (2) under the 2005 August Agreement, Kerbel could not cause Romandale to trigger the buy-sell in the COAs until after SPA (the "**Representations**"). It says that Romandale made the Representations and statements consistent with them in: its pleadings; Ms. Roman-Barber's affidavits;

its solicitors' letters, both before and after the Settlement Agreement; and, Ms. Roman-Barber's discovery evidence. Fram submits that the Representations formed the basis of a shared common understanding among the parties, and para. 5 was incorporated into the Settlement Agreement in reliance on the Representations and with Romandale's full knowledge. It will be recalled that para. 5 of the Settlement Agreement states the parties' intention that the purchase and sale of the Remaining Interest would take place after SPA.

[114] Fram argues that estoppel by representation and estoppel by convention both operate to bar Romandale from reversing its position and claiming that para. 5 of the Settlement Agreement is a breach of the 2005 August Agreement. It contends that the trial judge made a palpable and overriding error in refusing to apply estoppel on the basis that Fram and Kerbel had not relied on the Representations or, if they did, that their reliance was unreasonable.

[115] In terms of reliance, Fram says that the trial judge erred in dismissing its and Kerbel's evidence that they relied on the Representations on the basis the evidence was simply "bald assertions". Fram argues there is nothing "bald" about the change in course of action it and Kerbel took in entering into the Settlement Agreement. It contends that as a result of the Settlement Agreement, it gave up seeking specific performance of its contractual remedies and limited its damages claim against Romandale to 50% of the Lands, while Kerbel gave up 50% of its

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rights under the 2005 August Agreement. They did so based on the common understanding – perpetuated by Romandale and its lawyers – that post-SPA closing was consistent with the COAs and the 2005 August Agreement.

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[116] Further, Fram contends, there was nothing unreasonable about it and Kerbel's reliance on Romandale's Representations. Those Representations were made in a litigation context – through pleadings, affidavits, solicitors' letters, and examination testimony. The very purpose of the Representations was to allow the courts and other parties to rely on them for notice and the truth of their contents. For example, when Ms. Roman-Barber swore her affidavit in 2007, she intended the court to rely on it in the injunction proceeding. The court did exactly that: Forestell J. accepted Ms. Roman-Barber's evidence that the "original intent of the [2005 August Agreement] was that the sale to [Kerbel] of the remaining interest of Romandale in the Lands would not occur until some time after SPA". If the court was entitled to rely on Romandale's representation of its position Fram argues it was surely reasonable for Fram and Kerbel to do the same.

[117] Fram says the trial judge erred in concluding that reliance was "totally unreasonable" in light of Romandale's objection to the Settlement Agreement, because Romandale's objection was not based on the timing of the buy-sell.

[118] In terms of detriment, Fram submits that it would be unjust and unfair to permit Romandale to resile from the mutual assumptions or Representations. In

2010, Kerbel and it entered into the Settlement Agreement with the assistance of a judicial mediation and, at that time, all three parties agreed that the 2005 August Agreement would close post-SPA. Five years later in 2015, knowing the state of the Settlement Agreement, Romandale "upended the playing field" and changed its position to make an uncontroversial term in 2010 (i.e. para. 5) an allegedly repudiatory breach of the 2005 August Agreement. This, Fram contends, is unfair because it threatens to take away Fram and Kerbel's entire economic interest in the 2005 August Agreement.

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Kerbel

[119] On these appeals, Kerbel repeats and relies on Fram's submissions on estoppel. However, because the trial judge did not deal with estoppel by convention, it falls to this court to decide that matter *de novo*. Consequently, I will set out a summary of Kerbel's trial position on that issue.

[120] At trial, Kerbel argued that estoppel by convention applied to bar Romandale from contending that, because of para. 5 in the Settlement Agreement, Kerbel breached the 2005 August Agreement by entering into the Settlement Agreement. It referred to the principles governing estoppel by convention, as set out in *Ryan v. Moore*, and argued that those principles squarely applied.

[121] Kerbel identified the following as its shared understanding with Romandale when they entered into the 2005 August Agreement: because the sale of

Romandale's Remaining Interest would close after SPA, the 2005 August Agreement did not breach the COAs between Romandale and Fram (the "**Shared Understanding**"). Romandale repeatedly expressed the Shared Understanding after the 2005 August Agreement was entered into. This includes in the fall of 2010, during which time all three parties – Romandale, Fram and Kerbel – participated in the judicial mediation that took place in respect of the 2007 and 2008 Actions. Kerbel argued that was evidence that all three parties held and operated under the Shared Understanding.

[122] Kerbel also pointed to the fact that even after Romandale resiled from the Settlement Agreement, it knew that Fram and Kerbel were continuing to discuss settlement on the basis of the Shared Understanding. It was only months after the Settlement Agreement was executed that Romandale, for the first time, took the position that by entering into the Settlement Agreement, Kerbel breached the 2005 August Agreement. Kerbel argued that Romandale was obliged to warn it, before the Settlement Agreement was executed, that it intended to change its position on the Shared Understanding.

[123] Kerbel also contended that it would suffer detriment if Romandale were allowed to resile from the Shared Assumption. It had already given Romandale over $16 million in value under the 2005 August Agreement and, through the Settlement Agreement, it compromised its rights under that agreement. If

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Romandale were allowed to resile from the Shared Assumptions, Kerbel would lose the opportunity to close its purchase of the Remaining Interest under the 2005 August Agreement and develop the Lands.

Romandale

[124] Romandale says that Fram's submissions on estoppel are premised on an erroneous oversimplification of the equitable doctrine of convention. It contends that, even if there was a shared assumption that the buy-sell could not be triggered under the 2005 August Agreement until after SPA, there was no transaction or dealing between Romandale and either Fram or Kerbel for which this shared assumption formed the basis. In making this argument, Romandale relies on para. 4 of *Ryan v. Moore*, in which the Supreme Court of Canada states:

> Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are **about** to enter. If they have acted upon the agreed assumption, then, as regards **that transaction**, each is estopped **against the other** from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it. [Citations omitted; emphasis as added by Romandale.]

[125] Thus, Romandale argues, neither Fram nor Kerbel can use estoppel by convention against Romandale to protect the Settlement Agreement. Because the Settlement Agreement was entered into between Fram and Kerbel only, estoppel by convention "may apply as between them but not [to] Romandale".

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[126] As well, Romandale submits that Fram's argument on estoppel starts with a misstatement about the nature and character of its position prior to the Settlement Agreement. It says that it made no representation upon which Fram or Kerbel could rely, nor did the parties have a shared assumption for the purposes of estoppel.

[127] Its position in the 2007 Action was that the 2005 August Agreement was not a breach of the COAs. It says that the timing of the triggering of the buy-sell was irrelevant to whether Romandale had breached the COAs. To the extent Romandale asserted that the buy-sell in the 2005 August Agreement would be triggered after SPA, "this was just another way of Romandale asserting that the buy-sell under the [2005 August Agreement] could only be triggered when it was triggerable under s. 5.07 of the COAs, coupled with the mistake the parties and counsel had made about s. 5.07". Given that the mistake was of no consequence to the matters in dispute in the 2007 Action, it went unnoticed, was not something the parties deliberated on, joined issue on, or turned their minds to. It did not form the basis of any of their dealings nor were they all of the mind that it would govern their future affairs.

[128] Romandale also argues that the trial judge did not err in concluding that Fram and Kerbel had not established reliance. It says that the trial judge correctly gave no weight to either Mr. Giannone's self-serving assertion of reliance in his affidavit evidence or to the recital in the Settlement Agreement. It contends that

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the evidence made clear that Fram and Kerbel were not relying on Romandale at all but, rather, crafted the Settlement Agreement to carry out a scheme in which they would immediately assume control over the development of the Lands for their benefit while putting off their purchase of the Lands for at least decades.

[129] Furthermore, Romandale says, the trial judge did not err in finding that any reliance by Fram and Kebel was unreasonable. Just because a statement is made in the course of litigation does not mean it can automatically be relied on for the purposes of estoppel. It depends on the circumstances. Fram and Kerbel cannot have reasonably relied on Romandale's assertions regarding the timing of the buy-sell in the 2005 August Agreement because that issue was not in dispute in the litigation prior to the Settlement Agreement being entered into.

[130] Romandale also points to its objection to the Settlement Agreement, arguing that it does not matter whether its objection was based on para. 5 of that agreement. Its objection put Fram and Kerbel on notice that it would object to any settlement between them. Thus, they proceeded at their own risk.

[131] Romandale also says that, given their position on these appeals, Fram and Kerbel could not have reasonably relied on a shared assumption that the buy-sell could only be triggered after SPA when entering into the Settlement Agreement. Their position on appeal is that Kerbel had an unfettered discretion to trigger the buy-sell in the 2005 August Agreement either before or after SPA. Thus,

Romandale contends, they cannot be heard to say it was reasonable for them to rely on a clearly wrong and now abandoned interpretation.

[132] Romandale also says Fram has not established that it would be unjust to allow it to correct its mistake or that Fram and Kerbel suffered any detriment. It cannot be unjust for a party to correct a mistake that is patently obvious on the express words of the contracts, to which all parties had access. Furthermore, Fram and Kerbel's entry into the Settlement Agreement was a deliberate and inequitable scheme to tie up and control the Lands to Romandale's exclusion while putting off their purchase for decades.

[133] Moreover, Romandale submits that neither Fram nor Kerbel suffered any relevant detriment in entering into the Settlement Agreement. To the extent Fram suffered detriment by giving up 50% of its claim against Romandale, that detriment is moot because Fram's claims in the 2007 and 2008 Actions were dismissed and are not being appealed. And, Kerbel presented no evidence of detriment. Romandale says that granting Fram an option to buy 50% of the Lands is not detriment: Kerbel granted the option in exchange for Fram giving up its claims against Kerbel. It was Kerbel's choice to assign some litigation risk to being sued by Fram and to mitigate that risk by striking a deal with Fram. That Fram ultimately lost and Kerbel "paid" for nothing is irrelevant.

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B. Estoppel by Representation

(1) Governing Legal Principles

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[134] In *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*, [1970] S.C.R. 932, at pp. 939-40, the Supreme Court stated that the essential factors giving rise to estoppel by representation are:

> (1) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made;
>
> (2) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and
>
> (3) detriment to such person as a consequence of the act or omission.

[135] More recently in *Ryan v. Moore*, at para. 5, the Supreme Court referred to its much earlier decision in *Page v. Austin* (1884), 10 S.C.R. 132, at para. 164, to describe the doctrine of estoppel by representation as follows:

> Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it.

(2) Application of the Law

[136] I agree with the trial judge that Fram and Kerbel fail in their claim of estoppel by representation. However, I do so for different reasons than those of the trial judge.

[137] It will be recalled that, at trial, Fram and Kerbel argued that they entered into the Settlement Agreement in reliance on Romandale's representation that the 2005 August Agreement was valid and that the buy-sell provision in it was to be performed or completed after SPA. The trial judge concluded that estoppel by representation was not made out because Fram and Kerbel had not proven that they relied on the representation and, if they had, their reliance was unreasonable. That is, the trial judge concluded that Fram and Kerbel failed to prove the second essential factor giving rise to estoppel by representation.

[138] In my view, however, Fram and Kerbel fail on the first essential factor giving rise to estoppel by representation.

[139] *Canadian Superior Oil Ltd.* describes the first essential factor as a representation "intended to induce a course of conduct" on the part of the person to whom the representation was made. In *Ryan v. Moore*, this factor is expressed as the requirement that a positive representation be made "with the intention that it shall be acted on" by the party to whom the representation is made. On the facts,

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Romandale did not make a representation with the intention that Fram and Kerbel should act on it.

[140] In the fall of 2010, Fram, Kerbel, and Romandale were attempting to settle the 2007 and 2008 Actions. After reaching a settlement agreement in principle, the parties continued to negotiate the terms of the settlement. During that process, Fram and Kerbel were made aware that Romandale continued to maintain its position that the 2005 August Agreement was valid and the buy-sell provisions in it and in the COAs could not be utilized until SPA had been achieved for the Lands.

[141] However, knowledge of Romandale's position and the fact its position remained unchanged from the time that it entered into the 2005 August Agreement until December 2010, when Fram and Kerbel entered into the Settlement Agreement, is not tantamount to Romandale representing that it would not change its position going forward.

[142] Further and in any event, Fram and Kerbel's knowledge of Romandale's position does not meet the requirement in the first essential element that Romandale made a representation of its position *with the intention of inducing* Fram and Kerbel to enter into the Settlement Agreement or otherwise act on it.

[143] Consequently, Fram and Kerbel failed to prove the first essential factor giving rise to estoppel by representation. For these reasons, I agree with the trial judge that estoppel by representation was not made out.

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C. Estoppel by Convention

(1) Governing Legal Principles

[144] At para. 59 of *Ryan v. Moore*, the Supreme Court states that the following criteria form the basis of the doctrine of estoppel by convention:

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly). [Emphasis in original.]
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[145] On the first criterion – which the Court refers to as "Assumption Shared and Communicated" – the Court provides the following additional guidance, at paras. 61-62:

> The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind". The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity.

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> While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other. Mutual assent is what distinguishes the estoppel by convention from other types of estoppel. … Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other. Further, the estopped party must have, at the very least, communicated to the other that he or she is indeed sharing the other party's (*ex hypothesi*) mistaken assumption. [Citations omitted.]

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[146] The court also offers further guidance on the second and third criteria, namely, reliance and detriment. It notes that the requirement of detrimental reliance lies at the heart of true estoppel and that detrimental reliance encompasses two distinct, but interrelated concepts: reliance and detriment: at paras. 68-69.

[147] Reliance requires a finding that the party seeking to establish the estoppel changed its course of conduct by acting, or abstaining from acting, in reliance upon the assumption, thereby altering its legal position: at para. 69.

[148] In terms of detriment, the Court offers this guidance, at para. 73 of *Ryan v. Moore*. Once the party seeking to establish estoppel shows that it acted on a shared assumption, it must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption. A change from the presumed legal position will facilitate the establishment of detriment "because there is an element of injustice inherent within the concept of the shared

assumption – one party has acted unjustly in allowing the belief or expectation to ‘cross the line’ and arise in the other’s mind”: at para. 73, citing Sean Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel*, 2nd ed. (Oxford: Oxford University Press, 2002), at p. 228.

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(2) Application of the Law

[149] Unlike estoppel by representation, I must approach the issue of estoppel by convention on a *de novo* basis. I do so because, while the parties expressly raised and argued the issue of estoppel by convention at trial, the trial judge did not address it.

[150] I will address each of the three criteria that form the basis of estoppel by convention: (a) assumption shared and communicated; (b) reliance; and (c) detriment.

(a) Assumption Shared and Communicated

[151] The first criterion for estoppel by convention requires that the parties’ dealings were based on a shared assumption of fact or law: *Ryan v. Moore*, at para. 59. Thus, I must determine what state of affairs the parties accepted and decide whether there was sufficient certainty and clarity in the shared assumptions to give rise “to an enforceable equity”: *Ryan v. Moore*, at para. 61.

[152] I deal first with whether the alleged shared assumptions are sufficiently certain and clear.

[153] In the fall of 2010, when Fram, Kerbel, and Romandale were trying to settle the 2007 and 2008 Actions, the parties based their dealings on two assumptions: (1) the buy-sell provision in the COAs could not be triggered until after SPA had been achieved for the Lands;[9] and (2) under the 2005 August Agreement, Kerbel could not cause Romandale to trigger the buy-sell under the COAs until after SPA[10] (the "**Shared Assumptions**"). There is no ambiguity or lack of clarity about the Shared Assumptions: they have sufficient certainty and clarity to satisfy that requirement in the first criterion of estoppel by convention.[11]

[154] It is worth recalling at this point that I did not find statements to the same effect as the Shared Assumptions to amount to representations within the meaning of estoppel by representation. That is because a common or shared assumption, as that term is used in estoppel by convention, is not the same thing as a

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[9] The parties were mistaken on this matter. Under s. 5.07 of the COAs, the buy-sell could have been exercised when the DMAs were terminated. Romandale terminated the DMAs in February 2005. Therefore, the buy-sell in the COAs could have been exercised as early as February 2005.

[10] This may or may not have been a mistaken assumption. Whether, under the 2005 August Agreement, Kerbel could have required Romandale to trigger the buy-sell in the COAs before SPA is a point of contractual interpretation. As I have concluded that estoppel by convention applies to bar Romandale from contending that it could have been triggered pre-SPA, this point of contractual interpretation need not be decided.

[11] As discussed below, the communications in *Ryan v. Moore* are an example of alleged shared assumptions that do not have sufficient clarity and certainty to satisfy the first criterion.

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representation. As the Supreme Court explained, at para. 62 of *Ryan v. Moore*, an assumption need not be created or encouraged by the estopped party: it must simply be shared, in the sense that each party is aware that the assumption is held by the other(s). As the Supreme Court stated, "Mutual assent is what distinguishes the estoppel by convention from other types of estoppel".

[155] Having found the Shared Assumptions were sufficiently certain and clear, I must now determine whether the parties were of "a like mind". In making this determination, I must consider whether the three parties: (1) held the Shared Assumptions at the material times; (2) communicated to the others that they held the Shared Assumptions; and (3) based their dealings on them: *Ryan v. Moore*, at paras. 61-62. In my view, the following documents establish these three matters. Thus, the first criterion for estoppel by convention is met.

(i) The Settlement Agreement and Drafts Leading to It

[156] The final Settlement Agreement is clear evidence that Fram and Kerbel held the Shared Assumptions, communicated that to one another, and based their dealings on them. This is evident from the first, second, and sixth preambles, and para. 5 of the Settlement Agreement:

- The first preamble recites that Fram and Romandale are co-owners of the Lands and parties to the COAs and, under the COAs, each has a buy-sell right in respect of the other's interest but that right "may only be exercised after [SPA] has been obtained for the Lands".

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- The second preamble recites that Romandale and Kerbel are parties to the 2005 August Agreement under which Romandale agreed to sell to Kerbel its Remaining Interest “at such time as Romandale could exercise its buy-sell rights under the Buy-Sell Provisions of the [COAs]”.

- The sixth preamble recites that Fram and Kerbel “have agreed to settlement so that the right of [Kerbel] to acquire Romandale’s Remaining Interest in the Lands pursuant to the [2005 August Agreement] may be exercised 60 days after [SPA] for the Lands is obtained”.

- Paragraph 5 provides that “[i]t is the intention of [Fram and Kerbel] that the purchase and sale of Romandale’s Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after [SPA] for the Lands has been obtained”.

[157] Though Romandale was not a party to the final Settlement Agreement, its conduct in the fall of 2010 up to and including when Fram and Kerbel executed the Settlement Agreement demonstrates that it too held the Shared Assumptions, communicated that to Fram and Kerbel, and based its dealings with them on the Shared Assumptions.

[158] It will be recalled that in September of 2010, the three parties came to an agreement in principle at the judicial mediation. Based on the agreement in principle, counsel for Fram prepared “very preliminary” draft minutes of settlement and sent the draft to counsel for Romandale under cover of a letter dated September 8, 2010. The preliminary draft was short; it consisted of four preambles

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and seven paragraphs. The fourth preamble and para. 6 of that draft reflect the Shared Assumptions.

- The fourth preamble reads as follows:

> **WHEREAS** the parties have agreed to settlement so that the right of [Kerbel] to acquire Romandale's Remaining Interest in the Lands pursuant to the [2005 August Agreement] shall be exercised 60 days after [SPA] for the Lands is obtained …

- Paragraph 6 provides:

> [Fram] does not by this agreement consent to the transaction referred to in paragraph 2 of the [2005 August Agreement]. Romandale hereby acknowledges that this settlement agreement does not constitute [Fram's consent] … and that it is the intention of the parties that the purchase and sale of Romandale's entire Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place 60 days after [SPA] for the Lands has been obtained.

[159] After the preliminary draft was circulated, counsel for the three parties continued to exchange draft settlement agreements and discuss other possible provisions that might be included.

[160] In a letter dated September 24, 2010, counsel for Romandale wrote to counsel for Kerbel and Fram and set out the areas on which the parties were in agreement, including "[t]hat the sale of each parcel will take place when that particular parcel achieves Secondary Planning Approval".

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[161] Under cover of a letter dated September 29, 2010, counsel for Fram sent Romandale's counsel (with a copy to Kerbel's counsel) a proposed final draft. The letter stated that if the draft was acceptable, the "draft stamp" would be removed and it would be circulated for signature. The proposed final draft settlement agreement contained essentially the same fourth preamble as that in the preliminary draft (set out above) and, of a total of seven paragraphs, three reflect the Shared Assumptions.

- Paragraph 1 provided that "the injunction ordered by Forestell J. July 26, 2007 shall continue in respect of each of the two parcels comprising the Lands … until 60 days after [SPA] has been granted in respect of that particular parcel of the Lands".
- Paragraph 4 provided that "Fram Kerbel and Romandale shall complete the sale of the entire Remaining Interest of Romandale in the Lands on the terms described in paragraph 2 of the [2005 August Agreement], 60 days after [SPA] has been obtained for each of the two parcels comprising the Lands".
- Paragraph 7 provided that "<u>[t]he parties hereby acknowledge</u> that in making these minutes of settlement, it is <u>their common intention that the purchase and sale of the Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement shall take place</u> in respect of each of the two parcels of the Lands <u>after [SPA] for each parcel has been obtained</u>, and that the closing of the purchase and sale for each parcel shall take place 60 days after [SPA] for that particular parcel of the Lands has been obtained. [Emphasis added.]

[162] In response, by letter dated September 30, 2010, counsel for Romandale provided comments on the draft and asked that the final settlement agreement include, among other things, a provision explicitly requiring the parties to do

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nothing to hinder or delay the obtaining of SPA for the Lands. He wrote, “As we were specifically advised at the mediation that this would not be a problem, the wording should be inserted in the Minutes”. As well, counsel for Romandale asked that a “drop-dead” date for the contemplated sale of the Lands be inserted in case the Lands never achieved SPA:

> At present, there exists the possibility that one or both parcels may not receive [SPA]. Such a failure to address that point may call into question the validity of the agreements or at least pose a practical problem for the parties if [SPA] is not achieved (at least in our lifetimes) for either of the parcels.

[163] The parties continued to communicate about the draft settlement agreement for some weeks. In October 2010, Romandale began taking issue with the draft agreements, which I discuss in more detail below. Ultimately, in a letter dated November 12, 2010, Fram’s counsel wrote to Romandale’s counsel (with a copy to Kerbel’s counsel), stating that it appeared Romandale was resiling from the settlement agreement so steps would be taken to reschedule the trial of the 2007 and 2008 Actions. Fram’s counsel enclosed a copy of the draft settlement agreement that Fram and Kerbel intended to enter into. The enclosed agreement was substantially the same as the final Settlement Agreement, including the provisions that reflected the Shared Assumptions.

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[164] Never once during the judicial mediation or in the period that followed leading up to the Settlement Agreement – despite the many communications among counsel which reflected the Shared Assumptions – did Romandale ever object to the Shared Assumptions or the terms in the drafts that reflected them. On the contrary, during that period, Romandale expressly affirmed the parties' shared understanding that the sale and purchase of Romandale's Remaining Interest would occur after SPA – as, for example, in its counsel's letters of September 24 and September 30, 2010, described above.

[165] In my view, what transpired among the three parties during this period alone satisfies the requirements of the first criterion for estoppel by convention. The following documents reinforce this conclusion.

(ii) Letters between Counsel

[166] In a letter dated September 22, 2009, Romandale's corporate counsel wrote to Kerbel's counsel to address the matter of participation in the NMLG. He stated that, under the 2005 August Agreement, Kerbel was to act as Romandale's agent and attorney "for the purposes of taking the steps necessary to proceed to [SPA] and thereby trigger the buy-sell rights under the [COAs]". This is communication by Romandale to Kerbel of its belief in the Shared Assumptions.

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[167] Romandale also communicated its belief in the Shared Assumptions to Fram. By letter dated January 28, 2011, counsel for Romandale wrote to counsel for Fram stating:

> [Romandale] was and is the registered owner of 90% of the [Lands]. It conditionally sold those lands to [Kerbel] by way of an agreement dated August 2005. The condition could only be satisfied by either a) secondary plan approval (which has not been achieved); b) or the consent of [Fram] to the transaction.

[168] This letter was sent more than a month after Fram and Kerbel entered into the Settlement Agreement. It demonstrates that Romandale continued to believe the Shared Assumptions even after the Settlement Agreement was executed.

(iii) Pleadings and Evidence at Trial

[169] The pleadings and evidence at trial further demonstrate that all three parties held the Shared Assumptions in the relevant time period. In addition, they show that each party made manifest representations of its belief in the Shared Assumptions and communicated that to the other parties.

[170] At trial, Fram and Kerbel's positions rested on the Shared Assumptions. Their pleadings – including Fram's Fresh as Amended Reply and Kerbel's Statement of Defence and Crossclaim in the 2007 Action – reflect their shared belief that SPA was required before the buy-sell provision in the COAs and the 2005 August Agreement could be triggered.

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[171] Romandale's Statement of Defence in the 2007 Action (before it was amended in 2015), its Statement of Defence in the 2008 Action, and its Notice of Motion to stay the 2007 Action all explicitly stated that the buy-sell provision in the 2005 August Agreement could not be triggered until after SPA was obtained for the Lands.

[172] Furthermore, Ms. Roman-Barber's affidavits sworn July 11, 2007, and August 23, 2007, and her discovery evidence in February 2009 communicated – to Fram, Kerbel, and beyond – her (and therefore, Romandale's) belief that the sale of the Remaining Interest under the 2005 August Agreement was conditional on SPA being obtained for the Lands.

(b) Reliance

[173] Having established that the first criterion for estoppel by convention is met, I must now determine whether Fram and Kerbel acted in reliance on the Shared Assumptions. For the purpose of estoppel by convention, reliance requires a finding that the party seeking to establish estoppel changed its course of conduct by acting (or abstaining from acting) in reliance on the shared assumption, thereby altering its legal position: *Ryan v. Moore*, at para. 69.

[174] In my view, Fram and Kerbel satisfy the reliance criterion. Paragraph 5 of the Settlement Agreement is based on the Shared Assumptions. Fram and Kerbel entered into the Settlement Agreement in reliance on the Shared Assumptions. As

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a result of having entered into the Settlement Agreement, their respective legal positions under the COAs and the 2005 August Agreement were altered. An overview of the alteration to their legal positions that resulted from having entered into the Settlement Agreement is as follows.

[175] Before entering into the Settlement Agreement, Fram's legal position in respect of the Lands was governed by the COAs between it and Romandale. In the 2007 Action, it claimed that Romandale had breached the prohibition against Disposition in the COAs by entering into the 2005 August Agreement. If Fram succeeded in its claim, Fram was entitled to, among other things: a declaration that the offending agreement (i.e., the 2005 August Agreement) was void under s. 5.03 of the COAs; bring proceedings for specific performance under s. 6.02(b) of the COAs; and purchase Romandale's interest in the Lands at 95% of their fair market value under s. 6.02(d) of the COAs. As a result of entering into the Settlement Agreement, Fram gave up those rights: pursuant to s. 1 of the Settlement Agreement, Fram agreed that it would not seek a declaration that the 2005 August Agreement was void and that it would limit its damages claims against Romandale to 50% of the Lands.

[176] Before entering into the Settlement Agreement, Kerbel's legal position in respect of the Lands was governed by the 2005 August Agreement between it and Romandale. The Conditional Provision in that agreement gave Kerbel the

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opportunity to acquire 100% ownership of the Lands. After entering into the Settlement Agreement, that changed. Pursuant to para. 2 of the Settlement Agreement, if Kerbel acquired ownership of the Lands, Kerbel was obliged – at Fram's option – to allow Fram to acquire a 50% undivided interest in the Lands on the same terms and conditions as Kerbel had acquired the Remaining Interest from Romandale.

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[177] Thus, it can be seen, Fram and Kerbel's legal positions were altered as a result of relying on the Shared Assumptions.

[178] I do not view my determination that Fram and Kerbel meet the reliance criterion for estoppel by convention as running afoul of the trial judge's determination of no reliance on the part of Fram and Kerbel or, if there was reliance, it was unreasonable. That is because the trial judge made her reliance determination based on the legal principles governing estoppel by representation whereas I decided reliance in accordance with the legal principles governing estoppel by convention. The two legal frameworks are different, the test for reliance in each is different, and, therefore, the determination of reliance under each may be different without being inconsistent.

[179] However, if, as Romandale urges, the trial judge's determination on reliance is a finding of fact for which deference must be shown, I would set it aside on the basis that it is the result of palpable and overriding error.

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[180] On the evidence set out above, it is clear that Fram and Kerbel relied on the Shared Assumptions in entering into the Settlement Agreement. A plain reading of the Settlement Agreement alone shows that. A contrary finding – namely, that Fram and Kerbel did not rely on the Shared Assumptions in entering into the Settlement Agreement – is simply not available on the evidence. Thus, such a finding would be the result of palpable and overriding error.

[181] The trial judge also made a palpable and overriding error in determining that, if there was reliance, it was unreasonable. In making this determination, the trial judge accepted that Romandale put Fram and Kerbel on notice that it objected to any settlement agreement between them in respect of the Lands without its consent: Reasons, at para. 129. Romandale says that it objected "clearly and unequivocally" to the Settlement Agreement "including Fram and Kerbel deferring the closing of the 2005 August Agreement by decades rather than carrying it out immediately in 2010, as Romandale expressly asked them to do". In support of this argument, it relies on its letter to Fram, dated October 25, 2010.

[182] I do not agree. The relevant portions of Romandale's letter of October 25, 2010, are as follows:

> More importantly, your correspondence only confirms our client's belief that the relationship contemplated by the proposed Minutes of Settlement cannot work. Simply put, the benefit of the August 2005 Agreement cannot be assigned in whole or in part to your client without our

> client's consent. In order to give that consent, not only would real estate counsel have to draft extensive documentation, but there remain at present simply some points to which our client cannot agree, in particular, the registration of the injunction against title to the lands for which Romandale continues to hold legal title; and arbitration over a process which Romandale has effectively controlled without objection from any party for 5 years now.
>
> To avoid these problems, your client, together with Mr. Kerbel, can formulate an offer to purchase our client's interest in the lands immediately. Failing that, we should appear before Justice Moore and request a trial date to adjudicate all issues. If you and [counsel for Kerbel] believe that a settlement of the August 2005 Agreement can be effected without the consent of the 90% land holder, then that issue will likely also form the subject matter of the trial. [Emphasis added.]

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[183] Nothing in this letter suggests that Romandale objected to the Settlement Agreement because of para. 5. That is, there is nothing in the letter to indicate that Romandale objected to the expressed intention in para. 5 that the purchase and sale of the Remaining Interest was to take place after SPA. Instead, the letter shows that Romandale resiled from the Settlement Agreement over matters such as registration of the injunction on title to the Lands and arbitration.

[184] Further, Romandale's call to Fram and Kerbel to "formulate an offer to purchase [Romandale's] interest in the lands immediately" does not indicate that Romandale believed the buy-sell provisions in the COAs and the 2005 August Agreement could be triggered at any time, pre or post-SPA. The parties all knew

Fram could consent to the sale of Romandale's Remaining Interest before SPA and, with that consent, the purchase and sale of Romandale's Remaining Interest could proceed immediately. Romandale's call to Fram and Kerbel to make an immediate purchase is merely a request that the parties proceed with the sale under Fram's consent. It says nothing about Romandale's assumptions regarding the buy-sell provisions.

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[185] Until 2015, Romandale never retracted its communications on the Shared Assumptions and never purported to. In fact, as I describe above, Romandale confirmed in writing its belief in the Shared Assumptions in a letter in January 2011 – after Fram and Kerbel executed the Settlement Agreement – when it again made manifest that the sale of its Remaining Interest under the 2005 August Agreement could not take place until after SPA or with Fram's consent.

[186] As Romandale did not communicate to Fram and Kerbel that it no longer held the Shared Assumptions until 2015, in the circumstances of this case, it was not unreasonable for Fram and Kerbel to rely on the Shared Assumptions when they entered into the Settlement Agreement in 2010. As Fram points out, the court relied on Romandale's assertions to the same effect in the injunction proceeding. In light of that, it can scarcely be said to be unreasonable that Fram and Kerbel also relied on them.

(c) Detriment

[187] The third criterion for establishing estoppel by convention is detriment. As the parties seeking to establish estoppel by convention, Fram and Kerbel must prove that if Romandale were allowed to resile from the Shared Assumptions, they would suffer detriment since there had been a change from their presumed legal positions: *Ryan v. Moore*, at paras. 59, 69. To succeed in proving detriment, Fram and Kerbel must show that it would be unjust or unfair to allow Romandale to resile from the Shared Assumptions: *Ryan v. Moore*, at paras. 59, 73 and 74. A change from their presumed legal positions will facilitate the establishment of detriment: *Ryan v. Moore*, at para. 73.

[188] As I have explained, Fram and Kerbel entered into the Settlement Agreement in reliance on the Shared Assumptions and thereby altered their legal positions under the COAs and the 2005 August Agreement respectively. While the change in their legal positions facilitates the establishment of detriment, it remains their burden to show that it would be unjust or unfair to allow Romandale to resile from the Shared Assumptions: *Ryan v. Moore*, at para. 74. One need only consider what transpired at the trial below and the resulting Judgment to find they satisfy that burden.

[189] Paragraph 5 of the Settlement Agreement reflects the parties' Shared Assumptions that the purchase and sale of Romandale's Remaining Interest would

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take place after SPA had been obtained. The trial judge accepted Romandale's submission that para. 5 was a breach of the 2005 August Agreement on Kerbel's part. In so doing, the trial judge permitted Romandale to resile from the Shared Assumptions. Having determined that Kerbel was in breach, the trial judge declared the 2005 August Agreement at an end and excused Romandale from performance of its obligations under that agreement. Thus, it can be seen, if Romandale had not been permitted to resile from the Shared Assumptions, Kerbel would not have been found to have been in breach of the 2005 August Agreement and it would not have lost the right to compel Romandale to fulfill its obligations under that agreement. In the circumstances of this case, it was unjust and unfair to Kerbel that Romandale was permitted to resile from the Shared Assumptions.

[190] It was also unfair and unjust to Fram. In accordance with the Settlement Agreement, Fram discontinued its claims against Kerbel in the 2007 and 2008 Actions and gave up significant claims against Romandale under the COAs. However, the *quid pro quo* under the Settlement Agreement was that Fram would have the opportunity to acquire 50% ownership of the Lands once Kerbel bought Romandale's Remaining Interest. Because Romandale was permitted to resile from the Shared Assumptions and was consequently excused from performance under the 2005 August Agreement, Romandale was no longer obliged to sell its Remaining Interest to Kerbel. Thus, Fram gave up its claims for nothing.

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[191] Accordingly, in my view, it would be unjust and unfair to allow Romandale to resile from the Shared Assumptions. In reaching this conclusion, I reject Romandale’s submission to the contrary.

[192] Romandale makes two arguments in support of its submission that it would be neither unjust nor unfair to allow it to resile. First, it argues that it cannot be unjust or unfair that it be allowed to correct the mistaken Shared Assumptions because the mistake as to the timing of the buy-sell provisions was “patently obvious” on the express words of the contracts to which all parties had access. Second, it argues that Fram and Kerbel’s entry into the Settlement Agreement “was a deliberate and inequitable scheme to tie up and control the Lands (to Romandale’s exclusion) while putting off their purchase for at least decades”.

[193] Respectfully, Romandale’s first argument misunderstands the detriment criterion in the doctrine of estoppel by convention. Detriment is not about the correctness of the Shared Assumptions or how obviously incorrect they might have been. Detriment is a question of whether it would be unjust or unfair to allow Romandale to resile from the Shared Assumptions – regardless of whether the Shared Assumptions were correct or were patently incorrect.

[194] Romandale’s second argument is that if it was not permitted to resile, Fram and Kerbel would get away with their “deliberate and inequitable scheme” to tie up the Lands for decades without having to pay for them. This argument does not

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withstand scrutiny. Before trial, Fram gave its consent to Kerbel's purchase of Romandale's Remaining Interest. Accordingly, had Romandale wished, it could have completed the sale of its Remaining Interest to Kerbel right then. In short, by the time of trial, there was no threat that, as a result of the Settlement Agreement, the Lands would be tied up for decades without Romandale being paid for its Remaining Interest in them.

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[195] At all material times during its dealings with Fram and Kerbel, Romandale manifestly represented to Fram and Kerbel that it held the Shared Assumptions. Fram and Kerbel then relied on the Shared Assumptions and entered into the Settlement Agreement. As a result of that, Fram and Kerbel's legal positions were altered. In the circumstances, it would be unjust and unfair to permit Romandale to resile from the Shared Assumptions. Consequently, Fram and Kerbel have met their burden on the detriment criterion.

(d) Romandale's Overriding Submission on Estoppel by Convention

[196] Before finally determining whether estoppel by convention applies, I must address Romandale's overriding submission that Fram and Kerbel cannot avail themselves of the doctrine because there was no contract between it and either Fram or Kerbel based on the Shared Assumptions – only Fram and Kerbel were parties to the Settlement Agreement.

[197] It will be recalled that Romandale relies on para. 4 of *Ryan v. Moore* for this submission. For ease of reference, I set out para. 4 again, below.

> Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are **about** to enter. If they have acted upon the agreed assumption, then, as regards **that transaction**, each is estopped **against the other** from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it. [Citations omitted; emphasis as added by Romandale.]

[198] I accept that the language in para. 4 of *Ryan v. Moore* may be seen as suggestive of a contractual relationship among the parties. However, the facts of *Ryan v. Moore* show that the doctrine of estoppel by convention is not limited to such situations.

[199] *Ryan v. Moore* concerned a three-vehicle accident that took place in 1997. Peter Ryan (the "Plaintiff") and Rex Gilbert Moore were two of the drivers involved in the accident. Soon after the accident happened, the Plaintiff began corresponding with the adjuster assigned by Mr. Moore's insurer.

[200] Mr. Moore died in 1998 from causes unrelated to the accident. Letters of Administration were granted to his administratrix in February 1999.

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[201] The Plaintiff started a personal injury action against Mr. Moore in October 1999. That claim was within the two-year limitation period in the *Limitations Act*, S.N.L. 1995, c. L-16.1.

[202] The insurer learned of Mr. Moore's death in May 2000; the Plaintiff learned of it in September 2000. In November 2000, the insurer refused to settle the Plaintiff's claim on the basis it was outside the limitation period in the *Survival of Actions Act*, R.S.N.L. 1990, s. S-32, which imposes a six-month limitation period from the granting of Letters of Administration. The insurer then applied to have the action struck as being out of time. The trial judge dismissed the application.

[203] An appeal and cross-appeal were taken to the Newfoundland Court of Appeal. A majority of the Court of Appeal held that estoppel by convention barred the insurer and Mr. Moore's estate from pleading that Mr. Moore died in 1998 or that Letters of Administration were granted in February 1999. Thus, they could not invoke the shorter limitation period in the *Survival of Actions Act*.

[204] The insurer and Mr. Moore's estate appealed to the Supreme Court. The Supreme Court allowed the appeal and struck the Plaintiff's statement of claim because it had been brought outside the six-month period prescribed by the *Survival of Actions Act*.

[205] The Supreme Court held that the doctrine of estoppel by convention had not been made out. It found that none of the letters exchanged by the Plaintiff and the

insurer with respect to the Plaintiff's personal injury claim proved the existence of a common assumption. The mere fact that communications occurred between the parties did not establish that they assumed that Mr. Moore was alive. And, the fact the parties were conferring without regard to the limitation period did not establish a shared assumption that the limitation period defence would not be relied on. There was never any discussion by the Plaintiff of the limitation period.

[206] Thus, while the Supreme Court in *Ryan v. Moore* refers to the Plaintiff, the insurer, and Mr. Moore's estate as "parties", they were not parties to a contract. Despite that, the Supreme Court considered whether the doctrine of estoppel by convention operated. In fact, estoppel by convention was the central legal point on which the appeal hinged. Further, when the Supreme Court concluded that the doctrine was inapplicable, it made no mention of the absence of a contract among the parties. Rather, the Court found the doctrine to be inapplicable because the correspondence among the parties did not prove the existence of a shared assumption among the parties. It found that such things as the subject line in the correspondence, which read "Your Insured: Rex Moore", lacked sufficient clarity and certainty to demonstrate a common belief that he was alive. It further found that even if one could conclude that there was a common assumption, the Plaintiff had never communicated that he shared it.

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[207] Accordingly, the applicability of the doctrine of estoppel by convention does not depend on the parties having entered into a contract with one another. Rather, as the Supreme Court states in para. 59 of *Ryan v. Moore*, the question is whether the “parties’ dealings” were based on a shared assumption of fact or law. In this case, while Romandale was not a party to the Settlement Agreement, it was actively involved in the negotiations leading up to that agreement. As I explain above, during that period, the parties’ correspondence (among other things) clearly demonstrate that their “dealings” were based on the Shared Assumptions.

(e) Conclusion on Estoppel by Convention

[208] In the judicial mediation in September 2010, Fram, Kerbel, and Romandale communicated to one another their common belief in the Shared Assumptions. They reached a settlement agreement in principle which reflected those assumptions. The Shared Assumptions were manifest in the preliminary draft settlement agreement and all the drafts that followed through to the final Settlement Agreement. Romandale participated in ongoing negotiations of the Settlement Agreement and received copies of all the drafts, even after it resiled from that agreement. Never once during that process did Romandale dispute the validity of the Shared Assumptions. Rather, at several points it expressly reiterated the Shared Assumptions in communications it sent to Fram and Kerbel.

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[209] When Fram and Kerbel entered into the Settlement Agreement, they relied on their unqualified understanding that all three parties and their counsel held the Shared Assumptions. As a result of having entered into the Settlement Agreement, their legal positions were altered. Allowing Romandale to resile from the Shared Assumptions years after the Settlement Agreement was concluded would cause detriment to both Fram and Kerbel.

[210] As Fram and Kerbel satisfied the three criteria that form the basis for doctrine of estoppel by convention, Romandale was estopped from resiling from the Shared Assumptions and the trial below should have been conducted accordingly.

Issue #2: Did the trial judge err in determining that, by entering into the Settlement Agreement, Kerbel breached the 2005 August Agreement?

[211] After Romandale terminated the DMAs with Bordeaux in early 2005, Bordeaux responded with an action against Romandale and Fram, alleging the termination was invalid and of no force and effect. The litigation was ongoing in August 2005 when Romandale and Kerbel entered into the 2005 August Agreement. The trial judge interpreted the 2005 August Agreement as permitting Kerbel to delay triggering the buy-sell provisions until after SPA only if the Bordeaux litigation dragged on (emphasis added) (the "**Interpretation**"). Based on the Interpretation, the trial judge concluded that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement because, as a result of para.

5 of the Settlement Agreement, the purchase and sale of the Remaining Interest could not take place until after SPA.

[212] Fram argues that the trial judge's Interpretation is erroneous. It contends that she made four extricable errors of law in reaching the Interpretation: (1) failure to give the text of the 2005 August Agreement primacy; (2) accepting impermissible subjective evidence as factual matrix evidence; (3) misinterpreting the "time is of the essence" clause in the 2005 August Agreement; and (4) failing to look at commercial reasonableness at the time of contract execution and from the viewpoint of both parties.

[213] In light of my conclusion on the doctrine of estoppel by convention, Romandale is barred from asserting that the buy-sell provisions in either the COAs or the 2005 August Agreement could be exercised before SPA. Because the trial judge's Interpretation permits for the buy-sell provision in the 2005 August Agreement to be exercised before SPA, the Interpretation is contrary to the Shared Assumptions and cannot stand. Consequently, I need not address the errors in contractual interpretation that Fram contends the trial judge made.

[214] While I need not address the alleged errors in contractual interpretation, nothing in these reasons is to be taken as approving the trial judge's interpretation of the 2005 August Agreement or her application of the principles of contractual interpretation.

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VIII. ANALYSIS OF KERBEL'S ISSUES

Issue #3: Did the trial judge err in concluding that Kerbel repudiated the 2005 August Agreement?

[215] In addition to finding that Kerbel breached the 2005 August Agreement by entering into the Settlement Agreement with Fram, the trial judge also found that, by entering into the Settlement Agreement, Kerbel failed to act in good faith, breached the fiduciary duty she found Kerbel owed Romandale, breached the "time is of the essence" clause in the 2005 August Agreement, and repudiated the 2005 August Agreement. As I have explained, estoppel by convention operates to bar Romandale from attacking the validity of para. 5 of the Settlement Agreement. As para. 5 of the Settlement Agreement was the basis on which the trial judge concluded that Kerbel repudiated the 2005 August Agreement, that conclusion must fall. Accordingly, it is not necessary to address the issues (and related sub-issues) that Kerbel raises respecting the trial judge's conclusion that by entering into the Settlement Agreement, Kerbel repudiated the 2005 August Agreement.

[216] However, nothing in these reasons is to be taken as approving the trial judge's determination that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement, her application of the principles governing repudiation, her finding that Kerbel owed a fiduciary duty to Romandale and breached it, her finding that Kerbel breached its contractual duty of good faith, or

her analysis and conclusion that, as a result of the Settlement Agreement, Romandale was deprived of substantially the whole benefit of the 2005 August Agreement.

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Issue #4: Did the trial judge err in concluding that the 2005 August Agreement was frustrated?

A. The Parties' Positions

Kerbel

[217] Kerbel's overarching position on appeal rests on this foundational legal proposition: the general rule is that it is not the function of the court to rewrite a contract for the parties nor is it the court's role to relieve one of the parties against the consequences of an improvident contract: *Pacific National Investments Ltd. v. Victoria (City of)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 31. Kerbel says that the trial judge violated this general rule and, after determining that enforcement of the 2005 August Agreement was not in Romandale's interests, allowed that conclusion to drive her reasoning. However, Kerbel says, the question for the trial judge was not whether the 2005 August Agreement turned out to be a good deal for Romandale but, rather, whether the defences Romandale asserted to the enforcement of the 2005 August Agreement were tenable in law and fact.

[218] In terms of frustration specifically, Kerbel submits that the trial judge erred when she concluded, at para. 349 of the Reasons, that the 2005 August

Agreement was frustrated because "unforeseen planning changes resulted in SPA not only being delayed for decades but also putting the two farms on different development tracks". Kerbel says that the doctrine of frustration does not apply for two reasons.

[219] First, it notes that frustration applies when a supervening event alters the nature of the parties' obligations to such an extent that to compel performance would require a party to do something "radically different" than what they had agreed to under their contract. It says that the change in the development timeline for the Lands did not fundamentally alter what the parties contracted for under the 2005 August Agreement. The parties had agreed that Romandale would sell and Kerbel would buy its Remaining Interest in the Lands. The thing the parties bargained for has not changed – only the timing of the closing of the transaction has.

[220] Second, Kerbel says that a contract is not frustrated if the supervening event was contemplated by the parties at the time of contracting and was provided for, or deliberately chosen not to be provided for, in the contract. It argues that to the parties' knowledge, the planning and development process is fluid, unpredictable, and outside the parties' control. There was never any certainty as to the development timeline for the Lands and the fact that governmental decisions altered the timetable was within the parties' contemplation. They point to this

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court's decision in the Triple R Lands Litigation, in which that precise point is made: *First Elgin Mills Developments Inc. v. Romandale Farms Limited*, 2014 ONCA 576, 324 O.A.C. 153, at para. 32.

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[221] Further, Kerbel argues, contrary to the trial judge's finding, the parties' agreement to a fixed purchase price in this context does not lead to a "commercial absurdity". The parties deliberately chose to enter into an agreement for a fixed purchase price of the Remaining Interest that was significantly above market value. In doing so, Romandale assumed the risk of what a delay in closing would entail.

Fram

[222] Fram adopts Kerbel's position on all issues it raises on appeal. To avoid repetition, on the balance of the issues, I will not reiterate Fram's position.

Romandale

[223] Romandale submits that Kerbel has not demonstrated any palpable and overriding errors in the trial judge's finding that the 2005 August Agreement was frustrated when unforeseen planning changes delayed SPA for decades and put the Lands on different development tracks. It makes two key arguments in support of this submission.

[224] First, it says that Kerbel is wrong that the change in the development timeline did not fundamentally change the nature of the contract because it simply delayed

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closing. The trial judge found that a short closing horizon was part of the “pith and substance” of the contract and, in any event, that SPA was at most years away, not decades. A delay of decades is “radically different” than what the parties agreed to. Further, Romandale says Kerbel failed to address the trial judge’s finding on frustration based on the farms being placed on different development tracks.

[225] As well, Romandale says Kerbel is wrong that legislative changes cannot frustrate a contract. Relying on *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 61 D.L.R. (3d) 385 (Ont. C.A.) and *Focal Properties Ltd. v. George Wimpey (Canada) Ltd.* (1975), 73 D.L.R. (3d) 387 (Ont. C.A.), it says that changes in law or policy will frustrate a contract and relieve the parties of performance where the “common venture” is frustrated. The trial judge found that the parties’ “common venture” of providing for the most expedient sale of the Lands, without breaching the COAs, was no longer attainable.

[226] Romandale says that proof of a delayed timeline for development and separate development tracks for the farms resulted in radically different circumstances than those contemplated in the 2005 August Agreement. It argues this is apparent from the terms of the that agreement: it was silent on how to close if the Lands achieved SPA at different times; the farms were treated as a single property; there were no terms on how to treat the farms individually; and, it made

no commercial sense when closing was decades in the future. This, Romandale argues, would result in an irreconcilable divergence of interests when the express terms of the 2005 August Agreement provide it is conditional for the benefit of both parties.

[227] Second, Romandale says that Kerbel is wrong that the parties contemplated the planning changes when entering into the 2005 August Agreement or deliberately did not provide for such changes. It argues that Kerbel's reference to this court's 2014 decision regarding the Triple R Lands is misleading. Even if the parties were aware that the process of developing the Lands was fluid, unpredictable, and would take time, this does not mean they contemplated SPA being deferred for decades and that the Lands would be put on separate development tracks.

[228] Romandale contends that the trial judge's factual findings are important – that when the 2005 August Agreement was made, the parties expected the Lands would achieve SPA by 2010 or soon thereafter and not decades later or with the farms on separate development tracks. It says these are "radical" changes in the planning law and process and Kerbel has not challenged them.

B. Governing Legal Principles

[229] A contract is frustrated when – without the fault of either party – a supervening event alters the nature of a party's obligations under the contract "to

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such an extent that to compel performance despite the new and changed circumstances would be to order [the party] to do something radically different from what the parties agreed to under [their] contract": *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 55; *Perkins v. Sheikhtavi*, 2019 ONCA 925, 16 R.P.R. (6th) 42, at para. 15.

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[230] However, a contract is not frustrated if the supervening event results from a voluntary act of one of the parties or if the parties contemplated the supervening event at the time of contracting and provided for, or deliberately chose not to provide for, the event in the contract: *Perkins*, at para. 16; *Capital Quality Homes*, at p. 626.

[231] The party claiming frustration bears the burden of proving the constituent elements necessary to establish frustration: *Perkins*, at para. 17.

C. Application of the Law

[232] The trial judge concluded that the 2005 August Agreement was frustrated because unforeseen planning changes resulted in SPA being delayed by decades and put the Snider and McGrisken Farms on different development tracks. She said these matters rendered performance of the Conditional Provision "radically different from that which the parties agreed to": at para. 349. In my view, the trial judge erred in law in so concluding: the planning changes do not amount to a "supervening event", as that term is used in the doctrine of frustration.

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[233] As previously noted, at para. 55 of *Naylor Group*, the Supreme Court stated that a contract is frustrated when – without the fault of either party – a supervening event alters the nature of a party's obligations under the contract to such an extent that to compel performance would be to order the party to do something "radically different" from that to which it had agreed under the contract. Neither the change to the timing of the development of the Lands nor the fact that the development paths of the two farms now diverge render Romandale's obligations under the 2005 August Agreement radically different from that to which it agreed. Therefore, the planning changes are not a supervening event and the agreement is not frustrated.

[234] This conclusion follows inescapably from a consideration of the 2005 August Agreement as a whole, including the Conditional Provision. When Romandale and Kerbel entered into the 2005 August Agreement, all of their obligations under it were to be performed in short order with one exception: their obligations under the Conditional Provision. Those obligations were clearly spelled out: Romandale was to sell its Remaining Interest in the Lands to Kerbel at a price of $160,000 per acre: (1) with Fram's consent to the transaction or (2) through Romandale's exercise of the buy-sell provision in the COAs, after the Lands achieved SPA. The parties specified the two methods by which the transaction could be completed – rather than simply setting a date for its completion – because they wanted to ensure that

the 2005 August Agreement did not run afoul of Romandale's pre-existing legal obligations to Fram under the COAs.

[235] While the planning changes altered the timing horizon for the development of the Lands and the development paths of the Snider and McGrisken Farms, those changes did not radically alter what the parties had agreed to under the 2005 August Agreement. In fact, the planning changes did not alter the parties' obligations under the Conditional Provision in any way. What changed were the parties' expectations about when SPA would be obtained for the Lands. Romandale remained obliged to sell its Remaining Interest to Kerbel, either by obtaining Fram's consent to the transaction or by using the buy-sell provisions in the COAs, once SPA for the Lands was achieved. And Kerbel remained obliged to pay Romandale $160,000 per acre for the Remaining Interest. The fact that the expected timing for SPA changed did not alter those obligations – and nothing in the 2005 August Agreement suggests otherwise. For example, there is no "drop-dead date" provision in the agreement. With due respect to the trial judge, the boiler-plate statement at para. 7(c) of the 2005 August Agreement that "time is of the essence" cannot be construed to mean that a "short closing horizon" was part of the "pith and substance" of the contract. Further and in any event, if Romandale was troubled by the prospect of a lengthy delay in closing based on SPA, it could have sought Fram's consent to the transaction. On the record, Romandale took no

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steps in that regard, despite having expressly undertaken in the Conditional Provision “to use reasonable best efforts to obtain” Fram’s consent.

[236] Because the parties’ obligations under the Conditional Provision are not altered by the planning changes, it cannot be said that compelling performance of the 2005 August Agreement would be to order Romandale to do something “radically different” from that to which it agreed. In short, in the circumstances of this case, the planning changes do not amount to a supervening event.

[237] Further, even if the planning changes were to amount to a supervening event, the 2005 August Agreement is not frustrated because the supervening event was within Romandale and Kerbel’s contemplation when they entered into the agreement and they did not provide for it: Perkins, at para. 16. Of this there can be no doubt, given this court’s findings in *First Elgin Mills*.

[238] It will be recalled that *First Elgin Mills* dealt with the transaction in the 2005 August Agreement in which Kerbel purchased the Triple R Lands from Romandale (acting on behalf of the Roman family). The purchase price for the Triple R Lands was calculated on the basis that the land was all developable. However, the land was not all developable so Kerbel sought an adjustment to the purchase price in accordance with the terms of the 2005 August Agreement. Romandale resisted, saying that the purchase price adjustment clause had expired. The matter was

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litigated. This court ultimately found in favour of Kerbel. At paras. 31-32 of *First Elgin Mills*, Lauwers J.A. writing for the court, stated:

> The process of moving raw land through the land development process, is complex, time consuming, and expensive. The outcome is frequently uncertain. …
>
> The parties to this litigation are sophisticated and experienced land developers and were legally represented throughout the proceedings. The principals' affidavits show that, when they entered into the [2005 August Agreement], they were aware that the process of developing the [Lands] would be fluid and the outcome somewhat unpredictable, and that it would take time – perhaps years – to finalize the [Lands'] development potential. There were provincial, regional, and local requirements to be met, any of which could affect the [Lands'] development potential ...

[239] Thus, it can be seen, this court found that Romandale and Kerbel were aware of the vagaries of the planning process when they entered into the 2005 August Agreement. That is, the possibility of planning changes was within the parties' contemplation when they entered into the 2005 August Agreement. Despite that, they made no provision for such a possibility – as, for example, through the insertion of a "drop-dead" provision. Therefore, even if the planning changes were a supervening event, the 2005 August Agreement is not frustrated.

[240] I conclude on this issue by noting that, while Romandale is correct that legislative changes can frustrate a contract, this applies when the legislation

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destroys the very foundation of the agreement: *Capital Quality Homes*, at para. 29. As I have explained, that is not this case.

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Issue #5: Did the trial judge err in concluding that the 2005 August Agreement was void for mistake?

A. The Parties' Positions

Kerbel

[241] Kerbel submits that the trial judge erred in law in finding that the 2005 August Agreement was void for mistake because the parties were operating on the mistaken understanding that SPA would occur "within a relatively short time period", not decades after the agreement was entered into.

[242] It argues that the doctrine of common mistake requires the plaintiff to show that, as a result of the common mistake, the subject matter of the contract became something essentially different from what it was believed to be. Moreover, on the theory that the mistake destroys the consensual nature of the bargain, the mistake must have existed at the time that the contract was made. However, Kerbel says, there was no mistake in this case. Both parties considered SPA to be years away when they executed the 2005 August Agreement. The fact that an assumption turns out to be incorrect, as a result of subsequent events, does not affect the consensus at the time the contract was made.

[243] In any event, Kerbel says, the change to the development timeline did not fundamentally change the subject matter of the contract.

Romandale

[244] Romandale submits that Kerbel has not articulated a basis for disturbing the trial judge's conclusions on mistake. It says that Kerbel is referring to the common law doctrine of mistake in its submissions to this court whereas the trial judge relied on the equitable doctrine of mistake.

[245] Romandale contends that the trial judge found that the parties were mistaken as to the time horizon for achieving SPA and that change in the development timeline did fundamentally alter the subject matter of the contract.

B. Governing Legal Principles

[246] At common law, a contract will be void for mistake when the parties were under a common mistake that changes the subject matter of the contract into something essentially different from what the parties believed it to be: *Miller Paving Ltd. v. B. Gottardo Construction Ltd.*, 2007 ONCA 422, 86 O.R. (3d) 161, at paras. 22, 30. The mistake must have existed at the time the contract was made: *Zeitel v. Ellscheid* (1991), 85 D.L.R. (4th) 654 (Ont. C.A.), at para. 44, aff'd [1994] 2 S.C.R. 142.

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[247] In equity, the court may relieve for common mistake when it would be "unconscientious", in all the circumstances, to allow a contracting party to avail itself of the legal advantage it had obtained and granting relief can be done without injustice to third parties. The contract is liable to be set aside if the parties were under a common misapprehension as to the facts or their respective rights, provided the mistake was fundamental and the party seeking to set aside the contract was not at fault: *Miller Paving*, at para. 23.

C. Application of the Law

[248] In my view it matters not whether the trial judge decided this issue based on the common law or equitable principles governing mistake. Mistake is not made out under either.

[249] At common law, the court's jurisdiction to set aside a contract for mistake arises when the parties are under a common mistake that changes the subject matter of the contract into something "essentially different" from what the parties believed it to be: *Miller Paving*, at para. 30. As I explain above on the issue of frustration, that is not this case. The parties' obligations were clearly spelled out in the 2005 August Agreement: Romandale was to sell its Remaining Interest to Kerbel at a price of $160,000 per acre, either with Fram's consent or through Romandale's exercise of its buy-sell rights under the COAs. The planning changes made to the development of the Lands did not alter those obligations. The parties

were aware of the vagaries of the planning process when they entered into the 2005 August Agreement. They knew that the process of developing the Lands was fluid and the outcome unpredictable. The fact that events did not play out according to the parties' initial time estimates does not somehow elevate those estimates into a common mistake such as to vitiate their consent to the deal in the 2005 August Agreement. As the subject matter of the 2005 August Agreement remained essentially the same as what the parties believed it to be when they entered into the agreement, mistake is not made out at common law.

[250] In equity, the court may set aside a contract for common mistake when it would be "unconscientious", in all the circumstances, to allow a contracting party to avail itself of the legal advantage it obtained, provided it can be done without injustice to third parties. I address the issues of unjustness and unfairness above, in my discussion of estoppel by convention. I will not repeat myself. The considerations set out in that analysis show why, even if Kerbel could be seen to have obtained a legal advantage because of the changes in the planning process, it is not "unconscientious" to enforce the 2005 August Agreement. In any event, there was no fundamental mistake upon which to base common mistake in equity.

[251] I conclude on the equitable doctrine of common mistake by observing that the court is to take into consideration "all of the circumstances" when deciding whether it would be unconscientious to enforce the contract. The circumstances at

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the time of trial included the fact that Fram had provided its consent to the transaction in the Conditional Provision. Consequently, the transaction could have closed immediately. The trial judge did not take that into consideration. This is evident from her conclusion that enforcing the 2005 August Agreement would be unconscionable because the transaction had been put off "for decades". In the face of Fram's consent, the transaction could have closed immediately. Thus, it was a palpable and overriding error to find that the transaction had been put off for decades. Moreover, in my view, the trial judge erred in law in failing to take into account the relevant consideration of Fram's consent when determining whether it would be unconscionable to enforce the 2005 August Agreement. For these reasons, Romandale failed to make out the requirements for common mistake in equity and the trial judge erred in finding otherwise.

Issue #6: Did the trial judge err in finding Kerbel's claim was limitation-barred?

A. The Parties' Positions

Kerbel

[252] Kerbel submits that the trial judge made palpable and overriding errors of fact and law in finding that its claim was limitation-barred. It makes three arguments in support of this submission.

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[253] First, until 2015, Romandale alleged that the 2005 August Agreement was terminated by Kerbel's breach in reducing the net developable acreage of the Lands; it sought damages in the alternative. It was only in 2015 that Romandale claimed it would not comply with the 2005 August Agreement in any event, and Kerbel started the 2016 Action shortly thereafter.

[254] Second, the trial judge's finding that Kerbel discovered its claim in 2011 ignores Master Graham's ruling on December 21, 2012.[12] In that ruling, Master Graham dismissed Romandale's motion for leave to amend its pleadings to allege that Kerbel had breached the 2005 August Agreement by entering into the Settlement Agreement. Kerbel says it was entitled to rely on the ruling and that the trial judge's reasoning leads to an anomalous and unreasonable result. In order to bring its action in time, Kerbel would have had to commence an action by 2013 for a declaration that the Settlement Agreement did not breach the 2005 August Agreement but, in 2012, Master Graham had already reached that conclusion.

[255] Third, even if Kerbel was aware in 2011 that Romandale viewed the 2005 August Agreement to be at an end, the trial judge erred in law in finding that the limitation period began to run as of that date. At its highest, Romandale's statement to Kerbel that it was not going to comply with the 2005 August Agreement

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[12] It will be recalled that Kiteley J. upheld this ruling on June 20, 2014.

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amounted to an anticipatory breach of contract, not an actual breach of contract. An anticipatory breach does not terminate or discharge the contract. Where the innocent party does not accept the anticipated breach and continues to treat the contract as subsisting, it does not "discover" its claim for the purposes of the *Limitations Act* – and the limitation period does not begin to run – until the breach has occurred and the innocent party has suffered some damage. In this case, Kerbel made it clear that it did not accept Romandale's anticipatory breach of the 2005 August Agreement and considered the agreement to continue in effect. Therefore, the limitation period did not begin to run as of 2011.

Romandale

[256] Romandale says that Kerbel's submission that it had no reason to commence an action until 2015 is contradicted by the evidence, as is Kerbel's assertion that it did not accept Romandale's "anticipated repudiation" and continued to treat the agreement as subsisting. As the trial judge found, by 2011 Romandale was no longer acting in accordance with the 2005 August Agreement. Under para. 5 of that agreement, Romandale was obliged to cede control over development to Kerbel but it was not complying with that obligation. Kerbel's counsel sent a letter in February 2011 asserting that Romandale was breaching the agreement and its conduct was actionable. Romandale did not comply even after that letter. The manner in which Romandale was breaching the 2005 August

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Agreement demonstrated that it did not ever intend to sell the Lands to Kerbel. The conduct was not ambiguous: Kerbel was on notice that if it wanted specific performance it could not sit on its rights.

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[257] Furthermore, Romandale argues, Kerbel was not entitled to rely on the decisions of Master Graham and Kiteley J. in the pleadings motion to prevent the running of the limitation period. Those decisions did not reach a conclusion on the merits of the impact of the Settlement Agreement on the 2005 August Agreement. All that was decided was that Romandale's proposed amendment was not tenable in law.

B. Governing Legal Principles

[258] An anticipatory breach of contract occurs when one party to a contract, by express language or conduct, or as a matter of implication from what it has said or done, repudiates its contractual obligations before they fall due: *Ali v. O-Two Medical Technologies Inc.*, 2013 ONCA 733, 118 O.R. (3d) 321, at para. 22, citing G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 585.

[259] An anticipatory breach does not, in itself, terminate the contract. Once the offending party shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages, in which case the innocent party must "clearly and

unequivocally" accept the repudiation to terminate the contract. Alternatively, the innocent party may choose to treat the contract as subsisting, continue to press for performance, and bring the action only when the promised performance fails to materialize. However, by choosing the latter option, the innocent party is bound to accept performance if the repudiating party decides to carry out its obligations: *Ali,* at para. 24.

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[260] Section 4 of the *Limitations Act* provides that "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered." Section 5(1)(a) sets out the factors for determining when a party discovers a claim. However, where the innocent party does not accept the repudiation of the contract, the limitation period does not begin to run until the breach actually occurs: *Ali*, at paras. 26-27.

C. Application of the Law

[261] The trial judge found that the two-year limitation period governing Kerbel's claim for specific performance began running in February 2011 because, by that time, Romandale's conduct showed that it "intended to remain the owner of the Lands" and "from its point of view, the "Conditional [Provision] was dead" (Reasons, at para. 403). That is, the trial judge concluded that Romandale had repudiated the 2005 August Agreement by February 2011 and Kerbel knew that. Consequently, the trial judge held that the 2016 Action was brought out of time. In

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my view, the trial judge made a palpable and overriding error in finding that the two-year limitation period began running in 2011. To explain why, we must review the situation between Romandale and Kerbel in February 2011 and the trial judge's findings on their conduct at that time.

[262] Under para. 5 of the 2005 August Agreement, Romandale gave Kerbel "exclusive control" over the development process for the Lands. Nonetheless, by 2011, Ms. Roman-Barber (and, at her direction, those working for her) was actively attempting to shut Kerbel out of the development planning process. In a letter dated February 17, 2011 ("**Kerbel's February 2011 Letter**"), from Kerbel's counsel to Romandale's counsel, Kerbel complained about Romandale's conduct, stated it was a breach of the 2005 August Agreement, demanded that Romandale confirm to the NMLG that Kerbel's planning consultant had the sole authority to represent the Lands, and threatened to commence proceedings if Ms. Roman-Barber did not comply with the terms of para. 5 of the 2005 August Agreement.

[263] By letter dated February 25, 2011, Romandale's counsel responded to Kerbel's February 2011 Letter (the "**Responding Letter**"). In the Responding Letter, counsel for Romandale denied that Ms. Roman-Barber had breached the 2005 August Agreement and asserted that his client had, at all times, complied with the terms of that agreement. The Responding Letter also stated that

Romandale was considering whether Kerbel's "purported settlement with [Fram] is in breach of the [2005 August] Agreement".

[264] At para. 146 of the Reasons, the trial judge summarized what transpired between Kerbel and Romandale in the relevant time period (i.e. December 2010 to February 2011). Her summary includes references to Kerbel's February 2011 Letter and the Responding Letter. Paragraph 146 ends with the trial judge's conclusion that the evidence was clear "that Romandale continued to exclude Kerbel from participation in the development of the Lands and Kerbel took no action as threatened in its letter of February 17, 2011" (the "**First Finding**").

[265] Based on a consideration of precisely the same conduct as that which she considered in making the First Finding, the trial judge found, at para. 403 of the Reasons, that Kerbel was aware that Romandale "intended to remain the owner of the Lands and that from its point of view the Conditional [Provision] was dead" (the "**Second Finding**").

[266] The two findings are very different. The First Finding is specific and limited: in February 2011, Romandale was excluding Kerbel from participation in the development of the Lands. The Second Finding is that Romandale's conduct put Kerbel on notice that Romandale had repudiated the Conditional Provision by acting as if it "was dead".

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[267] Thus, the question becomes: are the two findings reconcilable? They are not, either on the facts or the law.

[268] Factually, the Second Finding cannot stand in light of Romandale's Responding Letter. In that letter, Romandale's counsel denied that his client was in breach of the 2005 August Agreement and also stated that Romandale was considering whether the Settlement Agreement was a breach of the 2005 August Agreement. Clearly, the Responding Letter contains no express repudiation of its obligations under the Conditional Provision. On the contrary, in the Responding Letter, Romandale affirms that the 2005 August Agreement is operating, that it is complying with it, and that it is considering its position under the 2005 August Agreement as a result of Kerbel having entered into the Settlement Agreement.

[269] In terms of the law, the Second Finding was not open to the trial judge either. In the Reasons on this issue, when the trial judge makes the Second Finding, she does not explicitly refer to anticipatory breach or the legal principles that govern it. However, based on the parties' positions on this issue, it appears that she made the Second Finding based on those principles. On that assumption, the trial judge was considering Romandale's language and conduct in the relevant period to determine whether it could be construed as a repudiation of its obligations under the Conditional Provision before they became due for performance. In other words, the trial judge was considering whether Romandale had committed an anticipatory

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breach of the 2005 August Agreement by indicating that it would not comply with its obligations under the Conditional Provision. Romandale made no express assertion to that effect. Therefore, the Second Finding must have been based on Romandale's conduct. However, as I have just explained, in light of the Responding Letter in which Romandale affirmed the 2005 August Agreement, its conduct cannot be so construed.

[270] Thus, there was no anticipatory breach by Romandale of its obligations under the Conditional Provision in 2011 and the limitation clock did not begin ticking.

[271] Romandale's anticipatory repudiation of the 2005 August Agreement occurred for the first time in 2015 through its express statement to that effect by its new counsel. As the innocent party, Kerbel had the choice whether to accept the repudiation or treat the 2005 August Agreement as subsisting. It elected to accept the anticipatory breach and commenced the 2016 Action, which was within the two-year limitation period.

[272] I note that Romandale points to other findings the trial judge made regarding Romandale's conduct after Fram and Kerbel entered into the Settlement Agreement, which Romandale says demonstrate that it treated the 2005 August Agreement as dead. These findings relate to events that occurred after February 2011. As the trial judge based her determination on Kerbel having discovered its

claim by February 2011, it is unnecessary to consider Romandale's conduct falling after that time.

[273] I conclude on this issue with the following two points. First, it is trite law that not every breach of a contract amounts to a repudiation. By February 2011, Kerbel was aware that Romandale was in breach of para. 5 of the 2005 August Agreement because of its conduct respecting the development process for the Lands. However, that breach was not a repudiation of the Conditional Provision. Second, even if Romandale's conduct could be construed as a repudiation of the Conditional Provision, it was an anticipatory breach. As such, the limitation period did not begin running unless Kerbel accepted the repudiation (*Ali*, at paras. 26-27) and that Kerbel did not do. On the contrary, as discussed above, Kerbel protested Romandale's conduct in its February 2011 Letter and affirmed the validity of the 2005 August Agreement. Kerbel then continued its work with the NMLG in the development process and maintained its position in the various lawsuits that the 2005 August Agreement was valid and enforceable. Thus, Romandale's breach of its obligations relating to the development process by February 2011 could not have started the limitation clock running.

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Issue #7: Did the trial judge err in concluding that Kerbel was not entitled to specific performance of the 2005 August Agreement?

A. The Parties' Positions

Kerbel

[274] Kerbel submits that the trial judge erred in law in rejecting its claim for specific performance because she ignored the uniqueness of the Lands to Kerbel. Instead, the trial judge focused entirely on whether the Lands were capable of valuation and whether substitute properties were available.

[275] Kerbel gives five reasons for its contention that the Lands have a peculiar or special value to it.

[276] First, Kerbel already owns a 4.75% undivided interest in the Lands. It purchased that interest with the express intention that it would become the owner of all of the Lands. For that reason, Romandale and it never contemplated what a co-owner relationship would look like (unlike Romandale and Fram which entered into COAs). If specific performance is not ordered, Romandale and Kerbel will be forced to remain as co-owners of the Lands, a relationship that neither expected nor wanted. Granting specific performance, however, would allow the parties to put an end to their "fraught – and highly litigious – relationship".

[277] Second, in light of this court's ruling in the Triple R Lands Litigation, Kerbel is entitled to set off the purchase price adjustment for those lands from the

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purchase price it is to pay Romandale for the Remaining Interest. Such a price reduction is not available for any other property that might come on the market and gives the Lands a quality that cannot be duplicated.

[278] Third, Kerbel has already made significant investments – in time, money, and expertise – in the development of the Lands and surrounding properties.

[279] Fourth, Kerbel entered into all of the transactions in the 2005 August Agreement with a view to its long-term plan to secure large tracts of undeveloped land for the purposes of development and construction. The transactions in the 2005 August Agreement included its purchase of the Triple R Lands, which adjoins the Lands, and a right of second refusal on the Elgin South Property.

[280] Fifth, Kerbel is not seeking specific performance of a purely executory contract. It is seeking performance of a contract which it has already substantially performed. The transactions in the 2005 August Agreement were intertwined and formed part of a package. Kerbel has upheld its end of the bargain by assuming the BNS mortgage, purchasing the initial 4.75% interest in the Lands, and purchasing the Triple R Lands.

[281] Kerbel also submits that the trial judge erred in finding its claim for specific performance was barred by laches. It says that, in determining whether there has been delay amounting to laches, the main considerations are acquiescence on its part and any change of position by Romandale arising from reasonable reliance

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on Kerbel's acceptance of the status quo. Kerbel says neither of those considerations applied. It never acquiesced and, as the trial judge found, there was no change to the status quo after the Settlement Agreement.

[282] Finally, Kerbel takes issue with the trial judge's statement at para. 406 of the Reasons that, because Romandale had spent years investing significant time, effort, and money into the Lands, it would be "unjust" to disrupt that by granting specific performance. It notes that the 2005 August Agreement required Romandale to cooperate in the development of the Lands and there is no injustice or prejudice that follows from compliance with its legal obligations. To the extent that Romandale incurred development costs, it can seek reimbursement from Kerbel under the terms of the 2005 August Agreement, just as it did in the past.

Romandale

[283] Romandale submits that this court owes a high degree of deference to the trial judge's exercise of discretion in refusing to grant specific performance. It argues that the trial judge did not ignore the uniqueness of the Lands to Kerbel – she rejected Kerbel's claim of uniqueness because she found Mr. Kerbel's own expert evidence contradicted his bald assertion that the Lands were unique and because the Lands were "just an investment" for Kerbel.

[284] Further, Romandale says, the trial judge considered whether substitute properties were available and concluded that the undeveloped Lands were not

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unique to Kerbel, a developer engaged in a profit-seeking venture, and there were plenty of substitute properties available. Romandale says that Kerbel has not articulated any palpable and overriding errors in the trial judge's conclusion.

[285] As for the five arguments that Kerbel advances for why the Lands are special and unique to it, Romandale says they are simply re-argument, which the trial judge was entitled to reject, as she did. Romandale says that Kerbel has not pointed to a palpable and overriding error in the trial judge's determination, therefore it must stand.

[286] On laches, Romandale says that the trial judge found both acquiescence and reliance and Kerbel has not cited any evidence to show the findings were the result of palpable and overriding error.

B. Governing Legal Principles

[287] Specific performance is not to be ordered for breach of contract unless damages are inadequate. When damages are found to be inadequate, it is generally because of the unique nature of the property bargained for. It is for this reason that specific performance has historically been granted in cases involving the purchase and sale of real property: *Erie Sand & Gravel Ltd. v. Series' Farms Ltd.*, 2009 ONCA 709, 97 O.R. (3d) 241, at paras. 110-11.

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[288] However, it cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. Specific performance should not be granted absent evidence "the property is unique to the extent its substitute would not be readily available": *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 22. Whether a substitute is readily available depends on the facts of the particular case. Therefore, uniqueness is a fact-specific inquiry: *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 67, leave to appeal refused, [2019] S.C.C.A. No. 55.

[289] Laches is an equitable doctrine that offers a defence to delayed equitable claims. Mere delay is insufficient to trigger laches. The party asserting laches must establish one of two things: (1) acquiescence on the claimant's part; or (2) a change of its position arising from reasonable reliance on the claimant's acceptance of the *status quo*: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 145-47; *Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada*, 2015 ONCA 764, 128 O.R. (3d) 658, at paras. 8-11.

C. Application of the Law

[290] The trial judge declined to order specific performance largely because she concluded that the Lands were not unique to Kerbel. In my view, she erred in three ways in reaching that conclusion.

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[291] First, the trial judge erred in law in relying on the evidence of the experts called to provide a value for the Lands to find that the Lands were not unique to Kerbel. The experts had used the direct comparison approach to value the Lands. That approach required the experts to find comparable properties with similar characteristics to the Lands. While the direct comparison approach is an accepted method for valuing land, it does not speak to whether a property is "unique" in the legal sense. Put another way, because the direct comparison approach does not address the legal requirements for determining whether land is unique, it cannot be used as a proxy for that purpose. It was an error in law to do so.

[292] Second, it was a palpable and overriding error for the trial judge to find that the only evidence on uniqueness was Mr. Kerbel's "bald assertion" to that effect. In so doing, the trial judge neglected to consider the following points:

(1) Kerbel already owns a 4.75% undivided interest in the Lands and fully owns the adjoining property, the Triple R Lands. No other property has both these characteristics;

(2) In light of this court's ruling in the Triple R Lands Litigation, Kerbel is entitled to set off the purchase price adjustment for the Triple R Lands from the purchase price it is to pay Romandale for the Remaining Interest. Such a price reduction is not available for any other property that might come on the market and gives the Lands a quality that cannot be duplicated;

(3) Kerbel has already made significant investments – in time, money, and expertise – in the development of the Lands;

(4) With Romandale's full knowledge and consent, Kerbel entered into the package of intertwined transactions in the 2005 August Agreement in order to secure a large tract of undeveloped land for the purposes of development and construction. The transactions in the 2005 August Agreement include Kerbel's purchase of the Triple R Lands, which adjoins the Lands, and a right of second refusal on the Elgin South Property; and,

(5) Kerbel is not seeking specific performance of a purely executory contract. It is seeking performance of a contract which it has already substantially performed. On the trial judge's findings, Romandale received over $16.7 million of immediate value under the 2005 August Agreement. The "upfront" money Kerbel paid Romandale was to satisfy Romandale's need for liquidity. Kerbel has upheld its end of the bargain by assuming the BNS mortgage, purchasing the initial 4.75% interest in the Lands, and purchasing the Triple R Lands.

[293] Third, a property is unique if there is no readily available substitute property: *Semelhago*, at para. 22. One method of proving that there is no readily available substitute is to show that the property has a quality that cannot be readily duplicated elsewhere: *Erie Sand*, at paras. 115-16. The above considerations

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establish that the Lands have qualities that cannot be readily – if at all – duplicated elsewhere. They also show that, contrary to the trial judge's finding, the Lands are not merely an investment for Kerbel with any number of suitable substitutes available. The Lands are unique to Kerbel.

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[294] While the trial judge's analysis focused on the uniqueness of the Lands, I also view her to have fallen into error in failing to consider the effects of refusing to grant specific performance. In this case, if specific performance is not ordered, Romandale and Kerbel will remain co-owners of the Lands. As Kerbel points out, that situation was not expected, wanted, or provided for in the 2005 August Agreement. And, as the events of the past 12 years have shown, the situation is unworkable. This consideration militates in favour of finding that damages are an inadequate remedy.

[295] The trial judge gave laches as a further reason for refusing to grant specific performance. In my view, she erred in law in this regard because Romandale made out neither of the two requirements enunciated in *Manitoba Metis Federation*.

[296] First, Kerbel did not acquiesce in Romandale's attempts to shut it out of the development process. As discussed above, counsel for Kerbel wrote to counsel for Romandale in February 2011, complaining about this conduct, stating it was a breach of Romandale's obligations under the 2005 August Agreement, and demanding that Romandale confirm to the NMLG that Kerbel's planning consultant

had the sole authority to represent the Lands. Moreover, despite Romandale's attempts to shut Kerbel out of the development process, Kerbel continued to be actively involved in the development process through the NMLG. Kerbel also continued to maintain that the 2005 August Agreement was in force until – in response to Romandale's declaration in 2015 that it would not perform its obligations under the 2005 August Agreement – it started the 2016 Action.

[297] Second, Romandale did not change its position in reliance on Kerbel's alleged acceptance of the status quo. The trial judge found, at paras. 118-19 and 339 of the Reasons, that there was no change in Romandale's behavior and the "status quo did not change" after Kerbel and Fram entered into the Settlement Agreement.

[298] Further, to the extent that the trial judge found reliance based on Romandale's investment of time, money and effort into the Lands' development, in my view she erred. Under the terms of the 2005 August Agreement, Romandale was obliged to cooperate with Kerbel in development of the Lands. Reliance cannot be claimed when it is a matter of compliance with one's legal obligations. And, in any event, Romandale can seek reimbursement for development costs from Kerbel under the terms of the 2005 August Agreement, just as it did in the past.

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IX. FRAM'S CLAIM FOR DAMAGES

[299] Fram asks that it be awarded damages of $11,997,500 "for its loss respecting 50% of the Lands that go to Kerbel under the Settlement Agreement". Its very brief submissions are as follows. The 2005 August Agreement was a breach of the prohibition against Dispositions in s. 5.03 of the COAs. Upon breach, pursuant to s. 6.02(d) of the COAs, Romandale was obliged to sell the Lands to Fram for 95% of fair market value. As Romandale refused to do that, Fram is entitled to the difference in the market value of the Lands between then and trial. Fram says it mitigated its losses by entering into the Settlement Agreement and withdrawing its challenge to the validity of the 2005 August Agreement. Because Romandale's actions were responsible for Fram giving up its 50% interest in the Lands, Fram should be compensated in damages.

[300] The foundation for Fram's claim to damages is that Romandale breached the prohibition against Dispositions in s. 5.03 of the COAs when it entered into the 2005 August Agreement. However, the trial judge found against Fram on that matter. In paras. 168-90 of the Reasons, the trial judge gives a thorough explanation for her determination that Romandale did not breach the prohibition against Dispositions in s. 5.03 of the COAs by entering into the 2005 August Agreement (the "**Determination**"). In its appeal, Fram did not challenge the

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Determination. Therefore, the Determination stands and Fram's claim to damages must necessarily fail.

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X. THE COSTS APPEAL

[301] By order dated April 2, 2020 (the "**Costs Order**"), the trial judge ordered costs in favour of Romandale in the amount of $2,708,651.57. Costs were awarded on a substantial indemnity basis and made payable on a joint and several basis by Fram and Kerbel.

[302] Both Fram and Kerbel seek leave to appeal the Costs Order.

[303] The general principle is that when an appeal is allowed, the order for costs below is set aside and the appellant is awarded costs below and on appeal: *St. Jean v. Cheung*, 2009 ONCA 9, 45 E.T.R. 3(d) 171, at para. 4; *Climans v. Latner*, 2020 ONCA 554, 449 D.L.R. (4th) 651, at para. 85. As I would allow the appeals, the general principle applies and the Costs Order is set aside. Thus, it is unnecessary to determine whether leave to appeal the Costs Order should be granted and, if so, whether the appeals against that order should be allowed.

[304] Based on the parties' brief submissions on this matter at the oral hearing of the appeals, I understand that all three agree that if the appeals are allowed, costs below should be awarded on a partial indemnity basis. However, they disagree on the basis by which those costs should be determined. Fram and Kerbel argue that

this court should fix those costs at 60% of the full indemnity request contained in the bills of costs they submitted at trial. Romandale contends that, if the parties are unable to agree on the quantum of partial indemnity costs, costs should be assessed.

[305] Romandale also challenges Fram's entitlement to costs below. It submits that Fram has no appeal but, rather, only an "economic interest" in the outcome of Kerbel's appeal. Consequently, if the appeals are allowed, Romandale says that Fram is not entitled to costs below.

[306] For the reasons given in my determination of Romandale's first alleged threshold flaw, I reject Romandale's submission that Fram is disentitled to costs below.

[307] The oral submissions do not provide the court with an adequate basis on which to quantify the costs below for Fram and Kerbel. I trust that the foregoing provides the parties with sufficient guidance that they can resolve the quantum of costs below among themselves. If they are unable to do that, as indicated in the disposition below, the parties may have recourse to this court to resolve the matter.

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XI. A COMMENT ON THE CONCURRING REASONS

[308] My reasons do not address the first proposition set out in my colleague's concurring reasons because no party raised or argued the legal effect of Fram's consent.

[309] In terms of the second proposition – estoppel by convention – no party raised or argued the legal issues addressed by my colleague in his concurring reasons. Consequently, my reasons do not address those legal issues.

[310] Accordingly, nothing in my reasons should be taken as approving of those parts of the concurring reasons relating to the first and second propositions.

XII. DISPOSITION

[311] Accordingly, I would allow the appeals and declare that the 2005 August Agreement is valid and enforceable, and I would order specific performance of Romandale's obligations under the 2005 August Agreement.

[312] Counsel for the parties advised that they had resolved the matter of costs of the appeals and that no order was required in that regard. Thus, I would make no order as to costs of the appeals.

[313] In terms of costs below, if the parties are unable to resolve that matter, I would permit them to make written submissions to a maximum of 5 double-spaced

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pages. I would give the Appellants 14 days from the date of release of this judgment to file their written submissions and Romandale 21 days.

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[314] Neither Fram nor Kerbel specified what changes should be made to the Judgment if the appeals were successful. In light of that and the complexity of the pleadings, I will leave it to the parties to resolve that matter. I offer the following comments as guidance:

i. because I would dismiss Fram's request for damages and no appeals were taken in respect of the 2007 Action and the 2008 Action, I would make no change to paras. 1 and 2 of the Judgment to the extent it dismisses those actions. However, that part of para. 1 of the Judgment dismissing Kerbel's crossclaim may need to be altered to reflect the result of these appeals;

ii. I would set aside para. 3 of the Judgment and substitute an order dismissing the 2016 Action;

iii. I would set aside para. 5 of the Judgment and substitute an order declaring that the 2005 August Agreement is valid and enforceable and an order for specific performance of Romandale's obligations under it; and,

iv. I would set aside para. 6 of the Judgment.

"Gillese J.A."
"I agree. M.L. Benotto J.A."

SCHEDULE "A": CHRONOLOGY OF EVENTS

2003

[1] Romandale sells Fram an undivided 5% interest in two neighbouring farms in Markham known as the McGrisken Farm and the Snider Farm (the "**Lands**") and the parties enter into two identical sets of agreements, one set for each farm property: the Co-Owners Agreement ("**COA**"), which sets out the terms and conditions on which Romandale and Fram, as co-owners, hold title to the Lands; the Construction Management Agreement ("**CMA**"), under which Fram is to construct and sell residential units on the Lands, once they achieve Secondary Plan Approval ("**SPA**"); and the Development Management Agreement ("**DMA**"), which governs the development process for the Lands. Bordeaux Developments (Ontario) Inc. ("Bordeaux") is also a party to the DMAs and, under its terms, is appointed the development manager. When the parties enter into these agreements, they expect to obtain SPA for the Lands around 2010.

[2] Of these agreements, the COAs are the most significant for these appeals. The buy-sell provision in s. 5.07 of the COAs permits either co-owner, under certain conditions, to tender on the other an offer to sell its entire interest in the Lands and, at the same time, an offer to buy the other's entire interest in the Lands on the same terms as the offer to sell. The non-tendering party must choose whether to buy out the tendering party or sell its interest. The buy-sell is available once SPA is obtained for the Lands or the DMA is terminated.

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[3] Section 6.02 of the COAs provides that if an Event of Default occurs and is continuing, the non-defaulting party can, among other things, bring proceedings for specific performance and/or buy the defaulting party's interest in the Lands at 95% of fair market value.

[4] Development of the Lands depends on obtaining planning approval, including appropriate amendments to the official plan. These changes are made to the secondary plan, which provides more detailed policies for the development of a specific area. The process of obtaining development approval for specific lands is known as SPA. This is reflected in s. 5.07(a) of the COAs, which defines SPA as "an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)".

[5] When Romandale and Fram enter into these agreements in 2003, Romandale has not yet started the SPA process.

2004

[6] With Fram's consent, Romandale borrows $6 million from the Bank of Nova Scotia ("**BNS**") secured by a mortgage on the Lands.

2005

[7] With Fram's consent, Romandale terminates the DMAs with Bordeaux.

[8] In response, Bordeaux brings an action against Romandale and Fram, alleging the termination was invalid and of no force and effect.

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[9] The ongoing work to move the Lands through SPA continues through a new agreement between Fram and Romandale to co-manage development of the Lands.

[10] BNS calls the $6 million mortgage. Romandale needs financing to repay the BNS loan by August 30, 2005. It also needs cash to make distributions to the Roman family. The solution is an agreement which Romandale and Kerbel enter into on August 29, 2005 (the "**2005 August Agreement**").

[11] In the 2005 August Agreement, Kerbel agrees to pay off the BNS mortgage and extend the same amount as a new loan to Romandale under the same security and Romandale agrees to: (1) sell to Kerbel its 95% interest in the Lands, at a fixed price of $160,000 per acre; (2) sell to Kerbel (on behalf of the Roman family) the Triple R Lands for $175,000 per acre, subject to a price adjustment for non-developable acreage; and (3) grant Kerbel a right of second refusal over other lands called the Elgin South Property. The sale of Romandale's interest in the Lands is to occur in two steps:

a. an initial sale of 5% of Romandale's interest in the Lands; and

b. the sale of Romandale's remaining interest in the Lands ("**Remaining Interest**"), conditional on:

   i. Romandale buying out Fram's interest in the Lands pursuant to the buy-sell provisions in the COAs; or

ii. Fram consenting to the transaction.

[12] The second step of the sale of Romandale's interest in the Lands to Kerbel is referred to as the "**Conditional Provision**".

[13] All the transactions in the 2005 August Agreement have been completed, except the sale of Romandale's Remaining Interest to Kerbel under the Conditional Provision.

[14] Paragraph 5 of the 2005 August Agreement empowers Kerbel to cause Romandale to trigger the buy-sell provision in the COAs following SPA being obtained for the Lands. It also gives Kerbel full control over the development of the Lands.

[15] When the parties entered into the 2005 August Agreement, Romandale expected the Lands would advance through the planning process by approximately 2010 and Kerbel hoped that SPA might take only seven to ten years to unfold.

[16] Ms. Roman-Barber tells Fram she reached an agreement with Kerbel under which Keel bought the Triple R Lands, assumed the BNS mortgage, and bought 5% of Romandale's interest in the Lands. She does not disclose that Romandale has committed to sell its entire interest in the Lands through the Conditional Provision.

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2007

[17] In January, Romandale discloses to Fram that it sold its entire interest in the Lands to Kerbel. Fram’s repeated requests for a copy of the 2005 August Agreement are refused. Fram’s counsel is shown a copy of the agreement in April, on conditions.

[18] In June, Romandale attempts to sell a further 7% interest in the Lands to Kerbel on the same terms as the 2005 August Agreement. This time it notifies Fram, which issues a notice of default for a prohibited disposition.

[19] In July, Fram starts an action against Romandale and Kerbel, alleging that the 2005 August Agreement was a prohibited disposition under the COAs, and seeking an injunction restraining Romandale from any further sale of its interest in the Lands (the “**2007 Action**”).

[20] Fram also gives notice it will seek to exercise its remedy under the COAs to purchase Romandale’s interest in the Lands at 95% of fair market value.

[21] In July, Ms. Roman-Barber produces a copy of the 2005 August Agreement as an exhibit to her affidavit on the injunction motion. This is the first time that Fram is provided with a copy of the agreement.

[22] In her affidavit, Ms. Roman-Barber swears that “The Agreement of August 29, 2005 is conditional upon [SPA]” and “The Buy/Sell Provisions are only exercisable after what is commonly known as [SPA]”.

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[23] Justice Forestell grants the injunction restraining Romandale from making any disposition of the Lands or any part of its interests in them, stating “[t]he original intent of the [2005 August Agreement] was that the sale to [Kerbel] of the [Remaining Interest] would not occur until some time after SPA”.

2008

[24] Fram and Bordeaux start an action against Romandale and Kerbel based on alleged breaches of the CMAs (the “**2008 Action**”). Under the CMAs, Fram had the right to construct residences on the Lands once SPA is obtained.

[25] Kerbel, as owner of the Triple R Lands, together with neighbouring landowners, form the North Markham Landowners Group (“NMLG”) with the goal of engaging collectively with the relevant authorities about the development of their respective properties.

[26] From 2008 onward, the NMLG retains consultants and commissions studies required for the development process and engages in that process with Markham. NMLG’s development costs have been in the hundreds of thousands of dollars. Until 2011, Kerbel reimbursed Romandale for all costs associated with the Lands, including Romandale’s share of the NMLG “cash calls” that were made to fund the NMLG ongoing development activities.

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2009

[27] The anticipated development timeline for the Lands changes because of government decisions. As a result, development of the Snider Farm is delayed until 2021-2031 and of the McGrisken Farm until 2031-2051. In addition, the Snider Farm is proposed for employment use, which would prevent residential development.

[28] Ms. Roman-Barber makes further statements during examinations that the buy-sell would be triggered after SPA.

[29] The 2007 and 2008 Actions are set down for trial in July. In November, they are consolidated.

2010

[30] The parties attend pre-trial conferences, following which the trial is adjourned and the parties engage in settlement discussions.

[31] At a judicial mediation in September 2010, the parties reach an agreement in principle on the main settlement terms. One of the agreed settlement terms is that the sale of Romandale's Remaining Interest to Kerbel will occur after the Lands achieve SPA.

[32] In a letter dated September 24, 2010, from Romandale's counsel to counsel for Kerbel and Fram, he set out areas on which the parties had agreed, including

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"That the sale of each of parcel will take place when that particular parcel achieves [SPA]".

[33] Various drafts are exchanged among counsel for the three parties, all of which include a provision to the effect that purchase and sale of Romandale's Remaining Interest will take place after SPA.

[34] Romandale withdrew from the settlement in October for reasons that include disagreement over registration of the injunction against the Lands. Its reasons do not include an objection to the provision that purchase and sale will take place after SPA.

[35] Fram and Kerbel move forward with settlement and enter into final minutes of settlement, (the "**Settlement Agreement**") in December 2010. It provides that if Romandale does not concur in it and the 2007 and 2008 Actions proceed to trial:

1) Fram would discontinue its claims against Kerbel and restrict its claims against Romandale to damages;
2) Kerbel would grant Fram an option to purchase a 50% interest in Romandale's Remaining Interest in the Lands, on the same terms and conditions as Kerbel might purchase Romandale's Remaining Interest;

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3) If Fram exercises the option, it and Kerbel would enter into a joint venture agreement to develop the Lands with (effectively) an equal sharing of costs;
4) Fram did not consent to Romandale's sale of its Remaining Interest in the Lands to Kerbel; and
5) It is Fram and Kerbel's intention that "the purchase and sale of Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after [SPA] for the Lands has been obtained".

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2011

[36] By letter dated January 28, 2011, counsel for Romandale advises Fram and Kerbel that Romandale objects to Kerbel's land planner telling the North Markham Landowners Group ("**NMLG**") that there was a change in the ownership of the Lands. The letter reiterates that Romandale conditionally sold the Lands to Kerbel under the 2005 August Agreement and "[t]he condition could only be satisfied by either a) secondary plan approval (which has not been achieved); b) or the consent of [Fram] to the transaction".

[37] Romandale represents the Lands at the NMLG and instructs its planning consultant (and others working for it) to not share information with Kerbel's planner.

[38] Kerbel's counsel sends a letter, dated February 17, 2011, to Romandale's counsel complaining that Ms. Roman-Barber's conduct was a breach of para. 5 of the 2005 August Agreement in which Romandale ceded control of the development process for the Lands to Kerbel. It demands that Romandale confirm to the NMLG that Kerbel's planning consultant has the sole authority to represent the Lands and threatens to commence proceedings if Ms. Roman-Barber did not comply with para. 5 of the 2005 August Agreement.

[39] Romandale's counsel responds by letter, dated February 25, 2011, asserting that its client had "at all times acted in accordance" with the 2005 August Agreement and was considering whether the Settlement Agreement was a breach of the 2005 August Agreement.

2012

[40] In February, Romandale seeks payment from Kerbel of invoices and expenses incurred pursuant to the 2005 August Agreement.

[41] In June, Romandale moves to amend its pleadings in the 2007 and 2008 Actions and for leave to commence claims against Kerbel, alleging the Settlement Agreement fundamentally breached the 2005 August Agreement.

2013

[42] Master Graham dismisses Romandale's amendment motion, finding that the Settlement Agreement did not amount to a breach of the 2005 August Agreement

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"because whatever the Kerbel defendants do with the [L]ands once Romandale's interest in them is conveyed … is none of Romandale's concern". Accordingly, he said, Romandale's argument that the 2005 August Agreement was breached is not tenable at law.

[43] Romandale appeals Master Graham's order.

[44] Meanwhile, Romandale and Kerbel were involved in litigation over the Triple R Lands (the "**Triple R Lands Litigation**"), one of the transactions in the 2005 August Agreement. Under the 2005 August Agreement, Kerbel purchased the Triple R Lands for $175,000 per developable acre, subject to a purchase-price rebate calculated in reference to developable acreage. The parties disagreed about whether and how much rebate was owed. In February 2013, Romandale and Kerbel enter into a partial settlement in which they agree that if Kerbel is found to be entitled to a price adjustment, the determination of the non-developable lands is to be done "pursuant to the terms of the [2005 August Agreement] and the Amendment".

[45] Romandale leaves the NMLG.

2014

[46] Romandale brings an action against Kerbel, alleging Kerbel breached the 2005 August Agreement by taking steps to reduce the amount of potential

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developable acreage on the Lands. It seeks a declaration that the 2005 August Agreement was terminated or, alternatively, damages (the "**2014 Action**").

[47] Justice Kiteley dismisses Romandale's appeal of Master Graham's order.

[48] This court releases its decision in the Triple R Lands Litigation. It finds in favour of Kerbel, declaring that Kerbel was "entitled to a purchase price reduction in accordance with the [2005 August Agreement]".

[49] NMLG enters into a funding agreement with Markham for the purpose of funding the municipality's studies and reports related to future development of lands in north Markham. Kerbel pays all of the costs associated with the Lands under the funding agreement.

2015

[50] Romandale retains new counsel and takes a new position. For the first time it claims that the buy-sell provisions in the COAs could be performed <u>before</u> SPA because the DMAs with Bordeaux had been terminated in February 2005.

[51] Romandale obtains leave to amend its pleadings in the 2007 Action to allege, for the first time, that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement because the latter included a provision that the purchase and sale of its Remaining Interest would occur after SPA. Also for the first time, in its amended pleadings, Romandale asserts that it will not perform the 2005 August Agreement in any event. Until then, Romandale's position in the

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2007 Action mirrored its position in the 2014 Action: that it was entitled to damages from Kerbel if the court did not find that the 2005 August Agreement was terminated.

[52] Justice Dunphy orders that Kerbel be added as a party to the 2007 Action, that the injunction be dissolved, and that Romandale be permitted to amend its pleadings to argue repudiation.

2016

[53] Kerbel starts an action against Romandale seeking specific performance of the 2005 August Agreement (the "**2016 Action**").

2017

[54] Kerbel files a crossclaim in the 2007 Action seeking specific performance of the 2005 August Agreement and an order directing Romandale to comply with its terms.

[55] Romandale files a defence to Kerbel's crossclaim in the 2007 Action alleging that the 2005 August Agreement offends the rule against perpetuities.

2018

[56] Shortly before the trial of the four actions begins in October 2018, Fram and Kerbel amend the Settlement Agreement to allow the sale of Romandale's Remaining Interest to close immediately, rather than after SPA. The stated basis

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for this is to militate against the risk that the 2005 August Agreement could offend the rule against perpetuities.

[57] Fram delivers its consent to Romandale to close the sale of its Remaining Interest under the 2005 August Agreement.

[58] The trial of the four actions begins in October. SPA had not been obtained for the Lands.

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SCHEDULE "B": KEY CONTRACTUAL PROVISIONS

1. Key Provisions in the COAs

Section 1.01 Definitions:

Unless the subject matter or context otherwise requires:

[…]

(s) "Disposition" means the sale (including judicial sale), assignment, exchange, transfer, lease, mortgage, hypothecation, pledge, encumbrance, devise, bequeath or other disposition or agreement for such by a Co-Owner of the whole or part of its Co-Owner's Interest, and a Disposition shall include an amalgamation, a transfer by arrangement, conversion, exchange, sale, assignment or trust of the Equity Shares or the issue of any treasury shares which in any case would result in a change of Control of a Co-Owner;

Section 5.03 Dispositions:

Save for those Dispositions expressly permitted in this Agreement neither Co-Owner shall make or permit a Disposition without the consent of the other Co-Owner (which consent may be unreasonably or arbitrarily withheld) and any attempt to do so shall be void and the other Co-Owner shall, in addition to all other rights and remedies in law and in equity, be entitled to a decree or order restraining and enjoining such Disposition and the offending Co-Owner shall not plead in defence thereto that there would be an adequate remedy at law it being recognized and agreed that the injury and damage resulting from such default would be impossible to measure monetarily. Notwithstanding anything in this Agreement contained no Disposition may be made if:

(t) as a result thereof, the other Co-Owner or its Co-Owner's Interest shall be subject to any taxation to which it was not theretofore subject or to any governmental controls or regulations to which it was not subject prior thereto by reason solely of the nationality or residence of the transferee; or

(u) the Disposition is not permitted by law or any term of any Permitted Encumbrance or any agreement or document affecting the Co-Owners or the

Lands unless any approval required by such Permitted Encumbrance, agreement or document has been obtained and is in effect; or

(v) the Disposition is for less than all of the Co-Owner's Interest; or

(w) such Co-Owner or any Affiliate of such Co-Owner is a Defaulting Party hereunder,

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and any Disposition which would procure such result shall be void. The Co-Owners shall use their reasonable best efforts to obtain the consents of any third parties to any Disposition which would otherwise be permitted hereunder (provided, however, that a Co-Owner shall not be obligated to expend any funds, incur any liabilities or amend any agreements in order to obtain any such consent).

Notwithstanding anything herein contained, no Disposition may be made unless the transferee enters into an agreement with any continuing Co-Owner (and satisfactory to its counsel acting reasonably) whereby the transferee shall be bound by and entitled to the benefit of this Agreement to the extent of the Co-Owners Interest which is the subject of the Disposition.

Section 5.07 Buy-Sell Provisions:

(a) Provided that what is commonly called secondary plan approval (that is an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)) (the "**Secondary Plan Approval**") has been obtained for the Lands, or if the Management Agreement has been terminated, then a Co-Owner who is not then a Defaulting Party (the "**Initiating Party**") may, at any time thereafter tender on the other party (the "**Recipient Party**"), not less than two (2) copies of an agreement combining a separate offer to sell the Initiating Party's full title to all (but not less than all) of its Co-Owner's Interest in the Lands to the Recipient Party (the "Sale Offer") and an offer to purchase all (but not less than all) of the Recipient Party's Co-Owner's Interest in the Lands (the "Purchase Offer") at a price and upon such terms and conditions as may be set by the Initiating Party except that the purchase price must be paid by cash and the assumption of the assumable Permitted Encumbrances affecting the applicable co-Owner's Interest and save and except that the price and terms as to payment with respect to the Sale Offer for each one percent (1%) interest must be equal to and identical to the price and terms as to payment with respect to the Purchase Offer for each one percent (1%) interest and that the closing of the transaction resulting from the acceptance of the Sale Offer or the Purchase Offer Shall take place no earlier than 30 days and no later than 90 days after the expiration of the 100 day period referred to in Subsection 5.07(b). On the completion date of the transaction contemplated in the Sale Offer

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the purchasing Co-Owner shall pay to the selling Co-Owner the balance of the purchase price by cash or certified cheque.

(b) One business day after receipt of the Purchase Offer by the Recipient Party, the Initiating Party shall deliver to the Recipient, as a deposit, a certified cheque or bank draft in an amount equal to five percent (5%) of the purchase price stipulated in the Purchase Offer and such cheque or bank draft shall be payable to the Recipient Party's counsel, in trust. The Recipient Party shall have 100 days following the receipt of the Sale Offer and the Purchase Offer in which to elect either to accept the Purchase Offer or the Sale Offer.

(c) If the Recipient Party shall elect to accept the Sale Offer it shall return to the Initiating Party its deposit (by way of certified cheque or bank draft) together with one (1) fully executed copy of the Sale Offer accompanied by the Recipient Party’s certified cheque or bank draft as a deposit equal to 5% of the purchase price stipulated in the Sale Offer payable to the Initiating Party's counsel, in trust. If the Recipient Party shall not accept the Sale Offer it shall accept the Purchase Offer within the time limited. Failure of the Recipient Party to accept the Sale Offer or the Purchase Offer shall be deemed to mean that the Recipient Party has accepted the Purchase Offer.

(d) To the extent not stated or contradicted in any Purchase Offer or Sale Offer, the closing thereof shall be completed in accordance with the terms and conditions referred to in Section 8.01 hereof.

Section 5.10 Romandale’s Right to Sell:

Subject only to the provisions of Section 5.03(a), (b) and (d) but notwithstanding any other provision in this Agreement to the contrary, Romandale may upon 20 days notice to Frambordeaux, accompanied with a copy of a bona fide arm's length offer to purchase (the “Offer”), elect to sell in one or more transactions up to but not in excess of an undivided 39% interest in the Lands payable only in cash and by assumption of existing assumable Permitted Encumbrances, provided that any purchaser of such interest shall agree in writing that following such purchase and sale the Co-Owners Committee shall remain the same and that the representative of Romandale shall also be the representative of the purchaser that all decisions and actions of Romandale and the purchaser under or pursuant to this Agreement (including the exercise of all rights hereunder) shall be made by Romandale alone. Frambordeaux may, at any time within 10 days from receipt of the aforesaid notice, by written notice to Romandale, elect to sell all or part of its Co- Owner's Interest on the same terms and conditions as contained in the Offer (except that the consideration shall be adjusted in accordance with the ratio of Frambordeaux's Co-Ownership Proportion to Romandale's Co-Ownership Proportion) provided that if Frambordeaux elects to sell only a part of its Co-Owner's Interest, it shall retain at least an undivided 2% Co-Owner's Interest and if Frambordeaux elects to sell all or part of its Co- Owner's Interest, Romandale or the purchaser

shall be obligated to complete the purchase of Frambordeaux's Co-Owner's Interest pursuant to this Section 5.10.

Section 6.02 Remedies Available to a Non-Defaulting Party:

If an Event of Default has occurred and is continuing, a Non-defaulting Party shall have the right to:

(a) remedy such Event of Default and any event of default of the Defaulting Party under any other agreements Approved by the Co-Owners, and shall be entitled upon demand to be reimbursed by the Defaulting Party for any monies expended to remedy any such Event of Default and any other expenses incurred by such Non-defaulting Party, together with interest (calculated and payable monthly) at the lesser of the rate of 4% per annum in excess of the Prime Rate or the maximum rate then permitted at law from the date such monies were expended or such expenses were incurred to the date of repayment thereof; and/or

(b) bring any proceedings in the nature of specific performance, injunction or other equitable remedy, it being acknowledged by the parties hereto that damages at law may be an inadequate remedy for a default or breach of this Agreement; and/or

(c) bring any action at law as may be necessary or advisable in order to recover damages; and/or

(d) arrange, upon written notice to the Defaulting Party, for a determination of the Fair Market Value (as determined pursuant to Section 6.03) of the Defaulting Party's Co-Owner's Interest as at the date of such notice and shall deliver written notice to the other Co-Owner of such Fair Market Value, and either contemporaneously with such first written notice or such second written notice, a Non-defaulting Party shall have the right to give written notice ("Notice of Exercise") to the Defaulting Party that such Non-defaulting Party elects to purchase the Defaulting Party's Co-Owner's Interest at a price equal to ninety-five (95%) per cent of the Fair Market Value thereof payable only in cash and by the assumption of assumable Permitted Encumbrances affecting the Defaulting Party's Co-Owner's Interest and to purchase such interest at such price in which event the Defaulting Party shall sell and the Non-defaulting Party shall purchase such interest on the terms set forth in Subsections 6.03 and 6.04 hereof.

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2. The 2005 August Agreement

WHEREAS:

A. Romandale, as to an undivided 95% interest, and Frambordeaux Developments Inc. ("FDI"), as to an undivided 5% interest, are the owners of the lands and premises consisting of 278 acres, more or less, described as part of Lot 25 in Concessions 4 and 5, Town of Markham (having P.I.N. 03055-0008 (LT) (the "Snider Property") and 03056-0052 (LT) (the "McGrisken Property")) (collectively, the "Snider/McGrisken Property") which are subject to a mortgage in favour of The Bank of Nova Scotia (the "Bank") in the original principal amount of $6,000,000 registered as Instrument No. YR479080 (the "BNS Mortgage");

B. The amount outstanding under the BNS Mortgage is scheduled to become due and payable on August 30, 2005 and Romandale has requested 2001251 to acquire the mortgagee's interest under the BNS Mortgage and such of the Bank's additional security provided by Romandale in connection therewith as may be required in order to ensure that the BNS Mortgage is a good and valid first charge against title to the Snider/McGrisken Property (collectively, the "Security") and thereafter extend its terms for repayment;

C. Romandale has agreed to sell its interest in the Snider/McGrisken Property to 2001251 on the terms herein set out;

D. Romandale and parties affiliated with Romandale are the owners of the lands and premises described as part of Lot 26, Concession 4, Town of Markham (having PIN 03055-0009 (LT)) (the "Triple R Property") and Romandale has agreed to cause the sale of such property to 2001251 on the terms herein set out;

E. Romandale is the owner of the lands and premises described as part of Lot 24, Concession 5, Town of Markham (being PIN 03056-0199 (LT)) (the "Elgin South Property") and has agreed to grant to 2001251 a right of refusal to purchase such property on the terms herein set out;

NOW THEREFORE THIS AGREEMENT WITNESSES that, in consideration of 2001251 agreeing to acquire the BNS Mortgage and extend the term for repayment thereunder and in consideration of the other covenants contained herein, the parties agree as follows:

1. BNS Mortgage

(a) 2001251 or its affiliate shall acquire the mortgagee's interest under the Security, including without limitation, the BNS Mortgage on or before the amount outstanding thereunder becomes due and payable. 2001251 and/or its designate shall be at liberty to contact the Bank at any time hereafter for the purposes of settling the terms and conditions in respect of the purchase of the BNS Mortgage. 2001251 shall receive a mortgage statement from the Bank

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setting out the current outstanding balance under the BNS Mortgage. Thereafter, the parties to the BNS Mortgage shall enter into an amending agreement whereby: (i) the term is extended such that all amounts secured thereby shall become due and payable upon the earlier of (A) the date that is three (3) years from the date of closing of 2001251's purchase of the BNS Mortgage and (B) the date upon which Romandale conveys the Remaining Portion (as hereinafter defined) of the Snider/McGrisken Property to 2001251 and (ii) the interest rate chargeable thereunder shall be 8% per annum payable interest only monthly in arrears.

(b) Romandale shall pay the sum of $20,000 to 2001251 on the execution of this agreement to reimburse it for its costs and expenses incurred to date, and it shall pay to 2001251 all further costs and expenses of 2001251 incurred in connection with the BNS Mortgage acquisition on the date that the mortgage assignment and amending agreement is executed by the parties an registered on title. Notwithstanding the foregoing, the parties agree that Romandale shall only be responsible up to the sum of $10,000 in respect of legal fees incurred in connection with 2001251's acquisition of the BNS Mortgage.

(c) In connection with the acquisition of the BNS Mortgage by 2001251, Romandale shall cause its counsel Berkow Cohen LLP (Jack Berkow) and Gowling Lafleur Henderson LLP (John Whyte) (collectively, "Romandale Counsel"), to provide opinions in favour of 2001251(collectively, the "Opinions"), which shall be in forms acceptable to 2001251 and its counsel, Aird & Berlis LLP (Hayden Solomons), acting reasonably, and which shall include, without limitation, opinions that the BNS Mortgage is a good and valid first fixed mortgage registered against title in the Snider/McGrisken Property and that the BNS Mortgage and this Security has been validly assigned to 2001251, that there are no other financial encumbrances affecting title to the Snider/McGrisken Property and that acquisition and amendment by 2001251 of the BNS Mortgage on the terms and conditions as herein set out shall not constitute a transaction (including, without limitation, a "Disposition" as defined under the Co-Owner Agreement dated May 29, 2003 in respect of the Snider Property (the "Snider Co-Owner Agreement") and as defined under the Co-Owner Agreement dated May 29, 2003 in respect of the McGrisken Property (the "McGrisken Co-Owner Agreement") (collectively, the Snider Co-Owner Agreement and the McGrisken Co-Owner Agreement are referred to herein as the "Co-Owners Agreements", and any amendments thereto) that requires the consent of FDI pursuant to the said Co-Owners Agreements.

2. Sale of the Snider/McGrisken Property

Romandale shall sell 5% of its interest (the "Initial Interest") in the Snider/McGrisken Property (being 4.75% of the total 100% ownership in the Snider/McGrisken Property (e.g.

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95% Romandale and 5% FDI as of the date of this agreement) and, of FDI if it so desires, to 2001251 or its affiliate on the terms herein set out. Romandale shall sell its remaining interest in the Snider/McGrisken Property, being 95% of its interest in the Snider/McGrisken Property (the "Remaining Interest") also on the terms herein set out save that the sale of the Remaining Interest is conditional for the benefit of the vendor and the purchaser on the valid exercise of the buy-sell rights under the Buy-Sell Provisions (as defined in paragraph 5 of this Agreement) and the completion of the buy-out of the interest of FDI, or, in the alternative, the consent of FDI to the transaction and save that financial figure shall be adjusted pro-rata to represent the said Remaining Interest. In respect of the foregoing, Romandale covenants to use reasonable best efforts to obtain the consent of FDI in respect of the sale of the Remaining Interest to 2001251 or its affiliate as aforesaid. For clarification, the following terms are applicable in respect of the Initial Interest but would be adjusted to reflect the aforesaid Remaining Interest at the time that Romandale is able to sell the Remaining Interest to 2001251 or its affiliate as aforesaid:

(a) The purchase price shall be based on the sum of $160,000 per acre which price will be calculated using the existing most recent survey of the subject property which Romandale represents and warrants accurately describes the subject property. With respect to the purchase of the Initial Interest, an initial deposit of $100,000 shall be paid immediately, and the balance of the purchase price shall be paid by certified cheque or bank draft on the closing of such transaction. With respect to the purchase of the Remaining Interest, the purchase price shall be reduced at the end of the 5th year of the term of the VTB #1 Mortgage (as hereinafter described) by the amount that the acreage of the non-developable land (being land prohibited from development by law) subject to environmental protection requirements, wood lots, land below top-of-bank and the set-backs from top-of-bank, streams and floodplain, existing easements, but not including up to half of the existing lake on the subject property to a maximum of two acres (the "ND Land") exceeds 15% of the total acreage. The parties shall each retain their own consultant to determine the acreage of the ND Land and both parties shall agree upon a third independent qualified consultant to determine the acreage of the ND Land in the event that their own consultants cannot agree upon such acreage. In the event of such disagreement, the amount of the ND Land shall be deemed to be the average of the amounts determined by the 3 consultants. Such determination of the amount of acreage of the ND Land shall be final and binding upon the parties, with no rights of appeal therefrom. The parties shall each bear the cost of their own consultant and 50% of the cost of the third consultant.

(b) The purchase price in respect of the purchase of the Remaining Interest shall be paid to the extent of 35% thereof by certified cheque on closing and the balance by way of a vendor take-back mortgage (the "VTB #1 Mortgage") with a term of 7 years, bearing no interest, with two balloon principal payments of $9,500,000 each to be paid at the end of the 3rd year of the term and at the end

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of the 5th year of the term, respectively, with the price adjustment described in section 2(a) hereof to be applied at the time of such [later] payment. Notwithstanding the above, however, the parties further agree that the aggregate of the amount paid on closing and the two balloon principal payments shall not exceed 75% of the overall purchase price as adjusted pursuant to section 2(a) hereof.

(c) The closing of the sale of the Initial Interest shall take place on the 31st day of January, 2006. The closing of the sale of the Remaining Interest shall take place sixty (60) days (or the next business day following such sixtieth (60th) day after the earlier of: (1) Romandale obtaining the consent of FDI pursuant to the Co-Owners Agreements to the sale of the Remaining Interest to 2001251 pursuant to the terms and conditions hereof, or (2) Romandale closing the purchase of FDI's co-ownership interest in the Snider/McGrisken Property pursuant to its rights under the Buy-Sell Provisions (as defined in paragraph 5 of this Agreement).

(d) The occupants approved by Romandale (the “Superintendents”) shall be entitled to occupy the residence on the Snider/McGrisken Property as Superintendents and caretakers to maintain and supervise the property, and they are to pay all maintenance, utilities and fire and liability insurance costs (which insurance shall be obtained by them and with the owner noted on all insurance policies for the above coverages as loss payee). The Superintendents' right to occupy the property shall automatically terminate on the earlier of the 5th anniversary of the closing of the purchase and sale of the Initial Interest or Secondary Plan Approval being obtained for the Snider/McGrisken Property.

(e) In the event of any final judgment or order or any execution in favour of Bordeaux, FDI or any third party which attaches to or creates an interest in or affects title to the Snider/McGrisken Property, then in such case, the purchase price hereunder for Romandale's interest in the Snider/McGrisken Property shall be reduced by the value of such judgment, order or execution as follows: (1) in the event that the purchase transaction in respect of the Initial Interest has not yet closed, a reduction in the cash component of the said purchase price, (2) in the event that the purchase transaction in respect of the Remaining Interest has not closed then the purchase price in respect thereof shall be reduced by a reduction first in the cash component of the said purchase price and the balance, if any, resulting in a reduction of the principal amount owing under the VTB #1 Mortgage, or (3) in the event that such purchase transaction in respect of the Remaining Interest has closed, a reduction in the principal balance, owing under the VTB #1 Mortgage. The parties covenant and agree to notify the other of the details of any such judgment, order or execution forthwith following first becoming aware of such judgment, order or execution.

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3. Sale of the Triple R Property

Romandale shall sell, or shall cause the owners to sell, the Triple R Property to 2001251 or its affiliates on the terms herein set out:

(a) The purchase price shall be based on the sum of $175,000 per acre which price will be calculated using the existing most recent survey of the subject property which Romandale represents and warrants accurately describes the subject property. The purchase price shall be reduced at the end of the 5th year of the term of the VTB #2 Mortgage (as hereinafter described) by the amount that the acreage of the ND Land within the Triple R Property exceeds 20% of the total acreage. The determination of the amount of acreage of such ND Land shall be made in the same manner as that described in section 2 (a) hereof;

(b) The purchase price shall be paid to the extent of 70% thereof by certified cheque on closing and the balance by way of a vendor take-back mortgage (the VTB #2 Mortgage) with a term of 7 years, bearing no interest, with a balloon principal payment of $1 million at the end of the 3rd year of the term. The price adjustment described in section 3(a) hereof shall be applied at the end of the 5th year of the term, and 50% of the balance owing under the VTB #2 Mortgage shall be paid at the end of the 6th year of the term and the balance at the end of the 7th year of the term;

(c) The Superintendents shall be entitled to occupy the residence on the Triple R Property as Superintendents and caretakers to maintain and supervise the property, and they are to pay all maintenance, utilities and fire and liability insurance costs (which insurance shall be obtained by them and with the owner noted on all insurance policies for the above coverages as loss payee). The Superintendents' right to occupy the property shall automatically terminate on the earlier of the 5th anniversary of closing or Secondary Plan Approval being obtained for the Triple R Property.

(d) 2001251 shall immediately provide a deposit to Romandale in the amount of $100,000 in respect of its obligations to purchase the Triple R Property pursuant to the terms hereof, together with an interest-free loan of $1,000,000 evidenced by a promissory note signed by Romandale which shall be repayable on the closing of the sale of the Triple R Property to 2001251 or its affiliates.

(e) The closing of such sale shall take place on the date that is 70 days following the closing date of the transactions described in section 1 hereof (or the next business day thereafter in the event that such 70th day is not a business day).

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4. Elgin South Property

The Elgin South property is subject to an existing right of first refusal in favour of Angus Glen Farm (1996) Limited. On the closing of the acquisition of the BNS Mortgage, Romandale shall grant to 2001251 or its affiliate a right of second refusal to purchase such property on the same terms as contained in any offer to purchase that Romandale is prepared to accept. The form of such grant shall be in the same form as the existing agreement with Angus Glen Farm (1996) Limited. 2001251 shall be permitted to register notice of the aforesaid right of second refusal against title to the Elgin South Property. Romandale covenants and agrees to execute such further documents and to do all such further acts and things from time to time as requested by 2001251, to more effectively confirm and evidence the right of second refusal.

5. Irrevocable Appointment

Romandale hereby agrees that, on consideration of entering of this agreement by 2001251, other good and valuable consideration and the sum of Ten Dollars ($10.00) paid by 2001251 to Romandale, the receipt and sufficiency of all of which is hereby acknowledged, Romandale hereby irrevocably appoints 2001251 as its exclusive true and lawful attorney and agent having full power of substitution, and 2001251 is hereby fully authorized as such to act on behalf of and/or give binding instructions to Romandale solely in connection with the exercise of the buy-sell rights pursuant to the Buy-Sell Provisions (as hereinafter defined). Romandale agrees that any and all decisions, operations, conduct and actions relating to the development of the Snider/McGrisken Property shall be within the exclusive control of 2001251 and Romandale shall assist in facilitating such control to comply with Section 5.10 of the Co-Owners Agreements over all decisions, operations, conduct and actions exercisable by Romandale relating to the development and obtaining of development approvals for the Snider/McGrisken Property. Prior to the closing of the sale of the Remaining Interest, Romandale acknowledges and agrees that it may not transfer, sell, encumber or otherwise deal with or dispose of all or any part of the Snider/McGrisken Property without the prior written consent of 2001251. Romandale covenants and agrees to execute such further documents and to do all such further acts and things from time to time as requested by 2001251, to more effectively confirm and evidence the said attorney as it relates to the buy-sell rights. Romandale and 2001251 shall cooperate in getting the Snider/McGrisken Property included under the Town of Markham urban envelope for development purposes, and Romandale shall make all reasonable steps to reduce land wastage to as small an amount as possible, using Joanne Burnett, Jeff Kerbel and/or his designate to act on behalf of Romandale in taking such steps. Romandale further acknowledges that the foregoing rights of 2001251 are intended, without limitation, to permit 2001251 to cause Romandale to trigger Romandale's buy-sell rights under section 5.07 of each of the Co-Owners Agreements in respect of the Snider/McGrisken Property (collectively, the “Buy-Sell Provisions”) following Secondary Plan Approval being obtained for the Snider/McGrisken Property such that Romandale acquires the co-ownership interest of FDI in the Snider/McGrisken Property and then conveys such interest to 2001251 in accordance with this Agreement and to restrict Romandale from

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dealing with the Remaining Interest or any part thereof in the Snider/McGrisken Property in any way whatsoever, subject to the terms and conditions of the Co-Owners Agreement.

6. Development Costs

Romandale shall not be responsible for development costs incurred by 2001251 Ontario Inc.

7. General

(a) This agreement shall be a binding agreement between the parties hereto save that it shall be conditional upon compliance with the *Planning Act*.

(b) Any notice given hereunder shall be in writing and given by personal delivery or by fax to the addresses set out on the signing page hereof. Such notice shall be deemed to have been given on the day of delivery or transmission if such was completed by 5:00 p.m. failing which it shall be deemed to have been given on the next day.

(c) Time shall be of the essence hereof.

(d) Romandale shall take all actions so as to ensure that all property interests conveyed pursuant to this agreement shall be good and marketable, free of all mortgages, liens and encumbrances.

(e) This agreement may be executed and delivered by counterparts and by facsimile transmission, and if so executed and delivered, each document shall be deemed to be in original, shall have the same effect as if each party so executing and delivering this agreement had executed the same copy of this agreement and all of which copies when taken together shall constitute one and the same document.

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3. The Settlement Agreement

WHEREAS Frambordeaux Developments Inc. (“Frambordeaux”) and Romandale Farms Limited (“Romandale”) are co-owners of two parcels of land which are the subject of these actions (the “Lands”) and are parties to Co-Owners Agreements governing their rights and obligations respecting their ownership of the Lands (the “Co-Owners Agreements”) which provide, *inter alia*, that each Co-Owner has a right of first refusal respecting an offer to purchase the other Co-Owner’s interest (the “Right of First Refusal”) and each Co-Owner has a buy-sell right in respect of the other Co-Owner’s interest (the “Buy-Sell Provision”), but that in both cases the rights may only be exercised after secondary plan approval has been obtained for the Lands, and that save for those dispositions expressly permitted by the Co-owners Agreements (whereby Romandale was permitted under certain conditions to sell up to 39% interest in the Lands), neither Co-Owner is permitted to dispose of its interest in the Lands without the consent of the other Co-Owner;

AND WHEREAS Romandale and 2001251 Ontario Inc. ("2001251") made an agreement dated August 29, 2005 (the "August 29, 2005 Agreement") whereby Romandale agreed, inter alia, in respect of the Lands: to sell 5% of its interest (the "Initial Interest") in the Lands (being 4.75% of the total 100% ownership in the Lands) on the terms set out therein and originally scheduled to close January 31, 2006; and to sell its Remaining Interest in the lands (being 95% of its interest representing 90.25% of the total 100% ownership in the Lands) on the terms set out therein and at such time as Romandale could exercise its buy-sell rights under the Buy-Sell Provisions of the Co-Owners Agreements or Frambordeaux consented to the transaction;

AND WHEREAS pursuant to the August 29, 2005 Agreement, Romandale transferred 5% of its interest in the Lands (being 4. 75% of the total Lands) to First Elgin Mills Developments Inc. ("First Elgin"), an affiliate of 2001251, on or about June 6, 2006;

AND WHEREAS Romandale and First Elgin made a further agreement dated June 25, 2007, (the "June 25, 2007 Agreement"), whereby Romandale agreed to sell a further 7% of its original 95% interest in the Lands (being 6.65% of the total 100% ownership in the Lands) to First Elgin for the same purchase price of $160,000 per acre subject to adjustment for net developable acreage as provided in the August 29, 2005 Agreement;

AND WHEREAS Frambordeaux sought and obtained an interlocutory injunction July 26, 2007 enjoining the defendants until further order of the Court from making any disposition of the Lands or any part of the interest of Romandale in the Lands;

AND WHEREAS the Plaintiffs and the Defendants 2001251, First Elgin and Jeffrey Kerbel have agreed to settlement so that the right of 2001251 or its affiliate to acquire Romandale's Remaining Interest in the Lands pursuant to the August 29, 2005 Agreement may be exercised 60 days after Secondary Plan Approval for the Lands is obtained, and upon such acquisition the entire Lands shall at Frambordeaux' option be beneficially owned equally between 2001251 and Frambordeaux thereafter, so that a 50% undivided interest therein shall be beneficially owned by

2001251 or its nominee, and a 50% undivided interest therein shall be owned beneficially by Frambordeaux or its nominee.

THE PARTIES HERETO agree as follows:

1. In the event Romandale will not concur in this settlement and these actions proceed to trial, Frambordeaux, Fram 405 Construction Ltd. and Bordeaux Homes Inc. shall not seek any relief against 2001251, First Elgin or Jeffrey Kerbel and shall not seek a declaration that the August 29, 2005 Agreement is void nor that the June 6, 2006 transfer is invalid, but may pursue its claims against Romandale otherwise, including its claims for damages for breach of contract, misrepresentation and damages in lieu of specific performance, and all claims in these actions against 2001251, First Elgin and Jeffrey Kerbel shall be discontinued, with such discontinuance being an absolute defence for those defendants to any subsequent actions arising out of the circumstances pleaded.

2. 2001251 hereby grants an option to Frambordeaux to purchase a 50% interest in Romandale's Remaining Interest in the Lands to be acquired by 2001251 as described in paragraph 2 of the August 29, 2005 Agreement, on the same terms and conditions as 2001251 may purchase Romandale's Remaining Interest in the Lands, at such time or times as 2001251 may exercise its right to purchase all or part of Romandale's Remaining Interest, provided that in the event Frambordeaux exercises its option hereby granted, the respective interests of Frambordeaux and 2001251 shall be adjusted so that each of Frambordeaux and 2001251 (including their affiliates and related parties) beneficially hold an exactly equal percentage ownership interest (being an undivided 50% interest each) in the Lands.

3. In the event Frambordeaux exercises its option described in paragraph 2 hereof, and all or part of Romandale's Remaining Interest shall have been purchased, 2001251, First Elgin and Frambordeaux shall assign all of their right, title and interest in the Lands to Fram First Elgin Developments Inc. which shall hold in trust for 2001251 or its nominee and for Frambordeaux or its nominee, each as to a 50% beneficial interest therein.

4. 2001251 and Frambordeaux, or their nominees, together with First Elgin Mills Developments Inc. and Fram First Elgin Developments Inc. shall enter into the form of joint venture agreement attached as Schedule "A" hereto and agree to share equally all costs relating to the acquisition of the Remaining Interest from Romandale, and all development costs incurred by either of them relating to the Lands since August 29, 2005 and going forward, and to make all decisions concerning the development and/or the exercise of all rights and obligations respecting the Lands, on a joint basis. Any disputes or disagreements shall be resolved by arbitration before a single arbitrator as the parties may agree, or failing such agreement, as may be appointed by a judge of the Ontario Superior Court.

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5. Frambordeaux does not by this settlement agreement or otherwise consent to the transaction referred to in paragraph 2 of the August 29, 2005 Agreement. It is the intention of the parties hereto that the purchase and sale of Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after Secondary Plan Approval for the Lands has been obtained.

6. The parties acknowledge that the legal description of the Lands is as set out in Schedule "B" appended hereto and that Notice of this Agreement pursuant to the Land Titles Act, R.S.O. 1990, c.L.5 may be registered against their respective undivided interest in the Lands and that Notice of Security Interest in respect of the option granted by this Agreement may be registered pursuant to the Personal Property Security Act, R.S.O. 1990, c. P. 10.

Dated: December 3rd, 2010

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Lauwers J.A. (concurring):

[315] I would reach the same destination as my colleague, dismissal of the appeal, but by a different route. We part company on the role of estoppel by convention. I adopt my colleague's short forms in these reasons.

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A. OVERVIEW

[316] I summarize my view of this appeal in the following propositions:

1) When Fram consented to the sale of Romandale's Remaining Interest in the Lands to Kerbel under the 2005 August Agreement on August 22, 2018, any estoppel against Romandale ceased to have practical effect and was therefore spent. It plays no further legal role in the contractual relations among the parties. Those relations are entirely structured and governed by their respective agreements.

2) In any event, on the facts of this case, estoppel by convention does not arise.

3) By entering into the Settlement Agreement, Kerbel did not breach the 2005 August Agreement.

4) Kerbel did not repudiate the 2005 August Agreement.

5) Kerbel is entitled to specific performance of the 2005 August Agreement.

[317] I will explain each of these propositions in turn, after restating the contractual context.

B. THE CONTRACTUAL CONTEXT

[318] The COAs between Fram and Romandale respecting the McGrisken and Snider Farms were signed in 2003. The COAs structure the relationship between Fram and Romandale.

[319] The 2005 August Agreement between Kerbel and Romandale was signed in 2005. It included not only the McGrisken Farm and the Snider Farm, but also the Triple R Lands and the Elgin South Property, both of which were owned by or subject to the direction of Romandale. The 2005 August Agreement structures the relationship between Kerbel and Romandale. It has been fully performed except for the sale of Romandale's Remaining Interest in the McGrisken and Snider Farms to Kerbel.

[320] Fram and Kerbel signed the Settlement Agreement on December 3, 2010. The Settlement Agreement structures the relationship between Fram and Kerbel. Romandale was not a party to the Settlement Agreement. Romandale had participated in the September 2010 judicial mediation but withdrew in October 2010. (I observe that calling the exercise a judicial mediation gives it unwarranted gravity.) In the end, the Settlement Agreement was a business deal between Kerbel and Fram to which Romandale was not a party.

[321] Romandale first raised the possibility that the Settlement Agreement breached the 2005 August Agreement in February 2011 but did not allege that by entering it Kerbel repudiated the 2005 August Agreement until 2015.

[322] As I will explain, these three agreements remain in full force and effect and govern the parties to them.

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C. ANALYSIS

(1) Any Estoppel Ceased to Have Practical Effect When Fram Consented to the Sale of Romandale's Remaining Interest on August 22, 2018

[323] The estoppel by convention raised by Kerbel and Fram against Romandale arises from the Settlement Agreement. Romandale argues that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement, which provided that the sale of Romandale's Remaining Interest would take place only after the Lands obtained SPA. Kerbel, in turn, seeks an order for specific performance of the 2005 August Agreement. Kerbel and Fram, together, argue that Romandale is estopped from resiling from Romandale's earlier position that the buy-sell in the COAs could only be triggered upon SPA. That position was reflected in earlier representations to that effect made by all three parties, as my colleague has detailed at paras. 156-172. But for Fram's 2018 consent, giving effect to this position would have the effect of extending the likely date for closing the COAs, and perforce the 2005 August Agreement, for many years, until after SPA.

[324] My colleague defines the "Shared Assumptions" that underpin the estoppel by convention, at para. 153:

> (1) the buy-sell provision in the COAs could not be triggered until after SPA had been achieved for the Lands; and (2) under the 2005 August Agreement, Kerbel

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> could not cause Romandale to trigger the buy-sell under the COAs until after SPA.

She finds that Romandale is estopped from resiling from these Shared Assumptions. In her analysis, the estoppel continues to operate and prevents Romandale from resisting on order for specific performance of the 2005 August Agreement on the basis that it was fundamentally breached and repudiated by Kerbel's entry into the Settlement Agreement.

[325] However, as my colleague notes, the assumption that the buy-sell provision in the COAs could not be triggered until after SPA was a mistaken reading of s. 5.07 of the COAs. Romandale could have triggered the buy-sell under the COAs at any time after the DMAs were terminated in February 2005. Because the 2005 August Agreement was tied to the COAs, Kerbel could have caused Romandale to pull the trigger at any time after it signed that agreement. This understanding of the true trigger date is now common ground.

[326] In August 2018, a few months before the trial started, Fram consented to the sale of Romandale's Remaining Interest in the McGrisken and Snider Farms to Kerbel, pursuant to the 2005 August Agreement. Under para. 2(c) of that agreement, "The closing of the sale of the Remaining Interest shall take place sixty (60) days… after… Romandale obtaining the consent of [Fram]... to the sale of the

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Remaining Interest". Fram's consent removed any obstacle to the closing of that transaction.

[327] The alleged estoppel prevented Romandale from insisting on an earlier closing date than after SPA, which by 2010 was projected to be years if not decades into the future. But this purpose of the estoppel was rendered redundant by Fram's 2018 consent. In my view, assuming the estoppel was founded and was enforceable against Romandale, it ceased to have practical effect and plays no further legal role in the contractual relations among the parties. Fram's consent could not have revived the 2005 August Agreement if it had been repudiated by Kerbel but, as I explain below, Kerbel did not repudiate that agreement.

[328] The relations among the contracting parties are entirely structured and governed by their respective agreements, which also govern the disposition of this appeal.

[329] If I am mistaken in concluding that the estoppel was effectively spent in 2018, I next set out my reasons for holding that there was no estoppel by convention on the facts of this case.

(2) Estoppel by Convention Is Not Made Out

[330] I begin with the governing principles of estoppel by convention, review the evidence, and then apply the principles to the facts.

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(a) The Principles Governing Estoppel by Convention

[331] The law on estoppel by convention, at least in Canada, is under-theorized. There has been little jurisprudence. The most authoritative statement is that of the Supreme Court in *Ryan v. Moore,* 2005 SCC 38, [2005] 2 S.C.R. 53. Bastarache J. set out the criteria that form the basis of the doctrine, at para. 59, which I repeat here for convenience:

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly). [Emphasis in original.]
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[332] Note the reference by Bastarache J. to the requirement for a "manifest representation". This expression must be read in context. The key difference between estoppel by representation and estoppel by convention is that in estoppel by representation, one party must make a representation to the other party on which the other party relies, whereas, in estoppel by convention, neither party need

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have made a representation to the other party so long as they both proceeded on a shared assumption and were each aware of the other’s assumption: see *Ryan v. Moore*, at paras. 54, 62.

[333] In *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499, leave to appeal refused, [2020] S.C.C.A. No. 360 and No. 361, Huscroft J.A. made explicit another element of the test that I believe was implicit: the party’s reliance on the shared assumption must have been reasonable. Huscroft J.A. noted, at para 54:

> Although the doctrine of estoppel cannot vary the terms of a contract, it may operate to prevent a party from relying on the terms of the contract to the extent necessary to protect the reasonable reliance of the other party. Thus, the doctrine has the potential to undermine the certainty of contract and must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel. Estoppel is a fact specific doctrine and the concern noted by Bastarache J. in *Moore*, at para. 50 remains apposite: "estoppels are to be received with caution and applied with care". [Emphasis added, citation omitted.]

[334] Huscroft J.A. added, at para. 55, that estoppel by convention “is a relatively rare form of estoppel,” and, at para. 56, “Estoppel exists to protect *reasonable* reliance: it must be reasonable to adopt a particular assumption and reasonable to act in reliance on it” (emphasis in original, citations omitted).

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[335] This orientation anchors estoppel by convention in the root principle of the common law of contract, which is to give effect to the reasonable expectations of contracting parties as set out in the text of their contract: see *Martin v. American International Assurance Life Co.*, 2003 SCC 16, [2003] 1 S.C.R. 158, at paras. 12, 16; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 5; *Onex Corp. v. American Home Assurance Co.*, 2013 ONCA 117, 114 O.R. (3d) 161, at paras. 106, 108, leave to appeal refused, [2013] S.C.C.A. No. 178; and *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at paras. 51-53.[13]

[336] Parol evidence figures in this case. Evidence of what a party said or did is often admissible as part of the narrative of a contractual dispute. It is undoubtedly admissible to found an estoppel, as stated in *Chartbrook Limited v. Persimmon Homes Limited*, [2009] UKHL 38, at para. 42:

> The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the

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[13] Angela Swan and Jakub Adamski point out that courts have not always adopted an approach consistent with this principle: “Contractual Interpretation in the Supreme Court: Confusion Reigns Supreme” in Matthew Harrington, ed., *Private Law in Canada: A 150-Year Retrospective* (Toronto: LexisNexis, 2017) p. 115. See also Edward J. Waitzer and Douglas Sarro, “Protecting Reasonable Expectations: Mapping the Trajectory of the Law” (2016) 57:3 Can. Bus. L.J. 285.

> parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it. [Emphasis added.]

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[337] Such evidence is also available, by necessary implication, to challenge the veracity of an estoppel.

(b) The Evidence

[338] As the trial judge explained, the mistaken view of the trigger date appears to have originated in some correspondence from counsel for Fram in February 2007. It was then perpetuated in many statements, as my colleague outlines at paras. 156-172. Often, these statements were made by Romandale's own representatives. This mistake was apparently not discovered until 2015 when Romandale's new counsel pointed it out and it became the factual backbone to Romandale's litigation strategy.

[339] The trial judge described the situation, at paras. 103-105:

> It is Romandale's position that "amidst the to-ing and fro-ing" of Fram and Romandale's counsel in respect of Romandale's alleged breach of the COAs, Fram's counsel set in motion a mischaracterization of the availability of the Buy-Sell in s. 5.07 of the COAs that pervaded subsequent pleadings and affidavits relied on by the parties and that was ultimately identified and rectified by Romandale in 2015 when it changed counsel. It is alleged that this began in a letter dated February 26, 2007, when counsel for Fram wrote to counsel for Romandale alleging a breach of the COAs and asserting:

> The Elgin Mills Lands have not received Secondary Plan Approval, as defined in Section 5.07(a) in each of the Co-ownership Agreements. Therefore, the provisions dealing with Dispositions set out in Section 5.04, 5.05 and 5.07 are inapplicable.

Whether or not this was the first time this incorrect position was stated or not, this position was clearly wrong in that as I have already stated, the Buy-Sell could also be triggered after termination of the DMAs, even before SPA, which I have found occurred in February 2005. This error in summarizing the Buy-Sell provisions of the COAs as only being available after SPA was also taken up by Kerbel and Romandale. For example, in the first recital to the Settlement Agreement the COAs are referred to, and with respect to the Buy-Sell provisions it is stated that "the rights may only be exercised after secondary plan approval has been obtained for the Lands ..." [emphasis added].

When Ms. Batner was retained by Romandale in 2015, Romandale was granted leave to amend its Statement of Defence to correct the mischaracterization that had pervaded the pleadings and tainted the parties' evidence until that time. As already stated, this error explains the evidence of Mrs. Roman-Barber and the positions of Romandale's former counsel in the period from 2007 to the time Ms. Batner was retained.

[340] My colleague identifies the assumption that the buy-sell provision in the COAs could not be triggered until after SPA as the shared assumption on which estoppel by convention arises. This assumption, in her view, was held by all of the parties in 2010 when the Settlement Agreement was negotiated. Candidly, I doubt

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the veracity of this assertion, at least as it relates to Kerbel and Fram, and particularly to Mr. Kerbel.

[341] The trial judge found that Mr. Kerbel knew he could have caused Romandale to trigger the buy-sell under the COAs at any time, because the DMAs had been terminated in February 2005:

> In his affidavit Mr. Kerbel swore that he and Mrs. Roman-Barber deliberately agreed to defer triggering the Buy-Sell in the August 2005 Agreement until after SPA because of Mr. Kerbel's reluctance to being dragged into the existing Bordeaux litigation regarding the DMAs and that their lawyers drafted the August 2005 Agreement to provide for this. He testified that he and Mrs. Roman-Barber and their lawyers agreed "and we specifically took [the DMAs] out of our deal because no judge had said [Bordeaux] was terminated".
>
> Romandale argues that this was false evidence and I agree. First of all, Mr. Kerbel abandoned that position during his cross-examination, when he admitted he could have caused Romandale to trigger the Buy-Sell before SPA under the August 2005 Agreement, and indeed that he would have when the Bordeaux litigation resolved:
>
> > Q: [...I]f the Bordeaux litigation settled, you would have caused Romandale to trigger the buy/sell. You recall I asked you that question?
> >
> > A: Yes, I'm going to say I would have.
> >
> > Q: Pardon?
> >
> > A: I am going to say I would have.

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> Q: You would have?
>
> A: Yes.
>
> [...]
>
> Q: And you wanted to be the decider on the timing and the amount of the buy/sell that Romandale would trigger with Fram.
>
> A: Well, the timing was as soon as I could, but the amount, yeah.
>
> Q: So when you say the timing was "as soon as I could", that just goes back to our last discussion. As soon as possible, as soon as you were satisfied that the Bordeaux litigation wasn't a problem, you would have caused Romandale to trigger the buy/sell.[14]
>
> A: Yes, I would have. [Emphasis added by the trial judge.]

[342] The trial judge stated, at para. 314, that the “pith and substance” of the 2005 August Agreement was an “expedient land sale (Kerbel gets the Lands and Romandale gets the equity it required) without breaching the existing Land agreements [with Fram].” She noted accurately: “There was zero benefit to Romandale in putting off closing.”

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[14] The Bordeaux action was settled in October 2014.

[343] What changed for all the participants was the development horizon. The trigger date acquired new saliency in 2009, when government decisions introduced a long delay in the development horizon. From development approvals that were, in 2005, anticipated in a few years, the development horizon went out many years, perhaps decades. The likely land use designations also changed, with the Snider Farm proposed for employment use, not residential development, reducing both the value of the Lands and Fram's incentive as a home builder.

[344] I noted in this court's decision in *First Elgin Mills Developments Inc. v. Romandale Farms Limited*, 2014 ONCA 573, 324 O.A.C. 153, at paras. 31-32: "The process of moving raw land through the land development process is complex, time consuming, and expensive." I added: "The outcome is frequently uncertain." This is known to experienced land developers like Kerbel and Fram and experienced owners of development lands like Romandale. The agreements between the parties were built around these uncertainties, which came to pass in this case.

[345] Because of the changes in the development horizon and the likely development permissions, both Kerbel and Fram had a substantially reduced appetite to complete the transactions contemplated by the COAs and the 2005 August Agreement. The trial judge explained:

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> Both Mr. Giannone and Mr. Kerbel acknowledged at trial that these developments concerned them. They both admitted that they would have preferred shorter development timelines and a residential designation for the Snider Farm, as residential use would have made for a significantly better investment. Fram would have preferred residential land use rather than employment land use as the real way that Fram was to make money was largely tied to its homebuilding rights under the CMAs, which would be dead if the Lands remained employment lands.
>
> Mr. Kerbel admitted that by 2009 as a result of these developments, he was no longer in the mindset of closing with Romandale as soon as possible. Mr. Giannone admitted that by 2010 the Lands were a materially "different product". Mr. Giannone also admitted that because of his concerns about the real estate market, when he entered into the Settlement Agreement with Kerbel, he was not committed to buying half of Romandale's remaining interest in the Lands. He wanted to have that option in the future. He was careful to ensure that by entering into the Settlement Agreement it could not be construed a consent under the Conditional Agreement because if Fram had consented, the deal between Romandale and Kerbel could have closed.

[346] I make several observations about where things stood upon execution of the Settlement Agreement by Kerbel and Fram. It was drafted by Kerbel and Fram to reflect their interests. It was an advantageous deal for two canny land developers, entirely at the risk and cost of the majority landowner, Romandale. The Settlement Agreement states that, under the COAs, the buy-sell could only be exercised after SPA had been obtained and that Romandale would sell its Remaining Interest to Kerbel under the 2005 August Agreement when the buy-sell could be exercised or

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when Fram consented. The Settlement Agreement goes on to provide that the sale of Romandale's Remaining Interest to Kerbel "will take place after" SPA is obtained. Effectively, under the terms of the Settlement Agreement, Kerbel agreed not to cause Romandale to trigger the buy-sell provision under the COAs as it was empowered to do under the 2005 August Agreement. This elongation of time spared both Kerbel and Fram the obligation to come up with the money to finance the acquisition of land whose value had become uncertain, until SPA, when its value could be ascertained.

[347] This allowed Kerbel to put off paying Romandale the fixed price of $160,000 per acre, negotiated in 2005, for many years, perhaps decades. With inflation over the ensuing years, the constant dollar value of the land would decline over that time at the sole expense of Romandale.

[348] This also saved Fram, for the same period of time, from having to respond to the buy-sell provision in the COAs. Fram instead acquired a solid development partner, in Kerbel, with whom to share acquisition and development costs, and risks. And both Fram and Kerbel, being formidable adversaries, eliminated litigation risk and cost between them by settling their actions against each other.

(c) The Principles Applied

[349] In my view, the invocation by Kerbel and Fram of estoppel by convention fails. Any application of estoppel by convention in this case requires this court to

account for the role that the supposedly shared but mistaken assumption regarding the interpretation of the COAs actually played in the formation of the Settlement Agreement.

[350] Given Mr. Kerbel's evidence that he knew the buy-sell could be triggered after the termination of the DMAs, and before SPA, as quoted by the trial judge and repeated at para. 341, above, it is very unlikely that Kerbel in particular, and Fram by implication, shared in Romandale's mistaken interpretation of the trigger date in the COAs. I infer that it is much more likely that they knowingly took advantage of Romandale's mistaken view, which had been repeated on many occasions. Ignorance of the true trigger date on the part of Kerbel and Fram, two savvy land developers, is highly implausible. Kerbel and Fram used the trigger date as a vehicle to put off payment to Romandale indefinitely.

[351] My colleague alludes to the fact that none of the parties to this appeal resisted the claim that they had all shared in the mistaken assumption that the buy-sell could only be triggered after SPA.

[352] It is true that estoppel by convention was not resisted on this basis. However, the trial judge found, at para. 87, that "Mr. Kerbel knew that [the buy-sell] could be triggered before SPA after termination of the DMAs". At para. 89, she found Mr. Kerbel's evidence that he had forgotten this fact "disingenuous". A finding that Kerbel shared in the mistaken shared assumption that my colleague identifies is

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inconsistent with the trial judge's findings, to which I would defer as factual determinations of credibility. The inferences I have drawn from these determinations are inescapable.

[353] Further, "estoppels are to be received with caution and applied with care": *Ryan v. Moore*, at para. 50. Because "the doctrine has the potential to undermine the certainty of contract [it] must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel": *Grasshopper Solar*, at para. 54, *per* Huscroft J.A. Applying due caution and care, I cannot find an estoppel by convention where, given the evidence, one does not arise on the facts and the law, however argued by parties whose concern is less for the law than for their individual advantage. Here, the claimed estoppel by convention cannot survive Mr. Kerbel's knowledge, when the Settlement Agreement was negotiated, that the shared assumption was mistaken. This can be seen in two ways.

[354] First, given the fact of Mr. Kerbel's knowledge, I have difficulty accepting that the assumption that the buy-sell could not be triggered until after SPA was shared in the manner required for estoppel by convention. Bastarache J. notes that the "crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of 'a like mind'": *Ryan v. Moore*, at para. 61 (citations omitted). Further, estoppel by

convention requires “mutual assent”: *Ryan v. Moore*, at para. 62. Where one party knows that the other party is mistaken and chooses to acquiesce in their mistake rather than correct it, they were plainly not of like minds nor did they mutually assent.

[355] Second, Mr. Kerbel’s knowledge that the assumption was incorrect renders unreasonable any reliance by Kerbel and Fram on the mistaken trigger date. Mr. Kerbel was under no illusion that this reading was not correct, as the trial judge found. Nor had he forgotten what the correct reading was, as she also found. As noted above, I would defer to those findings as factual determinations of credibility. They also comport with the commercial realities. It was not reasonable of Kerbel and Fram to rely on Romandale’s interpretation of the trigger date, knowing that it was mistaken.

[356] These two reasons are sufficient to dismiss the estoppel by convention arguments put forward by Kerbel and Fram. I conclude that the legal basis for estoppel by convention is not made out on the facts of this case. This conclusion obliges me to consider whether Kerbel repudiated or breached the 2005 August Agreement, a task that my colleague was spared by her view of estoppel, and to which I now turn.

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(3) Kerbel Did Not Breach the 2005 August Agreement by Entering Into the Settlement Agreement with Fram

[357] It is necessary to put the 2005 August Agreement in its proper context or factual matrix before assessing whether the trial judge properly assessed Kerbel's alleged breaches.

(a) The Context

[358] The court must survey the contractual landscape in this case with a clear eye. In my view, the trial judge's manifest sympathy for Romandale was misplaced. Romandale did not occupy the moral high ground in this bruising corporate battle, as I will explain.

[359] It is a truism that contracting parties seek their own ends. An important aspect of contractual design, as Swan and Adamski observe, at p. 148, is allocating risk between the contracting parties:

> [M]uch contract drafting is focused on the allocation of risk, on the need to make clear just how the risks associated with an activity or the actual operation of the contractual relation, are not only allocated but understood to be allocated. It is bizarre for a court to be — or to appear to be — unaware of this role, one performed by the majority of members of the legal profession. Solicitors would be aghast if a court, in interpreting a contract, were to focus on the parties' "intentions" and ignore the efforts of one party to shape the other's expectations, in the light of what the first party was prepared to do. Such "intentions" are nothing but a judicial construct, a chimera, and wholly fanciful.

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[360] The root contractual documents in this case are the 2003 COAs between Romandale and Fram. Romandale was looking for a land developer to assist it in bringing the Lands to the point at which they could be used for residential purposes. Fram became Romandale's business partner for this purpose. As the trial judge found:

> The plan was that Romandale and Fram would own the Lands and Bordeaux would manage the requirements for the development of the Lands, so they could be designated for residential use following [SPA], a stage of the municipal planning approvals process, Fram would then buy lots at market value and build homes and share the profits with Romandale.

[361] The COAs, and the buy-sell provision in particular, were carefully designed to allow each party to extract the maximum value for its interest in the Lands at the point that either party chose to force the other to buy its interest.

[362] By entering the COAs, Romandale got money (by selling the five percent interest in the Lands to Fram) and Fram got an exclusive option to purchase Romandale's remaining interest. The key problem with the COAs was that Romandale was effectively stuck with Fram as a partner in developing the Lands. The COAs permitted Romandale to sell its remaining interest in the Lands to another developer, but only with Fram's consent. Crucially, Fram's consent, per s. 5.03 of the COAs, "may be unreasonably or arbitrarily withheld," giving it control over any large disposition of the Lands by Romandale. (This provision was not

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unbalanced because it permitted Romandale to refuse consent to a disposition by Fram of its interest on the same basis.)

[363] When Romandale's need and appetite for money grew, it asked Fram to increase its interest in the Lands but Fram declined. Romandale's need for more money, coupled with Fram's reluctance to invest more, drove Romandale into a deal with Kerbel.

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(b) The 2005 August Agreement Favoured Kerbel

[364] The 2005 August Agreement was cleverly designed to accomplish Romandale's end of getting cash without breaching the COAs with Fram. Romandale did get more money. But Kerbel drove a careful bargain, recognizing both Romandale's need for cash and the difficult and complex situation that the COAs posed for Kerbel with respect to Fram's interest.

[365] The 2005 August Agreement was drafted in Kerbel's favour. This is not a surprise. Romandale had a strong need for funds and Kerbel was the able funder. As the trial judge stated, at para. 69, "Romandale needed to refinance a $6,000,000 Bank of Nova Scotia ("BNS") mortgage on the Lands and wanted cash to make distributions to Romandale and Roman family members." She noted, at para. 329, "Romandale actually received $16,703,000 of immediate value from Kerbel: $6,000,000 in new mortgage financing to retire the BNS Mortgage,

$2,128,000 cash on the sale of 5% of the Elgin Mills Lands owned by Romandale, and $8,575,000 cash was paid on the sale of the Triple R Lands."

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[366] The text of the 2005 August Agreement ceded a large measure of control to Kerbel, although it was constrained by Romandale's need and obligation to continue to comply with the COAs. The agreement appointed Kerbel as "attorney and agent" for Romandale in material and specific respects. Section 5 was entitled "Irrevocable Appointment" and provides in part:

> ... Romandale hereby irrevocably appoints [Kerbel] as its exclusive true and lawful attorney and agent having full power of substitution, and [Kerbel] is hereby fully authorized as such to act on behalf of and/or give binding instructions to Romandale solely in connection with the exercise of the buy-sell rights pursuant to the Buy-Sell Provisions (as hereinafter defined). Romandale agrees that any and all decisions, operations, conduct and actions relating to the development of the Snider/McGrisken Property shall be within the exclusive control of [Kerbel] and Romandale shall assist in facilitating such control to comply with Section 5.10 of the Co-Owners Agreements over all decisions; operations, conduct and action exercisable by Romandale relating to the development and obtaining of development approvals for the Snider/McGrisken Property.... Romandale and [Kerbel] shall cooperate in getting the Snider/McGrisken Property included under the Town of Markham urban envelope for development purposes, and Romandale shall take all reasonable steps to reduce land wastage to as small an amount as possible, using Joanne Burnett, Jeff Kerbel and/or his designate to act on behalf of Romandale in taking such steps. [Emphasis added.]

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[367] The control that Romandale granted to Kerbel was related to compliance with the COAs, as the trial judge found at para. 202. She noted, at para. 203, that Romandale continued to exercise control of the development process throughout.

[368] The trial judge correctly observed, at para. 202: “The opening sentence provides that Romandale appoints [Kerbel] as its agent ‘solely’ in connection with the Buy-Sell provisions in the COAs.” The trial judge added: “This makes sense as it was Kerbel's intention to buy Romandale's remaining interest in the Lands and so it would want control over <u>when</u> Romandale triggered the Buy-Sell” (emphasis added). I agree.

[369] It is noteworthy that the 2005 August Agreement did not bind Kerbel to a date by which it was required to pull the buy-sell trigger in the COAs. Although Mr. Kerbel testified to his reluctance to trigger the provision while Romandale was litigating with Bordeaux, nothing in the 2005 August Agreement required him to pull the trigger when that litigation ended, even though, as the trial judge observed, the Bordeaux litigation was expressly referred to in s. 2(e). (Recall that the Bordeaux litigation was settled in October 2014.)

[370] Only Fram’s consent to the sale of Romandale’s Remaining Interest to Kerbel under the 2005 August Agreement could force Kerbel to close.

[371] Despite finding that Kerbel would have wanted control over the timing of the triggering of the buy-sell, the trial judge later found, somewhat inconsistently, at

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paras. 299-300, that the intention of the parties was to close as soon as possible and Kerbel's discretion on when the buy-sell would be triggered was "not so broad as to allow it to transform a deal that was intended to close as soon as possible into a deal that was not to close until decades away". She relied on the "time is of the essence clause" in para. 7 (c) of the 2005 August Agreement for this finding.

[372] I agree with my colleague's statement, at para. 233, that the "time is of the essence" clause "cannot be construed to mean that a 'short closing horizon' was part of the 'pith and substance of the contract'." With respect, the trial judge misapprehended the purpose and role of a "time is of the essence" clause in commercial contracts. Such a clause is engaged where a time limit is stipulated; it "does not serve to impose a time limit but rather dictates the consequences that flow from failing to comply with a time limit stipulated in an agreement": see *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, at paras. 31-37, leave to appeal refused, [2019] S.C.C.A. No. 55. Benotto J.A. noted, in *Di Millo*, at para. 37:

> Notably, while the option clause includes two time limits, it is silent as to the time limit for exercising the option. However, the application judge found, that "providing notice to the Respondent that complies with the Agreement, 6 months after the option first arose, does not comply with the time is of the essence clause". In my view, he erred in finding that the "time is of the essence" clause was engaged where no time was stipulated in the contract for exercising the option and in finding that there

> was non-compliance with the "time is of the essence" clause. Those errors tainted his finding that the option had expired by the time the appellant gave notice.

Those words apply here with necessary modifications. The trial judge's reliance on the "time is of the essence" clause was an error of law.

[373] Mr. Kerbel testified that, in the early days when the development process looked like it would move quickly to a happy outcome, he wanted to close quickly. But the trial judge misapprehended this evidence to impose a contractual obligation on Kerbel to close as soon as possible, regardless. There is no express obligation in the 2005 August Agreement to close as soon as possible and there is no legal basis for implying one. Implying such an obligation is neither necessary to give business efficacy to the contract, nor would it pass the "officious bystander test": see *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514, 388 D.L.R. (4th) 672, at paras. 30-31; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 27; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, at p. 775.

[374] The 2005 August Agreement provided Kerbel with other advantages. The fixed-price of $160,000 per acre to be paid to Romandale on closing was above the 2005 current market value for the McGrisken and Snider Farms but the fact that it was a fixed-price contract minimized the risk to Kerbel and capped Romandale's return. In other words, Romandale gave up its right to share in any

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increases in the value of the Lands, to Kerbel's benefit. Had the development horizon contemplated by the parties in 2005 been met, then Romandale's return would have been limited to the fixed-price; any increase in the value of the Lands thereafter would have been enjoyed by either Kerbel or Fram. One of them would have ended up with the Lands at a higher price through the buy-sell mechanism in the COAs, if they did not come to some other agreement.

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[375] The 2005 August Agreement gave Romandale the opportunity to carry out an end run on Fram and its exclusive option to buy the rest of the Lands. The agreement was cleverly designed but it put Fram and Kerbel on a collision course.

(c) The Settlement Agreement

[376] As noted earlier, the development horizon changed substantially. By 2010, Kerbel and Fram were in lawsuits with each other. Neither was anxious to acquire all of the Lands immediately through the operation of the buy-sell provision, nor did they wish to give up their interests in the land. Their way out of the impasse was the Settlement Agreement, by which they ended up sharing costs. This was a practical outcome for experienced land developers.

(d) Kerbel's Alleged Breaches of the 2005 August Agreement

[377] Romandale's revised litigation strategy targeted s. 5 of the Settlement Agreement:

> [Fram] does not by this settlement agreement or otherwise consent to the transaction referred to in paragraph 2 of the August 29, 2005 Agreement. It is the intention of the parties hereto that the purchase and sale of Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after Secondary Plan Approval for the Lands has been obtained.

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[378] The trial judge found that Kerbel breached the 2005 August Agreement, at para. 310: "By entering into the Settlement Agreement, Kerbel totally fettered its discretion as to when to cause Romandale to trigger the Buy-Sell just because it no longer wanted to close the purchase of Romandale's Remaining Interest quickly."

[379] First, the trial judge found, at para. 319, that Kerbel had a fiduciary duty to Romandale that it breached by entering into the Settlement Agreement.

[380] There is no scope for the imposition of fiduciary duties on Kerbel. That would oblige Kerbel to act solely in the best interests of Romandale, which is the antithesis of the self-interest that contracting parties in commercial contracts are generally entitled to pursue. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, the court said, at p. 414, para. 38:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest…. [T]he law does not object to one party taking advantage of

> another *per se*, so long as the particular form of advantage taking is not otherwise objectionable. [Citations omitted.]

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[381] As noted, the wording of the 2005 August Agreement was in Kerbel's favour in order to avoid any such subordination either to Romandale entirely or to some notional conception of their "mutual best interests", as Romandale argues.

[382] It is possible for a contracting party to accept a fiduciary duty. Romandale submits that because the 2005 August Agreement explicitly made Kerbel Romandale's "lawful attorney and agent" for some purposes, that principle is applicable here. But this misconstrues the purpose of Kerbel's appointment as Romandale's attorney and agent, which was to leave the timing of the triggering of the buy-sell under the COAs in Kerbel's sole control without any further dependence on Romandale. Kerbel, as the funder, wanted to control all aspects of the exercise of the buy-sell provisions in the COAs. As the trial judge herself stated, this made sense.

[383] I would set aside the trial judge's holding that Kerbel owed Romandale a fiduciary duty as an error in law.

[384] Second, the trial judge found, at para. 310, that Kerbel breached its duty of good faith to Romandale under the 2005 August Agreement:

> … By entering into the Settlement Agreement with Fram, Kerbel acted in its own self-interest, to the detriment of

> Romandale's interests. Kerbel undermined the entire value of the August 2005 Agreement for Romandale. Without a doubt Kerbel did not act in good faith.

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[385] The trial judge invoked the “the duty to act in good faith” citing *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 65, and the expectation that a party exercising discretion is required to do so in good faith, citing *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at paras. 18 and 26, leave to appeal refused, [1985] 2 S.C.R. ix. Had the authorities been available, the trial judge would likely have invoked *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, for the same propositions.

[386] I do not agree. It is not obvious to me what role the doctrine of good faith in contractual performance should play in this complex commercial setting. Courts should be very reluctant to interfere in the dealings of hard-headed business people pursuing their competitive goals. This pursuit is not forbidden in a market economy: it is expected, as the Supreme Court observed in *Hodgkinson*, at p. 414, para. 38, quoted earlier.

[387] The parties were sophisticated, resourced and professionally advised throughout. No doubt both Fram and Kerbel have deeper pockets but there is no scope for invoking the concept of unequal bargaining power in this context without, by necessary implication, imperilling any larger corporation’s ability to engage in

commerce with smaller entities. The language in all of the agreements was carefully negotiated and chosen to allocate the parties' respective risks and responsibilities, benefits and burdens.

[388] This case illustrates operations in the real world. To achieve its ends, in negotiating the Settlement Agreement with Fram, Kerbel essentially pulled the same move on Romandale that Romandale had pulled on Fram in entering into the 2005 August Agreement with Kerbel.

[389] Seen through the good faith lens, Romandale could be criticized for defeating Fram's exclusive option to the Lands via the 2005 August Agreement with Kerbel. But all Romandale was doing was pursuing its own ends within the limits of the contractual language in the COAs in order to raise cash by extracting value from all of its lands, including the McGrisken and Snider Farms. (I note that by entering into the 2005 August Agreement, Romandale did not breach the COAs, contrary to Fram's assertions in the 2007 and 2008 actions. The trial judge dismissed those actions and Fram did not appeal the dismissals.)

[390] Similarly, by entering into the Settlement Agreement, all Kerbel was doing was pursuing its own ends within the limits of the contractual language in the 2005 August Agreement in order to reduce its exposure to the land and to the risks posed by the litigation with Fram.

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[391] The text of a contract matters in discerning the parties' reasonable expectations. Kerbel never undertook to perform its obligations under the 2005 August Agreement for Romandale's benefit, or even for their "mutual benefit," as Romandale argues. The parties reasonably expected that the commercial realities would pressure all sides to move with alacrity. But Kerbel did not bind itself to do so, wisely in retrospect, given how the commercial realities have changed. This is not unusual in the fraught sphere of land development in Ontario, and particularly in the area surrounding Toronto. What "gutted" the transactions was not the Settlement Agreement but the changed development horizon that affected all the parties adversely.

[392] Nor is it clear to me what the invocation of good faith performance would contribute in this setting. I note the submission, recorded by the trial judge, at para. 326:

> Romandale submits that it need not point to a specific date on which Kerbel must have caused it to trigger the Buy-Sell, nor does this Court need to pinpoint a date, in order to find that a fiduciary duty existed or to find that there has been a repudiatory breach arising from Kerbel's breach of same (among other contractual obligations).… In this case, it is clear the line was crossed when Kerbel settled with Fram in 2010 and deliberately ensured the Buy-Sell would never be triggered before SPA (if at all), in furtherance of its own self-interests and in complete contravention of Romandale's interests.

[393] Romandale's refusal to specify a date is noteworthy because if the date does not comport with Kerbel's best business interests, as permitted by the 2005 August Agreement, it would be purely arbitrary. I note in passing that the earliest date would be after the Bordeaux litigation settled, which was in October 2014.

[394] Nor is it clear to me that, had Kerbel and Fram never entered into the Settlement Agreement and had Fram not consented to the sale, there would be any obligation on Kerbel even <u>today</u> to cause Romandale to trigger the buy-sell provision in the COAs.

[395] Finally, I note that if there is a "right" date for the transfer of Romandale's Remaining Interest to Kerbel, it would be sixty days after Fram consented to that transaction in 2018, as that is precisely what is stipulated in the 2005 August Agreement.

[396] To conclude, the trial judge erred in finding that Kerbel breached the 2005 August Agreement and its duty of good faith performance by entering into the Settlement Agreement with Fram. I do not find any basis here for judicial tweaking via the doctrine of good faith performance, or for any judicial interference in the ordinary operation of these carefully negotiated contracts, which embody the reasonable expectations of the parties and which are fully capable of execution on their precise terms.

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[397] If Kerbel breached the 2005 August Agreement by entering into the Settlement Agreement with Fram, then that breach would have to be taken into account in the exercise of discretion as to whether to order specific performance. The behaviour of the parties is a relevant consideration in deciding whether to order specific performance: *Matthew Brady Self Storage Corporation v. InStorage Limited Partnership*, 2014 ONCA 858, 125 O.R. (3d) 121, at para. 32, leave to appeal refused, [2015] S.C.C.A. No. 50; *Paterson Veterinary Professional Corporation v. Stilton Corp. Ltd.*, 2019 ONCA 746, 438 D.L.R. (4th) 374, at para. 31, leave to appeal refused, [2019] S.C.C.A. No. 420. But here there is no such breach.

(4) By Entering Into the Settlement Agreement, Kerbel Did Not Repudiate Its Obligations Under the 2005 August Agreement.

[398] Because I have found that Kerbel did not breach the 2005 August Agreement, on that ground alone, there is no basis for finding that Kerbel repudiated that agreement.

[399] However, in my view the trial judge’s approach to the repudiation issue was wrong in principle and requires comment. Recall that Romandale argued that it is not required to close the 2005 August Agreement because Kerbel had repudiated that agreement by entering into the Settlement Agreement. The trial judge agreed

and refused Kerbel's request for an order compelling Romandale to specifically perform the 2005 August Agreement.

[400] The trial judge deconstructed the 2005 August Agreement into constituent parts. This approach was wrong in principle. She extracted the conveyance of the McGrisken and Snider Farms from the 2005 August Agreement in order to deem that part of the agreement repudiated. This approach is not consistent with the holistic approach courts must take to carefully negotiated commercial agreements. Just as a court interpreting a contract must read the contract as a whole, a court analyzing whether a fundamental breach amounting to repudiation has occurred should consider both the alleged breach, and the obligations the breaching party has performed, in relation to the breaching party's obligations under the whole contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47; *1193430 Ontario Inc. v. Boa-Franc Inc.* (2005), 260 D.L.R. (4th) 659 (Ont. C.A.), at para. 50, leave to appeal refused, [2006] S.C.C.A. No. 2.

[401] I conclude that the trial judge erred in recruiting the doctrine of repudiation, because of the substantial prior performance on Kerbel's part, which was valued by the trial judge at about $16 million. There is no basis upon which it could be said that Romandale was deprived of substantially all of the benefit it contracted for under the 2005 August Agreement: *Boa-Franc Inc.*, at para. 50; *Majdpour v. M&B Acquisition Corp.* (2001), 206 D.L.R. (4th) 627 (Ont. C.A.), at para. 31; *Hunter*

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Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, at p. 499, *per* Wilson J.

[402] Contrary to the submissions of Romandale and the trial judge's determination, Kerbel did not repudiate the 2005 August Agreement by entering into the Settlement Agreement, largely because much of the 2005 August Agreement had been performed to the benefit of both parties. It is simply too late for the proverbial egg to be unscrambled. It is too late for repudiation to play a useful role in analyzing the contractual relationships between Romandale and Kerbel.

(5) Kerbel Is Entitled to Specific Performance of the 2005 August Agreement

[403] I agree with my colleague's analysis, at paras. 290-298, and with her conclusion that Kerbel is entitled to specific performance of the 2005 August Agreement.

Released: April 1, 2021 "E.E.G."

"P. Lauwers J.A."

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Court of Appeal File No. COA-23-OM-0314
Court File No. CV-18-608978-00CL

BRIDGING FINANCE INC., AS AGENT FOR 2665405 ONTARIO LIMITED
Applicant

v.

1033803 ONTARIO INC. et al.
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

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